Changes in the Model Business Corporation Act—Proposed Section 2.08

By the Corporate Laws Committee, ABA Business Law Section

The Corporate Laws Committee of the ABA Business Law Section (the “Committee”) develops and from time to time proposes changes in the Model Business Corporation Act (the “Act” or “Model Act”).

The Committee has approved, on second reading, new section 2.08 of the Act, permitting the articles of incorporation or the bylaws to specify the forum or forums for litigation of internal corporate claims, and invites comments from interested persons. Comments should be addressed to Karl John Ege, Chair, Corporate Laws Committee, 1201 3rd Avenue, Suite 4900, Seattle, Washington 98101, or sent to him by e-mail at kege@perkinscoie.com. Comments should be received by May 20, 2016, in order to be considered by the Committee before adoption of section 2.08 on third reading.

Proposed section 2.08 is set forth below.

§2.08. FORUM SELECTION PROVISIONS

(a) 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 of 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.

(b) A provision of the articles of incorporation or bylaws adopted under subsection (a) 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 of this state specified in a provision adopted under subsection (a) 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.

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

(d) “Internal corporate claim” means, for the purposes of this section, (i) 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, (ii) any derivative action or proceeding brought on behalf of the corporation, (iii) any action asserting a claim arising pursuant to any provision of the Act or the corporation’s articles of incorporation or bylaws, or (iv) any action asserting a claim governed by the internal affairs doctrine that is not included in clauses (i)–(iii).

**CROSS-REFERENCES**

Articles of incorporation generally, see § 2.02.
Bylaws generally, see § 2.06.
Derivative proceedings, see ch. 7D.

**OFFICIAL COMMENT**

Section 2.08(a) authorizes a provision in either the articles of incorporation or the bylaws creating an exclusive forum or forums for the adjudication of internal corporate claims. Under section 2.08(a), the provision must specify at least one court of this state (i.e., a state court rather than a federal court). The provision may also include additional specified courts or all courts of this state or courts in this state (such as federal courts) or in one or more additional jurisdictions with a reasonable relationship to the corporation. In addition, the provision may prioritize among the specified courts. For example, the provision may specify that the claim shall be brought exclusively in a particular court of this state unless such court does not have the requisite personal and subject matter jurisdiction, in which case the claim shall be brought in other specified courts.

Under the last sentence of section 2.08(b), an internal corporate claim will always be permitted to be brought in at least one court of this state unless there is no court of this state that has the requisite personal and subject matter jurisdiction. For example, if the articles of incorporation or the bylaws provide that an internal corporate claim may only be brought in a specified court of this state and in the courts of another state with a reasonable relationship to the corporation, and the specified court of this state does not have the requisite personal and subject matter jurisdiction, then the claim can be brought in any other court of this state that does have the requisite jurisdiction or in the courts of the specified other state (so long as those courts have the requisite jurisdiction). Similarly, if the articles of incorporation or the bylaws provide that an
internal corporate claim may only be brought in a specified court of this state and in the federal courts in this state, and the specified court of this state does not have the requisite personal and subject matter jurisdiction, then the claim can be brought in any other court of this state that does have the requisite jurisdiction or in the federal courts in this state (so long as the federal court has the requisite jurisdiction). In each of the foregoing examples, (i) if the specified court of this state does have the requisite personal and subject matter jurisdiction, then such court would be the only court of this state in which the internal corporate claim could be brought, and (ii) if no court of this state has the requisite personal and subject matter jurisdiction, then the courts of the other state (in the first example) or the federal courts in this state (in the second example) would become the exclusive forum for such internal corporate claim, in each case so long as such court has the requisite jurisdiction.

If no court of this state has the requisite personal and subject matter jurisdiction, and none of the other courts, if any, specified in the provision of the articles of incorporation or the bylaws has the requisite jurisdiction, then the provision will have no effect and the internal corporate claim may be brought in any court that does have the requisite jurisdiction.