

§ 7.29A. JUDICIAL DETERMINATION OF CORPORATE OFFICES AND REVIEW OF ELECTIONS AND SHAREHOLDER VOTES

- (a) Upon application of or in a proceeding commenced by a person specified in subsection (b), the [name or describe] court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may determine:
- (1) the validity of the election, appointment, removal or resignation of a director or officer of the corporation;
 - (2) the right of an individual to hold the office of director or officer of the corporation;
 - (3) the result or validity of an election or vote by the shareholders of the corporation;
 - (4) the right of a director to membership on a committee of the board of directors; and
 - (5) the right of a person to nominate or an individual to be nominated as a candidate for election or appointment as a director of the corporation, and any right under a bylaw adopted pursuant to section 2.06(c) or any comparable right under any provision of the articles of incorporation, contract, or applicable law.
- (b) An application or proceeding pursuant to subsection (a) of this section may be filed or commenced by any of the following persons:
- (1) the corporation;
 - (2) a shareholder of the corporation, which for purposes of this section includes a beneficial owner of shares whose shares are held in a voting trust or held by a nominee on the beneficial owner's behalf;
 - (3) a director of the corporation, an individual claiming the office of director, or a director whose membership on a committee of the board of directors is contested, in each case who is seeking a determination of his or her right to such office or membership;

- (4) an officer of the corporation or an individual claiming to be an officer of the corporation, in each case who is seeking a determination of his or her right to such office; and
 - (5) a person claiming a right covered by subsection (a)(5) and who is seeking a determination of such right.
- (c) In connection with any application or proceeding under subsection (a), the following shall be named as defendants, unless such person made the application or commenced the proceeding:
- (1) the corporation;
 - (2) any individual whose right to office or membership on a committee of the board of directors is contested;
 - (3) any individual claiming the office or membership at issue; and
 - (4) any person claiming a right covered by subsection (a)(5) that is at issue.
- (d) In connection with any application or proceeding under subsection (a), service of process may be made upon each of the persons specified in subsection (c) either by:
- (1) serving on the corporation process addressed to such person in any manner provided by statute of this state or by rule of the applicable court for service on the corporation; or
 - (2) service of process on such person in any manner provided by statute of this state or by rule of the applicable court.
- (e) When service of process is made upon a person other than the corporation by service upon the corporation pursuant to subsection (d)(1), the plaintiff and the corporation or its registered agent shall promptly provide written notice of such service, together with copies of all process and the application or complaint, to such person at the person's last known residence or business address, or as permitted by statute of this state or by rule of the applicable court.

- (f) In connection with any application or proceeding under subsection (a), the court shall dispose of the application or proceeding on an expedited basis and also may:
- (1) order such additional or further notice as the court deems proper under the circumstances;
 - (2) order that additional persons be joined as parties to the proceeding if the court determines that such joinder is necessary for a just adjudication of matters before the court;
 - (3) order an election or meeting be held in accordance with the provisions of section 7.03(b) or otherwise;
 - (4) appoint a master to conduct an election or meeting;
 - (5) enter temporary, preliminary or permanent injunctive relief;
 - (6) resolve solely for the purpose of this proceeding any legal or factual issues necessary for the resolution of any of the matters specified in subsection (a), including the right

and power of persons claiming to own shares to vote at any meeting of the shareholders; and
 - (7) order such other relief as the court determines is equitable, just and proper.
- (g) It is not necessary to make shareholders parties to a proceeding or application pursuant to this section unless the shareholder is a required defendant under subsection (c)(4), relief is sought against the shareholder individually, or the court orders joinder pursuant to subsection (f)(2).
- (h) Nothing in this section limits, restricts, or abolishes the subject matter jurisdiction or powers of the court as existed prior to the enactment of this section, and an application or proceeding pursuant to this section is not the exclusive remedy or proceeding available with respect to the matters specified in subsection (a).

CROSS-REFERENCES

“Corporation” defined, see § 1.40(4).

“Individual” defined, see § 1.40(13).

“Notice” defined, see § 1.41.

“Officer” defined, see § 8.40(a).

“Person” defined, see § 1.40(16).

“Principal office” defined, see §§ 1.40(17) and 16.21(a)(3).

Qualifications for directors and nominations, see § 8.02.

“Registered Agent” defined, see §§ 2.02(a), 5.01(2), 5.02, 5.03 and 16.21(a)(2).

“Registered office” defined, see §§ 2.02(a), 5.01(1), 5.02 and § 16.21(a)(2).

“Shareholder” defined, see § 1.40(21).

OFFICIAL COMMENT

Section 7.29A establishes a procedure for judicial resolution of certain governance disputes involving corporations incorporated under or subject to the provisions of this Act. It provides subject matter jurisdiction to the specified court to resolve these disputes,

which jurisdiction may be exercised either in a new proceeding or by an application made in an already pending proceeding. For example, a court that orders a meeting pursuant to Section 7.03 could resolve these types of disputes arising from such meeting on an application made by a party in the original proceeding without requiring the parties to file a new proceeding.

This section requires an expedited review of such disputes in order to prevent a corporation from being immobilized by controversies with respect to the identity of its directors or officers, the members of any committee of its board of directors, or the results or validity of shareholder votes. The section specifies the types of disputes that come within its coverage (subsection (a)),

the persons who may initiate such proceedings (subsection (b)), the persons who must be named as defendants in such proceedings (subsections (c) and (g)), how service may be effectuated on the required defendants (subsection (d)), what notice must be provided to the required defendants (subsection (e)), and the remedial powers available to the court in connection with such a proceeding (subsection (f)).

Subsection (h) makes clear that this section does not displace or alter any pre-existing remedies and is not intended to be the exclusive remedy for disputes of the type covered by this section. Consequently, the fact that a dispute does not come within the coverage of this section or that a person may not have standing under this section to initiate a proceeding does not foreclose the possibility that other remedies or proceedings may be available for the adjudication of the dispute. Similarly, the fact that a person may use this section to resolve a dispute does not prevent such person or others from pursuing or initiating other available remedies or proceedings.

1. The Court with Jurisdiction to Administer Section 7.29A

The identity of the specific court with jurisdiction over a proceeding under this section must be supplied by each state when enacting this section. The assumption is that this court will be a court of general civil jurisdiction. However, states with courts designated to adjudicate specified business disputes may determine that a proceeding pursuant to this section should come within the jurisdiction of such a court. Each enacting state also must consider whether the provisions of this section are consistent with the other statutes and rules applicable to the designated court and, if not, make appropriate adjustments. Each enacting state also should consider whether the court specified in this section has or should be granted the authority to promulgate rules applicable to proceedings pursuant to this section. Subject to any such special rules, a proceeding instituted pursuant to this section is governed by the otherwise applicable rules of civil procedure that apply in the specified court, including rules relating to the filing

or initiation of an action, service of process, discovery, injunctive relief, motions, and judgments.

The grant of jurisdiction under this section is permissive, not mandatory. The section states that the court “may” resolve the matters specified in the statute, not that it must do so. The court has the discretion to decline to resolve a matter, for example, because a justiciable controversy is not present, the court lacks jurisdiction over a party that the court determines is necessary to the resolution of the dispute, a prior action seeking the same relief is pending in another forum, or for other reasons generally applicable under the law of the enacting state. However, the purpose of the section is to provide a clear procedure and prompt remedy for the resolution of corporate governance disputes that, if not promptly resolved, could cause injury to the corporation and its shareholders. Consequently, the court ought to decline to exercise the jurisdiction provided under this section only in a rare and unusual case.

A state enacting this section also should consider the time limitations that may apply to filing an action under this section. An action under this section should be promptly filed when the facts giving rise to a claim are known or should be known. A delay in resolving disputes concerning corporate governance can result in prejudice to the corporation and its shareholders. The doctrine of laches provides an appropriate basis for determining whether there has been an unreasonable delay in commencing an action, and that doctrine should be applicable to an action pursuant to this section. If an adopting state would not otherwise apply the doctrine of laches to an action under this section or if there is a pre-existing statute of limitations that would be applicable, the state should consider providing in the legislative history of this section or otherwise that the doctrine of laches will apply to an action pursuant to this section and supercede any statute of limitations or, if not, consider providing that laches will apply in addition to the statute of limitations and, if necessary, that equitable tolling may apply to the statute of limitations.

An action under this section should be promptly filed. A delay in resolving disputes concerning corporate governance can result in prejudice to the corporation and its shareholders. The doctrine of laches provides an appropriate basis for determining whether there has been an unreasonable delay in commencing an action, and that doctrine should normally be applicable to an action pursuant to this section.

2. The Matters or Disputes Covered

Subsection (a) specifies five types of disputes that the court will have jurisdiction to resolve. Clause (3) relates to disputes concerning the result or validity of any shareholder votes on any matter, including election of directors, a merger, dissolution, amendment to the articles of incorporation, or any other matter on which a shareholder vote is required or held. A shareholder vote would be taken at a meeting or by written consent. Clause (5) covers disputes concerning the right to nominate or be nominated for election or appointment as a director, which includes whether an individual meets any applicable qualifications to be nominated or serve as a director. The clause also extends to disputes concerning rights under a bylaw adopted pursuant to section 2.06(c) to have a nominee appear on the corporation's proxy or to be reimbursed for expenses incurred in a proxy contest or any comparable rights under any provision of the articles of incorporation, contracts, or applicable law.

The ability to resolve disputes under section 7.29A over who shall serve as officers or directors of the corporation is not intended to reach disputes relating to contracts to be employed

as an officer, such as a claim for money damages for breach of an employment contract, because resolution of such contractual disputes generally will not affect who is entitled to serve as an officer. As provided in sections 8.43 and 8.44, the board of directors has the power to remove an officer regardless of the existence of a contract of employment, and the removal of an officer with such a contract is without prejudice to any existing contract rights.

3. *Person Who May Initiate a Proceeding*

Subsection (b) specifies the persons who may initiate a proceeding under this section. The corporation whose affairs are at issue or a shareholder of such corporation has standing to seek resolution of any of the disputes covered by the section. The standing of others is limited to disputes in which that person's rights are directly at issue. Under clause (2) of subsection (b), a shareholder need not hold shares of record to have standing to bring an action under this section. A shareholder for purposes of this section includes (1) the person in whose name shares are registered in the records of the corporation, (2) a beneficial owner of shares named in a nominee certificate under section 7.23, and (3) a beneficial owner, even in the absence of a nominee certificate, whose shares are held in a voting trust or held by a nominee on the beneficial owner's behalf. This provision is consistent with section 7.40, which allows beneficial owners to initiate derivative actions. It is not necessary that the shareholder own voting shares in order to have standing to bring an action.

Directors or officers of the corporation, or an individual claiming the right to be a director or officer of the corporation, also may initiate a proceeding under this section, but only with respect to a claim to resolve his or her right to such office or, in the case of directors, his or her right to membership on a committee of the board. Except in his or her capacity as a shareholder, if applicable, a director, officer, or an individual claiming the right to be a director or officer does not have standing to bring an action seeking the resolution of a contest over the right of some

other director or officer to serve, the right of some other individual claiming some other office, or the result or validity of any shareholder vote unrelated to the individual's own election. Those claims must be brought, if at all, by a shareholder, the corporation, or, respectively, the director or officer in question or the individual claiming to be a director or officer. The fact that a director's or officer's right to office is contested does not deprive the director or officer of standing to bring an action under this section.

Any person claiming a right covered by clause (5) of subsection (a) to nominate an individual, or to be nominated, for election or appointment as a director of the corporation, or to have a nominee included in the corporation's proxy or to be reimbursed for expenses in a proxy contest, may initiate a proceeding under this section. However, standing for such persons is limited to proceedings seeking to resolve such rights. Thus, for example, a person who has a disputed right to nominate someone for election will not have standing to initiate a proceeding under this section to resolve some other dispute covered by this section unless that person has standing to raise that other matter under some other provision of the section, such as where the person also is a shareholder.

4. *Necessary Defendants*

Subsection (c) specifies the persons that must be named as defendants in an action pursuant to this section. In any proceeding pursuant to this section, the corporation whose affairs are at issue must be named as a defendant in the action unless the corporation initiated the proceeding. In the absence of the corporation, the court would not be able to render effective relief.

In an action seeking the resolution of an individual's right to serve as a director, member of a board committee, or officer and in an action seeking resolution of an individual's claim to an office or membership, the individual whose right to office or membership is being contested must be named as a defendant in such action if such individual is not the plaintiff in the action. This requirement applies to any action under clauses (2) and (4) of subsection (a), and it may apply to actions under other

clauses of subsection (a) if the action seeks to resolve whether a director or officer was properly elected, appointed or removed, or properly resigned.

In the event that the corporation initiates a proceeding to resolve the result or validity of a shareholder vote, subsection (c) does not require that any particular person be named as a defendant. There is no assurance that whoever is named as the defendant will take a position adverse to the corporation. The court, therefore—pursuant to its power under clause (2) of subsection (f)—may order that some adverse party be added as a defendant to assure that the requisite adversity between parties exists and that both sides of any dispute are fairly presented. Subsection (c) does not provide a method for serving process on a shareholder who is named as a defendant in an action under this section. Consequently, any shareholder joined as a defendant either will be required to consent to the personal jurisdiction of the court or be subject to service of process pursuant to some other statute of the state or rule of the applicable court.

Subsection (g) provides that it is unnecessary to make shareholders parties except, among other circumstances, when relief is sought against the shareholder individually. The fact that a proceeding will resolve a shareholder election or vote does not mean that relief is being sought against the shareholders individually, even where the vote of particular shareholders may be the determinative factor. All of the shareholders could not possibly be named as defendants in an action under this section because the court likely will lack personal jurisdiction over all of them and such joinder would be impracticable. However, it also is not necessary to join any particular shareholder as a defendant in the action—even where the vote of that shareholder is at issue—so long as the resolution of any issues pertaining to that vote are solely for the purpose of the proceeding under this section and individual relief is not sought against the shareholder.

Nonetheless, the court has the power to order the joinder of a shareholder whose vote is at issue if the court determines the joinder is necessary for the just adjudication of the matter. If

such a shareholder is not subject to the personal jurisdiction of the court, the usual rules of the court will apply in determining whether the shareholder is an indispensable party whose absence requires the dismissal of the action. In determining whether such a shareholder is indispensable, a relevant factor for the court to consider is that any judicial determinations—such as a resolution of share ownership—are solely for the purpose of resolving the result or validity of the vote or election and will not be binding on the absent shareholder for any other purpose.

5. Service of Process on and Notice to Required Defendants

Subsection (d) provides the methods to serve process on those persons who are required to be joined as defendants under subsection (c) and, among other things, permits service upon specified individuals by service on the corporation. If service is accomplished by service on the corporation, however, notice must be provided to the defendant as required by subsection (e) and must be provided to both by the plaintiff *and* by the corporation or its registered agent. This duplicative requirement is intended to increase the likelihood that the defendant receives actual notice of the filing of the lawsuit. Under clause (1) of subsection (f), the court may require additional notice.

Subsection (e) does not specify the manner by which written notice must be delivered or communicated to the defendant. Section 1.41 contains various provisions dealing with notice and will be applicable to notice pursuant to subsection (e) of this section except to the extent subsection (e) specifies certain requirements, in which case those requirements will govern. Although section 1.41 provides that notice must be in writing unless oral notice is reasonable under the circumstances, the requirement in subsection (e) that notice be in writing will govern. Section 1.41 also provides that electronic transmission constitutes written notice and contains various other provisions concerning notice. States enacting this section should consider whether the terms of section 1.41 are compatible with the types of notice required in the state for notice to defendants in a law-

suit and should consider adding to subsection (e) any other requirements pertaining to notice deemed appropriate.

6. *Powers of the Court*

Subsection (f) lists various nonexclusive powers of the court in connection with a proceeding under this section. Other powers of the court provided by statute, rule, or applicable law may also be available in a proceeding under this section. This subsection requires that a proceeding under this section be expedited, but the degree of expedition will vary depending on the circumstances of the corporation and the nature of the dispute.

One of the powers granted to the court under Clause (6) of subsection (f) is to resolve legal or factual issues necessary to the resolution of the corporate governance dispute at issue. The resolution of the corporate governance disputes specified in subsection (a) of this section may require the court to resolve subsidiary or related questions, such as whether a shareholder who voted the shares at a meeting is the rightful owner of the shares. However, the determination of such legal or factual matters must be “necessary” for the resolution of the dispute over which the court is granted subject matter jurisdiction in subsection (a), and the resolution of such legal or factual matters is “solely for the purpose of” the proceeding pursuant to this section. Consequently, for example, the resolution of the rightful owner of shares will be controlling with respect to a determination of the result of the shareholder vote, but will not be binding upon the shareholder whose shares are at issue, unless that shareholder is properly subject to the personal jurisdiction of the court and is made a party to the proceeding. Such a shareholder need not be made a party to the proceeding in order to determine whether the shares were properly voted or counted.

The types of legal or factual issues that it may be necessary for the court to determine in order to resolve a matter specified in subsection (a) may be quite varied. The proper scope of a proceeding under this section is a case-specific inquiry not subject to precise statutory rules. Those issues may include the interpretation of the bylaws or articles of incorporation, the validity of a

share issuance, the validity of a proxy, voting rights pursuant to a contract between shareholders, the power of the beneficial owner to direct the voting of shares, the right of the record owner to vote shares without direction from the beneficial owner, the voting rights of preferred shareholders, whether notice and quorum requirements have been met, and the propriety of the inspectors' tabulation of the vote.

The issues "necessary" to resolve a matter specified in subsection (a) may turn upon the type of claim or contest made or identified by the plaintiff in the action. In applying this power, the court should be careful that a proceeding under section 7.29A is being pursued primarily to resolve a matter specified in subsection (a) and not for the purpose of using the section to obtain an adjudication of an issue that is not central to the purpose of the section. Issues not central to the purpose of section 7.29A may include claims of breaches of fiduciary duty by directors, unless central to the vote, election, appointment, or resignation at issue, claims that persons elected intend to breach their fiduciary duties in the future, and claims of mismanagement or breaches of fiduciary duty in connection with the approval of a particular transaction.

Under Clauses (1) and (2) of subsection (f), the court also has the power to order "additional and further notice" and the joinder of additional parties. The power to order additional or further notice may be used to assure that persons with a particular interest in the matter being adjudicated have notice of the proceeding and are given the opportunity to intervene. Joinder of additional parties may be used to assure adversity of the parties or to join a person who is directly affected by the resolution of subsidiary legal or factual issues under clause (6) of subsection (f).

The court also has the power to order a new election or meeting and appoint a master to conduct such meeting or election, under Clauses (3) and (4) of subsection (f). While the issues presented in a proceeding under this section may not require a new meeting or election, in some situations the court may be unable to determine the proper result without conducting a new election or meeting or the matter may be so uncertain that a new meeting

or election is the fairest means of resolving the dispute. This subsection permits the court to order such a new meeting or election without necessarily determining that the prior meeting or election was invalid. Such a new meeting or election may be held in accordance with the provisions of section 7.03(b) or otherwise. Under section 7.03(b), the court, among other matters, may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify the record date, prescribe the notice of the meeting, set the quorum and "enter other orders necessary to accomplish the purpose or purposes of the meeting." However, the court's power to control a new meeting or election is not limited to the powers specified in section 7.03(b).

Clause (5) of subsection (f) allows the court to enter temporary, preliminary, or permanent injunctive relief. The court may determine it is necessary to enter a temporary or preliminary injunction "freezing" the status quo until the proceeding can be resolved unless the parties can stipulate to how the affairs of the corporation will be conducted during this period. Such an order may enjoin action outside the ordinary course without the consent of the opposing parties or approval by the court. The rationale of such an order is that decisions outside the ordinary course ought not be made by directors, officers, or committee members whose right to office is in dispute until the dispute is resolved. Other occasions for temporary or preliminary relief may involve delaying a meeting or election until issues can be resolved in advance of the meeting, delaying the closing of a transaction subject to a shareholder vote until the result of the vote is determined, or restraining a person from exercising the powers of a director or officer until the person's claim to office can be resolved. Once the dispute is resolved, the court may need to enter permanent injunctive relief to effectuate its decision.

Clause (7) of subsection (f) allows the court to order such relief as the court determines is equitable, just, and proper. In this regard, the court may consider relief to assure that the shareholder franchise is not improperly manipulated and that the vote of the shareholders is effectuated and counted in accordance with the wishes of the owners of the shares. This provision allows the

court the discretion to order relief appropriate to the ends served by the section and the governing corporate law.

ANNOTATION

HISTORY

Model Act Derivation

1984 Act § 7.29A added by amendment, proposed 66
BUS. LAW. 963 (2011), adopted 67 BUS. LAW.
729 (2012)

Historical Background

Added to the Model Act in 2012, section 7.29A provides subject matter jurisdiction to the specified court to resolve certain corporate governance disputes, and establishes an expedited procedure for doing so. Section 7.29A does not displace or alter any preexisting remedies and is not intended to be the exclusive remedy for disputes of the type covered by the section.

STATUTES

Cal. Corp. Code § 709
Del. Code Ann. tit. 8, § 225
Kan. Stat. Ann. § 17-6515
N.J. Stat. Ann. § 14A:5-27
N.Y. Bus. Corp. Law § 619
Okla. Stat. Ann. tit. 18, § 1070
15 Pa. Cons. Stat. Ann. §§ 1791-1793
14 P.R. Laws Ann. §§ 3655, 3660