Chancery Court Upholds Bylaw Forum Selection Provisions

On June 25, 2013, the Delaware Court of Chancery issued its decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*,[1] ruling that corporate bylaw provisions adopted by the board of directors without specific shareholder approval mandating an exclusive Delaware venue for actions concerning internal corporate affairs are facially valid under the Delaware General Corporation Law (the "DGCL") and contract law.

I. Factual Background and Procedural History

In September 2010, the board of Chevron, a Delaware corporation, adopted a bylaw mandating that stockholder suits concerning internal corporate affairs be brought exclusively in the Delaware Court of Chancery.[2] In March 2011, the board of another Delaware corporation, FedEx, adopted an identical forum selection bylaw, amending it in March 2012 to allow for suit in any Delaware court with jurisdiction.

In February 2012, complaints were filed by stockholders of twelve Delaware corporations in the Delaware Court of Chancery alleging that forum selection bylaws are statutorily and contractually invalid. Ten of the corporations repealed their bylaws and the complaints against them were subsequently dismissed. The remaining defendants, Chevron and FedEx, asked to consolidate their cases to resolve the "common questions of law," as is allowed in Delaware Court of Chancery Rule 42(a). This action was resisted by the plaintiffs in both cases, but the court ruled in favor of consolidation.[3]

II. The Decision of the Delaware Court of Chancery

In an opinion by Chancellor Leo E. Strine, Jr., the Delaware Court of Chancery upheld the facial validity of forum selection bylaws for Delaware corporations, dismissing both statutory and contract arguments. Plaintiffs argued that the forum selection bylaws were statutorily invalid under the DGCL. The court cited 8 *Del. C.* § 109(b), which states that the bylaws of a corporation "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."[4] Because the forum selection bylaws at issue "easily meet these requirements," the court found them to be statutorily valid.[5]

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[1] *Boilermakers Local 154 Retirement Fund v. Chevron Corporation,* C.A. No. 7220 (Del. Ch. June 25, 2013) (the "*Opinion*").

[2] The bylaw states: "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]." *Id.* at 9.

[3] The plaintiffs against Chevron were Boilermakers Local 154 Retirement Fund and Key West Police & Fire Pension Fund; the plaintiff against FedEx was Iclub Investment Partnership.

[4] 8 *Del. C.* § 109(b).

[5] *Opinion* at 3.

The court also rejected the argument put forth by the plaintiffs that "stockholders' rights may not be regulated by board-adopted bylaws"[6] and thus the bylaws are contractually invalid. Noting that such an argument "misunderstands the relationship between the corporation and stockholders established by the DGCL,"[7] the court held that such a finding would be "inconsistent with the fundamental structure of Delaware's corporate law."[8] The court further pointed out that stockholders should have known that the boards can unilaterally adopt and amend bylaws of such a nature because it is authorized in their certificates of incorporation. This provision is viewed as "an essential part of the contract stockholders' assent to when they buy stock in Chevron and FedEx."[9] Further stockholder approval is unnecessary, the court noted, because "stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations."[10] Accordingly, the court found that the forum selection bylaws at issue should be enforced just like any other forum selection clauses.

The plaintiffs presented "an array of purely hypothetical situations in which they say that the bylaws of Chevron and FedEx might operate unreasonably."[11] The court determined that "it would be imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts,"[12] and therefore dismissed them as not relevant to the case at issue. Such challenges to the bylaws, the court stated, must be brought by the affected parties in the event that one of the defendants' bylaws operates in a situationally unreasonable manner. As the case before it did not present any real-life examples of improper action on the part of the defendant-corporations, the court dismissed plaintiffs' claims.

III. Significance of the Decision

The decision by the Court of Chancery establishes that forum selection bylaws will be upheld in the corporation-friendly courts of Delaware. Because of the well-developed precedent in Delaware on many corporate law issues, the certainty of a Delaware venue for the resolution of disputes will likely increase the predictability of outcomes, lead to further consistency in the law in these relevant areas, and curtail the practice of "multiforum litigation" for certain stockholder suits, wherein corporations are taken to court in more than one forum simultaneously for disputes involving a single transaction or board decision.

This ruling has significance for over 250 publicly traded corporations that have adopted similar provisions.[13] It may also encourage other Delaware corporations to adopt such exclusive venue provisions, although there is increasing pressure from investors and proxy advisory firms to obtain shareholder approval for these provisions.

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[6] *Id.* at 5.

[7] *Id.*

[8] *Id. See Kidsco Inc. v. Dinsmore* 674 A.2d 483 (Del. Ch. 1995).

[9] *Opinion* at 5.

[10] *Id.*

[11] *Id.* at 6.

[12] *Id.*

[13] Defs.' Opening Br. 21 (*citing* Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis,* 68 Bus. Law. 325, 326 (2013)).

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.