

# ClientAlert

## Mergers & Acquisitions

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### Courts Differ on Enforceability of Unilaterally Adopted Forum Selection Bylaws

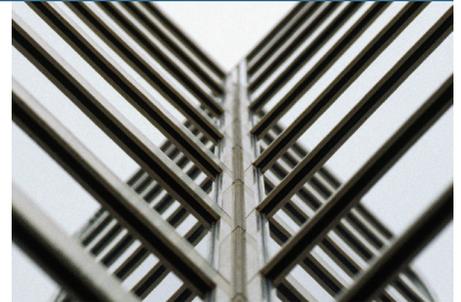
While forum selection bylaws have become increasingly popular with US public companies, courts in Delaware and Oregon recently came to opposite conclusions on whether such bylaws, when unilaterally adopted by a board of directors concurrently with the approval of a merger transaction, should be enforced. In August, an Oregon court found such a bylaw unenforceable as against public policy. A few weeks later, in September, a Delaware court found a similar bylaw enforceable and dismissed the plaintiff's complaint. This split among the courts highlights that even though there is increasing consensus that unilaterally approved forum selection bylaws are facially valid, courts may scrutinize the particular circumstances under which such bylaws are adopted.

In February 2014, RF Micro Devices, Inc. ("RFMD") and TriQuint Semiconductor, Inc. ("TriQuint") entered into a merger agreement providing for the combination of RFMD and TriQuint in a stock-for-stock transaction described as a "merger of equals." Following announcement of the transaction, stockholder lawsuits were filed in both Delaware, TriQuint's state of incorporation, and Oregon, the site of TriQuint's corporate headquarters, against TriQuint, its directors, RFMD and other defendants.

With respect to the Oregon litigation, the defendants moved to dismiss the lawsuit based on a provision in TriQuint's bylaws designating Delaware as the exclusive jurisdiction for such stockholder litigation. This bylaw provision was unilaterally adopted by TriQuint's board of directors concurrently with the approval of the merger agreement with RFMD.

In August, the Oregon Circuit Court hearing the case found TriQuint's forum selection bylaws to be unenforceable. While the court recognized that last year, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp*, 73 A.3d 934 (Del. Ch. 2013), the Delaware Chancery Court affirmed the legality of unilaterally adopted forum selection bylaws generally, the Oregon court went on to specifically cite *Chevron* in finding that application of forum selection bylaws in a particular situation remains subject to a determination of whether or not such enforcement would be unreasonable.

In determining whether or not enforcement of a forum selection bylaw provision would be unreasonable in a particular circumstance, the Oregon court looked to the test set forth by the US Supreme Court in *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15 (1972). Under *Bremen*, a forum selection clause is given effect unless (1) it is the result of fraud, undue influence or overweening bargaining power; (2) the selected forum is so inconvenient as to practically deprive the complaining party of their day in court; or (3) enforcement of the clause would contrive a strong public policy of the forum in which the suit is being brought.



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The Oregon court focused on the third prong of the *Breman* test, finding that enforcement of the unilaterally enacted bylaws in this instance would violate the public policy supporting contract formation. In particular, the Oregon court noted that enforcing the bylaws would have the effect of forcing TriQuint's stockholders to accept Delaware as the exclusive jurisdiction for litigation without affording them the opportunity to amend or repeal the provision, a right that the court, citing to *Chevron*, characterized as "indefeasible."

Less than a month after the Oregon court's decision, the Delaware Chancery Court ruled that forum selection bylaws similar to TriQuint's are enforceable, even though, again like TriQuint's bylaws, they were adopted concurrently with the approval of the merger transaction which formed the subject matter of the litigation. In *City of Providence v. First Citizens BancShares, Inc., et al.*, Consol. C.A. No. 9795-CB, the Delaware Chancery Court rejected the plaintiff's claim that the bylaw provision violated *Breman* by holding, quoting *Chevron*, that "an essential part of the contract stockholders assent to when they buy stock in [First Citizens] is one that presupposes the board's authority to adopt binding bylaws consistent with 8 *Del. C.* §109." The fact that First Citizens' stockholders never had an opportunity to repeal or amend the bylaw provision was not mentioned as a factor in the Delaware court's analysis. In fact, the Delaware court cited to the Oregon court's opinion in *TriQuint* and declared that to the extent *TriQuint* purports to apply Delaware law, it is "based on a misapprehension of Delaware law regarding the facial validity and as-applied analysis of forum selection bylaws." The Delaware court's opinion in *City of Providence* thus directly calls into question the Oregon court's analysis in *TriQuint*, and the Chancery court's holding should likely result in non-Delaware courts being more likely to uphold unilaterally adopted forum selection bylaws in future cases.

Nevertheless, the Oregon and Delaware conflicting rulings serve as a reminder that the law with respect to forum selection bylaws is not uniformly settled across jurisdictions as to its application to particular situations. Courts will still review the circumstances under which such bylaws are approved and the conditions in which they are implemented.

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