Amending the Delaware Corporate Code by Going to Court: Some Thoughts on *Sciabacucchi v. Salzberg*

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INTRODUCTION

In December 2018, the Delaware Chancery Court issued an opinion that may have vast implications for the way corporate America manages its litigation matters.[1] Under federal securities laws, any individual who purchases a security from an issuer has the right to sue for material misstatements or omissions included in various disclosures that public companies are required to make.[2] These lawsuits can be useful in holding bad management accountable. However, they can also be used by clever plaintiff's lawyers to extract payoffs from companies that have engaged in no wrongdoing, but for whom it would not be cost-effective to fight the claims.[3] In response, some companies include provisions in their corporate charters requiring any claims under the Securities Act of 1933 ("the 1933 Act") to be litigated in federal, rather than state, court.[4] Strategically, by routing such claims to a more sophisticated forum, the companies could avoid some of the inefficient consequences of the 1933 Act. Many commentators also see this as a step in the direction of corporations' ultimate goal: mandatory arbitration of all securities-law claims.[5]

A group of plaintiff stockholders challenged these so-called federal forum provisions in *Sciabacucchi v. Salzberg*.[6] In a closely watched opinion, the Delaware Chancery court invalidated federal forum provisions on the basis that they fall outside of the domain of Delaware

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[1] Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

[2] *See, e.g.*, Paul Vizcarrondo, *Liabilities Under the Federal Securities Laws*, WACHTELL, LIPTON, ROSEN & KATZ (Sept. 2014), http://www.wlrk.com/docs/OutlineofSecuritiesLawLiabilities2014.pdf.

[3] *See, e.g.*, James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 EUR. CO. & FIN. L. REV. 164 (2009) (surveying the various evidence in favor of and opposed to private enforcement of federal securities laws).

[4] *Sciabacucchi*, 2018 WL 6719718, at *1.

[5] *See, e.g.*, Alison Frankel, *A Delaware Death Blow for Mandatory Shareholder Arbitration*, REUTERS (Dec. 19, 2019), https://www.reuters.com/article/us-otc-forumselection/a-delaware-death-blow-for-mandatory-shareholder-arbitration-idUSKCN1OI2HB [https://perma.cc/TMZ8-3WTW].

[6] 2018 WL 6719718 at *1.

law, which, in the court's view, is circumscribed by the so-called "internal affairs doctrine."[7]

This Article argues that the *Sciabacucchi* opinion is flawed because it treats choice of law provisions and form contracts differently without justification. The court uses the internal affairs doctrine—the choice of law rule in question—as a means of determining what the corporation and stockholders are allowed to contract for, instead of its intended use: a means of determining what law applies to whatever the parties did, in fact, contract for. In determining the validity of the corporate contract, the *Sciabacucchi* court simply asks the wrong question. Under contract law, the corporate contract, like other take-it-or-leave-it contracts, is only valid to the extent that the counterparty who did not participate in the drafting (in this case, the stockholders) would not be surprised by the contents of the contract.[8] The question then is whether the federal forum provision at issue falls into a plausible, even if not the best, reading of the section of the Delaware statute that establishes the contract's permissible subject matter.[9] This article argues that the statute permits the corporate contract to deal with the rights of stockholders, even if those rights or powers of stockholders are not exclusive to stockholders and do not arise exclusively under Delaware law. However, the statute does not permit the corporate contract to grant rights that have nothing to do with a stockholder's status as such. Under this reading, federal-forum provisions easily pass muster, and therefore the Delaware Supreme Court should overturn the Chancery Court's ruling.

I. BACKGROUND

Before laying out my critique of the case, I will first provide some background. The defendants in *Sciabacucchi*—the companies Blue Apron, Stitch Fix, and Roku—were stand-ins for various corporations in different industries that all have one thing in common: at the IPO stage, their charters each included federal-forum provisions requiring any claim under the 1933 Act to be filed in federal court.[10] While the federal regime acknowledges that both state and federal courts have concurrent jurisdiction with respect to such 1933 Act claims,[11] forum provisions bar plaintiff stockholders from choosing state court as a forum.

In his opinion for the Delaware Chancery Court, Vice Chancellor Laster held that the federal forum provision at issue in the case was invalid under Delaware law because it dealt with a matter that fell outside of the

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[7] *Id.*
[8] *See* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002).
[9] DEL. CODE ANN. tit. 8, §§ 102 (b)(1), 109(b) (West 2015).
[10] *Id*.
[11] *See* Cyan, Inc. v. Beaver Cty. Empls. Ret. Fund, 138 S. Ct. 1061, 1063 (2018).

corporation's internal affairs—the litigation of federal securities law claims.[12] A foundational principle of corporate law, the internal affairs doctrine functions as a choice of law rule for determining which state's law applies in cases involving corporations.[13] However, in *Sciabacucchi*, the question at issue wasn't a choice of law question. The court wasn't being asked to determine whether the federal forum provision should be interpreted under Delaware or some other state's law. Rather, the question was whether the contract was valid. Were the parties were permitted under Delaware law to even enter into that sort of contract in the first place?

Nevertheless, largely because of precedent that I argue is also problematic, Vice Chancellor Laster thought that the internal affairs doctrine helped resolve that contract validity question. He primarily relied on *Boilermakers Local 154 Retirement Fund v. Chevron,*[14] where then-Chancellor Strine upheld the validity of a different type of forum selection bylaw providing that litigation relating to the corporation's internal affairs must be conducted in Delaware.[15] As Chancellor Strine noted in that case, the Delaware General Corporation Law ("DGCL") establishes what can be included in the certificate and bylaws.[16] According to Section 109(b) of the DGCL, "[t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[17] Chancellor Strine read this provision to mean that the bylaws can regulate the rights or power of stockholders but only to the extent that these rights and powers pertain to the internal affairs of the corporation.[18]

Thus, it was in reliance on Chancellor Strine's interpretive move in *Boilermakers* that caused Vice Chancellor Laster to take the same approach in *Sciabacucchi*. He used the internal affairs doctrine to interpret the statutory language setting forth the boundaries of the corporate contract. Of course, that interpretive move alone doesn't account for the ultimate outcome in *Sciabacucchi*. After all, the term "internal affairs" isn't self-defining. In other words, it's not at all clear why that term is any more narrow or broad than the statutory language itself. Nor did

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[12] Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 at *1 (Del. Ch. Dec. 19, 2018).
[13] Apparently, the doctrine developed at a time when commerce was more localized and corporations had little choice but to incorporate in their home state. *See, e.g.*, Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 44–45 (2006). Thus, the doctrine served as a way of preserving a state's territorial sovereignty over its corporate entities. *See id*.
[14] Boilermakers Local 154 Ret. Fund v. Chevron, 73 A.3d 934, 937–39 (Del. Ch. 2013) [hereinafter *Boilermakers*].
[15] *See id*. at 941.
[16] *See id*. at 952.
[17] DEL. CODE ANN. tit. 8, § 109(b) (West 2015).
[18] *Boilermakers*, 73 A.3d at 952.

Chancellor Strine answer that question definitively in *Boilermakers*. However, he did provide examples of what he thought was included within the internal affairs category and what wasn't. For example, the forum selection bylaw at issue in *Boilermakers* itself fell within that category because, by its own terms, it only applied to claims pertaining to internal affairs.[19] By contrast, in Chancellor Strine's view, a bylaw that purported to bind a plaintiff who sought to bring a personal injury claim against the company would not be part of the corporation's internal affairs, even if the plaintiff was a stockholder.[20] The same would be true of a bylaw that purported to authorize a contract claim brought by a stockholder based on a commercial contract that the stockholder happened to have with the corporation.[21]

For Vice Chancellor Laster, the implication of *Boilermakers* was clear: the federal-forum provisions are invalid.[22] Like Strine in *Boilermakers*, Laster used the internal affairs doctrine as a lens through which to read the statutory provision, Section 102(b)(1), which pertains to the scope of the charter (but is functionally equivalent to its bylaw counterpart at issue in *Boilermakers*).[23] And for Vice Chancellor Laster, the federal forum provisions relate to the external, not internal, affairs of the corporation.[24] He observed that "[a] claim under the 1933 Act does not turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation."[25] Vice Chancellor Laster viewed a 1933 Act claim as indistinguishable from the tort or contract claims that Chancellor Strine in *Boilermakers* had deemed "external" to the affairs of the corporation.[26] Furthermore, he viewed this result as flowing not just from the *Boilermakers* precedent, but from the "first principles" of Delaware corporate law itself.[27] He explained that the corporate contract is unlike an ordinary contract in part because "[t]he State of Delaware is an ever-present party to the resulting corporate contract . . . ."[28] And the State of Delaware only has an interest in regulating the internal affairs of corporations.[29]

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[19] *See id*. at 939.
[20] *See id*. at 952.
[21] *See id*.
[22] *See* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *1 (Del. Ch. Dec. 19, 2018).
[23] *See id*. at *15.
[24] *See id*. at *16.
[25] *See id*. at *1.
[26] *See id*. at *16.
[27] *See id*. at *18–23.
[28] *See id*. at *2.
[29] *See id*. at *20.

II. ANALYSIS

The *Sciabacucchi* decision has two problems: First, it reinforces the mistake made in *Boilermakers* that one can infer from a choice of law rule the scope of a contract to which that rule applies. That is simply not the case, and any resulting inference is invalid. Second, *Sciabacucchi* asks the wrong question. It asks what the court thinks the statutory language means, when it should be asking whether a reasonable stockholder would be surprised by, or find it unexpected to encounter, the federal-forum provisions in the corporate contract. In asking the wrong question, it interprets the statutory language in an overly narrow way. Asking the correct question results in a broader interpretation.

The first problem with *Sciabacucchi* is one that it inherits from *Boilermakers*. Both opinions use the internal affairs doctrine to narrow the plain meaning of the statutory language. The statutory language at issue in *Sciabacucchi* permits the certificate of incorporation to include "any provision creating, defining, limiting and regulating the powers of . . . the stockholders."[30] Based on its examples of contractual provisions that are external to the affairs of the corporation, it is clear that the *Sciabacucchi* court reads this statutory language as limited to "the rights and powers of . . . the stockholder" *that are exclusive to stockholders and that arise exclusively under Delaware law*.[31] Yet, this is clearly not what the text says. Instead of relying on the plain meaning of the statute, the court read it in light of the internal affairs doctrine. To be sure, this move requires one to believe that the term "internal affairs" has some self-evident meaning. But does it? Can one really say that a claim brought by shareholders against corporate directors and officers for breaching their fiduciary duties under the common law—an "internal" claim under any definition—is in some Platonic sense somehow more internal to the corporation than essentially the same claim but brought under the 1933 Act?[32] I tend to think not.

Even if one thought that the term "internal affairs" has some self-evident meaning, using that expression to interpret the meaning of the statutory language is eccentric at best. The internal affairs doctrine is, at its

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[30] DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2015).

[31] *See Sciabacucchi*, 2018 WL 6719718, at *16–17 (citing Boilermakers Local 154 Ret. Fund v. Chevron, 73 A.3d 934, 952 (Del. Ch. 2013)).

[32] Professor Grundfest makes this point in his useful work on *Sciabacucchi*. *See* Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi (Stan. U. Rock Ctr. for Corp. Gov., Paper No. 241, 2019), https://poseidon01.ssrn.com/delivery.php?ID=300072021025000070097092104118120113025005005004070018073118113117026085108022111109117103025024123046008106068100011009012127017060093009000095109087015013107009022017093095121093021091101088031006018117076095103003084107100090102117025105071117083101&EXT=pdf.

root, a choice of law doctrine. It has little to say about the scope of the corporate contract. For example, what should one infer about a contract with a choice of law rule providing that all employment matters in the contract should be interpreted under Colorado law? Does it tell us anything about the scope of matters addressed in the contract? Not really. The contract could deal solely with employment matters or it could deal with other matters entirely. The mere fact that there is a rule that says anything related to X in the contract is to be interpreted under State A's laws doesn't reveal anything about the scope of the contract. Rather, one must look at the contract itself (or a description of the contract). Under Delaware law, that description is contained in the statute, not in the internal affairs doctrine.

Of course, Delaware courts are surely aware of the meaning and function of choice of law rules, which just raises the question: why did the *Boilermakers* and *Sciabacucchi* courts both treat the internal affairs doctrine in a way so foreign to other choice of law clauses? The answer is that they assume that the corporate contract cannot include any matter that wouldn't be interpreted under Delaware law. If this assumption is true, it would make sense to read the statute in light of the internal affairs doctrine. But to my knowledge, there is nothing in Delaware law that requires this assumption. There is no reason why the Delaware legislature couldn't allow corporations and stockholders to contract for items that, pursuant to applicable choice of law rules, would be interpreted by the law of some state other than Delaware. Thus, there is no reason to read the statute in light of the internal affairs doctrine.

The second problem with *Sciabacucchi* is that it asks the wrong question. It asks whether the federal-forum provision falls within the *best* reading of the statute, whereas it should ask whether it falls within a *plausible* reading of the statute. This reasoning has to do with the nature of a corporate contract. As the *Sciabacucchi* court observes, the corporate contract is different from a typical contract. But it is different not because of the state's important role in creating the background default rules and acting as an "ever-present party" to the contract.[33] After all, the state is always an ever-present party to a contract, establishing background default rules either through the common law process of ad hoc adjudication, or a code-based approach under the Uniform Commercial Code. Rather, the corporate contract is unusual because of how one of the contracting parties—the stockholders—manifests its assent to that contract. The corporate contract is not a typical arm's-length negotiated contract. The terms are initially adopted unilaterally by the directors, officers, lawyers,

[33] *See Sciabacucchi*, 2018 WL 6719718, at *2.

and other members of the deal team that take the company public.[34] The vast majority of stockholders will never look at the terms that they are purporting to assent to. Nor can they easily change them, because free-rider problems will prevent them from amending the bylaws,[35] and amendments to the charter typically require board approval.[36]

Given the unusual nature of the corporate contract, it is tempting to think that it's really not a contract at all. After all, it appears to lack the key contractual ingredient of mutual assent. However, this is incorrect, and I think the *Sciabacucchi* court would agree,[37] even if they don't exactly explain why. That reason, however, is crucial for correctly formulating the question at issue in the case. The reason why the corporate contract is enforceable is the same reason other take-it-or-leave-it contracts are enforceable. Even if stockholders don't read the terms, by purchasing shares in the corporation, they register consent—specifically, they are consenting to be legally bound by the corporate contract.[38] Of course, this doesn't mean there aren't any limits on the enforcement of such contracts. After all, the contract might contain certain provisions that are so unexpected that no reasonable person would consent to be bound by them.[39] This means stockholders are effectively consenting to all terms they could reasonably expect to find in the contract.[40] Thus, in determining whether a given provision of the corporate contract is valid, the question is straightforward (at least in theory if not practice): Would a majority of stockholders reasonably expect to discover that the corporate contract contains the provision at issue?

The difference between the *Sciabacucchi* court's "best-reading" approach and the "reasonable-stockholder" approach I'm urging here might seem inconsequential on its face. But I don't think it is. The "reasonable-stockholder" approach results in a more liberal reading of the statute, capturing a broader sweep of provisions in the corporate contract than the *Sciabacucchi* court's approach. The *Sciabacucchi* court is focused on discovering the best, or most plausible, reading of the statute. By contrast, with its emphasis on surprise, the "reasonable-stockholder" approach captures not just the best reading of the statute but other

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[34] *See, e.g.*, Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 377–82 (2018) (discussing the contractual nature of corporate bylaws).
[35] Under Section 109(a) of the DGCL, the stockholders have the power to amend bylaws. *See* DEL. CODE ANN. tit. 8, § 109(a) (West 2015).
[36] Under Section 242(b) of the DGCL, the stockholders amend the charter by voting on a resolution adopted by the board. *See* DEL. CODE ANN. tit. 8, § 242(b) (West 2015).
[37] *See Sciabacucchi*, 2018 WL 6719718, at *42 (noting that the corporate contract is enforceable just like an ordinary contract).
[38] *See, e.g.*, Barnett, *supra* note 8.
[39] *See id*. at 634–36.
[40] *See id*. at 637.

plausible readings as well. After all, one presumably wouldn't be surprised by a given reading, even though it might not be the most plausible.

Applying this approach to the facts of *Sciabacucchi*, the federal-forum provisions are clearly permissible. In my view, a plausible reading of the statute is that it permits the corporate contract to include any provision relating to the rights or powers of its stockholders, even if those rights or powers of stockholders are not exclusive to stockholders and do not arise exclusively under Delaware law.[41]

Not only is this a plausible reading of the statute, but it is probably the best reading. After all, the statute permits the corporate contract simply to include "any provision . . . relating to . . . the rights or powers of its stockholders."[42] That provision contains no language that would in any way limit the type of law under which such rights or powers must arise. Nor does it contain language suggesting that such rights and powers must belong to stockholders and no one else. Nevertheless, framing the question correctly, deciding the case does not require adopting the best reading of the statute. It only requires adopting a plausible one, and surely this is a plausible reading: the statutes pertain to rights and powers that, although arising under federal law, are properly asserted under the 1933 Act by stockholders, even though they are shared with other securityholders as well.

III. POTENTIAL OBJECTIONS

There are two principal objections that one might raise in response to this argument. The first casts doubt on whether my formulation of the proper question in the case is correct. The second casts doubt on the answer I've suggested to that question in light of the Delaware Legislature's post-*Boilermakers* legislative activity.

First, as I have explained, the relevant question in a case like *Sciabacucchi* is whether the terms of the corporate contract deal with the rights of stockholders period, regardless of (1) whether those rights arise

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[41] Notice what this reading of the statute excludes from the corporate contract. It excludes terms dealing with rights and powers that are irrelevant to the status of the stockholders as such. For example, it would exclude a forum selection clause dealing with tort claims, even though they might be brought by stockholders, if such claims have nothing to do with the tort claimant's status as stockholder. It would similarly exclude a forum selection clause pertaining to a claim for the breach of a supply contract claim, even though the supplier happens also to be a stockholder. In other words, this reading of the statute is entirely consistent with Chancellor Strine's examples in *Boilermakers* of provisions that fall outside of the corporate contract. *See Boilermakers*, 73 A.3d 934, 952 (Del. Ch. 2013).

[42] DEL. CODE ANN. tit. 8, § 109(b) (West 2015) (bylaws); DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2015) (charter). Despite some minor differences, the courts have concluded that these two provisions are essentially identical. *See, e.g.*, *Sciabacucchi*, 2018 WL 6719718, at *1.

from Delaware, or some other jurisdiction's, law, and (2) whether those rights are exclusive to stockholders or can be exercised by other stakeholders as well. In my view, this is the best reading of the statute, but it only has to be a plausible one under the reasonable-person approach to interpreting the statute. But is it really plausible? Plausibility here is measured by whether a reasonable person would be surprised by what is included in the corporate contract in light of what the statute says. Yet, one could presumably imagine a term that pertains to the rights of stockholders and therefore falls within what I consider be a plausible definition of the statute, but that nevertheless is formulated in a way as to be completely unexpected or surprising from the stockholder's point of view, and thus unlikely to earn the consent of a reasonable stockholder under this analysis. For example, a charter-based forum selection clause with respect to litigation between the stockholder and the corporation might not be unexpected as a general matter because it pertains to the rights of stockholders and therefore falls within the plausible reading of the statute set forth above. But if the designated forum is some far-off locale like Uzbekistan, then that term, although generally the type that a majority of reasonable stockholder might consent to, is nevertheless surprising or unexpected in its formulation.

I concede that there might be situations like this. However, I think that they will be fairly few and far between, because market forces are likely to discipline management who decide to include such provisions in the corporate contract. And where such a situation does arise, notwithstanding the disciplinary effect of market forces, it would be the role of the courts to review any allegedly offending provisions for reasonableness. Nor would such a judicial role be anything new.[43]

However, to be clear, I don't think that *Sciabacucchi* is that type of case. In other words, the plaintiffs in *Sciabacucchi* did not think a forum selection clause pertaining to federal-securities claims is permissible in general, and they were not simply objecting to a particular formulation of the provision. Rather, they argued that it is categorically impermissible, and the *Sciabacucchi* court agreed.[44] Thus, while the objection laid out above—that is to say, the objection regarding provisions of the corporate contract that might fall within the plausible definition of the statute, but are nevertheless surprising or unexpected from the shareholder perspective and therefore invalid—might be relevant to (some) future cases, it isn't

[43] *See, e.g.*, Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (reviewing the fairness of the contract's terms before deeming it valid).

[44] This observation follows from the fact that the court is analyzing the provision's validity in light of what is permissible under the statute. *See Sciabacucchi*, 2018 WL 6719718, at *1. To be sure, the court also considers "first principles," and suggests that such considerations would lead to the same result independent of the statutory analysis. *Id.* at *2. However, that "first principles" analysis has nothing to do with the fairness of the provisions in question. *See id*. at *18–23.

relevant to this one. And even if it were relevant, I don't see how anyone could argue that, given the ongoing policy debate about the cost-effectiveness of federal securities litigation, it is per se unreasonable for a corporation to channel such litigation to a federal forum for cost-effectiveness.[45]

Second, one might argue that the Delaware Legislature's post-*Boilermakers* activity casts doubt on my argument that the statute reaches any provision of the corporate contract dealing with stockholder rights, period. Following *Boilermakers*, in 2015, the Delaware legislature did two things. First, it adopted Section 115 of the DGCL, which (1) provides that the certificate and the bylaws can require "internal corporate claims" to be brought in Delaware, and (2) defines "internal corporate claims" as claims based on a duty of an officer, director, or stockholder or any other claim over which Delaware has jurisdiction.[46] The *Sciabacucchi* court seized on this language in support of its holding that the corporate contract can only regulate such internal corporate claims, which wouldn't encompass federal securities law claims.[47] However, that conclusion does not follow from Section 115.

Section 115 is both a codification and a clarification of *Boilermakers*. It codifies the holding by providing that Delaware forum selection clauses limited to claims arising from the corporation's internal affairs are valid. And it clarifies the opinion by doing something that *Boilermakers* doesn't do: it defines the meaning of the term "internal affairs." However, that does not mean that the scope of the corporate contract—set forth in Sections 102(b) and 109(b)—must now be interpreted in light of Section 115's reference to internal corporate claims. As explained above, that approach just doesn't make sense in light of the role of the internal affairs doctrine as a choice of law rule. Such a move would be especially odd considering that Section 115 looks like an attempt by the Delaware legislature to limit Delaware forum selection clauses to cases where Delaware courts have a comparative advantage—those to which Delaware law applies by virtue of the internal affairs clause. It would be odd, to say the least, to conclude from this that the Delaware legislature did not want to allow companies to rely on the same logic to limit federal claims to federal forums that have a similar comparative advantage.

The second action the Delaware legislature took after *Boilermakers* was narrowing the holding of a case called *ATP Tour v. Deutscher Tennis*

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[45] *Cf. Carnival Cruise Lines*, 499 U.S. at 593–94 (holding that the forum selection provision is reasonable in light of various policy considerations—including, for example, the possibility that customers benefit from such provision in the form of reduced fares—all of which are intended to show that the provision is not obviously designed to solely benefit the cruise line).

[46] DEL. CODE ANN. tit. 8, § 115 (West 2015).

[47] *See Sciabacucchi*, 2018 WL 6719718, at *14.

Bund.[48] In *ATP*, the Delaware Supreme Court, responding to questions certified to it by a federal district court, recognized the validity of provisions in the charter or bylaws that would require stockholder-plaintiffs to pay the corporation's attorneys' fees in the event that they failed to prevail in a judgment on the merits.[49] Yet, the Delaware legislature disagreed, effectively limiting the *ATP* holding to its facts.[50]

One might point out that under the definition of the statute set forth in this article—that the statute reaches any matters pertaining to the rights of stockholders—the fee shifting provisions at issue in *ATP* would be valid. And yet, the Delaware legislature must disagree with this in light of the statutory amendments it adopted in response to *ATP*. However, this is a non sequitur. At most, the Delaware Legislature's post-*ATP* legislative activity only reflects a specific carve-out from the statute, and shouldn't be reflected back on the rest of the statute to narrow its interpretation.[51]

CONCLUSION

If the *Sciabacucchi* court is correct, and it is the policy of Delaware that the corporate contract should only pertain to "the rights and powers of . . . the stockholder" *that are exclusive to stockholders and that arise exclusively under Delaware law*, then the Delaware legislature should amend the statute accordingly.[52] If it were to do so, a reasonable stockholder would register surprise at the inclusion of federal-forum provisions in the corporate contract, and thus such provisions would be invalid. Allowing the Delaware Court of Chancery to effectively carry out this amendment itself through creative legal reasoning is a mistake. It creates bad precedent and undermines core legal principles. In this case, it muddies the waters about the nature of the internal affairs doctrine in particular and choice of law provisions more generally. And it undermines the principles that uphold the validity of form contracts. *Sciabacucchi* is a

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[48] 91 A.3d 554 (Del. 2014).

[49] *See id*. The *Sciabacucchi* court characterized the *ATP* holding as validating fee-shifting provisions, but only to the extent they relate to intracorporate litigation. *Sciabacucchi*, 2018 WL 6719718, at *13. This is not an unreasonable reading of the case, as the relevant certified question had pertained to general litigation, and the Delaware Supreme Court's response only acknowledged "intra-corporate litigation." *See ATP Tour*, 91 A.3d, at 557–58. However, the Delaware Supreme Court never defined the meaning of that term. To be sure, it would seem that some of the claims in the case—dealing for example with antitrust violations, tortious interference and conversion—would not count as "intra-corporate." But what about for federal securities law claims? The *Sciabacucchi* court concluded that such claims are not "intra-corporate" under *ATP*, as if such a term is self-defining. *Sciabacucchi*, 2018 WL 6719718, at *11. It simply is not.

[50] *See* DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (West 2015).

[51] After all, the Delaware Supreme Court had upheld the validity of the fee-shifting bylaws as consistent with the statute. *See ATP Tour*, 91 A.3d, at 560.

[52] *Sciabacucchi*, 2018 WL 6719718, at *16 (citing *Boilermakers*, 73 A.3d 934, 952 (Del. Ch. 2013)).

highly consequential decision, affecting the ability of corporations to decide their own fate with respect to potentially costly litigation. The *Sciabacucchi* court might be right as a policy matter, but its legal analysis is lacking. Despite the Delaware courts' ingenuity, competence, and expertise in matters of corporate law, sometimes the right answer is to simply let the legislature act. *Sciabacucchi* presents such a case.