

# Drafting Effective Delaware Forum-Selection Clauses in the Shadow of Enforcement Uncertainty

John C. Jorgenson\*

*ABSTRACT: Beginning as dicta tucked away in an inconspicuous footnote, Delaware forum-selection clauses have become widely favored by corporations across the United States. Catapulted by corporations' desire to funnel expensive multijurisdictional litigation into a single forum, the clauses, which were nearly non-existent five years ago, have become ubiquitous. A revision to the General Corporation Law of the State of Delaware officially blessed forum-selection clauses in the summer of 2015, and there is little doubt that the clauses will enjoy even greater popularity in the future. Against this backdrop of success within Delaware, however, it is easy to lose sight of the national landscape. While courts outside of Delaware generally have enforced these clauses, there have been notable exceptions. This Note argues that companies crafting Delaware forum-selection clauses under DGCL § 115 should consider their enforceability outside of Delaware. This Note surveys the relevant federal and state litigation pertaining to Delaware forum-selection clauses and makes recommendations for drafting these clauses with an eye toward enforcement. It concludes with a proposed model Delaware forum-selection clause.*

I.	INTRODUCTION.....	354
II.	OVERVIEW OF DELAWARE FORUM-SELECTION CLAUSES .....	355
	A. DELAWARE COMMON LAW GROUNDING FOR FORUM-SELECTION CLAUSES .....	357
	B. DELAWARE STATUTORY GROUNDING FOR FORUM-SELECTION CLAUSES .....	362

---

\* J.D. Candidate, The University of Iowa College of Law, 2017; M.A., The Johns Hopkins University, 2009; B.A., The Johns Hopkins University, 2009. Thank you to Bryn R. Vaaler at Dorsey & Whitney LLP for sparking the idea for this Note. Thank you also to my loving wife for her support and my friends at the *Iowa Law Review* for their valuable feedback.

III.	LAY OF THE LAND: HOW DELAWARE FORUM-SELECTION CLAUSES HAVE FARED OUTSIDE OF DELAWARE .....	362
A.	<i>ENFORCEMENT IN FEDERAL COURTS</i> .....	362
1.	Are International Forum-Selection Clauses Enforceable? .....	363
2.	Are Domestic Forum-Selection Clauses Enforceable? .....	364
3.	What Is the Proper Enforcement Mechanism?.....	365
4.	Are Forum-Selection Clauses at Risk of Challenges Under Contract Theories?.....	368
B.	<i>ENFORCEMENT IN STATE COURTS</i> .....	371
IV.	PROPOSAL FOR ENFORCEABLE DELAWARE FORUM-SELECTION CLAUSES.....	373
A.	<i>STRATEGIC CONSIDERATIONS IN VIEW OF RECENT ENFORCEMENT TRENDS</i> .....	373
1.	Placement in Certificate of Incorporation versus Bylaws Depends on Company’s Risk Tolerance.....	373
2.	Adopt Your Bylaw on a “Clear Day” .....	373
3.	Expect Criticism from Proxy Advisory Firms and Provide a Rationale for Adoption .....	374
B.	<i>IDEAL PROVISIONS TO INCORPORATE IN LIGHT OF RECENT ENFORCEMENT TRENDS</i> .....	374
1.	Give Yourself an Out—Include a Waiver Provision ....	375
2.	Establish Personal Jurisdiction over Defendants and Plaintiffs .....	376
3.	Tailor Scope of Claims Covered to New § 115 .....	377
4.	Herd Plaintiffs into Delaware .....	378
5.	Allow Proceedings in Federal Court—on Your Terms .....	378
C.	<i>PROPOSED MODEL FORUM-SELECTION CLAUSE</i> .....	379
V.	CONCLUSION .....	381

## I. INTRODUCTION

On Wednesday, June 24, 2015, Delaware Governor Jack Markell signed an amendment to section 115 (“New § 115”) of the General Corporation Law of the State of Delaware (“DGCL”) into law authorizing corporations to include forum-selection clauses in their bylaws and certificates of incorporation.<sup>1</sup> The amendment became effective on August 1, 2015.<sup>2</sup> The

---

1. DEL. CODE ANN. tit. 8, § 115 (West 2015).

2. *Id.*

recent move is the latest development in Delaware's longstanding effort to provide Delaware corporations a means to consolidate intra-corporate disputes into their state of incorporation.

While New § 115 appears to be a creature of statute, it is actually rooted in common law. In an opinion related to the challenge of a proposed merger transaction, Vice Chancellor Laster included dicta suggesting that the court was open to exclusive-forum charter provisions.<sup>3</sup> Within a few years, the Court of Chancery also blessed the facial validity of unilaterally adopted forum-selection bylaws.<sup>4</sup>

Although the State of Delaware has, in its common law and now by statutory decree, declared its fondness for Delaware forum-selection clauses, this policy has had a mixed reception outside the state.<sup>5</sup> Even though the majority of states that have addressed the issue have enforced the facial validity of such clauses, forum-selection clauses are nonetheless subject to as-applied challenges in both federal and state actions.<sup>6</sup> In the recent past, there have been noteworthy and successful challenges to Delaware forum-selection clauses.<sup>7</sup>

In light of the recent case law and legislation on this topic, this Note argues that Delaware-incorporated companies looking to take advantage of New § 115 should draft their forum-selection clauses with an eye toward enforceability outside of Delaware. Specifically, this Note: (1) provides background on the rise of Delaware forum-selection clauses;<sup>8</sup> (2) surveys the relevant federal and state case law regarding enforcement of such clauses;<sup>9</sup> and (3) enumerates strategic considerations that companies should bear in mind before adopting their own Delaware forum-selection clause, concluding with a proposed model clause.<sup>10</sup>

## II. OVERVIEW OF DELAWARE FORUM-SELECTION CLAUSES

A forum-selection clause is a provision in which the parties to a contract establish the forum or fora for specified types of litigation that may occur between them.<sup>11</sup> While forum-selection clauses have long been a common provision in individual contracts,<sup>12</sup> their popularity in certificates of

---

3. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).

4. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 958 (Del. Ch. 2013).

5. *See infra* Part III.

6. *See infra* Part III.

7. *See infra* Part III.

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

11. *Forum-Selection Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1506 tbl. 13 (2009) (observing that forum-selection clauses appear in approximately 40% of material contracts of public companies).

incorporation and corporate bylaws is of a more recent vintage. Whereas only 16 U.S. public companies had adopted such provisions in 2010,<sup>13</sup> more than 250 U.S. public companies had adopted the same by the middle of 2013.<sup>14</sup> In 2013 and 2014 alone, more than 300 public companies adopted such provisions.<sup>15</sup>

Although no single source is the likely cause, recent scholarship has generally characterized the growth in popularity of governance-document forum-selection clauses as a response to the growth in multijurisdictional litigation.<sup>16</sup> Prior to the recent multijurisdictional shift, it was “conventional wisdom that most corporate law cases involving Delaware public companies flow to Delaware.”<sup>17</sup> Recently, however, the trend away from Delaware has been especially pronounced in the area of mergers and acquisitions (“M&A”) litigation, where multijurisdictional litigation has risen dramatically in recent years. Between 1999 and 2000, for instance, shareholders challenged only about 12% of all M&A deals over \$80 million.<sup>18</sup> Every year during the four-year period from 2010 to 2014, by contrast, shareholders challenged over 90% of all M&A deals valued over \$100 million.<sup>19</sup> Over the same period, the average number of lawsuits per deal has fluctuated between four and five.<sup>20</sup> In 2014, when 93% of all M&A deals valued over \$100 million were litigated, approximately 40% of those lawsuits were filed in more than one jurisdiction.<sup>21</sup> Even though the prevalence of multijurisdictional litigation is still high relative to pre-2000 levels, there are signs that forum-selection clauses are actually reducing the number of jurisdictions in which shareholders are filing claims.<sup>22</sup>

---

13. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum-Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 336 (2012).

14. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013) (observing that “in the last three years, over 250 publicly traded corporations have adopted such provisions”).

15. CORNERSTONE RESEARCH, *SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION* 3 (2015), <https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf>.

16. See Gideon Mark, *Multijurisdictional M&A Litigation*, 40 J. CORP. L. 291, 313 (2015) (observing that forum-selection clauses have garnered significant support as a solution to the rise in multijurisdictional M&A litigation).

17. John Armour et al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345, 1351 (2012).

18. C.N.V. Krishnan et al., *Jurisdictional Effects in M&A Litigation*, 11 J. EMPIRICAL LEGAL STUD. 132, 139-40 (2014).

19. CORNERSTONE RESEARCH, *supra* note 15, at 1.

20. *Id.* at 2.

21. *Id.* at 3.

22. *Id.* at 3 (“In 2014, 60 percent of M&A litigation was filed in only one jurisdiction. This is a reversal from the 2009 to 2013 period, when multi-jurisdictional litigation prevailed . . . This is likely a result of widespread adoption of forum provisions in corporate bylaws”).

Recent scholarship addressing the surge in multijurisdictional litigation has put forth various theories to explain the rise in multijurisdictional litigation (framed in a contrast to the historically Delaware-only litigation): (1) predictability of a pro-defendant outcome inside Delaware;<sup>23</sup> (2) perceived judicial bias against the plaintiffs' bar in Delaware;<sup>24</sup> (3) perceived higher attorney fees outside of Delaware;<sup>25</sup> (4) perceived higher likelihood of selection as lead counsel outside of Delaware;<sup>26</sup> and (5) changes in law under the Private Securities Litigation Reform Act.<sup>27</sup>

Whatever the underlying causes, multijurisdictional litigation is generally considered unfavorable to shareholders and their companies. Although M&A litigation can provide genuine value to shareholders,<sup>28</sup> multijurisdictional litigation is typically considered undesirable for four principal reasons: (1) it burdens shareholders by increasing expenses; (2) it wastes judicial resources; (3) it creates a danger of inconsistent rulings and collusive settlements; and (4) it raises premiums for directors' and officers' liability insurance.<sup>29</sup>

Forum-selection clauses address these issues directly by funneling multiple parallel litigations into a specified forum. This discourages plaintiffs from freely forum shopping and from bringing similar claims in multiple fora. Through its case law, and most recently, through New § 115, Delaware has facilitated a surge in corporations adopting corporate forum-selection clauses.

#### A. DELAWARE COMMON LAW GROUNDING FOR FORUM-SELECTION CLAUSES

The Delaware trend of adopting forum-selection clauses in corporate governance documents began with Vice Chancellor Laster's influential dicta

---

23. Armour et al., *supra* note 17, at 1365 (“Ted Mirvis, the Wachtell Lipton litigation partner, has suggested that corporate lawsuits have ‘greater settlement value outside of Delaware’ due to greater variation in possible outcomes.”).

24. *Id.* at 1367 (“Various recent utterances and rulings by Delaware judges suggest a jaundiced view of at least some members of the plaintiffs’ bar.”).

25. *Id.* at 1370 (“Our interviewees told us that Delaware courts scrutinize fee requests closely, but elsewhere judges routinely approve fee awards, at least if the defendant does not object.”).

26. *Id.* at 1373 (“If courts resolve disputes concerning lead counsel status by focusing on which law firm was first to file, a ‘filing Olympics’ is a logical by-product. A bias in favor of the first law firm to file used to apply in Delaware corporate litigation, and often continues to apply elsewhere. However, beginning in 2000, the Delaware courts moved to an approach closer to that used in federal securities cases, giving preference to firms whose clients had a substantial economic stake in the outcome.”).

27. *Id.* at 1380 (“[P]laintiffs’ lawyers . . . file tagalong derivative suits, usually outside Delaware because expedited discovery is often easier to obtain elsewhere.”).

28. Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1926 (2013) (arguing that “managerial agency costs are high and that class actions and derivative suits are key shareholder monitoring mechanisms that they can deploy to keep managers in line”).

29. Mark, *supra* note 16, at 295.

in *Revlon* that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”<sup>30</sup> Vice Chancellor Laster fleshed out his reasoning in an immediately following footnote citing recent Delaware case law, law journal articles, and the DGCL regarding the proper contents of certificates of incorporation, which allow:

[A]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . if such provisions are not contrary to the laws of this State.<sup>31</sup>

While Vice Chancellor Laster’s suggestion—confined to a single line of text and accompanied by a footnote—was merely dicta, it made a big splash with Delaware public companies. In the three years immediately following *Revlon*, hundreds of publicly traded corporations adopted Delaware forum-selection clauses.<sup>32</sup>

Although *Revlon* explicitly suggested that the Court of Chancery would treat forum-selection clauses in certificates of incorporation favorably, the opinion did not address the validity of the same when adopted through bylaw. The distinction between placement in certificates of incorporation and bylaws is relevant because the DGCL treats them differently. Specifically, the permissible scope of provisions within certificates of incorporation and bylaws are different, as are the procedures for amending them.<sup>33</sup>

30. *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).

31. *Id.* at 960 n.8 (quoting DEL. CODE ANN. Tit. 8, § 102(b)(1) (West 2015)).

32. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013) (observing that “in the last three years, over 250 publicly traded corporations have adopted such provisions”).

33. Generally speaking, the permissible scope of a certificate of incorporation provision is broader than the scope of a permissible bylaw provision. *Compare* DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2015) (authorizing the certificate of incorporation to include “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation.” (emphasis added)), *with* tit. 8, § 109(b) (“The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”). More importantly, when empowered by a relevant certificate of incorporation provision, bylaws may be unilaterally amended by the board of directors, whereas certificate of incorporation provisions may only be amended with shareholder approval. *Compare* DEL. CODE ANN. tit. 8, § 109(a) (West 2015) (“After a corporation . . . has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. . . . Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt,

Three years after *Revlon*, the Court of Chancery directly addressed the validity of forum-selection bylaws.<sup>34</sup> The Court of Chancery held that unilaterally adopted forum-selection bylaws, making Delaware the exclusive forum for disputes related to the “internal affair doctrine,”<sup>35</sup> are facially valid<sup>36</sup> if the corporation’s certificate of incorporation explicitly empowers the board of directors to unilaterally amend the bylaws.<sup>37</sup>

In *Boilermakers*, the Delaware Court of Chancery considered the forum-selection provisions of Chevron and FedEx, which their boards of directors had unilaterally adopted by amending their bylaws.<sup>38</sup> Although the court held that such bylaws were facially valid, and the particular bylaws adopted by Chevron and FedEx were valid as-applied, it nonetheless left the door open to future as-applied challenges:

[I]f a plaintiff believes that a forum selection clause cannot be equitably enforced in a particular situation, the plaintiff may sue in her preferred forum and respond to the defendant’s motion to dismiss for improper venue by arguing . . . the forum selection clause should not be respected because its application would be

---

amend or repeal bylaws upon the directors . . .”), with tit. 8, § 242(b) (setting forth the procedures for amending certificate of incorporation provisions after the sale of stock, all of which require shareholder votes).

34. *Boilermakers*, 73 A.3d at 934.

35. *Internal-Affairs Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Broadly speaking, ‘corporate internal affairs’ refers to the powers and obligations of a corporation’s manager vis-a-vis the corporation and its shareholders, and the rights and duties of the corporation’s shareholders vis-a-vis the corporation, its management and the other shareholders. Put differently, corporate internal affairs pretty much encompass the subject matter of those state laws typically referred to as corporate law. In dealing with a corporation’s internal affairs, courts . . . have looked to the law of the state of incorporation for the governing rule. Courts often refer to this choice of law principle as the ‘internal affairs doctrine.’”) (citing FRANKLIN A. GEVURTZ, CORPORATION LAW 35 (2d ed. 2000)).

36. *Boilermakers*, 73 A.3d at 939.

37. DEL. CODE ANN. tit. 8, § 109(a) (West 2015) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors”).

38. At the time of the litigation, Chevron’s forum-selection clause read as follows:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].

*Boilermakers*, 73 A.3d at 942. FedEx’s clause was nearly identical to Chevron’s, except that it allowed plaintiffs to bring suit in “a state or federal court located within the state of Delaware, in all cases subject to the court’s having personal jurisdiction over the indispensable parties named as defendants.” *Id.* (emphasis added).

unreasonable. The plaintiff may also argue . . . the forum selection clause should not be enforced because the bylaw was being used for improper purposes inconsistent with the directors' fiduciary duties.<sup>39</sup>

*Revlon* and *Boilermakers* made clear that the Court of Chancery would enforce duly adopted forum-selection clauses in Delaware corporations' certificates of incorporation and bylaws. However, the court was silent regarding whether it would enforce provisions limiting the forum to courts outside Delaware, such as the courts of the corporation's headquarters.

When this issue presented itself, the Court of Chancery enforced the non-Delaware provision in *City of Providence*.<sup>40</sup> In *City of Providence*, the defendant, a Delaware-incorporated bank holding company headquartered in North Carolina, adopted a forum-selection bylaw virtually identical to the one enforced in *Boilermakers*,<sup>41</sup> only it selected the North Carolina courts as the exclusive forum.<sup>42</sup> The Court of Chancery enforced the bylaw reasoning that:

[N]othing in the text or reasoning of *Chevron* can be said to prohibit directors of a Delaware corporation from designating an exclusive forum other than Delaware in its bylaws. Thus, the fact that the Board selected the federal and state courts of North Carolina—the second most obviously reasonable forum . . . rather than those of Delaware as the exclusive forums for intra-corporate disputes does not, in my view, call into question the facial validity of the Forum Selection Bylaw.<sup>43</sup>

Even though the court premised the thrust of the *City of Providence* holding on applying *Boilermaker's* reasoning to the facts presented, significantly, the Court of Chancery also acknowledged principles of judicial comity:

39. *Id.* at 958 (footnote omitted).

40. *See generally* *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014).

41. The at-issue forum-selection bylaw provides:

Unless the corporation consents in writing to the selection of an alternative forum, the United States District Court for the Eastern District of North Carolina or, if such court lacks jurisdiction, any North Carolina state court that has jurisdiction, shall, to the fullest extent permitted by law, be the sole and exclusive forum for (1) any derivative action or proceeding brought on behalf of the corporation, (2) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's shareholders, (3) any action asserting a claim arising pursuant to any provision of the General Corporation Law of the State of Delaware, and (4) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 8.

*Id.* at 234 n.18.

42. *Id.* at 230.

43. *Id.* at 235 (footnote omitted).



If Delaware corporations are to expect . . . that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes, then, as a matter of comity, so too should this Court enforce a Delaware corporation's bylaw that does not designate Delaware as the exclusive forum. In my opinion, to conclude otherwise would stray too far from the harmony that fundamental principles of judicial comity seek to maintain.<sup>44</sup>

In a nod to the limits of its own enforcement power, the Court of Chancery acknowledged that the utility of Delaware's forum-selection common law is worthless if foreign courts do not enforce it.

The Court of Chancery has been similarly reluctant to issue anti-suit injunctions brought in other jurisdictions in lieu of express waiver language. In *Edgen Group Inc. v. Genoud*, a Delaware-incorporated, Louisiana-headquartered corporation sought an injunction from the Court of Chancery to prevent its shareholders from continuing with a suit filed in Louisiana because it was in violation of a forum-selection provision within its certificate of incorporation.<sup>45</sup> Denying the anti-suit injunction, Vice Chancellor Laster emphasized that "the forum provision d[id] not specifically call out consent on the part of the stockholders to personal jurisdiction."<sup>46</sup> By contrast, Vice Chancellor Laster pointed to the "explicit consent to personal jurisdiction" contained within other previously enforced forum-selection clauses.<sup>47</sup> The Court of Chancery's narrow construction of the provision's language suggests that the court will not issue anti-suit injunctions, and thereby offend interstate comity, unless it stands on firm ground.

---

44. *Id.* at 242.

45. Verified Complaint for Injunctive Relief at 1–2, *Edgen Grp. Inc. v. Genoud*, No. 9055, 2013 WL 5939861 (Del. Ch. Oct. 31, 2013).

46. Telephonic Hearing on Plaintiff's Motions for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court at 35, *Edgen Grp. Inc. v. Genoud*, No. 9055, 2013 WL 6409517 (Del. Ch. Nov. 5, 2013). In relevant part, the forum-selection clause stated: "Any person or entity purchasing or otherwise acquiring any interest in the shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Article X." Verified Complaint for Injunctive Relief, *supra* note 45, at 1.

47. Telephonic Hearing on Plaintiff's Motions for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court, *supra* note 46, at 35. In one of the cases Vice Chancellor pointed to an included forum-selection clause in a Subscription Agreement between an investor and a private equity firm that stated:

The courts of the State of Delaware shall have exclusive jurisdiction over any action . . . the Investor hereby irrevocably waives, to the fullest extent permitted by law, any objection that it may have, whether now or in the future, to the laying of venue in, or to the jurisdiction of, any and each of such courts for the purposes of any such suit . . . and further waives any claim that any such suit, action, proceeding or judgment has been brought in an inconvenient forum, and the Investor hereby submits to such jurisdiction.

Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C., 67 A.3d 373, 377 (Del. 2013).

B. DELAWARE STATUTORY GROUNDING FOR FORUM-SELECTION CLAUSES

As noted in the introduction, the Delaware legislature recently amended the DGCL to explicitly authorize forum-selection clauses. New § 115 has two prongs: (1) it allows Delaware corporations to select Delaware courts, both state and federal, as the exclusive forum for “internal corporate claims”;<sup>48</sup> and (2) it invalidates any provision prohibiting plaintiffs from bringing internal corporate claims in Delaware courts.<sup>49</sup> New § 115 is essentially a codification of *Boilermakers’* approval of enforcing forum-selection clauses limiting litigation to Delaware, along with an explicit disapproval of *City of Providence’s* extension to non-Delaware fora.

While at a distance New § 115 seems to be a slam-dunk for the enforceability of forum-selection clauses, in actuality it is no more than a codification of Delaware’s preferred common law. As the Court of Chancery suggested in the *City of Providence*, the real threat to the effectiveness of forum-selection clauses is not Delaware’s own law, but their enforceability in non-Delaware courts.

III. LAY OF THE LAND: HOW DELAWARE FORUM-SELECTION CLAUSES HAVE FARED OUTSIDE OF DELAWARE

A. ENFORCEMENT IN FEDERAL COURTS

While the United States Supreme Court has not yet specifically considered the enforceability of forum-selection clauses in corporate governance documents,<sup>50</sup> recent decisions have typically favored contractually valid forum-selection clauses in individual contracts.<sup>51</sup> Duly executed forum-selection clauses are prima facie valid and enforceable, except in unusual circumstances.<sup>52</sup> As a consequence, the issue to be resolved in litigation is whether the forum-selection clause was duly executed, and enforceable as applied.<sup>53</sup>

48. Under the legislation, “internal corporate claims” means claims, including derivative claims: (1) that are based upon a violation of a duty by a current or former director, officer, or stockholder in such capacity; or (2) as to which the DGCL confers jurisdiction upon the Court of Chancery. DEL. CODE ANN. tit. 8, § 115 (West 2015).

49. *See id.* (“[N]o provision of the certificate of incorporation or the bylaws may prohibit bringing [internal corporate] claims in the courts of this State.”).

50. By this I mean that no case has been appealed from a federal court sitting in diversity jurisdiction, asking whether governance-document forum-selection clauses are valid on common law contractual grounds.

51. *See infra* Part III.A.

52. *See infra* Part III.A.

53. *See infra* Part III.A.

### 1. Are International Forum-Selection Clauses Enforceable?

The United States Supreme Court first indicated its favor of forum-selection clauses in a case arising in admiralty.<sup>54</sup> In *M/S Bremen*, the Court held that a valid forum-selection clause should be enforced unless the moving party “could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”<sup>55</sup>

The case arose in the context of an international towing agreement between a German company and an American company.<sup>56</sup> The agreement contained a forum-selection clause providing that any dispute between the parties would be resolved before the London Court of Justice.<sup>57</sup> When the parties’ relationship soured, the American company ignored the forum-selection clause and filed in a U.S. federal court.<sup>58</sup> Citing the “traditional view” of American courts that clauses barring the jurisdiction of U.S. courts are contrary to public policy, the district court held the forum-selection clause unenforceable.<sup>59</sup>

On appeal, the Supreme Court reversed and remanded noting: “The correct approach would have been to enforce the forum clause specifically unless [the American company] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”<sup>60</sup> The Court reasoned “[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”<sup>61</sup>

While rejecting arguments against enforcing the forum-selection clause in the international context as “parochial,”<sup>62</sup> the Court took a more reserved approach in the domestic context:

We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause.<sup>63</sup>

---

54. See generally *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

55. *Id.* at 15.

56. *Id.* at 2.

57. *Id.* (“Any dispute arising must be treated before the London Court of Justice.”).

58. *Id.* at 3-4.

59. *Id.* at 6. The district court relied on the Court of Appeals’ decision in *Carbon Black Exp., Inc. v. SS Monrosa*, 254 F.2d 297, 300 (5th Cir. 1958).

60. *M/S Bremen*, 407 U.S. at 15.

61. *Id.* at 9.

62. *Id.*

63. *Id.* at 17.

Thus, the Court carefully reserved questions about the enforcement of domestic forum-selection clauses for future cases.

## 2. Are Domestic Forum-Selection Clauses Enforceable?

The Court revisited this issue in *Stewart Organization, Inc. v. Ricoh Corp.*, holding that “28 U.S.C. § 1404(a), governs the District Court’s decision whether to give effect to the parties’ forum-selection clause” and then transferred the case to a Manhattan court.<sup>64</sup>

In *Stewart*, a New Jersey manufacturer entered into an agreement with an Alabama company to market its copier products.<sup>65</sup> Their agreement contained a forum-selection clause providing that any dispute arising from the contract would be brought in a Manhattan court.<sup>66</sup> When their relationship deteriorated, the Alabama company sued in the Northern District of Alabama.<sup>67</sup> Predictably, however, the New Jersey company sought to enforce the forum-selection clause by transferring the case to the Southern District of New York under 28 U.S.C. § 1404 or to dismiss the case for improper venue under 28 U.S.C. § 1406.<sup>68</sup>

Relying on state law, the district court denied the motion, reasoning “that Alabama [law] looks unfavorably upon contractual forum-selection clauses.”<sup>69</sup> The Court of Appeals for the Eleventh Circuit reversed, reasoning that federal law determines questions of venue in diversity actions that, consistent with *Bremen*, look favorably on forum-selection clauses.<sup>70</sup> The United States Supreme Court affirmed on different grounds.<sup>71</sup> Accordingly, the Court

64. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). See also 28 U.S.C. § 1404(a) (2012), which provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a) (2012).

65. *Stewart*, 487 U.S. at 24.

66. The clause read:

Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

*Id.* at 24 n.1.

67. *Id.* at 24.

68. *Id.* See also 28 U.S.C. § 1406(a), which provides: “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a) (2012).

69. *Stewart*, 487 U.S. at 24.

70. *Id.* at 25.

71. *Id.* at 32.

remanded to the district court to determine whether the court should grant the motion for transfer under 28 U.S.C. § 1404(a).<sup>72</sup>

*Bremen* and *Stewart* left two important questions unanswered: (1) how to handle procedurally cases filed in violation of a forum-selection clause; and (2) how the Court will address contractual challenges to forum-selection clauses.

### 3. What Is the Proper Enforcement Mechanism?

While *Stewart* simply reaffirmed *Bremen*—holding that forum-selection clauses are presumptively enforceable under federal law—it left the question of the proper enforcement mechanism muddled. In *Stewart*'s wake, circuit courts split regarding the proper mechanism for enforcement.<sup>73</sup> Specifically, the Court of Appeals for the Third,<sup>74</sup> Fifth,<sup>75</sup> and Sixth<sup>76</sup> Circuits held that an improperly filed case should be transferred under 28 U.S.C. § 1404, apparently believing that *Stewart* dictated that outcome. By contrast, the

---

72. *Id.*

73. EARSA JACKSON & JIM MEANEY, FORUM SELECTION CLAUSES AFTER *ATLANTIC MARINE* 28 n.100 (2014), <http://www.americanbar.org/content/dam/aba/administrative/franchising/materials2014/w4.authcheckdam.pdf> (summarizing the circuit splits leading up to the *Atlantic Marine* decision).

74. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 875 (3d Cir. 1995) (“Although the district court in effect disposed of the case under 28 U.S.C. Sec. 1406 (for improper venue), we conclude that, because venue was actually proper in the Eastern District of Pennsylvania, the case could not be dismissed pursuant to that provision. The district court should instead have invoked 28 U.S.C. Sec. 1404(a), which involves a multi-factor balancing test in which a contractual forum selection clause carries substantial although not dispositive weight.”).

75. *In re Atl. Marine Constr. Co.*, 701 F.3d 736, 743 (5th Cir. 2012) (“The core of *Stewart* is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract. Rather the agreement of parties will signify in the district court’s allocating decision, tempering the private agreement’s reflection of private interests with the public interest attentive to the usual metrics of this case law, such as time to trial and convenience of witnesses. The contention that dismissal may be under § 1406 or Rule 12(b)(3) empties *Stewart* of force and confounds the plain language [of] § 1406.”).

76. *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 539 (6th Cir. 2002) (reversing the district court’s dismissal under Rule 12(b)(3) as inappropriate and remanding for proper determination under 28 U.S.C. § 1404(a) (2012)).

Courts of Appeal for the Second,<sup>77</sup> Fourth,<sup>78</sup> Seventh,<sup>79</sup> Eighth,<sup>80</sup> Ninth,<sup>81</sup> Tenth,<sup>82</sup> and Eleventh<sup>83</sup> Circuits held that a court should dismiss an improperly filed case under 28 U.S.C. § 1406 and Rule 12(b)(3) of the Federal Rules of Civil Procedure, citing *Bremen* as authority.<sup>84</sup>

Recognizing the enforcement uncertainty created by the circuit split, the United States Supreme Court resolved the issue in *Atlantic Marine Constr. Co. v. United States District Court for the Western District of Texas*.<sup>85</sup> The Court held “a forum-selection clause may be enforced by a motion to transfer under § 1404(a) . . . . When a defendant files such a motion, we conclude, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.”<sup>86</sup>

In *Atlantic Marine*, a Virginia corporation entered into a construction agreement with the United States Army Corps of Engineers to construct a building in Texas.<sup>87</sup> The Virginia corporation in turn entered into a contract with a subcontractor, which included a forum-selection clause providing that disputes would be resolved in the Eastern District of Virginia.<sup>88</sup> “When a

77. *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011) (“We therefore join the circuits that have considered this issue and conclude that *Stewart* does not compel a district court to enforce a forum selection clause under § 1404(a) where that clause permits suit in an alternative federal forum . . . . Rather, in such circumstances, a defendant may seek to enforce a forum selection clause under Rule 12(b).”).

78. *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006) (“Accordingly, a motion to dismiss based on a forum-selection clause should be properly treated under Rule 12(b)(3) as a motion to dismiss on the basis of improper venue.”).

79. *Muzumdar v. Wellness Int’l Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006) (“A challenge to venue based upon a forum selection clause can appropriately be brought as a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(3).”).

80. *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 972 (8th Cir. 2012) (“However, the reasoning in *Stewart* ‘nowhere requires a court to consider a forum selection clause pursuant to § 1404(a).’” (citing *TradeComet.com*, 647 F.3d at 477)).

81. *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) (affirming the dismissal of a claim for improper venue under FED. R. CIV. P. 12(b)(3) on basis of a forum-selection clause).

82. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 960 (10th Cir. 1992) (affirming dismissal of a claim for improper venue under FED. R. CIV. P. 12(b)(3) on basis of a forum-selection clause).

83. *Slater v. Energy Servs. Grp. Int’l, Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011) (“Accordingly, we conclude that § 1404(a) is the proper avenue of relief where a party seeks the transfer of a case to enforce a forum-selection clause, while Rule 12(b)(3) is the proper avenue for a party’s request for dismissal based on a forum-selection clause.”).

84. FED. R. CIV. P. 12(b)(3) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (3) improper venue.”).

85. See generally *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568 (2013).

86. *Id.* at 575.

87. *Id.*

88. *Id.*

dispute [regarding] payment under the subcontract arose, however,” the subcontractor sued in the Western District of Texas.<sup>89</sup>

When the Virginia corporation sought to enforce the forum-selection clause, the lower court held that the analysis was proper under section 1404(a).<sup>90</sup> More critically, in its analysis under section 1404(a), the court determined the forum-selection clause was only one factor it would consider alongside the convenience of the parties and their witnesses, and placed the burden on the Virginia corporation to establish that transfer was appropriate.<sup>91</sup> In light of the other considerations regarding convenience, the court did not enforce the forum-selection clause.<sup>92</sup>

Reversing the lower court, the United States Supreme Court reasoned that a contractually valid,<sup>93</sup> bargained-for forum-selection clause represents the parties’ legitimate expectations and, for that reason, courts should consider it the controlling factor under section 1404(a) “in all but the most exceptional cases.”<sup>94</sup> Specifically, the Court laid out three ways in which district courts must adjust their section 1404(a) analysis in the presence of a forum-selection clause. First, “the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.”<sup>95</sup> Second, the Court “should not consider arguments about the parties’ private interests,”<sup>96</sup> instead it may only consider “public-interest factors.”<sup>97</sup> Third, if the case is transferred, the new forum will not apply the original choice-of-law rules.<sup>98</sup>

89. *Id.* at 576.

90. *Id.*

91. *Id.*

92. *Id.*

93. Significantly, the Court noted: “Our analysis presupposes a contractually valid forum-selection clause.” *Id.* at 581 n.5.

94. *Id.* at 581 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

95. *Id.* at 581.

96. *Id.* at 582. The Court explains private interests are:

[f]actors relating to the parties’ private interests include “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”

*Id.* at 581 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)).

97. *Atl. Marine*, 134 S. Ct. at 583. The Court explains public interests may include “the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law.” *Id.* at 581 n.6 (citing *Piper Aircraft Co.*, 454 U.S. at 241 n.6). “The Court must also give some weight to the plaintiffs’ choice of forum.” *Id.* (quoting *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955)).

98. *Id.* at 582.

While *Atlantic Marine* provides parties with powerful ammunition to enforce a forum-selection clause, it is no silver bullet. First, the Court explicitly acknowledges that public policy considerations play into the calculus. Second, the Court's analysis presupposes a contractually valid forum-selection clause, inviting future contract-grounded litigation. While the first issue has yet to play out in the lower courts, the second has been fertile soil for litigation.

#### 4. Are Forum-Selection Clauses at Risk of Challenges Under Contract Theories?

The Court first dealt with a contractual challenge to a forum-selection clause in *Carnival Cruise Lines, Inc. v. Shute*, a case that has become hornbook law for the enforceability of so-called "form contracts," or "contracts of adhesion."<sup>99</sup> In *Carnival Cruise Lines*, the Court applied *Bremen* to contracts of adhesion, and announced that such contracts should be scrutinized for "fundamental fairness."<sup>100</sup>

In *Carnival Cruise*, when a couple from Washington purchased their cruise tickets, the cruise line sent tickets that included a contract with a forum-selection clause.<sup>101</sup> After one of the purchasers was injured while aboard, she sued in Washington.<sup>102</sup> Predictably, the cruise line sought to enforce the forum-selection clause.<sup>103</sup> In enforcing the clause, the Court proceeded by: (1) noting federal law governs the issue because the case arose in admiralty; (2) acknowledging that the plaintiff had "essentially . . . conceded" notice of the clause; (3) asking whether the clause was contrary to its holding in *Bremen* because "the clause was not the product of negotiation."<sup>104</sup>

While the Court dismissed the notion that form contracts were per se unenforceable, it focused its inquiry instead on the question of fundamental fairness.<sup>105</sup> Noting the absence of bad faith on behalf of the cruise line,<sup>106</sup> and

99. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585(1991); *Adhesion Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms.").

100. *Carnival Cruise Lines, Inc.*, 499 U.S. at 595.

101. *Id.* at 587–88. In relevant part, the clause read:

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

*Id.*

102. *Id.* at 588.

103. *Id.*

104. *Id.* at 590.

105. *Id.* at 592–95.

106. *Id.* at 595 (noting that the cruise line had its principal place of business in Florida and many of its cruises originate and end in Florida so it made sense to conduct the litigation there).



the lack of evidence of “accession to the forum clause by fraud or overreaching,” the Court enforced the forum-selection clause.<sup>107</sup>

While the United States Supreme Court has not yet considered the enforceability of a forum-selection clause within a corporation’s governance documents, lower federal courts have treated them with mixed results. In fact, the Northern District of California’s negative reaction to a unilaterally adopted forum-selection bylaw was the precursor to the Delaware Court of Chancery’s *Boilermakers* decision.<sup>108</sup> In *Galaviz*, the Northern District of California refused to enforce a unilaterally adopted bylaw that required all shareholder derivative litigation against the corporation to be brought in the Delaware Court of Chancery.<sup>109</sup>

In *Galaviz*, the board of directors of a software company unilaterally adopted a forum-selection bylaw<sup>110</sup> against the backdrop of allegedly overcharging the government for sales of software licenses in excess of several million dollars.<sup>111</sup> Considering the software company’s motion to dismiss the case for improper venue, the court analyzed the bylaw’s validity under federal common law.<sup>112</sup> It noted that, as held in *Carnival Cruise*, even where a clause is within a contract of adhesion, the federal common law requires that the parties mutually agree.<sup>113</sup> The court held:

[W]here as here, the bylaw was adopted by the very individuals who are named as defendants, and after the alleged wrongdoing took place, there is no element of mutual consent to the forum choice at all, at least with respect to shareholders who purchased their shares prior to the time the bylaw was adopted.<sup>114</sup>

In summary, the court emphasized the integral nature of bilateral assent to the validity of a forum-selection clause. Had there been bilateral consent, “there would be little basis to decline to enforce the venue provision.”<sup>115</sup> The court remarked that a shareholder-approved amendment would have been stronger, even if the plaintiff shareholder had personally voted against the amendment.<sup>116</sup>

While the *Galaviz* court hung its hat on lack of shareholder approval, even consensual forum-selection clauses have not proven untouchable. The

---

107. *Id.* at 595.

108. *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

109. *Id.* at 1175.

110. The relevant bylaw stated: “The sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation shall be the Court of Chancery in the State of Delaware.” *Id.* at 1172.

111. *Id.* at 1171–72.

112. *Id.* at 1175.

113. *Id.* at 1174.

114. *Id.* at 1171.

115. *Id.* at 1174.

116. *Id.* at 1175.

Southern District of New York recently invalidated a forum-selection provision within Facebook's charter.<sup>117</sup>

In *Facebook*, when the shareholder–plaintiffs filed in the Southern District of New York, Facebook moved to dismiss for improper venue pointing to a forum-selection provision in its certificate of incorporation.<sup>118</sup> While the court found its prospectus had communicated notice of the provision to shareholders, it was not effective under Delaware law because it had not been filed with the Delaware Secretary of State until four days after the initial public offering.<sup>119</sup> Because the shareholder–plaintiffs had purchased shares before the filing with the Secretary of State, the court refused to enforce the forum-selection clause.<sup>120</sup> Putting that technicality aside, the court also expressed general misgivings about forum-selection clauses, noting that “[t]he Court recognizes the considerable debate on the efficacy, enforceability and desirability of the use of exclusive forum provisions and declines to advance any position here.”<sup>121</sup>

While *Galaviz* is still good law, its reasoning has been undermined by the *Boilermakers* decision. Most recently, the Southern District of Ohio expressly declined to follow *Galaviz*, and instead followed *Boilermakers*.<sup>122</sup> In *North v. McNamara*, a case with a similar fact-pattern to *Galaviz*, the corporation enacted a forum-selection bylaw requiring certain lawsuits to proceed in either state or federal court in Delaware prior to the derivative lawsuits alleging breaches of fiduciary duty, but after the alleged wrongdoing.<sup>123</sup> Rejecting *Galaviz*, the court noted that it found “the reasoning set forth in *Boilermakers* to be the most persuasive on the issue of consent in this case,” which as discussed above, acknowledged the contractual validity and enforceability of unilaterally adopted forum-selection clauses in corporate bylaws.<sup>124</sup>

117. *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445 (S.D.N.Y. 2013).

118. *Id.* at 460.

119. *Id.* at 463.

120. *Id.*

121. *Id.* at 462 n.16.

122. *North v. McNamara*, 47 F. Supp. 3d 635, 640–42 (S.D. Ohio 2014).

123. *Id.* at 639. The bylaw stated:

Unless the corporation consents in writing to the selection of an alternative forum, a state or federal court located within the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim for breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's stockholders, (iii) any actions asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, the certificate of incorporation or the by-laws of the corporation or (iv) any action asserting a claim governed by the internal affairs doctrine, in each such case subject to such court having personal jurisdiction over the indispensable parties named as defendants therein.

*Id.*

124. *Id.* at 642.

B. ENFORCEMENT IN STATE COURTS

The majority of states have not considered the enforceability of forum-selection clauses in corporate governance documents.<sup>125</sup> Even among those states that have addressed the issue, most have not resolved it at the highest courts of the state.<sup>126</sup> State courts that have ruled on the enforceability of forum-selection bylaws, however, have generally followed the *Boilermakers* decision and enforced them.<sup>127</sup>

While every state that has ruled on the issue has acknowledged the facial validity of unilaterally adopted forum-selection clauses,<sup>128</sup> there has been at least one successful as-applied challenge.<sup>129</sup> Notably, however, the decision was reversed by the state's supreme court.<sup>130</sup> While the reversal provides greater assurance that the trend is in favor of enforcing forum-selection bylaws, the facts of the case are still instructive for companies regarding specific conduct to steer clear of in order to avoid future challenges. As in

---

125. See *infra* Part III.B.

126. See *infra* Part III.B.

127. See *infra* Part III.B.

128. Patrick J. Rohl, *The Reassertion of the Primacy of Delaware and Forum Selection Bylaws*, 92 DENV. U. L. REV. ONLINE 143, 151 (2015) (providing overview summarizing the reception of Delaware forum-selection clauses outside of Delaware). Since the *Boilermakers* decision, state courts in Alabama, California, Illinois, Louisiana, New York, and Texas have enforced Delaware forum-selection clauses despite facial attacks. See, e.g., *Groen v. Safeway Inc.*, No. RG14716641, 2014 WL 3405752, at \*2 (Super. Ct. Cal. May 14, 2014) (rejecting plaintiffs facial challenge to forum-selection clause and had “failed to demonstrate that application of the forum selection bylaws would be unreasonable in this situation”); Transcript of Oral Argument at 39, *Miller v. Beam Inc.*, No. 2014 CH 00932 (Ill. Cir. Ct. Mar. 5, 2014) (“Even though it is procedurally different from this case, the Court finds *Boilermakers* to be persuasive.”); *Genoud v. Edgen Grp., Inc.*, No. 625244, 2014 WL 2782221 (La. Dist. Ct. Jan. 17, 2014) (refusing to invalidate a forum-selection bylaw and granting motion to dismiss for improper venue); *Hemg Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, at \*5 (N.Y. Sup. Ct. Nov. 4, 2013) (“[*B*]oilermakers, Aspen Group’s Certificate of Incorporation provides that the ‘board of directors is expressly authorized to make, amend, alter or repeal the by-laws of the Company.’ Aspen Group’s certificate of incorporation permitted the adoption of the Delaware forum selection clause and plaintiffs, like plaintiffs in *Boilermakers*, are bound by the forum selection clauses.”); *In re MetroPCS Commc’ns., Inc.*, 391 S.W.3d 329, 334 (Tex. App. 2013) (granting a writ of mandamus to enforce forum-selection clause improperly refused to be enforced by trial court). See also William Savitt et al., *Forum-Selection Bylaws—Another Brick in the Wall*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG., (Apr. 10, 2016), <https://corpgov.law.harvard.edu/2016/04/10/forum-selection-bylaws-another-brick-in-the-wall> (discussing a recent California case that enforced a Delaware forum-selection bylaw); Jennifer Ancona Semko, *General Trend Favoring Enforcement of Forum-Selection Bylaws Continues in 2014*, LEXOLOGY (Feb. 13, 2015), <http://www.lexology.com/library/detail.aspx?g=3ef7b6ce-3340-4a3c-8bf6-fc972c6028eb> (discussing a recent Alabama case, *Edelman v. Protective Life Corp.*, No. CV-2014-902474, which enforced a Delaware forum-selection bylaw by granting motion to dismiss shareholder litigation).

129. *Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, 2014 WL 4147465 (Or. Cir. Ct. August 14, 2014).

130. See generally *Roberts v. TriQuint Semiconductor, Inc.*, 358 Or. 413 (Or. 2015).

*Galaviz*, the challenge involved the proximity of the unilateral adoption of the forum-selection bylaw to a board's alleged wrongdoing.<sup>131</sup>

In *Roberts v. TriQuint Semiconductor, Inc.*, a group of activist shareholders announced their intention to oust the board of directors of the corporation at the next shareholder meeting.<sup>132</sup> After the announcement, but before the next annual shareholder meeting, the board of directors announced its intention to merge with another company.<sup>133</sup> The merger was recommended and the board of directors unilaterally adopted a forum-selection bylaw at the same meeting.<sup>134</sup> The board announced the merger a couple days later.<sup>135</sup> The activist shareholders alleged that the board passed the bylaw because it anticipated their lawsuit, given their prior announcement of the intention to oust the board.<sup>136</sup>

After surveying both *Galaviz*, and its successor, *Boilermakers*, the court chose to analyze adopted bylaw under the Ninth Circuit's interpretation of the *Bremen* standard, as summarized in *Argueta v. Banco Mexicano, S.A.*<sup>137</sup> Under *Argueta*, a forum-selection bylaw is not enforceable if:

- (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought.<sup>138</sup>

While the court quickly determined that the first two prongs were inapplicable, it determined that the third prong was violated if:

[T]he closeness of the timing of the bylaw amendment to the board's alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit, and keeping in mind that its enforcement will have the effect—and Defendants knew it would have the effect—of forcing the shareholders to accept the bylaw, this court finds that enforcing the unilaterally enacted bylaw by dismissing this case would be unfair and unjust. . . . [and] would violate the public policy supporting contract formation and would allow a potential defendant anticipating imminent litigation to, also unilaterally, restrict the plaintiff's choice of forum.<sup>139</sup>

131. *See id.* at 8.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 9.

136. *Id.* at 8.

137. *See generally* *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320 (9th Cir. 1996).

138. *TriQuint Semiconductor*, 2014 WL 4147465 at \*3 (quoting *Argueta*, 87 F.3d at 325).

139. *Id.* at \*5.

Simply put, the court found the forum-selection clause unpalatable because of the proximity of the adoption of the bylaw to the alleged wrongdoing, and because the clause deprived the plaintiffs of their traditional choice-of-forum advantage.

In summary, while state courts have generally followed the *Boilermakers* decision and enforced forum-selection clauses, the clauses are still susceptible to *Galaviz*-type challenges.

#### IV. PROPOSAL FOR ENFORCEABLE DELAWARE FORUM-SELECTION CLAUSES

Up until now, this Note has been purely retrospective. Part II considered the evolution of Delaware's case law and statutory framework for forum-selection clauses.<sup>140</sup> Part III assessed the reaction of non-Delaware jurisdictions to Delaware forum-selection clauses.<sup>141</sup>

##### A. STRATEGIC CONSIDERATIONS IN VIEW OF RECENT ENFORCEMENT TRENDS

Before adopting a forum-selection clause, companies should be mindful of certain strategic considerations, including where to place the clause, when to adopt it, and how shareholders will react.

##### 1. Placement in Certificate of Incorporation versus Bylaws Depends on Company's Risk Tolerance

Placement considerations should balance the relative ease of adoption against level of scrutiny to expect from courts. If the corporation is already incorporated, adopting a charter provision will require amending the corporation's certificate of incorporation, which requires a stockholder vote.<sup>142</sup> By contrast, boards of directors may unilaterally adopt forum-selection clauses within corporate bylaws if so empowered by the corporation's certificate of incorporation.<sup>143</sup> While facially valid under Delaware corporate law, as discussed in Subparts III.A–B, courts may impose heightened scrutiny to unilateral bylaw changes.<sup>144</sup>

##### 2. Adopt Your Bylaw on a "Clear Day"

If a company chooses to unilaterally adopt the bylaw, it should refrain from doing so in anticipation of a dispute to avoid having courts draw negative

---

140. *See supra* Part II.

141. *See supra* Part III.

142. DEL. CODE ANN. tit. 8, § 242 (West 2015) (governing amendments to certificates of incorporation after receipt of payment for stock). *See also supra* text accompanying note 32.

143. DEL. CODE ANN. tit. 8, § 109(a) (West 2015) (governing amendments to bylaws); *see also supra* text accompanying note 32.

144. *See supra* Part III; *see also* S.B. 75, 148th Gen. Assemb. (Del. 2015) (synopsis) (noting that New § 115 does not "foreclose evaluation of whether the . . . manner of adoption of a particular provision authorized by Section 115 comport[s] with any relevant fiduciary obligation or operate reasonably in the circumstances presented").

inferences.<sup>145</sup> While the trend in recent case law is not in favor of challenges based on the timing of bylaw adoption, corporations should consider adopting bylaws on a “clear day” because lawsuits on the heels of bylaw amendments may persist.<sup>146</sup>

### 3. Expect Criticism from Proxy Advisory Firms and Provide a Rationale for Adoption

Corporations should be aware that proxy advisors may change their voting recommendations if a board adopts a forum-selection clause without stockholder approval. Both Glass, Lewis & Co.<sup>147</sup> and Institutional Shareholder Services, Inc.<sup>148</sup> have signaled their disapproval of unilaterally adopted forum-selection clauses. As a result, companies adopting forum-selection clauses should make robust public disclosures of the reasoning for adopting the clause, which will help defend the company in any related, subsequent litigation.<sup>149</sup>

#### B. IDEAL PROVISIONS TO INCORPORATE IN LIGHT OF RECENT ENFORCEMENT TRENDS

Once a company has decided to adopt a forum-selection clause, it must determine the specific textual provisions to adopt. This Note makes five overarching recommendations: (1) include a waiver provision; (2) establish personal jurisdiction over the parties; (3) tailor the scope of claims covered to New § 115; (4) make Delaware courts the only forum for litigation; and (5) specify when litigation may be brought in federal court.

145. This is discussed in detail in Part III. *See also* Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011) (invalidating a forum-selection bylaw holding in relevant part that the provision was adopted “after the majority of the purported wrongdoing is alleged to have occurred”); Roberts v. TriQuint Semiconductor, Inc., No. 140202441, 2014 WL 4147465 at \*5 (Or. Cir. Ct. Aug. 14, 2014) (invalidating a bylaw that the board adopted on the same day that it approved a merger agreement for the corporation).

146. *Exclusive Forum Bylaws Gain Momentum*, SULLIVAN & CROMWELL LLP 9 (May 28, 2014), [http://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Exclusive\\_Forum\\_Bylaws\\_Gain\\_Momentum.pdf](http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Exclusive_Forum_Bylaws_Gain_Momentum.pdf); Michael G. O’Bryan, Kevin A. Calia, & James J. Beha II, *Recent Decision Confirms That Forum Selection Bylaws Are Best Considered on a Clear Day*, MORRISON & FOERSTER: CLIENT ALERT (Sept. 9, 2014), <http://www.mofo.com/~media/Files/ClientAlert/2014/09/140909ForumSelectionBylaws.pdf> (observing that companies adopting forum-selection bylaws should do so on a “clear day,” meaning not on the heels of anticipated particular litigation).

147. Glass Lewis & Co., *Guidelines 2015 Proxy Season*, PROXY PAPER 13–14 (2015), [http://www.glasslewis.com/assets/uploads/2013/12/2015\\_GUIDELINES\\_United\\_States.pdf](http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf) (noting it “will consider recommending” a vote against “[t]he governance committee chair, when during the past year the board adopted a forum selection clause” unilaterally).

148. Institutional Shareholder Services, *2015 Benchmark Policy Recommendations*, U.S. SUMMARY PROXY VOTING GUIDELINES 12 (Dec. 22, 2014), <http://www.issgovernance.com/file/policy/2015summaryvotingguidelines.pdf> (observing it will generally recommend a voting against one or more directors if the board has unilaterally adopted any amendment “that materially diminishes shareholders’ rights or that could adversely impact shareholders” after considering certain factors).

149. *See Exclusive Forum Bylaws Gain Momentum*, *supra* note 146, at 9.

### 1. Give Yourself an Out—Include a Waiver Provision

The forum-selection clause should include a provision allowing the corporation to waive the clause.<sup>150</sup> Depending on the circumstances, waiving the exclusive forum clause may be convenient, strategically desirable, or even demanded by the board of directors' fiduciary duties.<sup>151</sup>

On one hand, waiver provisions may be desirable simply for convenience. Assuming the law is favorable, a corporation headquartered in New York may find it desirable to litigate there, if the majority of witnesses and documents are located there.<sup>152</sup> In such cases, waiving the forum-selection clause may serve the corporation's interest by saving time and money.<sup>153</sup>

Separately, having the option to waive the clause may provide the corporation a strategic advantage.<sup>154</sup> The waiver is akin to a stock option that empowers the board to negotiate. For instance, when plaintiffs file in a foreign jurisdiction, the corporation can use the waiver as a bargaining chip on the condition that the litigation moves forward in the most defendant-friendly jurisdiction.<sup>155</sup> Of course, where there is no favorable alternative forum, the company may always fall back on the default and choose to litigate in Delaware.

On the other hand, under certain circumstances, the directors' fiduciary obligations may even demand litigating in a foreign jurisdiction.<sup>156</sup> For instance, if a Delaware court cannot obtain jurisdiction over an indispensable defendant from whom significant recovery is possible, then the directors' fiduciary duties may require that they consent to proceedings in a foreign forum.<sup>157</sup>

Indeed, the Delaware legislature anticipates this scenario in its synopsis to New § 115, which notes that the new legislation does not “foreclose evaluation of whether the specific terms . . . comport with any relevant fiduciary obligation or operate reasonably in the circumstances presented.”<sup>158</sup>

---

150. See Richard A. Rosen & Stephen P. Lamb, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP 12 (Jan. 8, 2015), [https://www.paulweiss.com/media/2756381/fsc\\_article.pdf](https://www.paulweiss.com/media/2756381/fsc_article.pdf).

151. *Id.*

152. *Id.* at 12.

153. *Id.*

154. *See id.*

155. *Id.*

156. *See id.*; Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 402 (2013) (“A bright-line rule invalidating all intra-corporate forum selection provisions ab initio would preclude the type of case-by-case analysis necessary to determine whether operation of a particular provision, under the particular facts of a case, would constitute a violation of the board's fiduciary obligations.”).

157. Grundfest & Savelle, *supra* note 156, at 402.

158. S.B. 75, 148th Gen. Assemb. (Del. 2015) (synopsis).

## 2. Establish Personal Jurisdiction over Defendants and Plaintiffs

A waiver provision may also aid in the enforceability of a forum-selection clause in cases where no Delaware court has personal jurisdiction over a defendant.<sup>159</sup> As discussed in Part II.A,<sup>160</sup> the Court of Chancery left this issue open for future litigants in *Boilermakers*.<sup>161</sup> Arguing against enforcement, the plaintiffs claimed that the underlying forum-selection bylaw would operate unreasonably where a defendant “is not subject to personal jurisdiction in the state of incorporation, but may be susceptible to service elsewhere.”<sup>162</sup> The Court of Chancery rejected the argument, reasoning that such challenges must be decided on an as-applied basis in the context of actual disputes.<sup>163</sup>

Some corporations have sought to preempt future as-applied challenges to their forum-selection clauses with language narrowing the clause’s application to circumstances in which the court has personal jurisdiction.<sup>164</sup> For example, some corporations have recently employed language requiring the court to have “personal jurisdiction over the indispensable parties named as defendants.”<sup>165</sup> Other clauses require that the forum state have exclusive jurisdiction “to the fullest extent permitted by the law.”<sup>166</sup> While this type of language likely does no harm, it is not clear it will provide an advantage for enforceability.<sup>167</sup> The better approach may be to address this issue simply through a waiver provision.<sup>168</sup>

An effective forum-selection clause will also establish personal jurisdiction over plaintiffs.<sup>169</sup> As discussed in Part II.A,<sup>170</sup> the Court of Chancery has signaled more willingness to enforce forum-selection clauses, at least in the context of anti-suit injunctions, where the language includes an express waiver of jurisdiction.<sup>171</sup> While only future litigation will tell whether any particular language will be effective, in light of the Court of Chancery’s

159. See Rosen & Lamb, *supra* note 150, at 13.

160. See *supra* Part II.A.

161. Rosen & Lamb, *supra* note 150, at 13.

162. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 958 (Del. Ch. 2013).

163. *Id.*

164. See Rosen & Lamb, *supra* note 150, at 13.

165. *Id.*; see also U.S. SEC. & EXCH. COMM’N, SWK HOLDINGS CORPORATION, CURRENT REPORT (FORM 8-K) (May 20, 2015) [https://www.sec.gov/Archives/edgar/data/1089907/00015527811500606/e00238\\_swkh-8k.htm](https://www.sec.gov/Archives/edgar/data/1089907/00015527811500606/e00238_swkh-8k.htm).

166. Rosen & Lamb, *supra* note 150, at 13; see also U.S. SEC. & EXCHANGE COMM’N, FOURTH AMENDED AND RESTATED BY-LAWS OF UNITED THERAPEUTICS CORPORATION (June 26, 2015), [https://www.sec.gov/Archives/edgar/data/1082554/000110465915048163/a1514669\\_1ex3d1.htm](https://www.sec.gov/Archives/edgar/data/1082554/000110465915048163/a1514669_1ex3d1.htm).

167. *Exclusive Forum Bylaws Gain Momentum*, *supra* note 146, at 8.

168. Rosen & Lamb, *supra* note 150, at 13.

169. *Id.* at 12.

170. See *supra* Part II.A.

171. See generally Rosen & Lamb, *supra* note 150, at 13.



previous opinions, language of express consent is more likely to result in a favorable outcome.<sup>172</sup>

### 3. Tailor Scope of Claims Covered to New § 115

The scope of forum-selection clauses should tightly parallel New § 115, which in turn roughly follows the Court of Chancery's holding in *Boilermakers*.<sup>173</sup> In the legislature's own words, New § 115 confirms the Court of Chancery's holding in *Boilermakers* that a corporation's certificate of incorporation or bylaws may require claims arising under the DGCL to be brought in Delaware courts.<sup>174</sup>

Consistent with *Boilermakers* and New § 115, the clause should cover the following types of claims: "claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which [Title 8 of the DGCL] confers jurisdiction upon the Court of Chancery."<sup>175</sup>

172. *Id.* at 16–17. *But see Exclusive Forum Bylaws Gain Momentum*, *supra* note 146, at 9 ("While [express consent provisions] may have been helpful when the enforceability of these provisions was less clear, such language does not appear to be necessary at this point, since duly adopted bylaws do not require further specific 'consent' under Delaware law to be enforceable against both existing and future shareholders.").

173. *Compare* DEL. CODE ANN. tit. 8, § 115 (West 2015) ("The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery."), *with Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013) (upholding a bylaw forum-selection clause).

174. S.B. 75, 148th Gen. Assemb. (Del. 2015) (synopsis).

175. DEL. CODE ANN. tit. 8, § 115 (West 2015). Prominent law firms have advocated for the scope of claims covered to mirror the clause approved in *Boilermakers* and cover the below four main issues: "(i) derivative actions (ii) claims for breaches of a fiduciary duty, (iii) claims under the DGCL or the corporation's certificate of incorporation or bylaws, and (iv) claims under the internal affairs doctrine." Rosen & Lamb, *supra* note 150, at 7–9 (discussing the permissible scope of Delaware forum-selection clauses); *see also Exclusive Forum Bylaws*, WACHTELL, LIPTON, ROSEN & KATZ, CLIENT MEMORANDUM 1–3 (June 26, 2013) (on file with the *Iowa Law Review*), <http://www.wlrk.com/docs/ForumSelectionBylawBODmemo.pdf> (advocating for a model Delaware forum-selection clause, which contains the four named categories of litigation); *Exclusive Forum Bylaws Gain Momentum*, *supra* note 146, at 2 (explaining that Delaware forum-selection clauses typically cover the four named types of litigation); *Forum Selection Clauses in Foreign Court*, CLEARY GOTTlieb STEEN & HAMILTON, ALERT MEMORANDUM 9 (March 12, 2014), <https://www.clearygottlieb.com/~media/cgsh/files/publication-pdfs/forum-selection-clauses-in-the-foreign-court.pdf> (advocating for a model Delaware forum-selection clause, which contains the four named categories of litigation). It is noteworthy that such a scope was advocated for prior to the passage of New § 115. While crafting a forum-selection provision after the four claims above is unlikely to result in any enforceability problems, the more prudent option, in light of Delaware's New § 115, is to follow the scope outlined in that legislation.

#### 4. Herd Plaintiffs into Delaware

While under New § 115 corporations have the option to select additional fora in which to be subject to suit, they should limit their exposure to Delaware courts.<sup>176</sup> As stated in Part II.B, New § 115 overturns the Chancery Court's holding in *City of Providence v. First Citizens BancShares* that a Delaware corporation's bylaws may exclusively select the courts of another state for internal corporate claims.<sup>177</sup> However, New § 115 does not require Delaware to be the exclusive forum.<sup>178</sup> Instead, the legislation leaves the door open for corporations to subject themselves to suit in additional fora, such as the corporation's principal place of business.<sup>179</sup>

While this option may be alluring to corporations where records and employees are located outside of Delaware, corporations should avoid allowing litigation to proceed outside of Delaware and the possibility of becoming subject to multi-forum litigation.<sup>180</sup> Because the plaintiff chooses where to file suit, providing plaintiffs more than one option opens the door to forum shopping, or even worse, concurrent litigation.<sup>181</sup> Accordingly, including a waiver provision may be a better means of achieving the same result. In so doing, the corporation achieves the upside of the ability to litigate selectively in a convenient forum, but avoids the downside of always being subject to suit in multiple fora.

#### 5. Allow Proceedings in Federal Court—on Your Terms

Forum-selection clauses should allow access to the District of Delaware in addition to the Court of Chancery because the latter lacks jurisdiction over certain federal claims that may arise.<sup>182</sup> In an effort to constrain the forum shopping problem discussed in Part II, however, forum-selection clauses should specify when actions may be brought in federal court.<sup>183</sup> The ideal approach is to allow a lawsuit to move forward in federal court, only on the

---

176. DEL. CODE ANN. tit. 8, § 115 (West 2015); see also Rosen & Lamb, *supra* note 150, at 9–10 (discussing the benefits of limiting the forum exclusively to Delaware).

177. See *supra* Part II.B.

178. See DEL. CODE ANN. tit. 8, § 115 (West 2015).

179. See *id.*

180. Rosen & Lamb, *supra* note 150, at 12; see also *supra* Part II.

181. Rosen & Lamb, *supra* note 150, at 13.

182. See Brenda R. Sharton, *Forum Selection Bylaws: More Than Just Boilerplate*, GOODWIN PROCTER LLP: BUS. LITIG. REP. (March 3, 2014), <http://www.goodwinlaw.com/viewpoints/2014/03/business-litigation-reporter> (“Some forum selection clauses say that any disputes will be resolved ‘in the federal courts’ or ‘in the business litigation session’ of a particular state or city. But federal courts are courts of limited jurisdiction, as are most business or complex litigation sessions, and simply stating your preference to litigate there is not enough to ensure that the dispute can be dealt with there. And if it cannot be dealt with there, your forum selection clause is then unenforceable.”).

183. See *supra* Part II.

condition that it cannot move forward in the Court of Chancery.<sup>184</sup> An open-ended provision effectively allows plaintiffs to shop between federal and state court, assuming there is a federal jurisdictional basis.<sup>185</sup> Instead, the more predictable approach is to narrow plaintiffs' options by allowing suit in federal court only on the condition that the Court of Chancery does not have jurisdiction.<sup>186</sup> Of course, regardless of the contractual language, plaintiffs may choose to sue in their preferred federal court. However, *Atlantic Marine* ensures that such claims will likely fail, unless public-interest factors overwhelmingly favor adjudication in the foreign jurisdiction.<sup>187</sup>

### C. PROPOSED MODEL FORUM-SELECTION CLAUSE

Putting the foregoing proposals into action, set forth below is a proposed model forum-selection clause for companies to adopt.

Unless the Corporation waives this provision in writing, the sole and exclusive forum for any claims, including those in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which the General Corporation Law of the State of Delaware confers jurisdiction upon the Court of Chancery, shall be the Court of Chancery in the State of Delaware, but if the Court of Chancery does not have jurisdiction, then the United States District Court for the District of Delaware. In any legal action raising the subject matter of this clause, any person or legal entity who purchases or otherwise acquires or holds any interest in the capital stock of the Corporation will be deemed to have notice of and to have expressly consented to the personal jurisdiction of the Court of Chancery in the State of Delaware and the United States District Court for the District of Delaware, and to have expressly consented to all other provisions of this clause.

Separately, certain prominent law firms have publicly advocated model clauses of their own.<sup>188</sup> The largest departure between the model clause

---

184. See Rosen & Lamb, *supra* note 150, at 11; *Exclusive Forum Bylaws Gain Momentum*, *supra* note 145, at 8.

185. Rosen & Lamb, *supra* note 150, at 11–12.

186. See *id.* at 11.

187. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Texas*, 134 S. Ct. 568, 583 (2013) (explaining the public factors that may be considered in granting a change of venue (28 U.S.C. § 1404(a) claim).

188. Clause advocated by Cleary Gottlieb Steen & Hamilton:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the State of Delaware, in all cases subject to such

court's having personal jurisdiction over the indispensable parties named as defendants. Any person or entity owning, purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw/Article].

If any action the subject matter of which is within the scope of paragraph (a) above is filed in a court other than a court located within the State of Delaware (a "Foreign Action") in the name of any stockholder, such stockholder shall be deemed to have consented to (i) the personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce paragraph (a) above (an "FSC Enforcement Action") and (ii) having service of process made upon such stockholder in any such FSC Enforcement Action by service upon such stockholder's counsel in the Foreign Action as agent for such stockholder.

*Forum Selection Clauses in Foreign Court*, *supra* note 175, at 1 n. 2.

Clause advocated by Paul, Weiss, Rifkind, Wharton & Garrison:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law or the Certificate of Incorporation or Bylaws (as either may be amended from time to time), or (iv) any action asserting a claim governed by the internal affairs doctrine shall be the Court of Chancery in the State of Delaware (or, if the Court of Chancery does not have jurisdiction, the federal district court for the District of Delaware). If any action the subject matter of which is within the scope of the preceding sentence is filed in a court other than a court located within the State of Delaware (a "Foreign Action") in the name of any stockholder, such stockholder shall be deemed to have consented to (i) the personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce the preceding sentence and (ii) having service of process made upon such stockholder in any such action by service upon such stockholder's counsel in the Foreign Action as agent for such stockholder.

Rosen & Lamb, *supra* note 150, at 18–19.

Clause advocated by Sullivan & Cromwell:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director or officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation arising pursuant to any provision of the Delaware General Corporation Law or the Certificate of Incorporation or these By-Laws (in each case, as they may be amended from time to time), or (iv) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation governed by the internal affairs doctrine shall be a state court located within the State of Delaware (or, if no state court located within the State of Delaware has jurisdiction, the federal district court for the District of Delaware).

*Exclusive Forum Bylaws Gain Momentum*, *supra* note 146, at 10.

Clause advocated by Wachtell, Lipton, Rosen & Katz:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on

advocated by this Note and those put forth by these law firms is the language describing the scope of claims covered. Specifically, this Note's model clause piggybacks off the language of New § 115.

#### V. CONCLUSION

From humble beginnings as common law dicta to statutory decree, Delaware forum-selection clauses have become a mainstay in Delaware corporation law. Given the passage of New § 115 in the summer of 2015, the popularity of such provisions in corporate governance documents will likely soar to new heights. Before adopting a forum-selection provision of their own, however, companies should look beyond the Delaware pale because it is non-Delaware jurisdictions that will decide whether to enforce such provisions.

---

behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director or officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation arising pursuant to any provision of the Delaware General Corporation Law or the Corporation's Certificate of Incorporation or Bylaws (as either may be amended from time to time), or (iv) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation governed by the internal affairs doctrine shall be a state court located within the State of Delaware (or, if no state court located within the State of Delaware has jurisdiction, the federal district court for the District of Delaware).

*Exclusive Forum Bylaws, supra* note 175, at Exhibit. A.