A Decade of *Trados*
Abe Cable

Discussion by
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Trados Opening the Door to Questions

- "How far must a preferred-controlled board go to wring value from a desperate situation?

- To what extent can investors contract around *Trados* or mitigate its effects through deal planning?

- And precisely *when* are different groups of shareholders in cognizable conflict?"

Summary / Claims

- Dissects the conflict at issue in *Trados* ("classic *Trados*") as a "multifaceted conflict based on a combination of preferred stock cashflow rights and fund economics."

- Categorizes 4 variations in scholarship and case law as "*Trados* progeny":
  - "(1) all-common *Trados* in which both founders and investors own common stock,
  - (2) reverse *Trados* in which a constituency director exhibits outsized ambition to the detriment of common holders,
  - (3) private equity and hedge fund *Trados* in which the constituency directors at issue are associated with private funds operating outside of traditional venture capital, &
  - (4) reach-back *Trados* in which the logic of *Trados* is applied to operational decisions that precede exit decisions."

- Argues that "certain stylistic features of *Trados* and its permutations are promising signs for Delaware's ability as a regulator"

Overview of Comments

- Great topic & contribution for an important book.

- Creative approach to looking at variations on *Trados*.

- Suggestions:
  1. Deeper engagement with what is a "conflict," what gives rise to it, & the limits or boundaries of the proposed categorization.

  2. Consider broader (& more critical?) view of what Delaware does "as a regulator of VC financing and the entrepreneurial economy" and connect the two parts of the chapter.

(1) What does *Trados* & progeny tell us about when a "conflict" exists?

- Possibilities?:
  - Incentive structures
    - "Economic" / pecuniary
    - Private benefits / non-pecuniary
  - Competing interests
    - In the abstract based on archetypes or position?
    - For the actual participants?
  - Agency costs / relationships
  - Potential vs. ripe disputes
  - Control
- Cable's view:
  - "The conflict at the heart of *Trados* is best understood as an interaction between two different incentive structures"
    - "(1) cashflow rights of preferred stock and
    - (2) investors' opportunity costs deriving from external portfolio considerations"
- Limits?:
  - In the venture-backed startup context, when is there <u>not</u> a "conflict" that would give rise to heightened judicial review of fiduciaries?
  - When is fact-specific evidence required to make this determination?
  - Is the categorization of 4 variations of *Trados* conflicts the entire universe?

(2) Expanding on Delaware "as a regulator of VC financing and the entrepreneurial economy"

- Cable's view:
  - Delaware's "style" + "engagement with legal and economic scholarship analyzing relevant market segments" = a form of "sectoral regulation."
  - Delaware doing sectoral regulation of venture-backed startups has the advantage of flexibility without the typical disadvantage of susceptibility to interest group pressure and capture.
- Consider zooming out more systematically on Delaware's role:
  - Ex ante regulator of corporate governance?
  - Ex post enforcer of fiduciary duties?
- Explore whether Delaware has a role in doing more to regulate startup governance & evaluate how well it has done as ex post enforcer of fiduciary duties. E.g.:
  - Who is "Delaware"?
  - Delaware's incentives
  - Delaware vs. SEC?
  - *Trados* as "pro founder" or "pro common"?
- Connect the two conceptual parts of the paper more explicitly.

Conclusion

- Great contribution bringing together *Trados* progeny & exploring variations!
- Suggestions for
    - (1) deeper theoretical or doctrinal exploration of conflict in the venture-backed startup context, and
    - (2) expanding on Delaware's role in startup governance & litigation and connecting the dots.
- Many thanks for the opportunity to engage with this interesting & timely work in progress!