Megan P. Boudreaux

From: Gordon Arata <publications@gordonarata.ccsend.com> on behalf of Publications
Sent: Wednesday, July 31, 2013 8:41 AM
To: Paul B. Simon
Subject: Gordon Arata Bulletin: Enforceability of Forum Selection Bylaw

New Orleans   Baton Rouge   Lafayette   Houston

Enforceability of Forum Selection Bylaw

Are you concerned that shareholder suits against the directors or officers of your corporation could result in the corporation being dragged into litigation in unfavorable or hostile jurisdictions? A recent Delaware Chancery Court decision could help allay those concerns for Delaware corporations, and to the extent followed by courts in other states, for corporations organized in other jurisdictions.

In *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, the court considered the enforceability of "forum selection" bylaws of two Delaware corporations that required all litigation relating to the internal affairs of each company to be brought in Delaware. Even though the bylaws were adopted without shareholder approval (as authorized by Delaware law, which allows the certificate of incorporation to grant the directors the power to adopt and amend bylaws unilaterally), the court rejected claims that the provisions were invalid as a matter of law. (The court did note, however, that there may be circumstances in which such provisions could be unenforceable as applied or in which application of such provisions could constitute a breach of fiduciary duty by the board.)

The court's reasoning, in part, was based on the conclusion that the bylaws are part of a contract among the directors, officers and shareholders of the company, and that where the certificate of formation of the company includes a provision authorizing the board to amend the bylaws unilaterally, the shareholders agree to that power when they purchase stock in the company.

It is not clear whether courts in other jurisdictions will respect the Chancery Court's decision and dismiss internal affairs claims against Delaware corporations brought before them or whether other states will follow Delaware and permit the adoption of such bylaws under their own corporate laws. The Business Organizations Code in Texas and the Business Corporation Law in Louisiana both authorize directors to adopt or amend bylaws (unless the Certificate of Formation/Articles provide otherwise). Although the law in those states does not require the Certificate of Formation/Articles

specifically to authorize the directors to amend bylaws, like in Delaware, any bylaw provision adopted by the directors is subject to change or repeal by the shareholders.

A court applying Texas or Louisiana law might follow the reasoning of the Delaware Chancery Court as to the facial enforceability of a forum selection clause based on the contract established by the organizational documents of the corporation, even absent a provision in the Certificate of Formation/Articles authorizing the directors to amend the bylaws. Louisiana courts have enforced forum selection clauses contained in the Articles of a corporation based on the premise that the Articles evidence the contractual agreement between the parties. A recent Texas Court of Appeals addressed whether the trial court should have considered a motion to dismiss based upon a mandatory exclusive forum selection clause in the bylaws of a Delaware corporation. In deciding that the trial court should have considered the issue, the Court of Appeals suggested that provisions in the bylaws may be entitled to the judicial deference of bargained-for contractual provisions.

This is a good time for corporations organized in Texas or Louisiana to consider whether it is appropriate to add a forum selection clause to their bylaws. To avoid the possible uncertainty of the enforceability of a forum selection clause in the bylaws of a corporation, persons who are in the process of organizing Texas or Louisiana corporations could consider including the forum selection clause in the Certificate of Formation/Articles of the new company.

Paul B. Simon
psimon@gordonarata.com
(337) 237-0132

Samuel E. Masur
smasur@gordonarata.com
(337) 237-0132

Cathy E. Chessin
cchessin@gordonarata.com
(713) 333-5561

Teanna W. Neskora
tneskora@gordonarata.com
(713) 333-5510

July 31, 2013

This is not an advertisement. The information in this email does not constitute legal advice or opinion, should not be considered as a substitute for legal advice, is based on laws in effect at the time of creation and is subject to change. This email is not privileged, does not create an attorney-client relationship, is intended for informational purposes only and is sent to clients and others with whom the firm has had connections. No representation is made that the quality of the legal services the firm's lawyers may perform is greater than the quality of legal services performed by other lawyers. For additional information about the firm, see the firm's website at www.gordonarata.com.

Gordon, Arata, McCollam, Duplantis & Eagan, LLC

- 201 St. Charles Avenue, 40th Floor, New Orleans, Louisiana 70170-4000
- 301 Main Street, Suite 1600, Baton Rouge, Louisiana 70801-1916
- 400 East Kaliste Saloom Road, Suite 4200, Lafayette, Louisiana 70508-8517
- 1980 Post Oak Blvd., Suite 1800, Houston, Texas 77056

Forward email

This email was sent to psimon@gordonarata.com by publications@gordonarata.com |
Update Profile/Email Address | Instant removal with SafeUnsubscribe™ | Privacy Policy.
Gordon Arata McCollam Duplantis & Eagan, LLC | 201 St. Charles Ave. | 40th Floor | New Orleans | LA | 70170-4000