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## Recasting a Boilerplate Provision: Exclusive Forum Provisions for Private Delaware LLCs After a Decade of Public Corporate Developments

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It was dicta that launched a thousand provisions. In a 2010 decision adjudicating the leadership structure of counsel representing the plaintiff stockholder class challenging a controller stockholder merger, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery proposed that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then [Delaware] corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”<sup>1</sup> And respond they did. Facing ubiquitous, multi-forum deal litigation, public Delaware corporations began adopting so-called exclusive forum provisions to require various types of “intra-entity disputes”—typically claims that directors breached their fiduciary duties in approving a sale transaction, often made in the wake of its announcement—be brought exclusively in Delaware courts.

Over the ensuing decade-plus since Vice Chancellor Laster’s dicta, the arms race between stockholder plaintiffs and corporate defendants has shaped these provisions into a customary boilerplate form that now encompasses certain U.S. securities law claims. A typical such provision reads as follows:

Unless the Company consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) (A) any derivative action or proceeding brought on behalf of the Company, (B) any action asserting a claim of breach of fiduciary duty owed by any director or officer or other employee of the Company to the Company or the Company’s stockholders, (C) any action asserting a claim against the Company or any director or officer or other employee of the Company arising pursuant to any provision of the Delaware General Corporation Law or the Certificate of Incorporation or these By-Laws (in each case, as they may be amended from time to time), or (D) any action asserting a

<sup>1</sup> *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960-61, n.8 (Del. Ch. 2010) (hereinafter, “*Revlon*”).

claim against the Company or any director or officer or other employee of the Company governed by the internal affairs doctrine shall be the Delaware Court of Chancery (or if the Delaware Court of Chancery does not have subject matter jurisdiction, a state court located within the State of Delaware or, if no state court located within the State of Delaware has subject matter jurisdiction, the federal district court for the District of Delaware) and (ii) any complaint asserting a cause of action arising under the Securities Act of 1933 shall be the federal district courts of the United States of America. Any person or entity that acquires any interest in shares of capital stock of the Company will be deemed to have notice of and to have consented to these provisions.

Though public Delaware corporations, which confront a significant risk of multi-forum deal litigation from a geographically dispersed stockholder base, understandably have been a primary focus in this ongoing legal drama about the validity and scope of exclusive forum selection clauses in governing documents, Delaware limited liability companies (“LLCs”) have played no small role. Indeed, LLCs delivered the prologue. The first Delaware case upholding an exclusive forum provision in an LLC agreement, *Elf Atochem North America, Inc. v. Jaffari*,<sup>2</sup> pre-dates its corporate analog by almost 15 years.<sup>3</sup> In upholding such provision, *Elf Atochem* expressly recognized the foundational Delaware policy for LLCs codified by Section 18-1101(b) of the Delaware Limited

Liability Company Act (the “DLLCA”) “to give . . . maximum effect to the . . . freedom of contract and to the enforceability of limited liability company agreements.”

Several of the relatively few existing public Delaware LLCs have forum selection clauses similar to those of their corporate brethren, or else include more bespoke forum arrangements specific to a particular ownership structure or commercial arrangement.<sup>4</sup> However, not being buffeted by multi-forum deal litigation like public entities, private multi-member Delaware LLC often provide for a different exclusive forum provision, one that might typically read as follows:

The parties hereby agree that any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this LLC Agreement or the transactions contemplated hereby, whether in contract, tort or otherwise, shall be exclusively brought in the United States District Court for the District of Delaware or in the Court of Chancery of the State of Delaware (or, if such court lacks subject matter jurisdiction, in the Superior Court of the State of Delaware), so long as one of such courts shall have subject-matter jurisdiction over such suit, action or proceeding, and that any cause of action arising out of this LLC Agreement shall be deemed to have arisen from a transaction of business in the State of Delaware. Each of the parties hereby irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in

<sup>2</sup> 727 A.2d 286 (Del. 1999).

<sup>3</sup> *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.2d 934 (Del. Ch. 2013).

<sup>4</sup> See, e.g., Peter Molk & Verity Winship, *LLCs and the Private Ordering of Dispute Resolution*, 41 J. Corp. L. 795, 796, 799 (2016) (observing just a “mere handful” of public LLCs out of over 2,000,000 LLCs in the United States).

any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding that is brought in any such court has been brought in an inconvenient form.

Form follows function. The two examples above are the products of differing ownership structures and legal risks. Whereas the corporate provision seeks to bind a diffuse body of stockholders but only to the extent they bring a covered claim, the LLC provision seeks to bind only the parties to the LLC agreement (usually the LLC members) but as to nearly all claims that might arise among them relating to the operating agreement.

Nevertheless, the evolution of exclusive forum provisions in the public corporation context can serve as a model to parties entering into private LLC operating agreements, who may confront different but in some ways similar legal risks. Private LLCs should evaluate whether their forum selection provisions sufficiently mitigate the risk of multi-forum litigation, focusing on (i) what parties or claimants may be bound by such provisions and (ii) what claims may be covered by such provisions. With that in mind, we offer a revised form of the typical private Delaware LLC exclusive forum provision with a view towards enhancing the ability of the LLC and its stakeholders to secure the benefits of resolving

disputes exclusively in the forum of the LLC's organization.

### **Exclusive Forum Selection Clauses in Public Corporations—A Brief History**

Forum selection clauses have been a staple of commercial contracts since the U.S. Supreme Court's 1972 decision in *The Bremen v. Zapata Off-Shore Co.*<sup>5</sup> established that such provisions were valid in freely negotiated private contracts unless (i) the clause was induced by fraud or undue influence, (ii) trial in the contractual forum would be so gravely difficult and inconvenient as to deprive a litigant of its day in court, or (iii) enforcement of the clause would contravene public policy of the forum where suit was brought.<sup>6</sup> In 1991, the U.S. Supreme Court confirmed that even a provision designating an exclusive dispute resolution forum written on the back of a cruise ticket was enforceable.<sup>7</sup> One study found that, by 2002, 53% of M&A agreements that year contained forum selection clauses,<sup>8</sup> while another found that 39.56% of material contracts publicly disclosed that same year also had forum selections clauses.<sup>9</sup> Concurrently and pursuant to federal and state statutes, courts continually affirmed the ability of parties to mandate their disputes be submitted to binding arbitration.

In stark contrast, by 2010, just 16 (or 0.18% of) publicly traded business entities had forum selection clauses in their governing documents.<sup>10</sup>

<sup>5</sup> 407 U.S. 1 (1972).

<sup>6</sup> *Id.* at 15, 18.

<sup>7</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>8</sup> Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 Vand. L. Rev 1975 (2006).

<sup>9</sup> Theodore Eisenberg & Geoffrey Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 Cardozo L. Rev. 1475 (2009).

<sup>10</sup> Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 Del. J. of Corp. L. 333, 336-37.

This quickly began to change in the wake of the *Revlon* decision and Vice Chancellor Laster's directional dicta noted above. By June 30, 2011, the number of public entities with forum selection provisions in their governing documents skyrocketed from 16 to 133.<sup>11</sup> By December 31, 2011, this had increased further to 195. By August 2014, another study reported that 746 exclusive forum clauses had been adopted by U.S. reporting companies.<sup>12</sup>

The demand for forum selection clauses was driven primarily by the massive increase in the incidence of litigation challenging public corporation deals, specifically that alleging breaches of fiduciary duties by the target company's directors (and aiding and abetting claims against the acquirer), filed in courts outside of the state of the target's incorporation. Before such "foreign" forum litigation increase, plaintiffs almost always filed such claims in the state of incorporation, perhaps under the understanding that the internal affairs doctrine required covered intra-corporate claims to be brought in the incorporating state's courts.<sup>13</sup> This status quo started to change in the early 1990s, with commentators questioning by 2002 whether Delaware was "losing its cases."<sup>14</sup> Thereafter, (i) the percentage of M&A deals challenged increased from 38.7% in 2005 to 94.2% in 2011,

and (ii) the percentage of multi-forum litigation increased from 8.6% to 47.4% during the same timeframe.<sup>15</sup>

Forum selection clauses in governing corporate documents (i.e., charters and bylaws), if enforced by forums where litigation was filed, presented a solution to the costs and uncertainty imposed by this trend. In 2013, the Delaware Court of Chancery held that the forum selection bylaws adopted by two prominent public companies that applied to stockholders who sue in their capacity as stockholders on matters governed by the internal affairs doctrine "easily" met the requirements of the Delaware General Corporation Law ("DGCL").<sup>16</sup> The decision was ultimately codified and amplified by a 2015 amendment to the DGCL at Section 115, which now provides:

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 of this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.<sup>17</sup>

Outside of Delaware, an initial decision by a federal district court in California created

<sup>11</sup> See Grundfest, *supra* note 9, at 339.

<sup>12</sup> Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* (Sept. 3, 2015).

<sup>13</sup> Verity Winship, *Shareholder Litigation by Contract*, 96 Boston Univ. L. Rev. 485, 500 (2016) (citing *Wilkins v. Thorne*, 60 Md. 253, 258 (1883) ("[A]ll such [internal management] controversies must be determined by the courts of the state by which the corporation was created.") (alterations in original)).

<sup>14</sup> See John Armour, et al., *Is Delaware Losing Its Cases?*, 9 J. Empirical Legal Stud. 605 (2012) (finding that while in 1995, more than 80% of cases involving directors of Delaware companies were heard in Delaware, by 2004 that percentage had dropped to below 50%, and in 2005 and 2008 to even below 30%).

<sup>15</sup> Winship, *supra* note 13, at 501 (citing Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011*, at 2).

<sup>16</sup> *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.2d 934 (Del. Ch. 2013).

<sup>17</sup> 8 Del. C. § 115.

uncertainty as to whether forum selection clauses in corporate governing documents of Delaware corporations would be enforced.<sup>18</sup> However, over the ensuing decade, many (but certainly not all) courts outside of Delaware have opted to dismiss litigation based on forum selection provisions and to that extent effectively validating the solution proposed in Vice Chancellor Laster’s *Revlon* dicta.<sup>19</sup> In a more recent development following the US Supreme Court’s decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*<sup>20</sup> allowing certain securities claims to be brought in state as well as federal court, some public companies amended their governing documents to require such claims be brought only in federal court. In *Sciabacucchi v. Salzberg*,<sup>21</sup> the Delaware Supreme Court upheld the facial validity of such federal-forum provisions as not violating the DGCL or federal law or policy.

Just before this *Revlon* revolution, public LLCs and other alternative entities appear to have been ahead of the corporate curve on forum clauses. According to one study, half (8 of 16) of the pre-*Revlon* public entities that had forum selection clauses in their governing documents were LLCs or limited partnership entities.<sup>22</sup> The number of such entities had increased to 22 by June 30, 2011, among a smaller total number of public LLCs and limited partnerships, so that while as of that date 1.31% of public

corporations had forum selection provisions in their governing documents, 5.12% of LLCs and limited partnerships did.<sup>23</sup> This observation is unsurprising: codes in Delaware and other states governing alternative business entities emphasized the animating policy of freedom of contract, the U.S. Supreme Court had confirmed the validity of exclusive forum selection clauses in commercial contracts, and for Delaware LLCs, the Delaware Supreme Court confirmed the validity of such provisions more than a decade earlier in *Elf Atochem*. Parties to private LLCs and limited partnerships have also taken to including exclusive forum clauses in some form in their governing agreements to resolve intra-company disputes among truly contracting parties,<sup>24</sup> though pre-*Revlon* data was not readily available for a clear before-and-after comparison.<sup>25</sup>

### **Private LLCs—Freedom of Contract and its Limited Limits**

In contrast to their corporate counterparts, exclusive forum provisions in private LLCs are set forth in what are typically negotiated LLC operating agreements among LLCs’ members, with such negotiation circumscribed by the few limits set forth in the LLCA. Corporations’ charters and bylaws are generally treated as contracts binding upon the stockholders,

18 See *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

19 See *Winship*, *supra* note 13, at 504 n. 106 (collecting cases).

20 138 S. Ct. 1061 (2018).

21 227 A.2d 102 (Del. 2020).

22 See *id.* at 352. For purposes of that study, limited partnership and limited liability partnerships were treated as equivalent business entities.

23 See *id.* at 357. “The probability that this difference is due to chance is less than one in 10<sup>9</sup>.” *Id.*

24 See DLLCA, § 18-101(9) (“‘Limited liability company agreement’ means any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members as to the affairs of a limited liability company and the conduct of its business.”).

25 See, e.g., *Molk & Winship*, *supra* note 4, at 802 (offering a 2016 study of dispute resolution clauses in private LLCs and observing the challenges in obtaining such data and noting that in a dataset of 233 LLC operating agreements, 26% included exclusive forum clauses in some form).

with differing levels of perceived stockholder “consent” depending on what particular governing document contains the provision at issue, and when and how that provision was adopted. Unlike stockholders who purchase shares of a public corporation in the open market, an LLC member (who must be admitted as such<sup>26</sup>) of a private LLC will often be agreeing by an executed contract to a proposed exclusive forum. And though the DLLCA is generally an enabling statute premised on the policy of freedom of contract, as with corporations, there are statutory limits to what exclusive forum provisions these LLC equityholders may agree. Section 18-109(d) of the DLLCA sets out the statutory limitations for an LLC exclusive forum provision and provides as follows:

In a written limited liability company agreement or other writing, a manager or member may consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction or the State of Delaware, and to be served with legal process in the manner prescribed in

such limited liability company agreement or other writing.

Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company.

As is clear under the DLLCA, the operating agreement may allow for managers or members to agree to Delaware as the exclusive forum.<sup>27</sup> Further, DLLCA Section 18-109(d) is silent on the types of claims that may be subject to an exclusive forum provision, though it does reserve Delaware as a forum for claims by non-managing members for “matters relating to the organization or internal affairs of a limited liability company.”

Against this broadly permissive statutory backdrop and the DLLCA’s and Delaware courts’ endorsement of freedom of contract, however, comes the challenge of exercising that freedom and ensuring parties get what they bargain for. In two Delaware cases, *Elf Atochem* and

<sup>26</sup> See DLLCA, § 18-301.

<sup>27</sup> At first blush, the first sentence of Section 18-109(d) might be read to imply that because LLC managers or members may consent to nonexclusive foreign (i.e., non-Delaware) jurisdiction, they may not consent to exclusive foreign jurisdiction. Delaware courts rejected that interpretation, emphasizing the statutory primacy of freedom of contract in LLC operating agreements and that the sentence is merely permissive rather than permissive and restrictive by implication. *Elf Atochem*, 727 A.2d 286 at 296. Against the backdrop of this permissive interpretation in *Elf Atochem*, the Delaware legislature amended Section 18-109(d) to add what is now the second sentence inset above, which preserves Delaware as a forum for non-managing LLC members. See *Li v. loanDepot.com, LLC*, 2019 Del. Ch. LEXIS 139, at \*4-7 (Del. Ch. Apr. 24, 2019) (explaining the evolution of DLLCA Section 18-109(d)). This act in the legal drama of exclusive forum provisions is beyond the scope of this article, which focuses on exclusive forum selection clauses selecting Delaware, which is also the state of the LLC’s organization. However, a smaller number of parties to a private LLC may have strong preferences to select a common home forum, outside of Delaware, for the resolution of disputes, and should be attentive to invalidity arguments in doing so. See, e.g., *Li*, 2019 Del. Ch. LEXIS 139, at \*7 n1 (acknowledging a policy argument in light of a party’s lack of influence over the decision to select a particular non-Delaware forum in an exclusive forum).

*Douzinias v. American Bureau of Shipping, Inc.*,<sup>28</sup> for example, the breadth of the applicable LLC forum provisions turned primarily on the parties' use of the phrase "related to." In *Elf Atochem*, the use of that phrasing subsumed claims under a separate contract under the applicable LLC agreement's arbitration clause;<sup>29</sup> in *Douzinias*, the use of similar phrasing compelled plaintiffs to arbitrate a host of claims under an LLC agreement's arbitration clause because arising from a set of facts related to the LLC manager's actions.<sup>30</sup>

Notably, an LLC operating agreement may provide for the rights and obligations of parties who are not parties to that contract. Members, managers, assignees of LLC interests and the LLC itself are bound by the operating agreement regardless of whether they execute the operating agreement.<sup>31</sup>

Further, "[a] limited liability company agreement may provide rights to any person, including a person who is not a party to the limited liability company agreement, to the extent set forth therein."<sup>32</sup> Operating agreements routinely address all manner of intra-company issues, from the methods of appointing managers and officers to the mechanics and terms for distribution of LLC profits and assets to the rights and obligations related to the day-to-day management of the LLC. The rights, powers and obligations of LLC managers, for example, often derive from their appointment pursuant to an LLC agreement,

which also may specify in some level of detail substantive rights, powers and obligations of those managers.

Litigation involving such internal LLC affairs and relationships among LLC constituents may, however, be pursued by parties who did not negotiate or execute the operating agreement. For example, members or even assignees of LLC interests may sue derivatively.<sup>33</sup> Indemnification and advancement rights, for example, are often granted to third parties, such as directors, managers, officers, employees and agents, under LLC operating agreements. Claims to vindicate such rights are a prime potential source of risk for multi-forum litigation by parties who are neither LLC members nor signatories to the operating agreement. In *Li v. loanDepot.com, LLC*, the plaintiff was an employee and non-managing LLC member who sought indemnification and advancement under an operating agreement in his capacity as an employee after the LLC dismissed an arbitration against the plaintiff. In that case, the operative provision provided mandatory indemnification and advancement to the fullest extent under Delaware law to employees and agents of the LLC, but with an exclusive forum fixed for courts in Los Angeles. The employee member nonetheless brought the advancement claim in Delaware court, arguing that under DLLCA Section 18-109(d), the DLLCA reserved a Delaware forum for the claim when brought by a member. Rejecting such interpretation on a plain reading of Section

<sup>28</sup> 888 A.2d 1146 (Del. Ch. 2006)

<sup>29</sup> *Elf Atochem*, 727 A.2d 286 at 294-95.

<sup>30</sup> *Douzinias*, 888 A.2d 1146 at 1150.

<sup>31</sup> DLLCA, § 18-101(9).

<sup>32</sup> *Id.* Perhaps in acknowledgment of the vagaries in defining who exactly may be bound by an LLC agreement, the LLC itself references members, managers and any other "person that is a party to or otherwise bound by a limited liability company agreement" in specifying construction of LLC agreements under the DLLCA. DLLCA, § 18-1101(e).

<sup>33</sup> *See* DLLCA, § 18-1001-02.

18-109(d), the court enforced the Los Angeles exclusive forum provision.

LLCs and their members and managers thus confront the specter of multi-forum litigation adjudicating key intra-company rights and obligations. To be clear, this risk for LLCs is not of the same magnitude as in the context of public corporation deals, not being driven by the forces that spurred the exponential increase in the frequency of deal litigation that, combined with other trends, gave rise to Delaware public corporations adopting exclusive forum selection provisions in their certificates and bylaws. But the risk for LLCs is not negligible. Therefore, exclusive forum selection provisions in the certificates and bylaws of public corporations may be instructive to parties drafting LLCs' governing documents and seeking to secure the benefits of resolving intra-company disputes in the organizing state's courts.

### **A Broader LLC Exclusive Forum Provision?**

Under Delaware law, courts will interpret LLCs' operating agreements applying familiar rules of contract construction and interpretation, giving clear and unambiguous language its plain and ordinary meaning, towards effectuating the parties' intent.<sup>34</sup> Parties drafting exclusive forum provisions into their private LLC agreements are likely seeking much the same thing as their corporate counterparts: the predictability of a sophisticated forum for adjudicating claims related to the operating agreement and relationships among various LLC constituencies impacted by that agreement. To better achieve this result, we suggest that parties should broaden the scope of the customary LLC exclusive forum provision noted above with a

view towards encompassing a broader set of claims and claimants, as follows (with changes against the "typical" provision from above underlined):

[Deletion of limitation to parties.] Any suit, action or proceeding (i) seeking to enforce any provision of, or based on any matter arising out of, relating to, or in connection with, this LLC Agreement, the Delaware Limited Liability Company Act, the Company or the transactions contemplated hereby, whether in contract, tort or otherwise, (ii) derivative in nature or proceeding on behalf of the Company, (iii) asserting a claim of breach of fiduciary duty owed by any Member, manager, officer or employee of the Company, or any other person or entity bound by the LLC Agreement to the Company, a Member, a manager or any other person or entity bound by the LLC Agreement, (iv) asserting a claim for a bad faith violation of the implied contractual covenant of good faith and fair dealing, or (v) asserting a claim relating to the organization or internal affairs of the Company, shall be exclusively brought in the United States District Court for the District of Delaware or in the Court of Chancery of the State of Delaware (or, if such court lacks subject matter jurisdiction, in the Superior Court of the State of Delaware), so long as one of such courts shall have subject-matter jurisdiction over such suit, action or proceeding, and that any cause of action arising out of this LLC Agreement shall be deemed to have arisen from a transaction of business in the State of Delaware. Each of the parties and any other entity

<sup>34</sup> See *Merinoff v. Empire Merchants, LLC*, \_\_\_\_ (Del. Ch. Feb. 2, 2017).



or person bound by this LLC Agreement or this Section irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding that is brought in any such court has been brought in an inconvenient form.

### **Expanding What Claims Are Covered**

As to covered claims, the customary LLC exclusive forum provision is both broader and narrower than its public entity counterpart. The typical private LLC provision is broader in that it does not purport to itemize specific claim types arising out of or in connection with the LLC agreement that would be covered by the provision; however, it is narrower in that it seemingly requires covered claims to be linked to the LLC agreement. In the proposed clauses (i) through (v) above, we suggest a hybridized approach to the provision that makes it potentially doubly broader by both expanding claims potentially covered by the exclusive forum provision via clause (i) above and, taking a cue from public corporation provisions, adding a litany of specific LLC claim types to avoid any doubt as to whether they are covered. Specifically, the new clauses (i) through (v) capture the following:

- Clause (i) - The revision adds oft-cited enabling language (“relating to”) and reference to the DLLCA and the Company itself to ensure claims relating to a pattern of facts about the LLC and

its management are covered without necessarily arising under a specific term of the LLC agreement or in connection with its formation or entry into the LLC agreement.

- Clause (ii) - The added reference to derivative actions makes clear that those are subject to the forum provision notwithstanding the fact that such actions by statute derive from the right of the LLC itself, which as noted above, is often itself not a party to the LLC agreement, and not the rights of its members or managers per se.<sup>35</sup>
- Clauses (ii) and (iii) - One of the distinguishing features of Delaware LLCs, as compared with corporations, is parties’ ability to limit or eliminate entirely liabilities for breaches of fiduciary duty owed to the LLC, its members or managers or any others bound by the LLC agreement, subject to those parties not being to limit or eliminate liabilities for bad faith violations of the implied contractual covenant of good faith and fair dealing. We suggest specifically referencing these to support enforceability of the forum provision in the event a party seeks an alternative forum by raising claims that such duties or covenant are common law creations that do not per se relate to the LLC agreement.
- Clause (iv) - We suggest specifically referencing the statutory terms for the internal affairs doctrine reflected in Section 18-109(d) of the LLCA. Though there is not an exact statutory definition for “organizational or internal affairs,” in the interest of a broader forum provision and

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<sup>35</sup> DLLCA 18-1001.

to the extent such affairs might or might not necessarily also relate to the specific terms of an LLC agreement, we would suggest including the reference.

For private LLCs, we do not suggest also specifying a forum for claims under the Securities Act. Though Securities Act liability might attach to certain private offerings arising in the private LLC context, the specific risk of multi-forum deal litigation that Securities Act coverage in the public corporation context is intended to mitigate is not likely present in most cases and might in any event be covered by the broad language of the revised clause (i).

### **Expanding What Claimants Are Covered**

The customary private LLC exclusive forum provision is framed primarily as a contractual provision between or among contracting parties. In context of forming an LLC, however, the parties bargaining for such provision might wish to support potential enforceability against entities or individuals often integral to the affairs of an LLC but often also not a direct party to the operating agreement. Whereas in the public corporate or LLC context, the provision would be primarily intended to mitigate the risk of multi-forum litigation by widely dispersed stockholders, in the private LLC context, one of the more likely goals would be making clear that the enforceability of the provision does not necessarily stop with the LLC members who are

parties to the operating agreement. To avoid being surprised by formalistic arguments by non-signatory member, manager, LLC interest holder, and employee claimants that they are not bound by a forum selection clause which by its clear and unambiguous terms is limited to “parties,” we suggest framing the provision as covering suits, actions or proceedings regardless of the party bringing them.

### **Concluding Caveats**

The suggested revisions above are intended primarily as cues for parties to reconsider what might often be a contractual boilerplate provision in a private LLC agreement. The specific revisions are subject ultimately to the needs and requirements of parties forming the LLC. Parties may, for example, opt for arbitration as the relevant dispute forum rather than any court, a choice that may be more attractive for LLCs involving cross-border investment or management. Moreover, the suggested revisions may increase the likelihood that the forum provision will be enforced, but will by no means guarantee it—any particular application of the provision will require consideration both of its plain terms, the facts and equitable considerations underlying such application and evolving case law on the extent to which, for example, non-parties might be bound by an LLC agreement or the contours of the internal affairs doctrine.<sup>36</sup>

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<sup>36</sup> For example, actual enforcement against non-signatories presents additional obstacles. Forum selection clauses may be enforced against non-signatories under Delaware law, provided certain conditions are fulfilled. As explained in *Sustainability Partners LLC v. Jacobs*, Delaware courts ask: “First, is the forum selection valid. Second, are the defendants third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the ... agreement?” 2020 Del. Ch. LEXIS 209, at \*11-12 (Del. Ch. June 11, 2020). In Delaware, the application of this test is far from being perfectly predictable. *See, e.g., id.* (explaining that Delaware law, “[t]he closely related concept expands the availability of the equitable estoppel doctrine to encompass parties who would not technically meet the definition of third-party beneficiaries” if certain conditions are satisfied) Other states in which litigation may be filed apply other tests, engendering even further uncertainty as to whether the parties’ preference for an exclusive forum will ultimately be respected.