

CORPORATIONS, SECURITIES AND FINANCIAL SERVICES COMMITTEE

MEETING TO BE HELD ON SEPTEMBER 3, 2016

ARTICLE 2 – SELECTED ISSUES

At the June 16, 2016 and July 21, 2016 meetings of the Chapter 607 Subcommittee, a decision was made to add to the FBCA:

- (i) an express authorization for forum selection provisions, and
- (ii) an express prohibition on the ability to include fee shifting provisions in the articles of incorporation or bylaws of a Florida corporation.

Exhibits "A", "B" and "C" to this memorandum are the current proposed versions of ss. 607.0202 (articles of incorporation), 607.0206 (bylaws) and 607.0208 (forum selection provisions), respectively, and the current proposed commentary to each section. The forum selection provisions that are attached to this agenda are largely based on the RMBCA provisions on these subjects, and the fee shifting provisions that are attached to this agenda are largely derived from the DGCL provision on this subject. These sections reflect the thinking on these topics of the co-chairs, after discussion with several members of the subcommittee.

We are seeking your input on a number of issues implicit within these proposed sections of the FBCA.

Issue 1.

Forum Selection Provisions – Proposed Section 607.0208 (Exhibit "C") and related cross references in Sections 607.0202 and 607.0206 (Exhibits "A" and "B")

Which of 3 general options should we follow?

- No Change. Don't add any provision at all and rely on existing broad authorizations.
- RMBCA Approach (following the approach on these provisions taken in the RMBCA:

Can restrict jurisdiction for all internal corporate claims or for just a subset of internal corporate claims

Allows articles or bylaws provision to include authorization to bring actions in courts in jurisdictions outside Florida, but not exclusively in jurisdictions outside Florida

Includes express language that provision cannot confer on a particular court personal or subject matter jurisdiction where general civil procedure rules would not otherwise allow such personal jurisdiction and/or subject matter jurisdiction, as the case may be

No clear reference to how federal courts sitting in the state are treated

Do they fall within the phrase “courts in this state”?

Do they fall outside the phrase “courts of this state”?

Expressly does not allow any provision that excludes ALL Florida courts from having jurisdiction

Expressly does not allow any provision that requires claims to be determined by arbitration

- Delaware Approach. Follow the Delaware approach – Section 115 (a copy of Section 115 of the DGCL is contained in Exhibit "D" to this Memorandum)

Can restrict jurisdiction for all internal corporate claims or for just a subset of internal corporate claims

Silent on whether certificate or bylaws can authorize bringing actions in courts in jurisdictions outside Delaware, as long as not exclusively in jurisdictions outside Florida

Expressly permits exclusive jurisdiction provisions if courts specified are ALL or a subset of all courts in the state of Delaware

Does the phrase “courts in this state” include federal courts sitting in Delaware?

Does the phrase “courts of this state” exclude federal courts sitting in Delaware?

Expressly does not allow any provision that excludes ALL Florida courts from having jurisdiction

Thus, has the effect, by implication, of prohibiting a provision that restricts jurisdiction to courts outside Delaware

Thus, has the effect, by implication, of prohibiting a provision that requires arbitration of such claims

Forum Selection Provision Questions:

- Which general approach should we take?

- If we add a forum selection provision:
 - Should we allow the provision to include non-Florida courts as permissible venues?
 - Should we allow the provision to limit jurisdiction to include only non-Florida courts? Or should we expressly prohibit the ability to add such provisions?
 - Should we somehow clarify that courts in the state include federal courts sitting in Florida while courts of the state do not?
 - Should we expressly prohibit any arbitration of such internal corporate claims?
 - Should we expressly prohibit any provision which mandates that all such internal corporate claims must be arbitrated?

Issue 2

Addressing Ability to Include in Articles Provisions that Impose Attorneys' Fees in Internal Corporate Claim Litigation – Proposed Section Sections 607.0202(5) and 607.0206(6)

Which of 3 general options should we follow?

- No Change. Don't include any provision at all
- Delaware Approach. Expressly prohibit ability to include such a provision in Articles or Bylaws – i.e., following Delaware approach (Section 102(f) of the DGCL is Exhibit "E" to this Memorandum).
- Making Provision Unenforceable. State that such a provision would be unenforceable

Fees Shifting Questions:

- Which general approach should we take?
- If we add statutory language that prohibits inclusion of such provision in the articles and bylaws:
 - Should the Department of State have to police such prohibition and reject Articles that include such a provision? If so, what would be the consequences if the Department allowed Articles with such a provision to be filed?
 - Note: Lyn Shoffstall of DOS has advised us that the Delaware Secretary of State does not police this issue (i.e., does not look at

Certificates of Incorporation to evaluate whether they include such provisions)?

- Would there be a need for a grandfathering provision for Articles and/or bylaws in effect prior to some specified date (e.g., effective date of legislation or date of enactment)?
- Do we need a sentence that expressly states that such prohibition does not prohibit attorneys' fees provisions in agreements (such as shareholders agreements) signed by the shareholder who is to be bound by such agreement?
 - If so, should such sentence be included (i) in Sections 607.0202(5) and 607.0206(6) or (ii) instead as a permitted listed type of provision in Section 607.0732, with a comment added to the commentary to each of Sections 607.0202(5) and 607.0206(6) stating that the prohibition with respect to articles and bylaws provisions should not be construed to prevent such provisions in contracts signed by the shareholder against whom the provision is to be enforced?

EXHIBIT "A"

SECTION 607.0202 (ARTICLES OF INCORPORATION)

607.0202. Articles of incorporation; content.

(1) The articles of incorporation must set forth:

(a) A corporate name for the corporation that satisfies the requirements of s. 607.0401;

(b) The street address of the initial principal office and, if different, the mailing address of the corporation;

(c) The number of shares the corporation is authorized to issue;

(d) ~~If any preemptive rights are to be granted to shareholders, the provision therefor;~~

~~(e)——~~The street address of the corporation's initial registered office and the name of its initial registered agent at that office together with a written acceptance as required in s. 607.0501(3); and

(f) The name and address of each incorporator.

(2) The articles of incorporation may set forth:

(a) The names and addresses of the individuals who are to serve as the initial directors;

(b) Provisions not inconsistent with law regarding:

1. The purpose or purposes for which the corporation is organized;

2. Managing the business and regulating the affairs of the corporation;

3. Defining, limiting, and regulating the powers of the corporation and its board of directors and shareholders;

4. A par value for authorized shares or classes of shares;

5. The imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; and

6. Exclusive forum provisions, to the extent permitted by s. 607.0208.

(c) If any preemptive rights are to be granted to shareholders, the provision therefor.

(d) Any provision that under this chapter ~~act~~ is required or permitted to be set forth in the bylaws.

(3) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter act.

(4) Provisions of the articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with s. 607.0120(11).

(5) The articles of incorporation may not contain any provision that would impose liability on a shareholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in s. 607.0208(4) of this chapter. Nothing in this subsection may be construed to prevent the application of such provisions pursuant to a shareholders' agreement or other writing signed by the shareholder against whom the provision is to be enforced.

Commentary for Section 607.0202:

Cleanup changes have been made to subsections (1) and (2). New subsection (2)(b)6. expressly authorizes articles of incorporation that allow exclusive forum provisions to the extent permitted by s. 607.0208. Although the drafting subcommittee believes that this provision would be permissible under the catch-all language in subsection (2)(d), a cross reference was added to make it clear that such provisions are permissible under this section.

New subsection (4) makes clear that articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with s. 607.0120(11).

New subsection (5) prohibits the inclusion in articles of incorporation of provisions that purport to impose liability upon a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in new section 607.0208(4). A similar provision has been added as new subsection (5) in s. 607.0206.

Similar provisions were recently added to the DGCL following the decision of the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), in which the Delaware Supreme Court upheld as facially valid a bylaw imposing liability for certain legal fees of the nonstock corporation on certain members who participated in the litigation. As a policy matter, the drafting subcommittee does not believe that such provisions are appropriate if unilaterally placed in articles or bylaws. At the same time, the proposed addition makes clear that this provision is not intended to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. A reference will be added to s. 607.0732 to make clear that shareholders may adopt an agreement to this effect so long as each shareholder has approved the provision.

EXHIBIT "B"

SECTION 607.0206 (BYLAWS)

607.0206. Bylaws.

(1) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation unless that power is reserved to the shareholders by the articles of incorporation.

(2) The bylaws of a corporation may contain any provision ~~for managing the business and regulating the affairs of the corporation~~ that is not inconsistent with law or the articles of incorporation, including the provisions described in subsections (3) and (4) below.

(3) The bylaws of a corporation may contain one or both of the following provisions:

(a) A requirement that if the corporation solicits proxies or consents with respect to an election of directors, the corporation include in its proxy statement and any form of its proxy or consent, to the extent and subject to such procedures or conditions as are provided in the bylaws, one or more individuals nominated by a shareholder in addition to individuals nominated by the board of directors; and

(b) A requirement that the corporation reimburse the expenses incurred by a shareholder in soliciting proxies or consents in connection with an election of directors, to the extent and subject to such procedures and conditions as are provided in the bylaws, provided that no bylaw so adopted shall apply to elections for which any record date precedes its adoption.

(4) The bylaws of a corporation may contain exclusive forum provisions to the extent permitted by s. 607.0208.

(5) Notwithstanding s. 607.1020(2)(b), the shareholders in amending, repealing, or adopting a bylaw described in subsection (3) may not limit the authority of the board of directors to amend or repeal any condition or procedure set forth in or to add any procedure or condition to such a bylaw to provide for a reasonable, practical, and orderly process.

(6) The bylaws may not contain any provision that would impose liability on a shareholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in s. 607.0208(4) of this chapter. Nothing in this section may be construed to prevent the application of such provisions pursuant to a shareholders' agreement or other writing signed by the shareholder against whom the provision is to be enforced.

Commentary for Section 607.0206:

The change to subsection (2) is to bring Chapter 607 into line with the RMBCA. The Committee believes that the existing language in subsection (2) is intended to mean the same as the current language in the RMBCA, allowing broad latitude as to what type of provisions can be contained in a corporation's bylaws. This includes, for example, the ability to include an exclusive forum bylaw provision. The change is designed to bring the language in the Florida statute into line with the Model Act and thus avoid any potential of claim that the words "for managing the business and regulating the affairs of the corporation" were intended to be limiting. For completeness, a cross reference to subsections (3) and (4) has been added to this subsection.

New subsection (3) expressly authorizes bylaws that require the corporation to include individuals nominated by shareholders for election as directors in its proxy statement and proxy cards (or consents) and that require the reimbursement by the corporation of expenses incurred by a shareholder in soliciting proxies (or consents) in an election of directors, in each case subject to such procedures or conditions as may be provided in the bylaws. Although the drafting subcommittee believes that this provision would be permissible under subsection (2), because this provision is expressly in the DGCL and in the Model Act, the decision was made to add these subsections to the FBCA.

For completeness, new subsection (4) has been added to cross reference s. 607.0208 into this provision, which expressly authorizes bylaws that allow exclusive forum provisions to the extent permitted by that section.

New subsection (6) prohibits the inclusion in bylaws of any provision that purports to impose liability upon a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in new section 607.0208(4). A similar provision has been added as new subsection (5) in s. 607.0202.

EXHIBIT "C"

SECTION 607.0208 (EXCLUSIVE FORUM PROVISIONS)

607.0208. Forum selection provisions.

(1) The articles of incorporation or the bylaws may require that any or all internal corporate claims shall be brought exclusively in any specified court or courts in this state and, if so specified, in any additional courts in this state or in any other jurisdictions with which the corporation has a reasonable relationship.

(2) A provision of the articles of incorporation or bylaws adopted under subsection (1) shall not have the effect of conferring jurisdiction on any court or over any person or claim, and shall not apply if none of the courts specified by such provision has the requisite personal and subject matter jurisdiction. If the court or courts in this state specified in a provision adopted under subsection (1) do not have the requisite personal and subject matter jurisdiction and another court of this state does have such jurisdiction, then the internal corporate claim may be brought in such other court of this state, notwithstanding that such other court of this state is not specified in such provision, and in any other court specified in such provision that has the requisite jurisdiction.

(3) No provision of the articles of incorporation or the bylaws may prohibit bringing an internal corporate claim in all courts in this state or require such claims to be determined by arbitration.

(4) “Internal corporate claim” means, for the purposes of this section:

 (a) any claim that is based upon a violation of a duty under the laws of this state by a current or former director, officer, or shareholder in such capacity;

 (b) any derivative action or proceeding brought on behalf of the corporation;

 (c) any action asserting a claim arising pursuant to any provision of this chapter or the corporation’s articles of incorporation or bylaws; or

 (d) any action asserting a claim governed by the internal affairs doctrine that is not included in subsections (a)-(c) above.

Commentary to Section 607.0208:

New s. 607.0208 largely follows s. 2.08 of the Exposure Draft of the RMBCA. It authorizes a provision in either the articles of incorporation or the bylaws creating exclusive jurisdiction for internal corporate claims. Under section 607.0208(1), the provision to be valid must include all of the courts in this state or any specified court or courts of this state. The provision may also,

but is not required to, include additional courts within this state (including federal courts) or in one or more additional jurisdictions with a reasonable relationship to the corporation.

Although the drafting subcommittee believes that this provision would be permissible under both existing s. 607.0206 and under the revised s. 607.0206 contained in this proposal, because this provision is expressly set forth in the DGCL and in the Model Act, the decision was made to add this section of the proposed FBCA.

EXHIBIT "D"

DGCL Section 115

§ 115 Forum selection provisions.

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.

EXHIBIT "E"

FEE SHIFTING PROVISIONS

§ 102 Contents of certificate of incorporation.

(f) The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.