FORUM SELECTION, JURY WAIVER AND CHOICE OF LAW PROVISIONS IN ACQUISITION AGREEMENTS

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Congress Takes Action: The Sarbanes-Oxley Act, XXII Corporate Counsel Review 1 (May 2003); and Legislation: *The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law*, 41 Texas Journal of Business Law 41 (Spring 2005); *Texas Chancery Courts – The Missing Link to More Texas Entities*, Texas Bar Journal, Opinion Section, February 2016 Issue.

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I. INTRODUCTION

The forum in which controversies relating to an acquisition are litigated can have a significant impact on the dynamics of the dispute resolution and can also affect the outcome. The forum selected by the buyer usually will be its principal place of business, which may not be acceptable to the seller. Often the seller will attempt to change the designation to a more convenient forum or simply to confer jurisdiction in the forum selected by the buyer without making it the exclusive forum.[1]

II. CONTRACTUAL FORUM SELECTION PROVISIONS

Clauses by which the parties select the forum for the resolution of any disputes between them and consent to jurisdiction[2] are usually given effect so long as they have been freely negotiated among sophisticated parties. Exclusive forum selection clauses are generally upheld by the courts if they have been freely bargained for, are not contrary to an important public policy

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1 For an analysis of whether a forum selection clause is permissive or exclusive, *see Action Corp. v. Toshiba America Consumer Prods., Inc.*, 975 F. Supp. 170, 171 (D.P.R. 1997).

2 A typical acquisition agreement combining a forum selection clause with a consent to jurisdiction could read as follows:

> Any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction shall be brought in the courts of the State of _____, County of _____, or, if it has or can acquire jurisdiction, a Proceeding may be brought in the United States District Court for the _____ District of _____, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the Proceeding shall be heard and determined only in any such court, and agrees not to bring any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction in any other court. The parties agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement between the parties irrevocably to waive any objections to venue or to convenience of forum. Process in any Proceeding referred to in the first sentence of this Section may be served on any party anywhere in the world.

of the forum and are generally reasonable.[3] In *Bremen v. Zapata Offshore-Shore Co.*,[4] the U.S. Supreme Court held that forum selection clauses are prima facie valid and enforceable unless they are unreasonable under the circumstances. The Supreme Court explained that a forum selection clause may be unreasonable if (1) the enforcement would be so gravely difficult and inconvenient that for all practical purposes the party resisting enforcement would be deprived of his day in court; (2) the clause is invalid for such reasons as fraud or overreacting; or (3) enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision; the party claiming unfairness has a heavy burden of proof.

Section 15.020 of the Texas Civil Practices and Remedies Code provides generally that in a "major transaction" (defined as a business transaction involving an aggregate amount of $1 million or more) the parties in a written agreement may agree that any action arising from the transaction must be brought in a specified venue.[5] Under Section 15.020 generally only a party to

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[3] *See Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 134 S.Ct. 568 (Dec. 3, 2013)) (the parties' contractual choice of forum should be enforced except in the most unusual cases, and that the party resisting the forum-selection clause (i.e., the plaintiff who filed in a different court) has the burden of establishing that public interests disfavoring transfer outweigh the parties' choice; if the parties' contract specifies one federal district court as the forum for litigating any disputes between the parties, but the plaintiff files suit in a different federal district court that lawfully has venue (and therefore could be a proper place for the parties to litigate), the defendant should seek to transfer the case to the court specified in the forum-selection clause by invoking the federal statute that permits transfers of venue "[f]or the convenience of the parties and witnesses, in the interest of justice"; if the contract's forum-selection clause instead specifies a state court as the forum for litigating disputes, the defendant may invoke a different federal statute that requires dismissal or transfer of the case).

[4] 407 U.S. 1, 10 (1972).

[5] TEX. CIV. PRAC. & REM. CODE § 15.020 (2017) provides:

> Sec. 15.020. MAJOR TRANSACTIONS: SPECIFICATION OF VENUE BY AGREEMENT. (a) In this section, "major transaction" means a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million. The term does not include a transaction entered into primarily for personal, family, or household purposes, or to settle a personal injury or wrongful death claim, without regard to the aggregate value.
>
> (b) An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county.
>
> (c) Notwithstanding any other provision of this title, an action arising from a major transaction may not be brought in a county if:
>
> (1) the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or
>
> (2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction.
>
> (d) This section does not apply to an action if:
>
> (1) the agreement described by this section was unconscionable at the time that it was made;
>
> (2) the agreement regarding venue is voidable under Chapter 272, Business & Commerce Code; or
>
> (3) venue is established under a statute of this state other than this title.

the forum selection agreement may enforce it.[6] The Texas Supreme Court held in *In Re Fisher and Boudreaux*[7] that mandamus relief is specifically authorized by Section 15.020 to enforce a mandatory venue provision to any action that "arises from" a "major transaction" and that Section 15.020 is to be applied broadly to any dispute arising out of the agreement even if focused on post closing conduct that only affects the amount payable under the agreement. Previously, the Texas Supreme Court in *In re Int'l Profit Associates, Inc.*,[8] held that:

> Forum-selection clauses are generally enforceable . . . . A trial court abuses its discretion if it refuses to enforce a forum-selection clause unless the party opposing enforcement clearly shows that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.[9]

A court in a forum other than the one selected may, in certain circumstances, elect to assert jurisdiction, notwithstanding the parties' designation of another forum. In these situations, the courts will determine whether the provision in the agreement violates public policy of that state and therefore enforcement of the forum selection clause would be unreasonable.[10]

A forum selection clause in an ancillary document can affect the forum in which disputes regarding the principal acquisition agreement are to be resolved. In a choice of forum skirmish in the *IBP, Inc. v. Tyson Foods, Inc.*[11] case, the Delaware Chancery Court concluded: (1) Tyson's Arkansas claims and IBP's Delaware clause claims were contemporaneously filed, even though Tyson had won the race to the courthouse by five business hours, and (2) most of Tyson's Arkansas claims fell within the scope of the contractual choice of forum clause in a confidentiality agreement requiring litigation in the courts of Delaware. The Chancery Court then concluded that because of the forum selection clause, only a Delaware court could handle all of the claims by Tyson, including the disclosure and material adverse change disputes. The Chancery Court found that the

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> (e) This section does not affect venue and jurisdiction in an action arising from a transaction that is not a major transaction.

6 *Pinto Technology Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (2017).

7 433 S.W.3d 523 (Tex. 2014); *see also In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (per curiam); *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (per curiam).

8 274 S.W.3d 672, 675 (Tex. 2009).

9 *See also Prosperous Maritime Corp. v. Farwah*, 189 S.W.3d 389, 391 (Tex. App.—Beaumont 2006, no pet.) ("While a Texas court may enforce a valid forum-selection clause and thereby require the parties to litigate their dispute in the jurisdiction agreed to by the parties, the existence of a forum-selection clause does not generally deprive the forum of jurisdiction over parties. 'Generally, a forum-selection clause operates as consent to jurisdiction in one forum, not proof that the Constitution would allow no other.' *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 792 (Tex. 2005). As a result, courts do not require that a party file a special appearance to perfect its right to enforce a forum-selection clause. *In re AIU Ins. Co.*, 148 S.W.3d 109, 121 (Tex. 2004).").

10 *See* David K. Duffee, J. Paul Forrester, John F. Lawlor, Richard B. Katskee, and James F. Tierney, *U.S. Supreme Court Reaffirms that Forum-Selection Clauses Are Presumptively Enforceable*, Bus. Law Today (Jan. 2014).

11 789 A.2d 14, 21 (Del. Ch. 2001).

confidentiality agreement provision explicitly limited Tyson's ability to base litigable claims on assertions that the evaluation materials it received were false, misleading or incomplete as follows:

> "We understand and agree that none of the Company [i.e., IBP], its advisors or any of their affiliates, agents, advisors or representatives (i) have made or make any representation or warranty, expressed or implied, as to the accuracy or completeness of the Evaluation Material or (ii) shall have any liability whatsoever to us or our Representatives relating to or resulting to or resulting from the use of the Evaluation Materials or any errors therein or omissions therefrom, except in the case of (i) and (ii), to the extent provided in any definitive agreement relating to a Transaction."[12]

The IBP/Tyson confidentiality agreement also limited Tyson's ability to sue over evaluation materials in a forum of its own choice:

> "We hereby irrevocably and unconditionally submit to the exclusive jurisdiction of any State or Federal court sitting in Delaware over any suit, action or proceeding arising out of or relating to this Agreement. We hereby agree that service of any process, summons, notice or document by U.S. registered mail addressed to us shall be effective service of process for any action, suit or proceeding brought against us in any such court. You hereby irrevocably and unconditionally waive any objection to the laying of venue of any such suit, action or proceeding brought in any such court and any claim that any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient form. We agree that a final judgment in any such suit, action or proceeding brought in any such court shall be conclusive and binding upon us and may be enforced in any other courts to whose jurisdiction we are or may be subject, by suit upon such judgment. . . .
>
> "This agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware."[13]

Noting that Tyson had not argued that the forum selection clause had been procured by fraud, the Chancery Court commented that forum selection clauses are *prima facie* valid and enforceable in Delaware, and in footnote 21 wrote as follows:

> "*Chaplake Holdings, Ltd. v. Chrysler Corp.*, Del. Super., 1995 Del. Super. LEXIS 463, at *17- *18, Babiarz, J. (Aug. 11, 1995) ("forum selection clauses are 'prima facie valid' and should be 'specifically' enforced unless the resisting party 'could clearly show that enforcement would be unreasonable and unjust, or that the clause is invalid for reasons such as fraud or overreaching'" (*quoting M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

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12 *Id.* at 32.

13 *In re IBP, Inc.*, No. CIV.A. 18873, 2001 WL 406292, at *2 (Del. Ch. Apr. 18, 2001).

> "Delaware courts have not hesitated to enforce forum selection clauses that operate to divest the courts of this State of the power they would otherwise have to hear a dispute. See, e.g., *Elf Atochem North Am., Inc. v. Jaffari*, Del. Supr., 727 A.2d 286, 292-96 (1999) (affirming dismissal of an action on grounds that a Delaware Limited Liability Company had, by the LLC agreement, bound its members to resolve all their disputes in arbitration proceedings in California); *Simon v. Navellier*, Series Fund, Del. Ch., 2000 Del. Ch. LEXIS 150, Strine, V.C. (Oct. 19, 2000) (dismissing an indemnification claim because a contract required the claim to be brought in the courts of Reno, Nevada). The courts of Arkansas are similarly respectful of forum selection clauses:
>
> > "We cannot refuse to enforce such a clause, which we have concluded is fair and reasonable and which we believe meets the due process test for the exercise of judicial jurisdiction. To do otherwise would constitute a mere pretext founded solely on the forum state's preference for its own judicial system and its own substantive law.
> >
> > "Accordingly, we conclude that the express agreement and intent of the parties in a choice of forum clause should be sustained even when the judicial jurisdiction over the agreements is conferred upon a foreign state's forum.
> >
> > "*Nelms v. Morgan Portable Bldg. Corp.*, 808 S.W.2d 314, 318 (Ark. 1991)."[14]

Thus, the inclusion of a forum selection clause in the IBP/Tyson confidentiality agreement ended up dictating where the litigation over major disclosure and material adverse change issues and provisions would be litigated.

Some state statutes attempt to validate the parties' selection of a forum. For example, a California statute provides that actions against foreign corporations and nonresident persons can be maintained in California where the action or proceeding arises out of or relates to an agreement for which a choice of California law has been made by the parties, and the contract relates to a transaction involving not less than $1 million and contains a provision whereby the corporation or nonresident agrees to submit to the jurisdiction of the California courts.[15]

III. BYLAW FORUM SELECTION PROVISIONS.

Forum selection provisions in both corporate certificates of formation or incorporation ("Charters") and bylaws are uncommon when compared to their ubiquity in business contracts. Bylaw forum selection provisions have been around since 1991,[16] but before 2010 only 16

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[14] *Id.* at *9, n.21.

[15] CAL. CIV. PROC. CODE § 410.40. *See also* DEL. CODE ANN. tit. 6, § 2708; N.Y. GEN. OBLIG. LAW § 5-1402.

[16] *See* Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (Feb. 2013); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012).

companies had adopted a forum selection Charter or bylaw provision.[17] One of these 16 companies was Oracle Corporation whose directors adopted a bylaw in 2006[18] that provides that "[t]he 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."[19]

A passing comment by Vice Chancellor Laster in *In re Revlon, Inc. Shareholders Litigation*[20] seems to have had an impact in the expansion in the number of companies including forum selection provisions in their bylaws.[21] The *Revlon* case arose in the context of two groups of plaintiffs' counsel jockeying for control of derivative litigation. The Vice Chancellor was unhappy with the original lead counsel's conduct of the litigation (or lack thereof) and what he viewed as somewhat of a sham settlement. In the course of his over twenty page opinion on why the conduct of the litigation by original counsel was inadequate, the Vice Chancellor discussed the volume litigation strategy pursued by traditional plaintiffs' firms in shareholder litigation and its questionable value to the class members and the companies.[22] During this discussion he addressed the policy considerations behind limiting frequent filers and noted that this might lead to more suits being filed in other jurisdictions if Delaware became too harsh on frequent filers and replaced them as lead counsel too frequently.[23] Addressing this concern the Vice Chancellor commented that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, the corporations are free to respond with Charter provisions selecting an exclusive forum for intra-entity disputes."[24]

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17 Steven M. Davidoff, *A Litigation Plan that Would Favor Delaware*, NEW YORK TIMES DEAL BOOK, http://tinyurl.com/m3z56z4 (Oct. 26, 2010).

18 Stanford professor Joseph Grundfest, a proponent of forum selection bylaws, was on Oracle's board when it adopted this bylaw provision. *See* Steven M. Davidoff, *A Litigation Plan that Would Favor Delaware*, NEW YORK TIMES DEAL BOOK, http://tinyurl.com/m3z56z4 (Oct. 26, 2010).

19 *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1172 (N.D. Cal. 2011). Although the Oracle forum selection bylaw only applied to derivative actions, another "sample forum selection provision states that the Court of Chancery at the State of Delaware shall 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 for breach of fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's stockholders; (3) any action asserting a claim arising pursuant to any provision of the DGCL; or (4) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring an interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this article. That sample provision is a mandatory provision, meaning that it requires all litigation to be in Delaware. An alternative form of the by-law is permissive, in that it permits the corporation to consent in writing to the selection of an alternative forum. It give the board additional flexibility in case they like the jurisdiction in which the litigation has been brought." *Towards State of the Art: Scrubbing Your Bylaws, Governance Guidelines & Committee Charters* (The Corporate Counsel.net January 12, 2011).

20 990 A.2d 940, 959 (Del. Ch. 2010).

21 Steven M. Davidoff, *A Litigation Plan that Would Favor Delaware*, NEW YORK TIMES DEAL BOOK, http://tinyurl.com/m3z56z4 (Oct. 26, 2010).

22 990 A.2d at 959.

23 *Id.* at 960.

24 *Id*.

The first test for the validity of bylaw forum selection provisions involved the bylaw of Oracle quoted below. In *Galaviz v. Berg*,[25] the U.S. District Court for the Northern District of California denied motions to dismiss a derivative action for improper venue, finding the forum selection clause in the corporate bylaws of a Delaware corporation to be unenforceable. The plaintiffs in *Galaviz* brought a claim in the U.S. Court for the Northern District of California against the directors of Oracle alleging that each director was individually liable for breach of fiduciary duty and abuse of control in connection with certain actions allegedly taken by Oracle from 1998 to 2006.[26]

In 2006, prior to the initiation of the *Galaviz* litigation, Oracle's board of directors ("Board") amended Oracle's bylaws to include a forum selection provision which provided that "[t]he 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."[27] The defendants contended that Oracle's bylaws should be treated like any other contract and cited to cases in other contexts that described bylaws as representing a contract between a corporation and its shareholders.[28] Accordingly, the defendants moved to dismiss the claims of the plaintiffs on the basis of improper venue, asserting that the forum selection clause in Oracle's bylaws is binding upon the plaintiffs and that the proper venue for the claims is the Delaware Chancery Court.

In analyzing whether to grant the motion to dismiss, the Court distinguished between corporate bylaws and contracts, rejecting Oracle's contention that the validity of a forum selection clause in corporate bylaws should be analyzed in the same manner as a forum selection clause in a contract.[29] The Court noted that Oracle sought to rely on principles of corporate law with respect to how its bylaws could be amended.[30] The Court believed this distinguished this case from federal contract law on forum selection clauses holding that "under contract law, a party's consent to a written agreement may serve as consent to all the terms therein, whether or not all of them were specifically negotiated or even read, but it does not follow that a contracting party may thereafter unilaterally add or modify contractual provisions."[31] As a result the Court held that the contract analysis did not control.[32] In so holding, the Court focused specifically on the fact that Oracle's directors could unilaterally amend the corporation's bylaws, the defendant's in the action were the ones who amended the bylaw after the majority of the purported wrongdoing had occurred, and that the amendment had occurred without the consent of the existing shareholders.[33] Consequently, the District Court denied Oracle's motion to dismiss, finding that Oracle had

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25 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

26 *Id.* at 1171-1172.

27 *Id.* at 1172.

28 *Id.* at 1174.

29 The district court acknowledged that if federal contract law principles were controlling, "there would be little basis to decline to enforce" the forum selection clause in Oracle's bylaws. *Id. See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 321 (9th Cir. 1996).

30 *Galaviz*, 763 F. Supp. 2d at 1174.

31 *Id.*

32 *Id.* at 1174-75.

33 *Id.* at 1175.

otherwise failed to demonstrate the effectiveness of its forum selection bylaw under federal law such that it restricted the plaintiffs from pursuing their claims in the District Court.[34]

As mentioned previously, the District Court noted that the *Galaviz* plaintiffs purchased shares in Oracle prior to the amendment to Oracle's bylaws adding the forum selection provision, that a majority of the alleged wrongdoing had occurred prior to the bylaw amendment, and that the same directors named as defendants had adopted the forum selection bylaw. If Oracle's bylaws had included a forum selection clause prior to any alleged wrongdoing or the purchase of shares in Oracle by the plaintiffs, the Court may have come to a different conclusion. Further, the Court suggested that if a majority of Oracle's stockholders had adopted the forum selection clause as a Charter amendment, the case for treating the venue provision like those in commercial contracts would be much stronger even if the plaintiffs themselves had not voted for the amendment.[35] In this sense the *Galaviz* decision may be confined to its facts.

In a consolidated opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation, et al.*[36] and *ICLUB Investment Partnership v. FedEx Corporation, et al.*,[37] then Chancellor (now Chief Justice) Leo Strine held that the unilateral adoption by a Board of a forum selection bylaw that "designates a forum as the exclusive venue for certain stockholder suits against the corporation, either as an actual or nominal defendant, and its directors and employees" is both statutorily valid under the Delaware General Corporation Law ("DGCL") and contractually valid.[38] In an effort to "address what they perceive to be the inefficient costs of defending against the same claim in multiple courts at one time," the Boards of Chevron Corporation and FedEx Corporation each unilaterally adopted without stockholder approval forum selection bylaw provisions. As initially adopted by each corporation, the forum selection bylaw provided that:

> 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].[39]

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34 *Id.*

35 *Id.* at 1171.

36 73 A.3d 934, 942 (Del. Ch. 2013).

37 *Id.*

38 The consolidated opinion only addresses the purely legal issues of whether forum selection bylaws are statutorily and contractually valid; the Chancellor did not address the plaintiffs' other counts involving "fiduciary duty claims and arguments about the ways in which the forum selection clauses could be inequitably adopted or applied in particular situations." *Id.* at 945.

39 *Id.* at 942.

These forum selection clauses were drafted to cover only four types of lawsuits, all of which related to claims brought by stockholders as stockholders:[40] (1) derivative suits relating to "whether a derivative plaintiff is qualified to sue on behalf of the corporation and whether that derivative plaintiff has or is excused from making demand on the board is a matter of corporate governance"; (2) fiduciary duty suits regarding the "relationships between directors, officers, the corporation, and its stockholders"; (3) suits regarding how, under the DGCL, the corporation is governed; and (4) internal affairs[41] suits regarding those "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."

The plaintiffs complaints were "nearly identical" and alleged that forum selection bylaws were (i) "statutorily invalid because they go beyond the board's authority under" the DGCL and (ii) contractually invalid "because they were unilaterally adopted by the… boards using their power to make bylaws" without approval by the stockholders whose rights were allegedly being diminished by such bylaw.[42] The Chancellor held that the forum selection bylaws in question were statutorily valid because (i) the Boards of both companies were "empowered in their certificates of incorporation to adopt bylaws under" DGCL § 109(a), which provides that any "corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors…." and (ii) the forum selection bylaws addressed a proper subject matter under DGCL § 109(b), which provides that a bylaw "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."[43] The Chancellor noted that "bylaws of Delaware corporations have a 'procedural, process-oriented nature'" and that DGCL § 109(b) "has long been understood to allow the corporation to set 'self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.'"[44] In the Chancellor's view, forum selection bylaws fit squarely within this construct and are therefore a proper subject matter under DGCL § 109(b) because such bylaws "are process-oriented" as they "regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation."[45]

Addressing the plaintiffs' argument that forum selection bylaws are not contractually valid because the affected stockholders did not vote in advance to approve such bylaws, the Chancellor noted that in each of the *Chevron* and *FedEx* cases, the stockholders in question knew in advance of acquiring stock that the corporation's certificate of incorporation conferred on the Board the

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40 As opposed to a "tort claim against the company based on a personal injury" a stockholder may suffer that "occurred on the company's premises or a contract claim based on a contractual contract" with the company, each of which would "not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*." *Id.* at 952.

41 The "'internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands.'" *Id.* at 938, n.3.

42 *Id.* at 938.

43 *Id.* at 937 n.1, 939 n.6.

44 *Id.* at 951.

45 *Id.* at 951-52.

power to adopt bylaws unilaterally. Each group of stockholders, therefore, assented to be "bound by bylaws that are valid under the DGCL" that are unilaterally adopted by the Board, as such unilateral board rights are "an essential part of the contract agreed to when an investor buys stock in a Delaware corporation."[46] In light of a Board's power to unilaterally adopt bylaws, the Court described bylaws in general as "part of an inherently flexible contract between the stockholders and the corporation," and noted that stockholders also "have powerful rights they can use to protect themselves if they do not want board-adopted forum selection bylaws to be part of the contract between themselves and the corporation," such as repealing Board-adopted bylaws or having the annual opportunity to elect directors.

The Chancellor emphasized, however, that stockholder-plaintiffs retain the ability to challenge the enforcement of such a bylaw in a particular case, either under the reasonableness standard adopted by the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*,[47] or under fiduciary duty principles. The Chancellor also left open the possibility that Board actions in adopting such bylaws could be subject to fiduciary duty challenges. Further, stockholders retain the unilateral right to repeal forum selection bylaws and proxy advisory firms generally recommend voting against them.[48]

Forum selection provisions in corporate Charters (like the bylaw forum selection provisions discussed above) were held to be presumptively valid in *Edgen Grp. Inc. v. Genoud*.[49] Although Edgen's certificate of incorporation included a provision that provided that any claim of breach of fiduciary duty by an Edgen stockholder must be filed in Delaware, a class action suit challenging a recently announced merger of Edgen with an unrelated third party was filed in Louisiana state court. In response, Edgen filed suit against the stockholder in Delaware, asking the Court of Chancery to enjoin him from proceeding in Louisiana. Although the Chancery Court denied Edgen's motion for a temporary restraining order to stop the plaintiff from proceeding in Louisiana, the Court noted that "the ability of plaintiff's counsel to sue in multiple forums is a factor that imposes materially increased costs on deals and effectively disadvantages stockholders as a whole," and recognized that corporations have properly adopted forum selection provisions in Charters and bylaws in response "in an effort to reduce the ability of plaintiff's counsel to extract rents." The Court held that "[t]he forum selection provision in the charter is valid as a matter of Delaware corporate law," and that "the [stockholder] here has facially breached the exclusive

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46 *Id.* at 957. Drawing an analogy to the shareholder rights plan, which, like the forum selection bylaw, was attacked as an excessive exercise of director authority, the Chancellor rejected plaintiffs' "position that board action should be invalidated or enjoined simply because it involved a novel use of statutory authority." The Court analogized its holding to the Delaware Supreme Court's seminal decision authorizing poison pill rights plans in *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985), and wrote, "that a board's action might involve a new use of plain statutory authority does not make it invalid under our law, and the boards of Delaware corporations have the flexibility to respond to changing dynamics in ways that are authorized by our statutory law." The Court emphasized that forum-selection bylaws, like rights plans, are subject to challenge if applied inequitably, and further noted that, unlike rights plans, bylaws may be repealed by vote of the stockholders. *Boilermakers Local 154*, 73 A.3d at 953.

47 407 U.S. 1 (1972).

48 Frederick H. Alexander, James D. Honaker and Daniel D. Matthews, *Forum Selection Bylaws: Where We Are and Where We Go from Here*, 27 INSIGHTS 1: THE CORPORATE & SECURITIES LAW ADVISOR, Jul. 31, 2013.

49 Transcript of Nov. 5, 2013 Hearing, C.A. No. 9055-VCL (Del. Ch. Nov. 19, 2013), ECF No. 17.

forum clause" by suing for alleged breaches of fiduciary duty outside of Delaware. Nevertheless, the Court observed that Edgen's pursuit of an anti-suit injunction was "the most aggressive" path it could take and expressed concern that such a remedy "creates potential issues of interforum comity." Citing the Chancellor's decision in *Chevron*, the Court expressed a preference "that the forum selection provision would be considered in the first instance by . . . the court where the breaching party filed its litigation, not through an anti-suit injunction in the contractually specified court," although the Court commented that "in the right case an anti-suit injunction [may be] appropriate."

Following these cases, legislation was enacted in Delaware to codify the Court's decision in *Boilermakers*.[50] In 2015 a new DGCL § 115 was adopted which provides:

> 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.[51]

DGCL § 115 expressly permits a clause in the certificate of incorporation or bylaws that would require all "internal corporate claims" to be brought only in a Delaware court of law.[52] However, DGCL § 115 prohibits a clause in the certificate of incorporation or bylaws that would prevent "internal corporate claims" from being brought to court in Delaware.[53] This means a Charter or bylaw provision can require "internal corporate claims" to be brought in Delaware and another jurisdiction, but not just another jurisdiction alone.[54] A forum selection clause that is not exclusive to Delaware, however, is valid if found in a stockholder's agreement or other writings signed by stockholder.[55]

Following Delaware's lead, Texas and other states have begun permitting forum selection clauses in the certificate of incorporation and bylaws.[56]

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50 73 A.3d 934 (Del. Ch. 2013).

51 DEL. CODE ANN. tit. 8, § 115.

52 *Id.*

53 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS §1.10 A (3d ed. 2017).

54 *Id.*

55 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS §1.10 A (3d ed. 2017).

56 *See Butorin on behalf of KBR Inc. v. Blount*, 106 F. Supp. 3d 833 (S.D. Tex. 2015) (US District Court for the Southern District of Texas upheld a forum selection clause found in the bylaws of a Delaware corporation). *See also*, *Bremen v. Zapata Offshore-Shore Co.*, 407 U.S. 1, 10 (1972) (forum selection clauses are prima facie valid and enforceable under unless they are unreasonable under the circumstances; a forum selection clause may be unreasonable if (1) the enforcement would be so gravely difficult and inconvenient that for all practical purposes the party resisting enforcement would be deprived of his day in court; (2) the clause is

IV. JURY TRIAL WAIVER

Parties in acquisition and other agreements are increasingly including a jury trial waiver clause such as the following:

> THE PARTIES HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS, WHETHER NOW OR EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. THE PARTIES AGREE THAT ANY OF THEM MAY FILE A COPY OF THIS PARAGRAPH WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY AND BARGAINED FOR AGREEMENT AMONG THE PARTIES IRREVOCABLY TO WAIVE TRIAL BY JURY, AND THAT ANY PROCEEDING WHATSOEVER BETWEEN THEM RELATING TO THIS AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.

The Seventh Amendment to the U.S. Constitution guarantees the fundamental right to a jury trial in "suits at common law, where the value in controversy shall exceed twenty dollars," and there is therefore a strong presumption against the waiver of the right to a jury trial.[57] As a result, courts have held that jury waiver clauses are to be narrowly construed and that any ambiguity is to be decided against the waiver.[58] The constitutional right to a jury trial is a question to be determined as a matter of federal law, while the substantive aspects of the claim are

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invalid for such reasons as fraud or overreacting; or (3) enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision; the party claiming unfairness has a heavy burden of proof); *In Re Fisher and Boudreaux*, 433 S.W.3d 523 (Tex. 2014); *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (per curiam); *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (per curiam); *In re Int'l Profit Associates, Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) ("Forum-selection clauses are generally enforceable . . . . A trial court abuses its discretion if it refuses to enforce a forum-selection clause unless the party opposing enforcement clearly shows that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial."); *Prosperous Mar. Corp. v. Farwah*, 189 S.W.3d 389, 391 (Tex. App.—Beaumont 2006, no pet.) ("While a Texas court may enforce a valid forum-selection clause and thereby require the parties to litigate their dispute in the jurisdiction agreed to by the parties, the existence of a forum-selection clause does not generally deprive the forum of jurisdiction over parties. 'Generally, a forum-selection clause operates as consent to jurisdiction in one forum, not proof that the Constitution would allow no other.' *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 792 (Tex. 2005). As a result, courts do not require that a party file a special appearance to perfect its right to enforce a forum-selection clause. *In re AIU Ins. Co.*, 148 S.W.3d 109, 121 (Tex. 2004).").

[57] *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("courts indulge every reasonable presumption against waiver").

[58] *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 256 (2d Cir. 1977); *Phoenix Leasing, Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1388 (D. Nev. 1994), *aff'd without opinion*, 89 F.3d 846 (9th Cir. 1996). *See also Truck World, Inc. v. Fifth Third Bank*, Nos. C-940029, C-940399, 1995 WL 577521, at *3 (Ohio App. Ct. Sept. 29, 1995) ("jury waiver clause should be strictly construed and should not be extended beyond its plain meaning").

determined under state law.[59] The Delaware Constitution preserves the right to trial by jury, as it existed at common law.[60]

While nearly every state court that has considered the issue has held that parties may agree to waive their right to trial by jury in certain future disputes,[61] either expressly[62] or by implication,[63] courts have also held that jury waiver clauses must be knowingly and voluntarily entered into to be enforceable.[64] In deciding whether a jury waiver clause was knowingly and voluntarily entered into, the court will generally consider four factors: (1) the extent of the parties' negotiations, if any, regarding the waiver provision; (2) the conspicuousness of the provision; (3) the relative bargaining power of the parties; and (4) whether the waiving party's counsel had an opportunity to review the agreement.[65] Other courts have formulated the fourth factor of this test as "the business acumen of the party opposing the waiver."[66]

While there are no special requirements for highlighting a jury waiver clause in a contract to meet the second prong of this test, there are ways to craft a sufficiently conspicuous jury waiver clause to support the argument that the waiver was knowingly entered into, including having the clause typed in all bold face capital letters and placing it at the end of the document directly above the signature lines. Although adherence to these techniques will not guarantee enforceability of the jury waiver clause,[67] courts have found these to be important factors in deciding the validity of jury waiver clauses.[68] The Texas Supreme Court in *In re General Electric Capital Corp.*[69] rejected the argument that evidence was not presented showing that the required jury waiver was entered into knowingly and voluntarily, and explained:

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59 *Simler v. Conner*, 372 U.S. 221, 222 (1963) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and other cases); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-993-JJF, 2003 WL 22769051, at *2 (D. Del. Nov. 19, 2003), *aff'd by Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212 (3d Cir. 2007) (hereinafter "*DaimlerChrysler*").

60 *Graham v. State Farm Mutual Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989). "The right [to a jury trial] existed at common law for actions arising from breach of contract." *Seaford Assoc. v. Hess Apparel, Inc.*, 1993 WL 258723, at *1 (Del. Super. June 22, 1993).

61 *In re Prudential Ins. of America*, 148 S.W.3d 124, 132-133 (Tex. 2004).

62 *U.S. v. Moore*, 340 U.S. 616 (1951).

63 *Commodity Futures Trading Com'n. v. Schor*, 478 U.S. 833 (1986).

64 *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 602 (S.D.N.Y. 1999); *but see Grafton Partners L.P. v. The Superior Court of Alameda County (PriceWaterHouseCoopers L.L.P., Real Party in Interest)*, 116 P.3d 479, 480 (Cal. 2005) (California Supreme Court holding that a pre-dispute agreement waiving the right to a jury trial in the event of a dispute between the parties to the contract is unenforceable under the California Constitution which accords the right to trial by jury to parties who elect a judicial forum to resolve their disputes with a few inapplicable exceptions).

65 *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994), *aff'd*, 96 F.3d 216 (7th Cir. 1996).

66 *Morgan Guar.*, 36 F. Supp. 2d at 604.

67 *Whirlpool Fin.*, 866 F. Supp. at 1106 (holding that there was no waiver despite the fact that the clause was printed in capital letters).

68 *See, e.g., Morgan Guar.*, 36 F. Supp. 2d at 604 (holding that the defendant had knowingly waived the right because the clause immediately preceded the signature line on the same page).

69 203 S.W.3d 314, 316 (Tex. 2006).

The waiver provision, however, was written in capital letters and bold print, providing that:

> THE MAKER HEREBY UNCONDITIONALLY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF, DIRECTLY OR INDIRECTLY, THIS NOTE, ... IN THE EVENT OF LITIGATION, THIS NOTE MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

Such a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it.

In deciding whether a jury waiver clause was voluntarily entered into, courts generally will consider (1) the disparity of the parties' bargaining power positions, (2) the parties' opportunity to negotiate, and (3) the parties' experience or business acumen.[70]

Even where the terms of the acquisition agreement are heavily negotiated, the drafter may want to anticipate a challenge to the jury waiver clause, particularly if the seller is financially distressed or not particularly sophisticated.[71] It is worth noting that the courts are split on the question of which party carries the burden of proving that a jury waiver was knowing and voluntary. Some have held that the burden is placed on the party attempting to enforce the waiver,[72] while some have held that the party opposing the waiver bears the burden of proving that

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70 *See, e.g., Morgan Guar.*, 36 F. Supp. 2d at 604 (enforcing a jury waiver when it found that certain terms of the note at issue had been negotiated); *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906, 910 (S.D.N.Y. 1995) (refusing to enforce a jury waiver contained in a pre-printed cruise ship ticket).

71 *See, e.g., Phoenix Leasing*, 843 F. Supp. at 1385 (holding that the waiver was voluntary because some of the agreement's terms were negotiated, evidencing bargaining power, and finding that knowledge by the other party that funds were "badly needed" did not indicate gross disparity of bargaining power. The *Phoenix Leasing* Court also enforced the waiver because it found that the defendant was "experienced, professional and sophisticated in business dealings" and "all parties were represented by counsel."). Similarly, in *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589, 595-96 (N.D. Ill. 1989), the Court found the waiver voluntary (1) because the party challenging the waiver was an experienced businessman who chose not to have counsel review the agreement, and (2) the defendant had explained the purpose of the jury waiver to the party challenging the waiver in terms of "the large verdicts juries tend to award" to which the Court noted, "[i]f that did not grab [the] attention [of the party objecting to the waiver], nothing would." In *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 382 F. Supp. 2d 411, 413 (2003) (S.D.N.Y. 2003), a jury waiver in an asset purchase agreement was enforced and held to apply to a claim for fraudulent inducement where the agreement was the product of negotiations among sophisticated parties and there was no allegation that the waiver provision itself was procured by fraud. *But see Whirlpool Fin.*, 866 F. Supp. at 1106, where the Court held that the waiver was not voluntary in the light of evidence showing that the party challenging the jury waiver clause was desperate for cash and had no ability to change the inconspicuous terms of a standardized contract.

72 *Sullivan*, 881 F. Supp. at 910.

the waiver was *not* knowing and voluntary,[73] while still other courts have expressly avoided the issue altogether.[74]

V. CHOICE OF LAW

The miscellaneous provision section of an acquisition agreement typically includes a choice of law provision along with the selection of forum and waiver of jury trial provisions. A typical choice of law provision in an acquisition agreement provides:

> This Agreement will be governed by and construed under the laws of the State of _____ without regard to conflicts of laws principles that would require the application of any other law.

The parties' choice of law can affect the outcome of litigation over a merger agreement. In a case granting specific performance to a target, *IBP, Inc. v. Tyson Foods, Inc.*,[75] the Delaware Court of Chancery suggested that its decision might have been different if it had applied Delaware rather than New York law (the law chosen by the parties to govern the merger agreement) as governing the burden of proof to justify that remedy. The standard under New York law is a "preponderance of the evidence," whereas Delaware law would have required a showing by "clear and convincing" evidence. Of course it may be impractical to fully evaluate at the drafting stage the potential effect of choosing the law of one state over another because of the many ways in which disputes can arise over the interpretation and enforcement of a merger agreement.

A choice of law provision allows the parties to select the law that will govern the contractual rights and obligations of the buyer, the seller and the seller shareholders.[76] Without a choice of law provision, the court must assess the underlying interest of each jurisdiction to determine which jurisdiction has the greatest interest in the outcome of the matter.[77]

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73 *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 754 (6th Cir. 1985).

74 *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 58 (D.RI. 1993); *Whirlpool Fin.*, 866 F. Supp. at 1102; *Bonfield*, 717 F. Supp. at 589 (noting that there does not appear to be any reported decisions regarding the required standard of proof in these cases.

75 789 A.2d 14, 22 (Del. Ch. 2001).

76 The parties may want to specify a different choice of law with regard to non-competition provisions.

77 As for which laws the parties may select, the RESTATEMENT, (SECOND) OF CONFLICT OF LAWS § 187 provides:

> § 187. Law of the State Chosen by the Parties
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the

In *Nedlloyd Lines B.V. v. Superior Court of San Mateo County (Seawinds Ltd.)*,[78] the Supreme Court of California applied the Restatement principles to uphold a choice of law provision requiring a contract between commercial entities to finance and operate an international shipping business to be governed by the laws of Hong Kong, a jurisdiction having a substantial connection with the parties:

> Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law . . . . If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. . . . If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue."... If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.[79]

However, choice of law provisions have not been uniformly upheld by the courts.[80] In *DeSantis v. Wackenhut Corp.*,[81] the Supreme Court of Texas adopted the choice of law rule set forth in § 187 of the RESTATEMENT, (SECOND) OF CONFLICT OF LAWS, and held that a choice of law provision will be given effect if the contract bears a reasonable relation to the state whose law is chosen and no public policy of the forum state requires otherwise. At issue in the *DeSantis v. Wackenhut Corp.* case was a covenant not to compete in an employment context and the court held that its holdings on the nonenforceability of covenants not to compete were a matter of fundamental public policy which overrode the parties' choice of law agreement.

> determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

78 834 P.2d 1148, 1152 (Cal. 1992).

79 *Id.* (footnotes omitted); *see also Kronovet v. Lipchin*, 415 A.2d 1096, 1104 n.16 (Md. Ct. App. 1980) (noting that "courts and commentators now generally recognize the ability of parties to stipulate in the contract that the law of a particular state or states will govern construction, enforcement and the essential validity of their contract" but recognizing that "the parties' ability to choose governing law on issues of contract validity is not unlimited and will not be given effect unless there is a 'substantial' or 'vital' relationship between the chosen sites and issues to be decided.").

80 *See, e.g., Rosenmiller v. Bordes*, 607 A.2d 465, 469 (Del. Ch. 1991) (holding that, notwithstanding an express choice of New Jersey law in the agreement, Delaware had a greater interest than New Jersey in regulating stockholder voting rights in Delaware corporations, and therefore the parties' express choice of New Jersey law could not apply to this issue).

81 793 S.W.2d 670, 677-78 (Tex. 1990).

DeSantis was in turn overridden by the subsequent enactment of Section 35.51 of the Texas Business and Commerce Code which generally validated the contractual choice of governing law for transactions involving at least $1,000,000, and has now been codified as TEX. BUS. & COM. CODE (the "TB&CC"), §§ 271.001 *et seq.*[82]

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[82] TB&CC §§ 271.004, 271.005, 271.006, and 271.007 provide in their respective entireties as follows:

> Sec. 271.004. DETERMINATION OF REASONABLE RELATION OF TRANSACTION TO PARTICULAR JURISDICTION. (a) For purposes of this chapter, a transaction bears a reasonable relation to a particular jurisdiction if the transaction, the subject matter of the transaction, or a party to the transaction is reasonably related to that jurisdiction.
>
> (b) A transaction bearing a reasonable relation to a particular jurisdiction includes:
>
> (1) a transaction in which:
>
> (A) a party to the transaction is a resident of that jurisdiction;
>
> (B) a party to the transaction has the party's place of business or, if that party has more than one place of business, the party's chief executive office or an office from which the party conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;
>
> (C) all or part of the subject matter of the transaction is located in that jurisdiction;
>
> (D) a party to the transaction is required to perform in that jurisdiction a substantial part of the party's obligations relating to the transaction, such as delivering payments;
>
> (E) a substantial part of the negotiations relating to the transaction occurred in or from that jurisdiction and an agreement relating to the transaction was signed in that jurisdiction by a party to the transaction; or
>
> (F) all or part of the subject matter of the transaction is related to the governing documents or internal affairs of an entity formed under the laws of that jurisdiction, such as:
>
> (i) an agreement among members or owners of the entity, an agreement or option to acquire a membership or ownership interest in the entity, and the conversion of debt or other securities into an ownership interest in the entity; and
>
> (ii) any other matter relating to rights or obligations with respect to the entity's membership or ownership interests; and
>
> (2) a transaction in which:
>
> (A) all or part of the subject matter of the transaction is a loan or other extension of credit in which a party lends, advances, borrows, or receives, or is obligated to lend or advance or entitled to borrow or receive, money or credit with an aggregate value of at least $25 million;
>
> (B) at least three financial institutions or other lenders or providers of credit are parties to the transaction;
>
> (C) the particular jurisdiction is in the United States; and
>
> (D) a party to the transaction has more than one place of business and has an office in that particular jurisdiction.
>
> (c) If a transaction bears a reasonable relation to a particular jurisdiction at the time the parties enter into the transaction, the transaction shall continue to bear a reasonable relation to that jurisdiction regardless of:
>
> (1) any subsequent change in facts or circumstances with respect to the transaction, the subject matter of the transaction, or any party to the transaction; or
>
> (2) any modification, amendment, renewal, extension, or restatement of any agreement relating to the transaction.
>
> Sec. 271.005. LAW GOVERNING ISSUE RELATING TO QUALIFIED TRANSACTION. (a) Except as provided by Section 271.007, 271.008(b), 271.009, 271.010, or 271.011 or by

Historically, courts had applied rigid tests for determining what substantive law was to govern the parties' relationship. In a contractual setting, the applicable test, *lex contractus*, stated that the substantive law of the place of contract formation governed that contract. As interstate and international commerce grew, several problems with this test became evident. First, at all times it was difficult to determine which jurisdiction constituted the place of contract formation. Second, this rule frustrated the ability of sophisticated parties to agree on the law that would govern their relationship.

A modern approach, exemplified in the RESTATEMENT, (SECOND) OF CONFLICT OF LAWS (particularly Sections 6, 187 and 188), focuses on the jurisdiction with the "most significant relationship" to the transaction and the parties where the parties did not choose a governing law. Where the parties did choose a governing law, that choice was to be respected if there was a reasonable basis for the choice and the choice did not offend a fundamental public policy of the jurisdiction with the "most significant relationship."

Chapter 272, the law of a particular jurisdiction governs an issue relating to a qualified transaction if:

(1) the parties to the transaction agree in writing that the law of that jurisdiction governs the issue, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement; and

(2) the transaction bears a reasonable relation to that jurisdiction.

(b) The law of a particular jurisdiction governs an issue described by this section regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.

Sec. 271.006. LAW GOVERNING INTERPRETATION OR CONSTRUCTION OF AGREEMENT RELATING TO QUALIFIED TRANSACTION. Except as provided by Section 271.008(b), 271.009, 271.010, or 271.011 and by Chapter 272, if the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement, the law of that jurisdiction governs that issue regardless of whether the transaction bears a reasonable relation to that jurisdiction.

Sec. 271.007. LAW GOVERNING VALIDITY OR ENFORCEABILITY OF TERM OF AGREEMENT RELATING TO QUALIFIED TRANSACTION. (a) Except as provided by Section 271.008(b), 271.009, 271.010, or 271.011 or by Chapter 272, this section applies if:

(1) the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the validity or enforceability of an agreement relating to the transaction or a provision of the agreement;

(2) the transaction bears a reasonable relation to that jurisdiction; and

(3) a term of the agreement or of that provision is invalid or unenforceable under the law of that jurisdiction but is valid or enforceable under the law of the jurisdiction that has the most significant relation to the transaction, the subject matter of the transaction, and the parties.

(b) If this section applies:

(1) the law of the jurisdiction that has the most significant relation to the transaction, the subject matter of the transaction, and the parties governs the validity or enforceability of a term described by Subsection (a)(3); and

(2) the law of the jurisdiction that the parties agree would govern the validity or enforceability of the agreement or provision governs the validity or enforceability of the other terms of the agreement or provision.

Several states have now gone a step further by enacting statutes enabling parties to a written contract to specify that the law of that state would govern the parties' relationship, notwithstanding the lack of any other connection to that state.[83] These statutes recognize that sophisticated parties may have valid reasons to choose the law of a given jurisdiction to govern their relationship, even if the chosen jurisdiction is not otherwise involved in the transaction.

These statutes contain several criteria intended to ensure that they are used by sophisticated parties who understand the ramifications of their choice. The primary requirement is that the transaction involve a substantial amount. Certain of these statutes do not apply to transactions for personal, family or household purposes or for labor or personal services. Further, these statutes do not apply to transactions where Section 1-105(2) of the Uniform Commercial Code provides another governing law. One of these statutes requires the parties to be subject to the jurisdiction of the courts of that jurisdiction and subject to service of process. That statute also specifically authorizes courts of that jurisdiction to hear disputes arising out of that contract.[84]

Practitioners may wish to consider the use of one of these statutes in appropriate circumstances, perhaps to choose a neutral jurisdiction if the choice of law negotiation has become heated. However, these statutes are a relatively new development and, as such, are not free from uncertainty. Perhaps the most significant uncertainty is whether the choice of law based on such a statute would be respected by a court of a different jurisdiction. While valid reasons (such as protecting the parties' expectations) suggest their choice is likely to be respected, the outcome is not yet settled.

While a choice of law clause should be enforceable as between the parties where the appropriate relationship exists, the parties' choice of law has limited effect with respect to third party claims.[85] Further, an asset transaction involving the transfer of assets in various jurisdictions may be governed as to title transfer matters by the law of each jurisdiction in which the transferred assets are located.[86] In particular, the transfer of title to real estate is ordinarily governed by the laws of the state where the real estate is located.[87]

A seller might propose an alternative governing law provision to support other seller proposed provisions to limit seller exposure to extracontractual liabilities reading as follows:

> *Governing Law*. This Agreement, and all claims or causes of action (whether in contract or tort) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement

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83 *See e.g.*, DEL. CODE ANN. tit. 6, § 2708; FLA. STAT. § 685.101; 735 ILL. COMP. STAT. 105/5-5; N.Y. GEN. OBLIG. LAW § 5-1401; OHIO REV. CODE § 2307.39; and TB&CC §§ 271.001 *et seq*.

84 DEL. CODE ANN. tit. 6. § 2708. *See also* OHIO REV. CODE § 2307.39 (authorizing commencement of a civil proceeding in Ohio courts if the parties choose Ohio governing law and consent to jurisdiction of its courts and further providing that Ohio law would be applied).

85 *E.g.*, claims under Bulk Sales Laws, Fraudulent Transfer Laws or various common law successor liability theories); *but c.f. Oppenheimer v. Prudential Securities, Inc.*, 94 F.3d 189, 190 (5th Cir. 1996) (choice of New York law in asset purchase agreement applied in successor liability case without dispute by any of parties).

86 RESTATEMENT, (SECOND) OF CONFLICT OF LAWS §§ 189, 191, 222 and 223.

87 RESTATEMENT, (SECOND) OF CONFLICT OF LAWS § 223.

(including any claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement), shall be governed by the internal laws of the State of [_____].[88]

In *Pyott-Boone Electronics Inc., etc. v. IRR Trust for Donald L. Fetterolf Dated December 9, 1997*,[89] a diversity action involving the sale of a Virginia business in which the disappointed buyer sued for damages for breach of the purchase agreement as well as for related tort claims and claims for breach of the Virginia Securities Act based on information that was furnished to buyer pursuant to a due diligence request months before the purchase agreement was signed, the choice-of-law provision in the purchase agreement stated "[t]his Agreement shall be governed by the laws of the State of Delaware without regard to any jurisdiction's conflicts of laws provisions."[90] Noting that Virginia courts generally enforce choice-of-law clauses, "unless the party challenging enforcement establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power" (elements not present in the case), the Court rejected the plaintiff's assertion that its tort claims for fraud and its claims under the Virginia Securities Act fall outside the scope of the purchase agreement's Delaware choice-of-law provision.[91] Commenting "that a majority, albeit not an overwhelming one, of courts that have addressed this issue have concluded that the scope of a choice-of-law provision is a threshold issue of enforceability to be decided under forum law," and "whether choice-of-law provisions encompass torts and other non-contract claims is unsettled," the Court concluded that "the scope of a choice-of-law provision should, absent a showing of intent otherwise, be read to encompass all disputes that arise from or are related to an agreement. If parties wish to exclude causes of action arising in tort or by statute from the coverage of their agreement, they may do so, but they should reflect that intent in their contract."[92]

VI. CONCLUSION.

Forum selection, waiver of jury trial and choice of law provisions are generally enforceable. Results in particular cases, however, can vary depending on how the provisions are drafted and the relative sophistication and bargaining power of the parties.

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88 This alternative choice of law provision is derived from the Model Provisions suggested in Glenn D. West and W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal?*, 64 Bus. Law. 999, 1038 (Aug. 2009), as well as the *Italian Cowboy*, *Allen* and *Staton Holdings* discussed above; *see* Byron F. Egan, Patricia O. Vella and Glenn D. West, *Contractual Limitations on Seller Liability in M&A Agreements*, University of Texas School of Law 7th Annual Mergers and Acquisitions Institute, Dallas, TX, October 20, 2011, at Appendix B, *available at* http://images.jw.com/com/publications/1669.pdf.

89 918 F. Supp. 2d 532, 535 (W.D. Va. 2013).

90 *Id.* at 537.

91 *Id.* at 541.

92 *Id.* at 542, 544-45.