Notes on Contracting under the Delaware General Corporation Law
Caroline Bradley, September 2023

DGCL § 115 (referred to in the Casebook at p 190) 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."
The bolded language (emphasis added by me) is not in the Boilermakers decision.

Delaware corporations have sought to limit their exposure to litigation by means of forum selection provisions that require claims to be brought in particular courts. As we will see as we move through the class, acts by the management of corporations can lead to litigation that focuses on the duties of directors and officers under corporate law, but they can also lead to litigation under federal securities laws, which are designed to protect investors. Corporate managements would like to limit their exposure to such claims, or at least control where the claims may be brought.

Salzberg v Sciabacucchi (Del. Supr 2023)
Blue Apron Holdings, Roku and Stitch Fix included provisions in their certificates of incorporation requiring claims brought under the federal Securities Act of 1933 to be brought in federal court (although the federal statute gives state courts jurisdiction in such cases), and then issued shares to investors, including Sciabacucchi who sought a declaratory judgment that the federal forum provisions were invalid.

DGCL §115 states that you cannot prohibit the bringing of internal claims in the state courts in Delaware. So, in order to be effective the provision must not impact "internal corporate claims." But in order to be a valid contract binding stockholders it must relate to internal, rather than external, claims.

In 2018 the Delaware Chancery Court (VC Laster) held that because claims under the securities laws are external rather than internal claims (" a 1933 Act claim is external to the corporation. Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or defendant"), and not about rights established by or under Delaware corporate law, such provisions were not valid. Boilermakers allows the certificate of incorporation or by-laws to require internal corporate claims to be brought in Delaware state court, but, as Laster wrote: "The Boilermakers decision noted that a bylaw cannot dictate the forum for tort or contract claims against the company, even if the plaintiff happens to be a stockholder."

The Delaware Supreme Court reversed this decision, stating that the federal forum provision

could survive a facial challenge (i.e. the plaintiff must show that the charter provisions cannot operate lawfully or equitably under any circumstances). It remained possible for plaintiffs to challenge such provisions as applied.

In the decision, the Court stated that a federal forum provision could easily fall within the language of DGCL §102(b)(1) regulating the contents of the certificate of incorporation either as a provision for the management of the business and conduct of the affairs of the corporation or a provision relating to the powers of the corporation, directors and stockholders. As such it is facially valid.

The Court noted that there is no procedural mechanism for consolidating or co-ordinating multiple suits in state and federal court leading to costs and inefficiencies, and the possibility of inconsistent judgments and rulings.

The Court holds that federal forum provisions do not violate the policies or laws of the state of Delaware.

DGCL §102(b)(1) is broadly enabling, stockholder approved charter amendments are given great respect under Delaware law, and the DGCL allows a lot of freedom to corporations to adopt the most appropriate terms for their enterprise (it is an enabling act which leaves latitude for substantial private ordering, subject to the statute and fiduciary duties).

The Court states that DGCL §115 (codifying Boilermakers) supports the validity of the provisions. The decision includes a lot of complicated statutory interpretation. For example there is nothing in §115 to limit §102(b)(1). §115 is about centering internal corporate claims in Delaware, and §11 claims (under the 33 Act) are not internal corporate claims so §115 does not apply, and, in any case §102(b)(1) is not limited to internal affairs matters (although "Section 11 claims are internal in the sense that they arise from internal corporate conduct on the part of the Board and, therefore, fall within Section 102(b)(1).").

As to the facial challenge, the Court states: "because we are dealing here with a facial challenge, it is possible to have a scenario where a [federal forum provision] could apply to an intra-corporate claim. For example, existing stockholders could assert that a prospectus relating to shares of stock the directors were selling in a registered offering, signed by the directors of a Delaware corporation, contained material misstatements and omissions. That is enough to survive a facial challenge."

That is, to the extent that the claims that would be brought under the Securities Act were claims brought by shareholders who are treated as bound by the contract comprising the certificate of incorporateion, by-laws and DGCL, there is no problem.

The Court identifies a category of intra-corporate matters which are between internal corporate claims and external claims. For such claims a forum provision is allowed under §102(b)(1) and

not restricted from being excluded from determination by Delaware state courts under §115.

This idea that section 11 claims may be brought by people who are already shareholders in the corporation at the time they acquire the shares does a lot of work in the decision and is emphasized by Joseph Grundfest in an article cited at note 133 in the judgment (which is also cited in the US Chamber of Commerce Amicus Brief in the case).

The Court states: "Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." So you can have contractual provisions that are in themselves valid (not subject to invalidity on their face) but which might not be enforced if applied inequitably.

The internal affairs doctrine provides that the state of incorporation should alone have the authority to regulate the internal affairs of a corporation. In Sciabacucchi the Court cites Edgar v MITE (S.Ct. 1982) and CTS v Dynamics (S.Ct. 1987) for this proposition (corporations are organized under the law of a single jurisdiction, the law of the state of incorporation, and only that state should have the authority to regulate internal affairs). These cases involved questions about the applicability of one state's laws (regulating takeovers) to a corporation incorporated in another state.

Interpreting internal affairs for the purposes of §102(b)(1) more narrowly than cases like Edgar v MITE might encourage other states to encroach into matters traditionally seen as within the internal affairs doctrine.

The Court notes that provisions in the DGCL do apply to people who are not yet stockholders (e.g. § 202 which allows for, and regulates, restrictions on the transfer of ownership of shares). The provision has implications for people who would like to become transferees of restricted securities but it also affects the holders of the restricted securities.

More recently courts have been assessing forum provisions which require certain securities claims brought as derivative suits to be brought in state court in Delaware, and a circuit split has developed.

Seafarers Pension Plan v Bradway (7th Cir. 2022)

A Boeing by-law allowed Boeing to require that any derivative suit be filed in Delaware Chancery court. The case involved a derivative suit under §14 (a) of the Securities Exchange Act of 1934, which provides for remedies for misleading statements in proxy materials, which are documents circulated to shareholders before a shareholders' meeting. This was an as applied challenge rather than a facial challenge. The 7th Circuit held the Securities Exchange Act of 1934 gives exclusive jurisdiction to federal courts, and that if the by-law were applied in thics case the

plaintiffs would have no recourse. They would not be able to bring the claims in Delaware state courts (which have no jurisdiction under the federal statute) and the by-law would prevent the bringing of the claims in federal court:

"In a derivative suit under Section 14(a), the theory "is that a corporation's board has been so faithless to investors' interests that investors must be allowed to pursue a claim in the corporation's name." ... A derivative suit is considered "an asset of the corporation" and permits "an individual shareholder to bring `suit to enforce a corporate cause of action against officers, directors, and third parties.'"... Here, plaintiff alleges that the false and misleading proxy statements caused harm to Boeing by enabling the improper re-election of directors who had for years tolerated poor oversight of passenger safety, regulatory compliance, and risk management during the development of the 737 MAX airliner. Plaintiff further alleges that the proxy statements provided misleading recommendations to shareholders and caused shareholders to vote down a shareholder proposal calling for bifurcation of the CEO and chairman positions. Regardless of the ultimate merits of the claims, plaintiff's chosen forum in the federal district where Boeing is headquartered seems appropriate for the case. To avoid that chosen forum and defeat the claims entirely, defendants invoked Boeing's forum bylaw. If it can be applied to this case, the bylaw will force plaintiff to raise its claims in a Delaware state court, which is not authorized to exercise jurisdiction over Exchange Act claims.... If that's correct, checkmate for defendants. That result would be difficult to reconcile with Section 29(a) of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act....
.. the two key phrases in Section 115 are "consistent with applicable jurisdictional requirements" and "courts in this State." As applied here, Boeing's forum bylaw violates Section 115 because it is inconsistent with the jurisdictional requirements of the Exchange Act of 1934... Further, federal courts in Delaware are courts "in" that State, as distinct from courts "of" that State. The statutory language shows that Section 115 does not authorize application of Boeing's forum bylaw to close all courthouse doors to this derivative action....
... Salzberg neither applies to claims brought under the Exchange Act of 1934 nor bars securities plaintiffs from bringing as-applied challenges to federal forum provisions. Nothing in Salzberg suggests it would extend Section 109 (or Section 102(b)(1), for that matter) to allow application of the forum bylaw to a case like this one, where it would effectively bar plaintiff from bringing its derivative claims under the 1934 Act in any forum. To the contrary, the Delaware court stressed the harmony between Delaware corporation law and federal securities law: "This Court has viewed the overlap of federal and state law in the disclosure area as `historic,' `compatible,' and `complimentary.'" ... Even more to the point here, as noted above, Salzberg expressly presumed that the reference to "courts in this State" in the bylaws authorized by the new Section 115 included federal courts ... which the Boeing forum bylaw does not."

Contrast **Lee v Fisher** (9th Cir. 2023).
Plaintiff shareholder brought a derivative claim under §14(a) of the Securities Exchange Act against Gap arguing that Gap had made false and misleading claims about its commitment to diversity:

“Gap's inclusion of a forum-selection clause in its bylaws is consistent with a modern corporate trend... In the first decade of the 2000s, there was an increase in litigation, id., "brought by dispersed stockholders in different forums, directly or derivatively, to challenge a single corporate action," .... Because multiforum litigation could impose high costs and hurt investors.. many corporations adopted forum-selection clauses in response...

... Lee's complaint is consistent with another modern trend, in which plaintiffs frame corporate mismanagement claims that normally arise under state law (including challenges to corporate policies relating to "ESG [environmental, social, and governance] issues ... such as environmentalism, racial and gender equity, and economic inequality") as proxy nondisclosure claims under § 14(a), in order to invoke exclusive federal jurisdiction and avoid any forum-selection clause pointing to a state forum...

We begin with Lee's argument that Gap's forum-selection clause is void under the Exchange Act's antiwaiver provision, § 29(a), which provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, ... shall be void." .... The Supreme Court has interpreted § 29(a) as prohibiting "only... waiver of the substantive obligations imposed by the Exchange Act."... We have held that § 29(a) "applies only to express waivers of non-compliance" with the provisions of the Exchange Act...

... On its face, Gap's forum-selection clause does not constitute an "express waiver[] of non-compliance," because the clause does not expressly state that Gap need not comply with § 14(a) or Rule 14a-9 or the substantive obligations they impose... Lee argues that Gap's forum-selection clause functionally waives compliance with § 14(a) and Rule 14a-9, even if it does not do so expressly. She reasons that Gap's forum-selection clause requires her to bring a derivative § 14(a) action in the Court of Chancery. Because § 27(a) of the Exchange Act provides that federal courts have "exclusive jurisdiction of violations" of the Exchange Act ... enforcing the clause would mandate that the Court of Chancery dismiss her derivative § 14(a) action. Thus, if Gap's forum-selection clause is enforceable, Lee would be precluded from bringing a derivative § 14(a) action in any forum. According to Lee, this means that Gap, its shareholders, directors, and officers have agreed to waive compliance with the substantive obligations imposed by § 14(a) and Rule 14a-9.

We disagree, because Lee can enforce Gap's compliance with the substantive obligations of § 14(a) by bringing a direct action in federal court...

.. Lee can bring her action against Gap under § 14(a) and Rule 14a-9 as a direct action under the Tooley test, because her complaint is based on the theory that Gap's shareholders were denied the right to a fully informed vote at the 2019 and 2020 annual meetings. Lee and other shareholders suffered the alleged harm—a proxy nondisclosure injury in violation of § 14(a) that interfered with their voting rights and choices—and would receive the benefit of the remedy—the equitable or injunctive relief sought in the complaint. This conclusion is confirmed by the Delaware Supreme Court's statement "that where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct.”...

...Because Gap's forum-selection clause does not waive Gap's compliance with the substantive obligations imposed by § 14(a) and Rule 14a-9, we conclude that the clause is not void under § 29(a).”