

## Forum Selection Clauses in the Foreign Court

It is now clear that, for Delaware companies, a charter or by-law forum selection clause (FSC) is a valid and promising response to the problems posed by multi-jurisdictional disputes involving claims based upon internal corporate affairs (such as M&A litigation and derivative actions). Three recent rulings by “foreign” courts – each of which granted motions to dismiss based upon an FSC selecting Delaware as the exclusive forum – show that foreign courts will respect and enforce these clauses. Still, as we have previously advocated,<sup>1</sup> the better course would be to include with an FSC a consent to jurisdiction and service provision for stockholders who commence the foreign litigation that would permit the defendants in the foreign case to enforce the forum selection clause in Delaware.<sup>2</sup>

Many Delaware companies now have forum selection clauses, adopted as part of their charters or through by-law amendments. While many litigations bringing internal affairs claims involving Delaware companies are filed in Delaware, very frequently litigation is also brought elsewhere. Indeed, in the public M&A context, 85% of recent proposed mergers or acquisitions of a Delaware companies have faced litigation brought outside of Delaware (generally, with identical litigation also brought in Delaware).

---

<sup>1</sup> See Cleary Gottlieb memorandum *Further Enhancing the Promise of Forum Selection Clauses Through Stockholder Consent to Jurisdiction: The Edgen Lesson*, November 19, 2013.

<sup>2</sup> A potential FSC, and a jurisdiction and service clause, could include the following:

(a) 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].

(b) 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.

A consent to jurisdiction and service provision permits defendants who are sued in a foreign court, in violation of a forum selection clause, to go to the selected forum and seek a final judgment and permanent injunction requiring the stockholder plaintiff to bring the suit in compliance with the FSC. This allows a Delaware corporation that has selected Delaware as the exclusive forum for internal affairs claims to, when faced with such a suit filed elsewhere, bring suit in Delaware against the stockholder/plaintiff in the foreign action, and on an accelerated basis seek redress in the Delaware courts against the further prosecution of the foreign litigation.

In the absence of a jurisdiction and service provision, the effectiveness of forum selection clauses will depend on how they are received in the foreign courts. Three recent cases suggest that foreign courts will respect those clauses, but they also indicate that defendants may need to incur considerable time and expense in order to obtain the full benefit of an FSC.

Two of the rulings are clear in their answers but do not contain extended discussion of their reasoning. In *Genoud v. Edgen Group Inc.*, No. 625,244 (19<sup>th</sup> Jud. Dist. Ct., East Baton Rouge, La., Jan. 17, 2014), the court issued an order enforcing a Delaware forum selection clause contained in Edgen's corporate charter. But the order was not issued until months after Edgen had agreed to be acquired, and indeed after the acquisition had closed. During that extended period, in addition to facing litigation demands in the foreign court (Louisiana), Edgen and its directors went to Delaware, seeking preliminary injunctive relief against the continued prosecution of the Louisiana action. That effort failed, however, based on concerns by the Delaware court over whether it had personal jurisdiction over the stockholder who brought suit in Louisiana and whether its entry of interim relief – a TRO or preliminary injunction – was appropriate on comity grounds. As a result, in violation of the FSC, the defendants had to face litigation outside of the selected forum throughout the period between the public announcement of the transaction and its closing – i.e., at all times while the transaction was subject to being enjoined.

In *Hemg Inc. v. Aspen Univ.*, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 14, 2013), a New York trial court granted a motion to dismiss traditional derivative claims based upon a forum selection clause in Aspen's by-laws. The court relied heavily on then Chancellor Strine's decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.2d 934 (Del. Ch. 2013), and concluded that, because Aspen's charter permitted the board to adopt and amend by-laws unilaterally, the adoption of a by-law containing an FSC was valid.

Most recently, in *Miller v. Beam Inc.*, No. 2014 CH 00932 (March 5, 2014), the Cook County Illinois Chancery Court issued an oral ruling granting a motion to dismiss in an M&A setting, enforcing an FSC by-law selecting Delaware as the exclusive forum for such litigation. In so ruling, the court noted that Beam had adopted the by-law in question after the buyer, Suntory, had proposed a merger between the two companies.<sup>3</sup> The stockholder plaintiffs urged the *Beam* court to apply a federal court decision, *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011), which refused to enforce an FSC by-law adopted after the facts giving rise to the

---

<sup>3</sup> Cleary Gottlieb represents Suntory in this matter.

claims being asserted there had taken place, arguing that the “wrongdoing” at issue in *Beam* was already taking place when the by-law was adopted, because Suntory had already made an offer. The Illinois court rejected that argument, relying heavily on then Chancellor Strine’s opinion in *Boilermakers*, which the *Beam* court noted was “more persuasive” than *Galaviz*, holding that – where the corporate charter so permits – Delaware boards of directors have the power unilaterally to adopt by-laws, including by-laws that select exclusive forums for addressing internal affairs claims.

The *Beam* court also held, in agreement with *Boilermakers*, “that it would be unreasonable, unpractical and costly to litigate in multiple jurisdictions,” and that it was “entirely reasonable for a corporation like *Beam* in this case, incorporated in Delaware and headquartered in Illinois, to want to limit litigation to one venue so that the corporation does not have to pass the cost of litigation onto the shareholders by litigating in multiple venues.”

Finally, the *Beam* court considered the issue that most concerned the *Galaviz* federal court. First, *Beam* noted that the charter provision permitting the board to adopt by-law provisions unilaterally had been enacted long before Suntory had made a takeover proposal. Second, it noted that, while Suntory had approached *Beam* before the *Beam* board adopted the FSC by-law, when the by-law was adopted the board had rejected both offers that Suntory had made, and the only allegation of wrongdoing asserted by the stockholder plaintiffs, apart from the general allegation that the *Beam* board conducted a flawed sales process, concerned events that took place after the by-law was adopted.

Lessons from these three rulings include that: (1) foreign courts are receptive to forum selection clauses and will enforce them, and (2) adopting an FSC on a clear day, before (or at least early in) a sale process will minimize debate over the FSC’s validity.

One additional observation. Particularly where an FSC by-law is adopted after a sales process is underway, plaintiffs will continue to argue, in an effort to fall under the *Galaviz* rubric, that the by-law was adopted after “wrongdoing” had taken place. Whether that argument – and any challenge based upon it that the by-law is invalid – will gain traction will depend on the facts pleaded.

What facts are relevant to any by-law validity analysis is, under *Boilermakers*, a question of Delaware law. The standard adopted is a high one, requiring one challenging the by-law to show fraud, undue influence or overweening bargaining power. This standard will be difficult to meet; *Boilermakers* makes clear that, as a matter of law, merely because the by-law was adopted unilaterally by the board is not enough to invalidate it. Further, adopting an FSC by-law, in the context of a typical public company sale process, should also not justify invalidating the by-law. (Indeed, the U.S. Supreme Court has upheld the validity of forum selection clauses were they were contained in small print on tickets received only after consumers made their purchases.) But still, the Delaware courts have not had occasion to address specific circumstances in which an FSC by-law may be invalid. Rather than leaving this important question of Delaware law to development by foreign courts, this is another reason why it is wise to include in an FSC a consent to jurisdiction and service provision, especially where an FSC by-law was adopted after the commencement of a sale process.

\* \* \* \*

Please feel free to call any of your regular contacts at the firm or any of our partners and counsel listed under "[Corporate Governance](#)" in the Practices Section of the website if you have any questions.

Cleary Gottlieb Steen & Hamilton LLP

## Office Locations

### NEW YORK

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

### WASHINGTON

2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

### PARIS

12, rue de Tilsitt  
75008 Paris, France  
T: +33 1 40 74 68 00  
F: +33 1 40 74 68 88

### BRUSSELS

Rue de la Loi 57  
1040 Brussels, Belgium  
T: +32 2 287 2000  
F: +32 2 231 1661

### LONDON

City Place House  
55 Basinghall Street  
London EC2V 5EH, England  
T: +44 20 7614 2200  
F: +44 20 7600 1698

### MOSCOW

Cleary Gottlieb Steen & Hamilton LLC  
Paveletskaya Square 2/3  
Moscow, Russia 115054  
T: +7 495 660 8500  
F: +7 495 660 8505

### FRANKFURT

Main Tower  
Neue Mainzer Strasse 52  
60311 Frankfurt am Main, Germany  
T: +49 69 97103 0  
F: +49 69 97103 199

### COLOGNE

Theodor-Heuss-Ring 9  
50688 Cologne, Germany  
T: +49 221 80040 0  
F: +49 221 80040 199

### ROME

Piazza di Spagna 15  
00187 Rome, Italy  
T: +39 06 69 52 21  
F: +39 06 69 20 06 65

### MILAN

Via San Paolo 7  
20121 Milan, Italy  
T: +39 02 72 60 81  
F: +39 02 86 98 44 40

### HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)  
Hysan Place, 37<sup>th</sup> Floor  
500 Hennessy Road  
Causeway Bay  
Hong Kong  
T: +852 2521 4122  
F: +852 2845 9026

### BEIJING

Twin Towers – West (23<sup>rd</sup> Floor)  
12 B Jianguomen Wai Da Jie  
Chaoyang District  
Beijing 100022, China  
T: +86 10 5920 1000  
F: +86 10 5879 3902

### BUENOS AIRES

CGSH International Legal Services, LLP-  
Sucursal Argentina  
Avda. Quintana 529, 4to piso  
1129 Ciudad Autonoma de Buenos Aires  
Argentina  
T: +54 11 5556 8900  
F: +54 11 5556 8999

### SÃO PAULO

Cleary Gottlieb Steen & Hamilton  
Consultores em Direito Estrangeiro  
Rua Funchal, 418, 13 Andar  
São Paulo, SP Brazil 04551-060  
T: +55 11 2196 7200  
F: +55 11 2196 7299

### ABU DHABI

Al Sila Tower, 27<sup>th</sup> Floor  
Sowwah Square, PO Box 29920  
Abu Dhabi, United Arab Emirates  
T: +971 2 412 1700  
F: +971 2 412 1899

### SEOUL

Cleary Gottlieb Steen & Hamilton LLP  
Foreign Legal Consultant Office  
19F, Ferrum Tower  
19, Eulji-ro 5-gil, Jung-gu  
Seoul 100-210, Korea  
T: +82 2 6353 8000  
F: +82 2 6353 8099