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# Delaware Court of Chancery Holds Charters Cannot Incorporate Private Agreements by Reference

Recently in *Seavitt v. N-able, Inc.*, the Delaware Court of Chancery (in an opinion by Vice Chancellor Laster) held that the charter of a Delaware corporation cannot incorporate by reference the substantive terms of a stockholders or other private agreement. According to the court, allowing parties to do so “introduces the DNA of a purely private agreement into a foundational and public document.” Further, because parties could amend such agreements without a stockholder vote, and thereby automatically change the charter’s substantive terms, allowing private agreements’ incorporation into a charter would deprive stockholders of their statutory right to vote on charter amendments under the Delaware General Corporation Law (DGCL).

The above holding arose in the context of an opinion that invalidated governance rights in a stockholders agreement in accordance with *W. Palm Beach Firefighters’ Pension Fund v. Moelis & Co.* and *Wagner v. BRP Grp., Inc.* As acknowledged by the court, the analysis resulting in the invalidation of the stockholders agreement provisions will not apply once the [2024 amendments to the DGCL](#) (discussed [here](#)) go into effect on August 1, 2024. However, the 2024 DGCL amendments will not affect the court’s holding that incorporation by reference of the terms of a private agreement into a charter is invalid. Though the *Seavitt* opinion remains subject to appeal, parties drafting charter provisions should consider this case carefully, including whether to minimize references to external documents, to ensure all desired charter terms are given their intended effects.

## Background

In anticipation of N-able’s spin-off from SolarWinds Corporation, the company amended its charter and bylaws and entered into a stockholders agreement granting various governance rights to certain lead investors. Many of these governance provisions were similar to those addressed in the *Moelis* and *BRP* decisions with a key distinction—certain provisions of N-able’s charter and bylaws contained language stating that the provision is “subject to” the lead investors’ rights under the stockholders agreement. An N-able stockholder brought claims challenging the facial validity of the rights granted to the lead investors in the stockholders agreement.

## Analysis

The court evaluated the plaintiff’s claims on the basis adopted in *Moelis* and *BRP* and concluded that the bulk of the challenged stockholders agreement provisions were facially invalid because they improperly restricted the board’s duty to manage the business and affairs of the corporation under DGCL Section 141. Importantly, the court acknowledged that this analysis will not apply once the DGCL is amended, effective August 1, 2024,<sup>1</sup> to add a new Section 122(18) that authorizes stockholders agreements like those at issue in *Seavitt*, *Moelis* and *BRP*.

<sup>1</sup> Note that though the 2024 amendments to the DGCL apply retroactively, they will not apply to or affect any civil action or proceeding completed or pending on or before August 1.

Because certain provisions of the N-able charter expressly provided that they were “subject to” the terms of the stockholders agreement, the court’s analysis involved an additional layer beyond *Moelis* and *BRP*, namely whether a charter may incorporate by reference the substantive terms of a private agreement (thereby elevating such provisions to the status of charter terms rather than mere contractual obligations). More specifically, though Section 102(d) of the DGCL permits charter provisions to be “made dependent upon facts ascertainable” outside the charter, the *Seavitt* court held that substantive terms of a private party document are not “facts” within the meaning of the DGCL and their incorporation by reference in a charter is prohibited.

We highlight the following key points from the court’s reasoning for this holding:

- “Facts ascertainable” are not “provisions ascertainable.” The court reasoned that Section 102(d)’s reference to “facts” ascertainable outside a charter does not include outside “provisions” or other incorporation by reference of a broad, substantive nature. According to the court, “facts ascertainable” refers to specific inputs and are not a vehicle for introducing substantive provisions. According to the court, the examples of “facts” given in the statute (*i.e.*, “the occurrence of any event” or “a determination or action by any person or body”) supported its conclusion. While the court distinguished and took no issue with references to private agreements for limited facts (*e.g.*, the identity of parties or whether there has been a breach of the agreement) or references to laws and regulations (*e.g.*, the definition of “affiliate” in the U.S. Securities and Exchange Act of 1934), a Delaware corporation cannot simply create substantive charter terms through an external, private document.
- Public unavailability of private agreements. The DGCL requires charters to be publicly filed, but not a private agreement. The court reasoned that the public nature of charters makes basic information about the corporation available to both investors and third parties, but incorporating provisions by reference to non-public documents frustrates that statutory purpose. Furthermore, while federal securities laws might require public companies to file their governance agreements, that fact does not affect the interpretation of the DGCL applicable to all Delaware corporations.
- Circumvention of stockholder vote on charter amendments. The court observed that DGCL Section 242 requires both board and stockholder approval of charter amendments, whereas incorporation by reference of private party agreement provisions permits the contracting parties to amend their agreement on their own and thereby amend the charter automatically. According to the court, this would circumvent Section 242, thereby depriving stockholders of their voting rights.

As noted above, though the *Seavitt* opinion remains subject to appeal, parties drafting charter provisions should consider it carefully to ensure that desired substantive terms receive their intended effects, such as by minimizing references to external private agreements and including substantive provisions in the charter itself to the extent feasible in the circumstances.

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