



September 18, 2014

Client Alert

Delaware Chancery Court Upholds Validity of a Bylaw Selecting Out-of-State Forum for Litigating Intra-Corporate Disputes

Last week, in *City of Providence v. First Citizens BankShares, Inc.*, C.A. No. 9795-CB (Del. Ch. Sept. 8, 2014), Chancellor Andre G. Bouchard of the Delaware Court of Chancery upheld a forum selection bylaw adopted by the board of directors of a Delaware corporation that designated a foreign jurisdiction (North Carolina) as the exclusive forum for litigating intra-corporate disputes (the “Forum Selection Bylaw”).

In the *Providence* case, First Citizens BankShares, Inc. (“FC North”), a Delaware Corporation headquartered in North Carolina adopted the Forum Selection Bylaw on the same day that it announced it had entered into a merger agreement to acquire First Citizens Bancorporation, Inc. (“FC South”). The City of Providence challenged, among other things, the facial validity of the Forum Selection Bylaw.

In upholding the facial validity of the bylaw, Chancellor Bouchard found the Forum Selection Bylaw to be “virtually identical” to the ones that the court found to be facially valid in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013) (“Chevron”),¹ except in one respect: in the present case, FC North selected North Carolina courts as the exclusive forum, not Delaware courts.

The Delaware Chancery Court found the distinction as to whether the board of directors of a Delaware corporation may adopt a bylaw that designates an exclusive forum other than Delaware for resolving intra-corporate disputes to be “an issue of first impression.”

¹ A copy of our earlier Client Alert dated July 8, 2013 analyzing the holding in *Chevron* is available [here](#).

Relying on the reasoning of the Chevron case, the Delaware Chancery Court found the Forum Selection Bylaw to be facially valid. The Court reasoned that there is nothing in Chevron that prohibits directors of a Delaware corporation from designating an exclusive forum other than Delaware in its bylaws. The Court noted that the fact that FC North (a Delaware corporation) is headquartered and has most of its operations in North Carolina, makes North Carolina “the second most obvious reasonable forum” and “does not call into question the facial validity of the Forum Selection Bylaw.”

The Delaware Chancery Court also concluded that the Forum Selection Bylaw is valid “as-applied.” The Court noted that Chevron did not reach this question, but relied on the reasoning of Chevron that “forum selection clauses are valid provided that they are ‘unaffected by fraud, undue influence, or overwhelming bargaining power,’ and that the provisions ‘should be enforced unless enforcement is shown by the resisting party to be unreasonable’.” The Court found no “well-pled” facts calling into question the integrity of the North Carolina courts or the reasonableness of the board of directors of FC North. The Court found the validity of the bylaw to be unaffected by the fact that the board of directors of FC North adopted the bylaw “on an allegedly ‘cloudy’ day when it entered into the merger agreement with FC South rather than on a ‘clear’ day....given the lack of any well-pled allegations....demonstrating any impropriety in this timing.”

Finally, the Court noted that the interests of judicial comity are served by its holding in the present case and reasoned that after Chevron, if Delaware corporations are to expect that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for resolving intra-corporate disputes, then, as a matter of comity, so too this Court should enforce a bylaw of a Delaware corporation that designates a foreign exclusive forum.

Conclusion

Reading the current holding in Providence with the earlier holding in Chevron, it appears that absent fraud, undue influence or overwhelming bargaining power, forum selection bylaws will be upheld by Delaware courts not only when Delaware is the designated forum, but also when a foreign jurisdiction is the designated forum.

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Please contact Meryl Wiener, any of the undersigned or your regular Warsaw Burstein attorney to review any bylaws your company may have adopted that provide for forum selection or to consider whether it is appropriate for your company to adopt forum selection bylaws.

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