


4-15-2015

Delaware Corporate Law Recognizes the Fundamental Validity of the Forum Selection Bylaw: A Survey of the Boilermakers Litigation

Zachary R. Cormier

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/jbel>

 Part of the [Corporation and Enterprise Law Commons](#), [Jurisdiction Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Zachary R. Cormier, *Delaware Corporate Law Recognizes the Fundamental Validity of the Forum Selection Bylaw: A Survey of the Boilermakers Litigation*, 8 J. Bus. Entrepreneurship & L. 115 (2015)
Available at: <http://digitalcommons.pepperdine.edu/jbel/vol8/iss1/4>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in The Journal of Business, Entrepreneurship & the Law by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

**DELAWARE CORPORATE LAW
RECOGNIZES THE FUNDAMENTAL
VALIDITY OF THE FORUM SELECTION
BYLAW: A SURVEY OF THE
BOILERMAKERS LITIGATION**

ZACHARY R. CORMIER

I. Introduction.....	116
II. Case Procedure and Background.....	116
III. The Forum Selection Bylaws.....	117
IV. Expressed Motivation for the Forum Selection Bylaws	118
V. The Plaintiffs' Claims	119
VI. The Standard of Review and the Plaintiffs' Hypothetical Circumstances for Potential Unfairness.....	120
VII. Questions Answered: Unilaterally Adopted Forum Selection Bylaws of This Kind Are Statutorily and Contractually Valid Under Delaware Law	120
A. Statutory Validity: The Subject Matter of the Forum Selection Bylaws Was Encompassed by the Broad Language of 8 Del. C. Section 109(b)	120
B. Contractual Validity: Forum Selection Clause Jurisprudence Will Apply to the Forum Selection Bylaws Even Though They Were Unilaterally Adopted by the Boards	122
VIII. Questions That Remain for Future Courts: Do Forum Selection Bylaws of This Kind Operate in a "Reasonable" Manner?	122
A. Survey of Forum Selection Clause Jurisprudence	123
B. Presumptive Validity	123
C. Forum Selection Clauses Remain Broadly Enforceable Even Without Bargaining Power or Negotiation	124
D. Fundamental Fairness Scrutiny	124
IX. Application of Forum Selection Clause Reasonability and Fairness Principles to a Forum Selection Bylaw of This Kind	125
A. The Court Refused to Apply Hypotheticals in a Facial Challenge	126
B. The Unilateral Nature of a Forum Selection Bylaw Will Not Render It Unreasonable or Fundamentally Unfair	126

C. Potential Fairness and Reasonability Applications Remain for Future Cases	126
X. Conclusion.....	127

I. INTRODUCTION

*Boilermakers Local 154 Retirement Fund v. Chevron Corp.*¹ represents a new and important chapter in the relationship between the forum selection clause and modern business relations. A forum selection clause is “[a] contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them.”² Forum selection clauses have most often been analyzed by courts within contractual relationships between businesses,³ or a business and its customers.⁴ The *Boilermakers* case sets important precedent for forum selection in an equally fundamental business relationship—the corporation and its stockholders.⁵ This article will survey the key points of the *Boilermakers* case and, in so doing, will hopefully complement the insightful conversation led by then Chief Justice Myron Steele about the case at the Pepperdine University’s Journal of Business, Entrepreneurship and the Law’s Fall 2013 symposium.

II. CASE PROCEDURE AND BACKGROUND

Forum selection clause provisions in corporate bylaws (forum selection bylaws) are becoming commonplace. “Generally speaking, a forum selection bylaw is a provision in a corporation’s bylaws 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.”⁶ “In the last three years, over 250 publicly traded corporations have adopted such provisions.”⁷ The *Boilermakers* litigation stems from twelve such companies, all of whom adopted similar forum selection bylaws in regards to corporate governance suits by stockholders.⁸ Complaints were filed against each of these

¹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

² *In re Oracle Corp.*, 399 Fed. App’x 587, 589 n.2 (Fed. Cir. 2010) (citing BLACK’S LAW DICTIONARY 726 (9th ed. 2009)).

³ *See, e.g.* *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

⁴ *See, e.g.* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).

⁵ *Boilermakers*, 73 A.3d at 937–38.

⁶ *Id.* at 941–42.

⁷ *Id.* at 944 (citation omitted).

⁸ *Id.* at 944–45.

companies to challenge such bylaws in the Court of Chancery of Delaware on “substantively identical” grounds by the same law firm.⁹ “Ten of the twelve defendant corporations repealed their bylaws,” prompting the respective plaintiffs to dismiss their complaints.¹⁰ Defendants Chevron Corporation (Chevron) and FedEx Corporation (FedEx), however, stood by such bylaws and answered these complaints.¹¹ The court consolidated the actions for the purpose of deciding a motion for judgment on the pleadings filed by Chevron and FedEx regarding the facial validity of such bylaws.¹²

III. THE FORUM SELECTION BYLAWS

Delaware law provides the power to “adopt, amend[,] or repeal bylaws shall be in the stockholders,” unless stockholders decide to place such power within the hands of the corporation’s board of directors.¹³ The certificates of incorporation for both Chevron and FedEx had so empowered their respective boards.¹⁴ Using such authority, the boards for both Chevron and FedEx unilaterally adopted an identical forum selection bylaw without stockholder vote, which was similarly provided for in each corporation’s certificate of incorporation.¹⁵ The bylaw read as follows:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer[,] or other employee of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].¹⁶

Chevron’s board eventually amended this bylaw to allow for suit in either state or federal court in Delaware and limited the bylaw’s scope to only those

⁹ *Id.*

¹⁰ *Id.* at 945.

¹¹ *Id.*

¹² *See id.* at 938–39, 945–47.

¹³ *Id.* at 941 (citing DEL. CODE ANN. tit. 8, § 109(a) (West 2010)).

¹⁴ *Id.*

¹⁵ *Id.* at 941–42.

¹⁶ *Id.* at 942.

cases where a Delaware court had personal jurisdiction over all “indispensable” parties.¹⁷ Importantly, whereas both Chevron and FedEx are incorporated in Delaware, Chevron is headquartered in California, and FedEx is headquartered in Tennessee.¹⁸

The court made it a point to emphasize Chevron and FedEx were not attempting to limit “*what* suits may be brought against the corporations, only *where* internal governance suits may be brought.”¹⁹ The court quoted the explanation given by Chevron and FedEx as to the four types of internal corporate governance suits encompassed under the bylaw:

- *Derivative suits.* The issue of 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, because it goes to the very nature of who may speak for the corporation.
- *Fiduciary duty suits.* The law of fiduciary duties regulates the relationships between directors, officers, the corporation, and its stockholders.
- *D.G.C.L. suits.* The Delaware General Corporation Law provides the underpinning framework for all Delaware corporations. That statute goes to the core of how such corporations are governed.
- *Internal affairs suits.* As the U.S. Supreme Court has explained, “internal affairs,” in the context of corporate law, are those “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.”²⁰

IV. EXPRESSED MOTIVATION FOR THE FORUM SELECTION BYLAWS

The boards of Chevron and FedEx explained they had adopted such forum selection bylaws in an attempt to prevent the costs of “multiforum litigation” for corporate governance claims.²¹ For purposes of corporate governance actions, personal jurisdiction is available against the corporation and its board at least in its incorporation state and its principal place of business—headquarters.²² Because many corporations like Chevron and FedEx have decided to incorporate in Delaware and establish headquarters in another state, such corporations and

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 943.

²⁰ *Id.* at 942–43.

²¹ *Id.* at 943.

²² *Id.*

their boards are subject to suits for one corporate action in both forums simultaneously.²³

Chevron and FedEx explained such simultaneous, multiform litigation imposes “needless” expenses, which amount to “high costs on the corporation[.]”²⁴ Chevron and FedEx argued such costs create harm to the investors and stockholders themselves, which are “not justified by rational benefits for stockholders from multiform filings.”²⁵ As the court summarized, “the boards of Chevron and FedEx claim to have tried to minimize or eliminate the risk of what they view as wasteful[,] duplicative litigation by adopting the forum selection bylaws.”²⁶

V. THE PLAINTIFFS' CLAIMS

Plaintiffs Boilermakers Local 154 Retirement Fund, Key West Police and Fire Pension Fund, and Iclub Investment Partnership (collectively, Plaintiffs) had two claims, which were the subject of the motion for judgment on the pleadings before the court.²⁷ First, “[P]laintiffs claimed that the bylaws [were] statutorily invalid because they [were] beyond the board’s authority under the Delaware General Corporation Law . . .”—the statutory validity claim.²⁸ Second, Plaintiffs claimed the forum selection bylaws cannot be enforced like contractual forum selection clauses have historically been because the boards unilaterally adopted such bylaws—the contractual validity claims.²⁹ Essentially, they claimed the forum selection clause jurisprudence, which has typically analyzed a more traditional contractual situation, should not apply to the proposed forum selection bylaws. In addition to these two specific claims, the Plaintiffs made the broader argument the forum selection bylaws might operate “unreasonably” under a myriad of hypothetical situations.³⁰ As will be seen below, this broader reasonability argument relates to the fundamental fairness of a forum selection clause, which has traditionally been one particular focus of analysis where forum selection clause jurisprudence is applied.³¹

²³ *Id.*

²⁴ *Id.* at 944.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 938.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See infra* Part VI.

VI. THE STANDARD OF REVIEW AND THE PLAINTIFFS' HYPOTHETICAL
CIRCUMSTANCES FOR POTENTIAL UNFAIRNESS

Importantly, the Plaintiffs were not actually bringing a *specific* corporate governance suit under the challenged bylaws.³² Instead, the Plaintiffs were facially challenging the forum selection bylaws themselves by presenting hypothetical factual scenarios that might make the operation of such bylaws unreasonable in the future.³³ Because the Plaintiffs were making a facial challenge to the bylaws, the standard of proof required them to show the “bylaws [could not] operate lawfully or equitably under any circumstances.”³⁴ Because the Plaintiffs “voluntarily assumed this burden by making a facial validity challenge, [they could not] satisfy it by pointing to some future hypothetical application of the bylaws that might be impermissible.”³⁵ This was essentially the nail in the coffin for what would be the Plaintiffs’ fairness or reasonability argument, as the court concluded “[t]he answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw”³⁶

VII. QUESTIONS ANSWERED: UNILATERALLY ADOPTED FORUM SELECTION
BYLAWS OF THIS KIND ARE STATUTORILY AND CONTRACTUALLY VALID UNDER
DELAWARE LAW

*A. Statutory Validity: The Subject Matter of the Forum Selection Bylaws
Was Encompassed by the Broad Language of Section 109(b) of the
Delaware Code*

Section 109(b) broadly provides corporate “bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers[,] or employees.”³⁷ The court’s analysis for statutory validity focused on whether the bylaws were related to the corporate “affairs” and the “rights” of stockholders portions of this provision and seemed to reserve the “inconsistent

³² See *Boilermakers*, 73 A.3d at 947–48.

³³ See *id.* (emphasis removed).

³⁴ *Id.* at 948.

³⁵ *Id.*

³⁶ *Id.*

³⁷ DEL. CODE ANN. tit. 8, § 109(b) (West 2010).

with law” caveat for the contractual validity claim as its substance overlapped.³⁸

First, the court found the forum selection bylaws “plainly” related to the “conduct of [the corporations’] affairs” because the bylaws provided a procedure for how to resolve “internal affairs claims” of the corporation.³⁹ The court explained the importance of this was the decision by the boards to “channel[] internal affairs cases into the courts of the state of incorporation, [which provided] for the opportunity to have internal affairs cases resolved authoritatively by [the Delaware] Supreme Court”⁴⁰ In sum, because the forum selection bylaws were by definition setting the procedure for the “conduct” of corporate “affairs,” such bylaws furthered a proper statutory purpose.⁴¹

Second, the court similarly found, by “a matter of easy linguistics,” such bylaws also addressed the “rights” of stockholders.⁴² According to the court, the bylaws very clearly related to the “rights or powers” of the stockholders of these corporations because the bylaws provided the critical limitation of where those rights may be asserted.⁴³ In an attempt to avoid the seemingly obvious application of this broad language, the Plaintiffs attempted to make the distinction that the forum selection bylaws were regulating “external” rights of the stockholder and not “internal” rights, which were supposed to be the subject of bylaws under Section 109(b).⁴⁴

The court declined to draw the external/internal rights distinction at the court house steps.⁴⁵ Instead, the court explained the bylaws indeed dealt with internal stockholder rights because the “right” that was being regulated was the stockholder’s procedural right to bring suit regarding the *internal* affairs of the corporation.⁴⁶ As the court explained, “[t]hese are the kind of claims most central to the relationship between those who manage the corporation and the corporation’s stockholders.”⁴⁷ The court, however, noted a bylaw might run afoul of this external right distinction if that “bylaw . . . purported to bind a plaintiff, even a stockholder plaintiff, who sought to bring a tort claim against the company based on a personal injury she suffered that occurred on the company’s premises or a contract claim based on a commercial contract with the

³⁸ See *id.* at 950–51.

³⁹ *Id.* at 951.

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² *Id.* at 950–51.

⁴³ See *id.*

⁴⁴ See *id.* at 951.

⁴⁵ See *id.* at 951–52.

⁴⁶ See *id.*

⁴⁷ *Id.* at 952.

corporation.”⁴⁸ The court labeled the distinction as “obvious”—the bylaws in that hypothetical “would not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*.”⁴⁹

In sum, the court found the forum selection bylaws proffered by Chevron and FedEx were valid under Section 109(b) because these bylaws regulated the “rights” of stockholders as to the “conduct” of internal corporate “affairs.”⁵⁰ Accordingly, the Plaintiffs’ claim of statutory invalidity was dismissed.⁵¹

B. Contractual Validity: Forum Selection Clause Jurisprudence Will Apply to the Forum Selection Bylaws Even Though They Were Unilaterally Adopted by the Boards

The Plaintiffs’ contractual argument was centered on the fact the forum selection bylaws were established unilaterally by the boards without any consent from the stockholders.⁵² Essentially, one party to the forum selection clause had not bargained for, or even agreed to, the limitation.⁵³ As such, this forum selection setup did not resemble those traditional contractual situations that have historically supported a forum selection clause.⁵⁴ The Plaintiffs argued the principle of a forum selection bylaw was not per se invalid, but rather such a restriction of rights must come from a vote opened to the stockholders themselves to come under traditional forum selection clause consideration.⁵⁵

The court flatly rejected the Plaintiffs’ argument, explaining it “misunderst[ood] . . . [and] . . . misapprehend[ed] fundamental principles of Delaware corporate law.”⁵⁶ The court explained “generations” of Delaware case law have established “bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.”⁵⁷ The court reminded Plaintiffs, when a corporation decides to empower its board to unilaterally adopt or amend bylaws, stockholders are on notice the board may adopt any bylaw within its power under Section 109(b).⁵⁸ Accordingly, the court explained such action by “the board is not extra-contractual simply because the board acts unilaterally;

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.* at 950–54.

⁵¹ *Id.* at 954.

⁵² *See id.* at 954–55.

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *Id.* at 940, 955.

⁵⁷ *Id.* at 955.

⁵⁸ *Id.* at 955–56.

rather it is the kind of change that the overarching statutory and contractual regime the stockholders buy into explicitly allows the board to make on its own.”⁵⁹

[T]he Chevron and FedEx stockholders have assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards. Under that clear contractual framework, the stockholders assent to not having to assent to board-adopted bylaws. The [P]laintiffs’ argument that stockholders must approve a forum selection bylaw for it to be contractually binding is an interpretation that contradicts the plain terms of the contractual framework chosen by stockholders who buy stock in Chevron and FedEx.⁶⁰

The court concluded, under this reasoning, the forum selection bylaws established by Chevron and FedEx were indeed contractually valid and contractually binding.⁶¹ Thus, the Plaintiffs’ contractual validity claim was also dismissed.⁶² This finding was important in and of itself to establish the binding nature of the bylaw; however, it was perhaps even more important because with contractual validity comes the opportunity to apply traditional forum selection clause jurisprudence to the bylaw itself.⁶³ This opportunity would normally have presented the Plaintiffs with a renewed chance to invalidate the bylaws on reasonability or fairness grounds—that is, had the Plaintiffs not presented a facial challenge.

VIII. QUESTIONS THAT REMAIN FOR FUTURE COURTS: DO FORUM SELECTION BYLAWS OF THIS KIND OPERATE IN A “REASONABLE” MANNER?

A. *Survey of Forum Selection Clause Jurisprudence*

Since the forum selection bylaws at issue in *Boilermakers* were statutorily and contractually valid, the court explained “the bylaws will also be subject to scrutiny under the principles for evaluating contractual forum selection clauses established by the Supreme Court of the United States in *The Bremen v. Zapata Off-Shore Co.*, and adopted by our Supreme Court.”⁶⁴ This “scrutiny” is not one that creates a barrier for forum selection bylaws. To the contrary, it is a scrutiny

⁵⁹ *Id.* at 956.

⁶⁰ *Id.*

⁶¹ *See id.* at 958.

⁶² *Id.*

⁶³ *See id.* at 957.

⁶⁴ *Id.*

that propels such bylaws onto very solid ground.

B. Presumptive Validity

In *Bremen v. Zapata Offshore Oil Co.*, the United States Supreme Court officially ushered in the era of the “forum selection clause”.⁶⁵ The Court observed forum selection clauses had been historically disfavored by American courts, with many courts having declined “to enforce such clauses on the ground that they were ‘contrary to public policy,’ or that their effect was to ‘oust the jurisdiction’ of the court.”⁶⁶ The Court, however, decided to adopt a more “hospitable attitude toward forum-selection clauses” by establishing federal courts should find forum selection clauses are “prima facie valid” and enforceable “unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”⁶⁷

The Court in *Bremen* reasoned such a rule “accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world.”⁶⁸ The Court concluded “in the light of present-day commercial realities and expanding international trade[,] . . . the forum clause should control absent a strong showing that it should be set aside.”⁶⁹ The general federal rule that emerged from *Bremen* was “a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.”⁷⁰ This rule was adopted by the Supreme Court of Delaware in *Ingres Corp. v. CA, Inc.*⁷¹

C. Forum Selection Clauses Remain Broadly Enforceable Even Without Bargaining Power or Negotiation

The context of the forum selection clause in *Bremen* was a contract between two corporations by way of “arm’s-length negotiation by experienced and sophisticated businessmen.”⁷² In *Carnival Cruise Lines v. Shute*, the United States Supreme Court remained highly favorable to the enforceability of a forum selection clause even where the forum selection clause was between a large

⁶⁵ *M/S Bremen v. Zapata Offshore Oil Co.*, 407 U.S. 1 (1972).

⁶⁶ *Bremen*, 407 U.S. at 9–10, n.10 (citations omitted).

⁶⁷ *Id.* at 11 (citations omitted).

⁶⁸ *Id.*

⁶⁹ *Id.* at 15.

⁷⁰ *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 591 (1991) (citing *Bremen*, U.S. at 12–13).

⁷¹ *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010).

⁷² *See Bremen*, 407 U.S. at 1, 12.

international cruise line and a private couple who had purchased cruise tickets.⁷³ In *Carnival*, the Court assumed the couple's "contract was purely routine and doubtless nearly identical to every commercial passage contract issued by [Carnival] and most other cruise lines."⁷⁴ Therefore, it was assumed, like every other ordinary passenger, the couple was not able to negotiate the terms of the forum selection clause in the ticket.⁷⁵

The Court in *Carnival* explained there were at least three policy rationales that supported the holding a forum selection clause should remain presumptively valid in this situation, even where bargaining power was non-existent for one party to the contract.⁷⁶ First, "a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit" because a cruise line "typically carries passengers from many locales" and, therefore, opens itself to litigation in "several different fora."⁷⁷ Second, a forum selection clause prevents confusion about the proper forum and, therefore, spares litigants and courts from having to resolve motions relating to the proper location of the lawsuit.⁷⁸ Third, the Court assumed "passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."⁷⁹

D. Fundamental Fairness Scrutiny

More importantly, the Court found the forum selection clause in *Carnival* further passed required judicial scrutiny for "fundamental fairness."⁸⁰ The Court in *Carnival* essentially established a breach of "fundamental fairness" in the context of a forum selection clause would be a manifest intent to select a forum that would "discourag[e]" customers from pursuing litigation.⁸¹ The Court in *Carnival* found that four factors present in the case belied an intent to discourage suit.⁸² First, *Carnival* had its principal place of business—headquarters—in the designated forum.⁸³ Second, *Carnival* conducted a

⁷³ *Carnival*, 499 U.S. at 587, 593–95.

⁷⁴ *Id.* at 593.

⁷⁵ *Id.*

⁷⁶ *Id.* at 593–94.

⁷⁷ *Id.* at 593.

⁷⁸ *Id.* at 593–94.

⁷⁹ *Id.* at 594.

⁸⁰ *Id.* at 595.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

substantial amount of business in the designated forum.⁸⁴ Third, there was no evidence Carnival obtained the couple's assent to the selection clause by "fraud or overreaching."⁸⁵ Fourth, the couple had "conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity."⁸⁶

IX. APPLICATION OF FORUM SELECTION CLAUSE REASONABILITY AND FAIRNESS PRINCIPLES TO A FORUM SELECTION BYLAW OF THIS KIND

A. The Court Refused to Apply Hypotheticals in a Facial Challenge

As was explained above, the court in *Boilermakers* refused to address the Plaintiffs' "conjured up" hypotheticals to determine if the bylaws were unreasonable or otherwise lacked fundamental fairness because this was a facial challenge.⁸⁷ The court explained "as-applied challenges to the reasonableness of a forum selection clause should be made by a real plaintiff whose real case is affected by the operation of the forum selection clause."⁸⁸

B. The Unilateral Nature of a Forum Selection Bylaw Will Not Render It Unreasonable or Fundamentally Unfair

Whereas the court did not wander into applying the Plaintiffs' hypotheticals to determine the reasonability of the forum selection bylaws, the court did apply the unilateral nature of the *Carnival* forum selection clause to the case in supporting the fundamental fairness of such a bylaw.⁸⁹ The court in *Boilermakers* analogized the forum selection bylaws that were unilaterally adopted after the stockholder purchased the stock to the *Carnival* context in which the forum selection clause "was not subject to negotiation and was printed on the ticket [that the plaintiff] received after she purchased the passage"⁹⁰ The court in *Boilermakers* opined, because the United States Supreme Court had found such a forum selection clause "reasonable" and "enforceable," so too should it find the forum selection bylaw was reasonable.⁹¹ The court explained the *Boilermakers* context was likely even more reasonable than that of *Carnival*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

⁸⁸ *Id.* at 941.

⁸⁹ *See id.* at 957–58.

⁹⁰ *Id.* at 957.

⁹¹ *See id.*

because “stockholders retain the right to modify the corporation’s bylaws.”⁹²

C. Potential Fairness and Reasonability Applications Remain for Future Cases

The court’s conclusion in *Boilermakers* that forum selection clause jurisprudence applies to forum selection bylaws goes a very long way towards securing the practice. Notably, however, the court made it a point to conclude its opinion by securing the opportunity for future plaintiffs to bring as-applied challenges to the reasonability or fairness of such bylaws.⁹³ Some of these challenges may be bolstered by *Carnival* itself and its fundamental fairness analysis.

Unlike *Carnival*, the corporations in this case, and undoubtedly many like it, designate a litigation state—Delaware—in which the corporations are not actually headquartered or do a substantial percentage of their business.⁹⁴ Should the fundamental fairness that was found for *Carnival*’s unilateral forum selection in that case apply to a forum selection bylaw that requires litigation so far from the actual beating heart of the corporation itself? Would not the same multiform litigation concerns be avoided by designating the forum where the corporation is actually headquartered? Indeed, selection of the state of headquarters might arguably be the best, if not only, evidence the corporation’s motivation for the bylaw was efficiency and not limiting litigation to a favorable forum to potentially discourage suit. On the other hand, a strong argument could be made that the unique procedures that exist in the Court of Chancery and the ability to have Delaware courts set precedent for the corporate law that governs the corporation, should carry substantial weight in proving a good faith motivation. These, and many other such factors, need further analysis alongside the actual facts of an as-applied challenge in the future.

X. CONCLUSION

Boilermakers set substantial precedent supporting the validity of forum selection bylaws under Delaware law.⁹⁵ Such forum selection bylaws are valid under Section 109(b) and are not otherwise invalid as a matter of contract law.⁹⁶ Accordingly, Delaware courts will apply the traditional prima facie presumption

⁹² *Id.* at 957–58.

⁹³ *See id.* at 963.

⁹⁴ *Compare Boilermakers*, 73 A.3d at 942–43, with *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991).

⁹⁵ *See Boilermakers*, 73 A.3d at 954, 958.

⁹⁶ *See id.*

of validity to such forum selection bylaws, subject to a reasonability and fundamental fairness inquiry reserved for as-applied factual challenges.⁹⁷ *Boilermakers* has the makings of a case that sets fundamental corporate law for generations to come. Undoubtedly, *Boilermakers* has been, and will continue to be, the subject of many board room discussions amongst Delaware corporations who must answer what has become a very important question, Where do we want to let our stockholders challenge corporate action? Or, perhaps more importantly, which court are we comfortable with deciding these challenges?

⁹⁷ See *id.* at 957–58.