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'Salzberg' Opens Door to Creativity in the 'Outer Band' of 'Intra-Corporate Affairs'

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In *Salzberg v. Sciabacucchi*, No. 346, 2019, at *3 (Del. Mar. 18, 2020), the Delaware Supreme Court, in an opinion authored by Justice Karen Valihura, upheld the facial validity of federal-forum provisions (FFPs)—charter provisions adopted by Delaware corporations requiring actions arising under the Securities Act of 1933 (the 1933 Act) to be filed exclusively in federal court. Emphasizing its "broadly enabling" scope, the court held Section 102(b)(1) of the Delaware General Corporation Law (DGCL) authorizes Delaware corporations to adopt charter provisions regulating activity within an "outer band" of "intra-corporate affairs" existing beyond the "internal corporate claims" addressed by Sections 102(f) and 115. This holding leaves the door open to Delaware corporations adopting additional charter provisions regulating such intra-corporate claims.

The basic principles underlying the Supreme Court's holding in *Salzberg* were developed in several recent high-profile Delaware decisions and statutory enactments, including *Boilermakers Local 154 Retirement Fund v. Chevron*, 73 A.3d 934 (Del. Ch. 2013), *ATP Tour v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), and DGCL Section 115, each of which addressed bylaws adopted to regulate disputes involving Delaware corporations. In *Boilermakers*, the Delaware Court of Chancery confirmed that DGCL Section 109(b) *authorizes* Delaware corporations to adopt bylaws designating the proper forum for claims relating to "internal corporate governance," and distinguished as *unauthorized* by DGCL Section 109(b) bylaws that purport to regulate "external matters," such as "a tort claim against the company based on a personal injury … or a contract claim based on a commercial contract with the corporation." This internal/external framework was implicitly affirmed by the Delaware Supreme Court in *ATP Tour*, where the court held that fee-shifting bylaws adopted by a non-stock corporation formed under Delaware law were facially valid under both DGCL Sections 109(b) & 102(b)(1) because they allocate "risk among parties in intra-corporate litigation." Finally, in 2015, Delaware codified, at DGCL Section 115, *Boilermakers*' definition of "internal corporate claims," and in the same provision limited Delaware corporations' authority to adopt charter and bylaw provisions preventing stockholders from pursuing such claims in Delaware's courts.

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When *Sciabacucchi v. Salzberg* was decided by the Court of Chancery in December 2018, Vice Chancellor J. Travis Laster relied on these principles to hold that FFPs regulating the forum for 1933 Act claims were facially invalid because such claims were "external" to the corporation, like tort or contract claims. In the vice chancellor's view, charter provisions regulating external claims were "invalid and ineffective" because Delaware's General Assembly implicitly narrowed Section 102(b)(1) by codifying the definition of "internal corporate claims" in Section 115.

On de novo review, however, the Supreme Court reversed. Although it ap-

peared to take no issue with the Court of Chancery's conclusion that FFPs could not validly govern "external" claims, *Salzberg*, No. 346, 2019, at *29-*30, the Supreme Court held that FFPs are facially valid under "either of the[] broad categories [of Section 102(b)(1)]," which permits any charter provision regulating "the management of the business" or "the conduct of [its] affairs," or "creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders." Thus, the court concluded Section 102(b)(1) authorizes charter provisions regulating a third category of "intra-corporate" claims that, like certain 1933 Act claims, "are neither 'external' nor 'internal affairs' claims." Instead, these "intra-corporate" claims exist in an "outer band" of matters that are beyond "the more traditional realm of 'internal affairs,'" and thus are not restricted by the statutory limitations of Section 115, but that are still not "external" to the corporation and remain within the broad reach of matters that charters may properly regulate under Section 102(b)(1).

The Supreme Court's holding raises the potential for several developments of interest.

The FFPs upheld in *Salzberg* as facially valid specified that "the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933." The same rationale underlying the facial validity of an FFP designating all federal district courts likely supports the facial validity of an FFP designating a single federal court: "If a forum-selection provision purports to govern intra-corporate litigation of claims that do not fall within the definition of 'internal corporate claims,' … such provision is authorized under [Section 102(b)(1)] and is facially valid." Indeed, the Court of Chancery upheld bylaws designating an exclusive forum in *Boilermakers*.

Similarly, as we anticipated one year ago, the outcome of *Salzberg* "has interesting potential ramifications for Delaware corporations seeking to benefit from arbitration provisions in corporate charters and bylaws." Hallowell & Mixon, "Will 'Salzberg' Curtail Arbitration Provisions in Corporate Charters and Bylaws?," Delaware Business Court Insider (Feb. 13, 2019). In *Salzberg*, the Supreme Court addressed "concern that if [FFPs were] upheld, the 'next move' might be forum provisions that require arbitration of internal corporate claims" by noting such provisions "would violate Section 115 which provides that, 'no provision of the certificate of incorporation or the bylaws may prohibit bringing such [internal corporate] claims in the courts of this state.'" Notably, however, this footnote sheds no light on the facial validity of a charter provision requiring arbitration of "intra-corporate litigation" beyond the realm of internal corporate claims. ("Section 115, read fairly, does not address the propriety of forum-selection provisions applicable to other types of claims.").

Further, *Salzberg* suggests Section 102(f)'s prohibition against attorney fee-shifting provisions also may not apply to charter provisions regulating intra-corporate litigation. Section 102(f)'s prohibition applies to "internal corporate claim[s]" as defined by Section 115. In light of the Supreme Court's recognition of "intra-corporate" claims that fall *outside* the reach of Section 115 but *within* the scope of 102(b)(1), Section 102(f) may be viewed as having not entirely covered the field in its reach. Indeed, the Supreme Court appears to have acknowledged this possibility, albeit implicitly. ("The language in Section 102(f) implies that Section 102(b)(1) can address claims other than 'internal corporate claims.'").

As was the case when Vice Chancellor Laster issued his decision in December 2018, "the true impact of *Salzberg* will be determined by other courts and regulators that grapple with and expand upon its reasoning." Hallowell & Mixon. Even before that happens, however, the Delaware General Assembly may opt to weigh in on such developments, as it did in 2015 when it adopted Section 102(f) and Section 115 in response to the Delaware Supreme Court's authorization of fee-shifting bylaws in *ATP Tour*. ("If our General Assembly wishes to narrow the scope of Section 102(b)(1) to be aligned perfectly with the boundaries of the internal affairs doctrine, it could do so."). For the moment though, a pathway to creative charter provisions addressing at least some commonplace corporate litigation may well have been opened.

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