

Delaware's Newest Dilemma: Mandatory Arbitration and State Competition for Corporate Charters

Law Working Paper N° 967/2026

September 2026

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Mandatory arbitration of shareholder claims is poised to reshape corporate litigation and interstate competition for corporate charters. SEC Chair Paul Atkins has led the SEC to reverse its long-standing policy against mandatory arbitration of federal securities claims. SpaceX's bylaws, which conditionally require arbitration of internal corporate and federal securities disputes, bring longstanding debates over arbitrability, shareholder consent, and corporate governance to the forefront. This Article examines the complex legal status of arbitration provisions under state and federal law and their implications for state competition for corporate charters. We argue that, under current law, most derivative corporate and securities claims already can be subjected to arbitration through contracts binding the corporation. Mandating arbitration of direct shareholder claims in public corporations through contracts presents greater legal and practical difficulties. Subjecting direct claims to arbitration likely requires bylaw or charter provisions but such provisions are, under current law, either invalid or of uncertain validity. In light of firm demand, we expect that some states will revise or clarify their corporate law to permit such mandatory arbitration bylaws. The Article then examines mandatory arbitration's appeal to companies (and its downsides). Proponents of mandatory arbitration of shareholder claims have pointed to the possibility of eliminating class actions, of limiting discovery, and of generally reducing lawsuits. Together, they argue, this will reduce wasteful shareholder litigation. Opponents, on the other hand, focus on the reduction of shareholders' litigation rights, and the accompanying reduction in deterrence, as well as on the difficulties that splitting claims among different forums can pose for comprehensive resolution of litigation. We then turn to the effects on the interstate competition for corporate charters of a substantial number of companies opting in to arbitration. We show that arbitration poses a serious threat to Delaware's preeminence. If widespread, it will reduce franchise-tax and legal-services revenues and erode the entry barriers in the market for corporate charters that have protected the enormous profits that Delaware derives from its position as the predominant domicile for large corporations. If we are right that the arbitration train is about to leave the station, Delaware will have to respond, even if it would prefer not to. We propose that Delaware amend its law to permit mandatory arbitration but to require that new exclusive forum provisions of all sorts be contained in the charter, not just the bylaws. This approach would preserve corporate choice, mitigate federal preemption risk, and protect shareholders against unilateral, board-imposed changes to their litigation rights.

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If we are right that the arbitration train is about to leave the station, Delaware will have to respond, even if it would prefer not to. We propose that Delaware amend its law to permit mandatory arbitration but to require that new exclusive forum provisions of all sorts be contained in the charter, not just the bylaws. This approach would preserve corporate choice, mitigate federal preemption risk, and protect shareholders against unilateral, board-imposed changes to their litigation rights.

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Introduction

Mandatory arbitration of shareholder claims is on the horizon. SEC Chair Paul Atkins has led the SEC to change its long-standing policy against mandatory arbitration.¹ Space Exploration Technologies Corp. (“Space X”), a Texas corporation, recently went public with bylaws that conditionally provide for mandatory arbitration of a broad set of shareholder claims.² Silicon Valley companies and their lawyers have long sought the ability to mandate arbitration and have been emboldened by their recent success in pressuring Delaware to change its law. We expect that there will be a renewed push to amend the Delaware General Corporation Law and the laws of other states to permit mandatory arbitration of shareholder claims. How will mandatory arbitration affect state competition for corporate charters? How should Delaware respond?

In this Article, we address these questions.³ In Part I, we examine the current state of the law governing contracts, charter provisions and bylaws that mandate arbitration of shareholder claims. We start with the plentiful Delaware and federal law and then turn to the Texas law that will apply to Space X’s bylaws. In Part II, we examine the potential advantages and disadvantages of mandatory arbitration from a company’s perspective. In Part III, we consider the implications of mandatory arbitration for the state competition for corporate charters and analyze how mandatory arbitration may undermine Delaware’s dominant position. Then, in Part IV, we analyze how Delaware should respond to the increasing demands for permitting mandatory arbitration. We close with a brief conclusion.

To frame our discussion, consider the dispute resolution structure described in Space X’s bylaws, adopted in advance of its June 2026 IPO. The bylaws seek to have all “internal disputes” exclusively litigated in the Texas Business Court.⁴ Internal disputes, for purposes of the bylaw, include: disputes between shareholders and the company, its officers, directors, controllers, or underwriters that are brought derivatively; disputes that are related to Space X’s internal affairs; disputes that arise under federal or state

¹ <https://www.sec.gov/newsroom/press-releases/2025-120-sec-issues-policy-statement-clarifying-mandatory-arbitration-provisions-will-not-affect>.

² <https://www.sec.gov/Archives/edgar/data/1181412/000162827926000583/filename1.htm>

³ This is turning out to be a popular topic. Contributions to the literature written more or less contemporaneously with this article include David Berger and Pierluigi Matera, *The Political Economy of Mandatory Shareholder Arbitration*, (forthcoming: -- Brooklyn Journal of Corporate, Financial & Commercial Law -- (Spring 2027)), available at SSRN: <https://ssrn.com/abstract=7208158> or <http://dx.doi.org/10.2139/ssrn.7208158>; and Mohsen Manesh, *The Past, Present, and Likely Future of Shareholder Arbitration* (January 01, 2026). 71 Villanova Law Review (forthcoming 2026), available at SSRN: <https://ssrn.com/abstract=6001095> or <http://dx.doi.org/10.2139/ssrn.6001095>. Each of our articles takes a different perspective on the issues posed by the SEC’s reversal of its policy on mandatory arbitration.

⁴ Space X bylaw 10.1(b). Space X also seeks to have a variety of non-shareholder claims such as antitrust claims adjudicated by the Texas Business court.

securities laws; and miscellaneous other disputes. In the event that a court refuses to transfer any claims to the Texas Business Court—for example, because it would lack jurisdiction over claims under the Securities Exchange Act—the bylaws provide that those claims be resolved by mandatory arbitration.⁵ In the event that a court rejects mandatory arbitration, the bylaws provide for the claims to be litigated in the U.S. District Court for the Southern District of Texas, Houston division.⁶ The bylaws further purport to waive jury trials and preclude class actions, consolidated actions, or joinder for any claims brought by shareholders whether those claims arise under state or federal law and regardless of the forum in which these claims are brought.⁷ Finally, they assert that shareholders buying shares of Space X “will be deemed to have notice of and to have consented to these provisions.”⁸ As Space X has acknowledged, some of these provisions may be held to be invalid.⁹

Given Space X’s prominence, its bylaws will “call the question.” They will inevitably be challenged in court. Other companies will copy them. States may amend their corporate laws to clarify their legality. As one works through Space X’s bylaws, one cannot help but wonder what they foretell about the future of shareholder litigation and what adoption of these or similar bylaws will mean for corporate law.

I. The Legal Landscape

In this Part, we analyze the current legal landscape as to arbitrability of corporate disputes. To do so, we distinguish between three types of disputes. The first category are suits that are traditionally governed by the internal affairs rule and hence by the law of the company’s state of incorporation. Internal affairs suits, in turn, fall into two subcategories: claims by shareholders against fiduciaries or against the corporation itself that are grounded in corporate law (“direct internal corporate claims”) and claims under corporate law by the corporation against fiduciaries that can be asserted by shareholders only derivatively (“derivative internal corporate claims”). The third category includes direct and derivative claims under the federal securities law.

⁵ Space X bylaw 10.2

⁷ Space X bylaw 10.1(c),(e).

⁷ Space X bylaw 10.1(c),(e).

⁸ Space X S-1/A at 64-65. Finally, Space X has opted into limiting derivative claims to shareholders with a minimum of 3% of the shares. Space X Bylaw 9.4, , opting into TBOC 21.419, and 21.552. The Space X bylaws also address two other issues that have come up in past disputes by providing that the limitations imposed by the Private Securities Litigation Reform Act will apply, and that class actions and other collective actions will not be available unless the company opts for such actions. Space X Bylaw 10.2(c) and (d).

⁹ Space X S-1/A at 64.

Conceptually, claims may be subjected to mandatory arbitration through a regular “traditional” contract or through a bylaw or charter provision. And as to each type of claim and for each type of arbitration provision, we examine applicable Delaware and Texas law and whether the Federal Arbitration Act (FAA) mandates the enforceability of such provisions regardless of state law.

A. Mandatory Arbitration via Traditional Contract

1. Internal Affairs Suits

Corporate internal affairs suits consist of suits that may be brought by shareholders directly and suits that may be brought by either the corporation or, derivatively on behalf of the corporation, by shareholders. Direct suits include claims in which the corporation itself is the defendant. Most statutory claims, such as suits to compel the corporation to hold an annual meeting,¹⁰ to inspect books and records,¹¹ or to seek appraisal¹² are direct suits against the corporation. But direct suits also encompass fiduciary duty claims against directors, officers, and controllers, as well as aiding and abetting breach of fiduciary duty claims, when shareholders are directly harmed. Direct suits for breach of fiduciary duty often arise in the context of mergers when shareholders receive cash or stock in exchange for their shares. These suits typically allege that the consideration received by shareholders was unfair, for example, because the transaction was a self-dealing or a conflicted transaction involving a controller or interested officers and directors, because directors did not act in good faith, or because directors failed to follow a reasonable process in selling the company. Finally, direct suits can also arise in certain other contexts, such as when a board takes a defensive action in response to a hostile bid, when a board intentionally interferes with the shareholder franchise, or when a board takes an action that favors one class of shareholders over another class.

In contrast, most other fiduciary duty claims can be brought by shareholders only derivatively on behalf of the corporation (or by the corporation itself). Examples of such other claims are claims that a related party transaction outside the context of mergers was conducted on unfair terms, claims that a fiduciary diverted a corporate opportunity or misused corporate information, claims for waste, claims involving the violations of *Caremark* duties of oversight, and most lack of good faith claims outside the merger context.

¹⁰ DGCL, Section 211

¹¹ DGCL, Section 220

¹² DGCL, Section 262

Derivative suits also include non-corporate claims that a corporation may have against a fiduciary.¹³

(a) Claims by the Corporation Itself and Derivative Claims

Arbitration provisions are common in various types of contracts into which corporations enter. The National Venture Capital Association (NVCA) model “share purchase agreement”¹⁴ contains an optional provision to submit to arbitration any dispute “arising out of or relating to this Agreement ... including the determination of the scope or applicability of this agreement to arbitrate.”¹⁵ The Employment Agreement between Advanced Micro Devices and Lisa Su, its CEO, provided for mandatory arbitration for all matters “arising out of or in any way related to” it.¹⁶ Stran & Company, Inc., a publicly traded company, has an Independent Director Agreement with its outside board members with provisions governing the directors’ duties and compensation that submits any disputes “arising under or in connection with” the agreement to arbitration.¹⁷

These are just illustrations of the many types of contracts involving the corporation that can and do contain mandatory arbitration provisions. In principle, an arbitration provision could even be free-standing, rather than part of a larger contract: a simple agreement between two parties to resolve disputes by arbitration.

An arbitration provision in such contracts binds the corporation as a party to the contract and binds shareholders who bring a derivative suit since derivative suits are brought on behalf of the corporation.¹⁸ In our context, the relevant counterparties to such contracts may include officers, directors, controlling shareholders, and any party that may face liability as aider and abettor of breach of fiduciary duty.

(i) Delaware law

Delaware courts have faced the question whether mandatory arbitration provisions and other forum selection clauses designating non-Delaware courts in traditional contracts

¹³ Sinclair v. Levien (discussing breach of contract claims against controlling shareholder).

¹⁴ NVCA SPA Section 6.16(a), <https://nvca.org/document/nvca-model-stock-purchase-agreement-updated-oct-2025/>.

¹⁵ NVCA SPA Section 6.16(a)

¹⁶ <https://www.sec.gov/Archives/edgar/data/2488/000119312514371185/d804367dex102.htm>

¹⁷ https://www.sec.gov/Archives/edgar/data/1872525/000121390025062526/ea024846001ex10-1_stran.htm

¹⁸ Morris v. Spectra Energy, 246 A.3d 121, 129 (Del. 2021); Ishimaru v. Fung (Del. Ch. 2005) (holding that shareholder asserting derivative claim on behalf of corporation must arbitrate claim within scope of arbitration provision in contract executed by corporation).

are inconsistent with some Delaware corporate law principle that Delaware courts must be available as a forum for fiduciary duty claims.¹⁹ It would be an understatement to say that Delaware courts have not embraced arbitration or, more generally, provisions mandating a non-Delaware forum. A long line of cases manifest hostility.

The analysis starts with the Delaware Supreme Court opinion in *Parfi Holding AB v. Mirror Image Internet, Inc.*²⁰ *Parfi* addressed an “underwriting agreement” pursuant to which Xcelera Inc. made a major capital infusion into (and became a controlling shareholder of) Mirror Image and received the right to appoint directors to the company’s board. The agreement contained a clause subjecting claims “arising out or in connection with” it to arbitration. Minority shareholders claimed that Xcelera, after becoming a controlling shareholder, breached its fiduciary duties by using its control to cause Mirror Image to issue stock to itself at an unfair price and usurping corporate opportunities belonging to Mirror Image.²¹

While the Chancery Court found that the claims were arbitrable, the Delaware Supreme Court disagreed. The basis for the court’s holding, however, is unclear. Several passages of the opinion indicate that the court was just interpreting the contract under ordinary contract law principles.²² For example, the court reasoned that the claims did not “touch on” the contract, and thus were outside the scope of the contractual arbitration provision, because they neither implicated any rights and obligations created by the

¹⁹ One logically prior issue is whether Delaware law is even relevant. An arbitration provision in a contract is, at least in the first instance, to be construed according to the law governing the contract. Contracts, of course, often contain choice of law provisions. To the extent that the issue of applicable law is raised in a court other than a Delaware court, that court may not apply Delaware law and may then likely enforce a mandatory arbitration clause as written.

For practical purposes, however, the question is what law Delaware courts would apply. The issue of validity of a mandatory arbitration clause for internal corporate claims involving a Delaware corporation typically arises because a shareholder brings a suit—and, as discussed below, such suits are mostly brought in Delaware Chancery Court—and the defendant moves to dismiss on the grounds that the suit is subject to mandatory arbitration. And Delaware courts dealing with such claims apply Delaware law, presumably because they see the issue of a contractual arbitration clause encompassing internal affairs claims as involving internal affairs, which are governed by Delaware law, as opposed to involving contracts, which would be governed by the law of another state.

²⁰ 817 A.2d 149 (Del. 2002).

²¹ *Id.* at 151 – 153.

²² Thus, the court stated that it “disagree[d] with [the chancery court’s] *interpretation* of what [the parties] *intended to provide* for in their contract,” *id.* at 155 (emphasis added), that “the arbitration clause signals only an *intent* to arbitrate matters that touch on the rights and performance related to the contract,” *id.* at 156, and that the claims at issue therefore did not arise out or in connection with the underwriting agreement, as required by the clause, *id.*

underlying agreement nor depended on the existence of the agreement.²³ And in its final sentence, the court noted that, “[a]bsent a clear expression of an intent to arbitrate breach of duty claims, [the plaintiff] has the right to have the merits of those claims adjudicated by the Court of Chancery.”²⁴ To the extent that a “clear expression” rule limits the scope of arbitration provisions, it is easily avoided through careful drafting like Space X’s bylaws that provide for a very detailed and expansive scope.²⁵

But *Parfi* also contains passages suggesting that that even a clear expression of an intent to arbitrate breach of duty claims would not have sufficed. Thus, in its initial summary, the court noted that

When contracting parties provide for the arbitration of claims in their agreement, the arbitration provision, *no matter how broadly drafted*, can reach only the claims within the scope of the contract, and the fiduciary duty claims here are beyond that scope.²⁶

And later, it added:

Nevertheless, arbitration is a mechanism of dispute resolution created by contract. An arbitration clause, *no matter how broadly construed*, can extend only so far as the series of obligations set forth in the underlying agreement.²⁷

In the end, *Parfi* leaves open the scope of arbitrability, concluding that it is unnecessary to “decide whether or to what extent a properly drafted agreement can compel

²³ Id. at 155; see also id. at n. 24 (“Generally, purportedly independent actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract.”)

²⁴ Id. at 159 (emphasis added).

²⁵ Space X Bylaw 10.1(a)(applicability) provides that:

(a) Applicability. To the fullest extent permitted by law, this Section 10.1 shall apply to all disputes between (i) one or more shareholders and (ii) the Corporation and/or its directors, officers, or controlling persons, or any underwriter of securities issued by the Corporation (or controlling person of the Corporation) relating to any of the following: (1) any derivative proceeding, meaning a civil dispute brought in the right of the Corporation; (2) any action based on the governance, governing documents, or internal affairs of the Corporation, including but not limited to any internal entity claim as that term is defined in the TBOC; (3) any action based on state or federal securities or trade regulation laws; (4) any action based on the alleged act(s) or omission(s) by any person(s) in his or her capacity as a shareholder, controlling person, director, officer, or other managerial official of the Corporation; (5) any action based on the alleged breach(es) by one or more shareholders, controlling persons, directors, officers, or other managerial officials of a duty owed, in his or her capacity as such, to the Corporation or to any shareholder(s) thereof; (6) any action seeking to hold one or more shareholders, controlling persons, directors, officers, or other managerial officials of the Corporation liable for an obligation of the Corporation, other than on account of a written contract signed by the person(s) to be held liable in a capacity other than as a shareholder or managerial official; or (7) any action arising out of the TBOC (each an “Internal Dispute”).

²⁶ Id. at 151 (emphasis added).

²⁷ Id. at 156 (emphasis added).

arbitration of fiduciary duty claims, as that issue is not before us ...”.²⁸ *Parfi* thus raised (but did not answer) a core issue: may an arbitration provision in a contract mandate arbitration of fiduciary duty claims that are not governed by the contract?

Subsequent Chancery Court decisions muddle the picture further. *Feeley v. NHAOCG, LLC*²⁹ involved various claims by Oculus LLC and its member NHAOCG against Christopher Feeley. Feeley, in turn, was wearing various hats: he was the president and CEO of Oculus and the managing member of AK-Feel, which in turn was the managing member of Oculus.

Feeley’s employment agreement with Oculus included an arbitration clause extending to any “controversy, dispute of claim arising out of or relating to” the agreement. The Chancery Court held that claims for breach of fiduciary duty in Feeley’s capacity as president and CEO were subject to arbitration³⁰ while claims for breach of duty in his capacity as managing member of AK-Feel were not. The court reasoned, citing *Parfi*, that “[p]urportedly independent actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract.”³¹ Finally, as to claims related to actions taken in Feeley’s “role as actual manager” of Oculus, the court concluded that there was a “non-frivolous” argument that they arose out of the agreement and left it to the arbitrator to make an ultimate determination.³²

While *Feeley* is consistent with the notion that forum selection clauses should be enforced as written, *Harris v. Harris*³³ contains language that seems to put some boundaries on the scope of forum selection provisions. *Harris* dealt with a clause in a management services agreement between the corporation and one of the defendants that designated New Jersey courts as the exclusive forum. In holding that the forum selection clause did not extend to the fiduciary duty claims at issue, the court noted:

If an ordinary forum selection clause encompassed those claims, then corporate planners could readily divest the Delaware courts of jurisdiction and route internal affairs cases to other states or into arbitration. ... [T]hat is not the law. *If corporations wish to route internal affairs claims to a particular forum, then they can adopt charter*

²⁸ Id. at n. 44 (“We need not, and we decide only the case before us.”)

²⁹ 62 A.3d 649 (Del. Ch. 2012).

³⁰ See also *Elf Atochem N. Am. v. Jaffari*, 727 A.2d 286, 293–94 (Del.1999) (requiring arbitration of claims for breach of fiduciary duty by manager when LLC agreement giving rise to manager’s status and duties contained mandatory arbitration clause). Federal decisions are in accord. See, e.g., *MULTIBAND CORP. v. BLOCK*, 2012 WL 1843261

³¹ Id. at 656.

³² Id. at 656.

³³ 2023 WL 193078, at *24 (Del. Ch. 2023).

*or bylaw provisions designed to achieve that result. ... A provision in a contract does not do the trick.*³⁴

Harris, it should be noted, dealt with direct, rather than derivative, claims. In fact, immediately preceding the quoted passage above, the *Harris* court remarked that the claims at issue were “direct claims for breach of fiduciary duty or for aiding and abetting a breach of fiduciary duty.”³⁵ One could thus interpret the passage as applying to direct claims: for direct claims, a contract with a provision signed by the corporation does not “do the trick;” for direct claims, it takes a charter and bylaw provision.

But such a reading of *Harris* is in tension with *Harris*’s treatment of *OTK Associates, LLC v. Friedman*, an earlier decision by the same judge.³⁶ As in *Harris*, the contract at issue in *OTK* designated the courts of another state (New York) as a forum for any dispute arising out or relating to it; but unlike in *Harris*, the claims in *OTK* were derivative rather than direct (seeking, among others, a declaration that a recapitalization transaction was the product of breaches of fiduciary duty and aiding and abetting of such breaches).³⁷

OTK offered various rationales³⁸ for its holding that the choice of forum clause did not apply to the fiduciary duty claims, including that the breaches of duty and the aiding and abetting of those breaches rendered the contract, and thus its forum selection provisions, subject to rescission under Delaware fiduciary duty law and hence unenforceable.³⁹ But *Harris*, in discussing *OTK*, did not mention the rescission rationale. Instead, it embraced a

³⁴ Id. at 24 (emphasis added)

³⁵ *Harris* at *24; see also id. at 1 (“The analysis of that issue is affected by a recent decision in this case, which held that the Outbound Merger caused the plaintiffs to lose standing to assert their derivative claims as such. *Harris v. Harris*, 2023 WL 115541, *2 (Del. Ch. Jan. 6, 2023) (the “Standing Decision”). The Standing Decision explained that the plaintiffs could challenge the Outbound Merger directly because of alleged disclosure violations and its evident failure to value the derivative claims.”); id. at *25 (“To be fair, the Complaint contains allegations that reference Royce’s contractual duties under the Royce MSA. If the plaintiffs had sued derivatively on behalf of the Company for breach of the Royce MSA, then the forum selection clause would apply. The plaintiffs have disavowed any intent to assert such a claim, and as a result of the Standing Decision, no claims of that sort are at issue.”)

³⁶ 85 A.3d 696, 721 (Del. Ch. 2014).

³⁷ Id. at 719.

³⁸ In addition, echoing *Parfi*’s interpretation rationale, *OTK* argued that “it has not traditionally been thought that a contractual forum selection provision in the transaction agreement governed the stockholder plaintiffs’ claims for breach of fiduciary duty and aiding and abetting.” Id. at 719. Indeed, according to *OTK*, the claims at issue “parallel[ed] those of the plaintiffs in *Parfi*”, id. at 721, a disputable assessment as the contract in *OTK* was the product of the alleged breaches and the plaintiffs sued for rescission whereas, in *Parfi*, the plaintiffs’ gripe was not with the contract as such but with the defendant’s subsequent conduct.

³⁹ Id. at 720. But see Uniform Arbitration Act, Section 6(c) (“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”)

broadier view of *OTK* and a correspondingly narrower view of the scope of forum selection provisions:

[In *OTK*], [t]his court also held that the forum selection clause did not control because whether a third party owed fiduciary duties or aided and abetted those fiduciary duties depends upon “a set of rights and obligations that are independent of any contract,” *and therefore did not arise out of or relate to the contract containing the claims*.

Harris also quoted *OTK* for the proposition that it is was implausible that transactional contracts could have forum selection clauses embracing fiduciary duty claims because if that were the case, “the solution to the problem of multi-forum litigation [would have] been hiding in plain sight for decades, under the noses of the courts and corporate bar.”⁴⁰ This discussion of *OTK* would be inapposite if the basis for the holding in *Harris* was that the claims at issue were direct.

The latest entry in the set of Chancery Court decisions is *Massimo Corp. v. Kiani*. *Kiani*, like *OTK* and *Harris*, but unlike *Parfi* and *Feeley*, dealt with an exclusive forum provision in favor of the court of another state (California), rather than a mandatory arbitration clause. *Kiani* reviewed *Parfi* and the subsequent cases but ultimately took no position on whether they establish merely a requirement to clearly articulate which fiduciary duty claims are subject to a forum selection or arbitration provision or whether such contracts can never encompass sufficiently unrelated fiduciary duty and other internal affairs claims.

The reason why *Kiani* did not resolve this issue is that *Kiani* held that recent legislation overrides *Parfi* and its progeny with respect to “stockholder agreements.” The 2024 adoption of DGCL Section 122(18) broadly validated stockholder agreements—defined as “contracts between a corporation and one or more current or prospective stockholders ... in its or their capacity as such”—and provided that stockholder agreements may contain provisions that, if they were contained in the charter, would violate Section 115. Section 115, which we discuss in more detail below, permits forum selection clauses only if Delaware courts are among the selected fora. But, *Kiani* reasoned, the fact that Section 122(18) specifically validated provisions inconsistent with Section 115 in stockholder agreements makes clear that, whatever the law before Section 112(18), and whatever the law currently regarding agreements other than stockholder agreements, stockholder agreements may contain *any* type of forum selection clause.⁴¹ This reasoning extends, by implication, to a mandatory

⁴⁰ *Id.* at *24.

⁴¹ Dorothy Lund and Eric Talley go further and claim that a stockholder agreement could be used to de facto change substantive law, e.g. by “agree[ing] to forbear from pursuing loyalty claims against any or all corporate fiduciaries.” Dorothy S. Lund & Eric L. Talley, *Should Corporate Law Go Private*, forthcoming J. Corp.

arbitration provision. According to *Kiani*, Section 122(18) not only removed any doubt as to the validity of such clauses, it also removed any special requirement to clearly articulate whether fiduciary duty breaches are subject to the forum selection clause.⁴²

The contract at issue in *Kiani* was an employment agreement with Kiani, who was the CEO as well as the controlling shareholder of Massimo, and, inter alia, provided for the issuance of restricted stock units to Kiani, allowed Kiani to terminate for “Good Reason” and to receive a special payment if he was terminated as Chairman, and required a vote of 75% of the board to terminate Kiani for cause. The court had no difficulty concluding that the agreement qualified as a stockholder agreement: the issuance of the restricted stock related to Kiani in his capacity as prospective shareholders while the other provisions allocated governance authority among internal corporate actors, the very type of provisions which were held potentially invalid in *Moelis* and which Section 122(18) was meant to validate. Since the claims at issue all referenced the employment agreement that contained the forum selection clause and since the plaintiff admitted that the claims all arose out of or were related to the agreement, the court granted the motion to dismiss.

Under *Kiani*’s rationale, it is likely that a simple, free-standing agreement between a corporation and a controller to arbitrate all disputes related between them, including any disputes based on the controller’s violation of her fiduciary duties to the corporation, is a stockholder agreement: it is a contract between a corporation and a shareholder acting in that “capacity.”⁴³ Similarly, under *Feeley*, an employment agreement with an officer could subject all claims that the officer breached her fiduciary duties in her capacity as officer to arbitration as such claims “touch on” the contract.

What is somewhat less clear is whether similar provisions in an agreement with directors (dealing, for example, with the director’s compensation and the company’s obligation to take out D&O insurance) would be valid. Arguably, a director’s fiduciary duties

L. , at 41. While resolution of this issue does not bear on the arguments we present in this paper, we note that stockholder agreements may not contain terms that would be contrary to state law if they were contained in the charter, with the sole exception of terms that conflict with Section 115. In order for a stockholder agreement to change substantive law, one would have to read DGCL 122(18) as permitting corporations to “covenant” not to bring particular claims. While DGCL 122(18) does explicitly authorize “the corporation to agree to . . . (c) covenant that the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation,” it is unclear whether this will be interpreted to authorize covenants that vary substantive provisions of the DGCL.

⁴² *Kiani* at 36-37.

⁴³ Once an agreement is a stockholder agreement, it is unclear how far it can go in containing provisions that would violate Section 115. Thus, can a stockholder agreement contain a provision requiring the company to arbitrate any suit (not just suits against the party to the agreement and its affiliates) and would other potential defendants be third-party beneficiaries of such limitations?

derive from the director's status, and a director's status is based on being elected to the board rather than on being a stockholder or on being hired by the company as a director.

It is also not entirely clear whether an arbitration clause in a contract governing a transaction could encompass transaction-related breaches of fiduciary duties even if the intent to do so was clear. On one hand, an arbitration clause that is sufficiently specific could govern any claim if *Parfi* is interpreted to merely require a clear expression of intent. Moreover, the alleged breach of duty would seem to "touch on" the contract as it is the very contract that contains the arbitration clause that is typically alleged to be the product of unfair dealing and it is the transaction governed by the contract which is alleged to involve an unfair price.⁴⁴ On the other hand, *Harris* and *OTK* seem to take a narrower view of what a forum provision may cover and *OTK* raises the possibility that a forum provision is unenforceable if the entire contract is subject to rescission.

(ii) Texas Law

Unsurprisingly, there is far less Texas law on arbitration of fiduciary duty disputes. In particular, unlike in Delaware, there is no line of cases parallel to *Parfi*.

Texas is thus likely to apply its regular contract law principles to arbitration provisions. To the extent that arbitration provisions are contained in employment contracts, e.g., between senior managers and the corporation, they will clearly be enforced. As under *Kiani*, it is less clear whether arbitration provisions in agreements with directors will be enforced with regard to fiduciary duty claims because, as under Delaware law, directors' fiduciary duties arise from their position, not from any contracts with the corporation. Finally, as in Delaware, there will be a question whether arbitration provisions in, for example, a merger agreement will cover all transaction-related breaches of fiduciary duty.

As with other contracts under Texas law, contracts providing for mandatory arbitration will not be enforced if they are "unconscionable."⁴⁵ Texas recognizes both substantive and procedural unconscionability: "Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision."⁴⁶ One ground for finding

⁴⁴ Cf. *Parfi* at n. 24 ("Generally, purportedly independent actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract.")

⁴⁵ *Olshan*, 328 S.W.3d 883 (Tex. 2010); *Lennar Homes of Tex., Inc. v. Rafiei*, 687 S.W.3d 726 (Tex. 2024).. Because the "unconscionability" exception is a general rule of contract enforcement, it is consistent with the FAA. FAA, 9 USC §2.

⁴⁶ *Olshan*, 328 S.W.3d 883, 891 (Tex. 2010), quoting *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006).

unconscionability is that the costs of arbitration that a plaintiff would bear are significantly greater than the costs of litigation would be, with the burden on the party challenging the arbitration provision to establish the cost differential.⁴⁷ As the Texas Supreme Court explained in *Lennar*, “Arbitration costs that are so excessive that they make the arbitral forum unavailable to a party seeking to vindicate his rights may render an agreement to arbitrate unconscionable.”⁴⁸

While there is extensive Texas law on unconscionability in general, there is no case law on whether or when mandatory arbitration agreements applying to internal corporate disputes will be found to be unconscionable. If such provisions are challenged as unconscionable, a key question will be the difference between the costs to a shareholder of pursuing a derivative claim in court versus in arbitration, for example, because contingent fees are limited in arbitration or because lawyers will not bring arbitrations on a contingent fee.

(iii) The FAA

The enforceability of arbitration provisions is not just a matter of state law. Congress adopted the Federal Arbitration Act which makes certain arbitration provisions enforceable and overrides any inconsistent state law. Specifically, Section 2 of the Federal Arbitration Act provides that:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract⁴⁹

“Commerce,” in turn, is defined broadly to include all types of interstate commerce.⁵⁰

⁴⁷ *Lennar Homes of Tex., Inc. v. Rafiei*, 687 S.W.3d 726 (Tex. 2024).

⁴⁸ *Lennar*, 687 S.W.3d, 726, 730 (Tex. 2024), citing *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 893 (Tex. 2010).

⁴⁹ FAA, Section 2. State law can invalidate an arbitration agreement under § 2 only so long as “that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (quoting *Perry*, 482 U.S. at 492 n. 9, 107 S.Ct. 2520).

⁵⁰ While the definition of commerce specifically excludes “contracts of employment of ... workers engaged in foreign or interstate commerce,” this exclusion has been interpreted to be limited to workers engaged in the movement of goods. 532 U.S. 105 (2001).

U. S. Supreme Court decisions have interpreted the scope of Section 2 of the FAA expansively. They regularly stress that the “preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,” a concern which “requires that [the court] rigorously enforce agreements to arbitrate.”⁵¹ Therefore, “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁵² In fact, a court should compel arbitration unless “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”⁵³

To fall under an arbitration provision in a contract, it is not necessary that the underlying claim is contractual. Rather, it is sufficient that the factual allegations “touch matters” covered by the contract containing the arbitration clause.⁵⁴ To “touch” a contract, if the arbitration clause is broad (e.g., if it encompasses disputes “related to” or “in connection with” or “arising from” the contract),⁵⁵ the claims need only concern a “collateral issue that is somehow connected to the main agreement that contains the arbitration clause.”⁵⁶ Among others, the U.S. Supreme Court has ruled that arbitration provisions in a contract may cover: claims by a distributor that a car manufacturer violated the antitrust laws by coercively attempting to replace the distributors with a wholly owned subsidiary which would serve as the exclusive distributor in the distributor’s region;⁵⁷ claims by customers of a brokerage firm that the firm had violated § 10(b) of the Securities Exchange Act by engaging in fraudulent, excessive trading and by making false statements in providing

⁵¹ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625(1985).

⁵² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Moses H. Cone Memorial Hospital*, 460 U.S., at 24, 103 S.Ct., at 941. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400–404, 87 S.Ct. 1801, 1804–1806, 18 L.Ed.2d 1270 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984)

⁵³ *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

⁵⁴ See *Mitsubishi Motors*, 473 U.S. at 624 n. 13, 105 S.Ct. 3346 (noting that “insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, [we] properly resolve[] any doubts in favor of arbitrability”); *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.1987) (holding that if factual allegations touch matters covered by agreements, then claims must be arbitrated). Accordingly, we must examine the factual allegations raised to determine which of Simula’s causes of action are arbitrable. See *J.J. Ryan & Sons*, 863 F.2d at 319; *Balan v. Tesla*, 840 Fed.Appx. 303 (9th Cir., 2021); (holding that defamation claim by an employee touch on the employment where the defamatory claims related to the employee’s conduct in her capacity as employee); *Altresco Phillipines, Inc. v. CMS Generation Co.*, 11 F.3d 140 (1997) (breach of contract claim is subject to arbitration even if contract does not contain arbitration provision where contract directly relates to other contract with arbitration provision).

⁵⁵ *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1361 (2d Cir.1993) (finding that the phrases “relating to,” “in connection with,” or “arising from,” all signify a broad scope).

⁵⁶ *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir.2001).

⁵⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

advice;⁵⁸ and claims by employees that the employer engaged in age discrimination in violation of the Age Discrimination in Employment Act.⁵⁹

FAA jurisprudence thus stands in significant tension with Delaware's treatment of arbitration clauses applicable to internal affairs claims. Indeed, one of the most striking features of the Delaware jurisprudence on arbitration provisions, reviewed above, is the nearly complete absence of any discussion of the FAA, much less any deference to it.

Thus, for example, the Delaware Supreme Court's statement in *Parfi* that it takes "a clear expression of an intent to arbitrate breach of fiduciary duty claims"⁶⁰ is flatly inconsistent with the U.S. Supreme Court's holding that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁶¹ Indeed, lower federal courts have adopted a rule of interpretation that is diametrically opposed to Delaware's: there must be " 'clear and unambiguous' or 'unmistakably clear' language to *exclude* an issue from an arbitration agreement."⁶²

Parfi is more in line with FAA jurisprudence when it holds that the scope of a contractual arbitration clause hinges on whether a claim "touches" the contract.⁶³ "Touch," however, is a vague and malleable standard and, as far as arbitration clauses are concerned, Delaware's interpretation of when a dispute touches a contract is not controlling. If a dispute touches a contract involving commerce under FAA jurisprudence, the Supremacy Clause requires that Delaware enforce the arbitration clause.⁶⁴

⁵⁸ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185

⁵⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 111 S.Ct. 1647 (1991)

⁶⁰ *Parfi* at 160; see also *DMS Properties-First v. Scott Associates*, 748 A.2d 389, 391 (Del.2000) ("A party cannot be forced to arbitrate the merits of a dispute ... in the absence of a clear expression of such intent in a valid agreement."); *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del.1998) ("A court will not compel a party to arbitrate ... absent a clear expression of such an intent").

⁶¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Moses H. Cone Memorial Hospital*, 460 U.S., at 24, 103 S.Ct., at 941. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-404, 87 S.Ct. 1801, 1804-1806, 18 L.Ed.2d 1270 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984). See also *Genesco* at 847 ("The federal policy favoring arbitration requires us to construe arbitration clauses as broadly as possible.")

⁶² *Genesco*, 815 F.2d at 847.

⁶³ Compare *Parfi* at 151 ("we hold that contracting parties who provide for the arbitration of disputes in their agreements need submit to arbitration only those claims that touch on the legal rights created by their contract.") with *Mitsubishi Motors*, 473 U.S. at 624 n. 13, 105 S.Ct. 3346 (noting that "insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, [we] properly resolve[] any doubts in favor of arbitrability"); *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.1987) (holding that if factual allegations touch matters covered by agreements, then claims must be arbitrated).

⁶⁴ Whether a party is bound by an arbitration clause is determined under federal law. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967); *In re Hart Ski Manufacturing*, 711 F.2d at 846; *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir.1960); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir.1959), cert. dismissed, 364 U.S. 801, 81 S.Ct. 27, 5

Parfi and *Feeley* may nevertheless be on comparatively safe grounds in their conclusions that the claims at issue did not touch the contract. In *Parfi*, the agreement related to a capital investment by Xcelera in exchange for stock making Xcelera a 62% shareholder and Xcelera's right of the investor to appoint some board members, while the dispute arose from self-dealing transactions with Xcelera that took place subsequently. While Xcelera became a controlling shareholder as a result of the agreement, the dispute is otherwise unrelated to the agreement. In *Feeley*, the contract related to Feeley's employment as an officer of Oculus and the disputes held not subject to arbitration related to Feely's action is his capacity as general member of AK-Feel.

The story may be different, however, for *Harris* and *OTK*. To be sure, *Harris* and *OTK* involved forum selection rather than arbitration clauses and the FAA only applies to arbitration clauses. But both cases, in relying on *Parfi* and the *Parfi* line of cases, treat arbitration and other forum selection clauses equivalently. In light of the FAA, applying the *Harris* and *OTK* analysis to arbitration clauses would be questionable.

In *Harris*, the forum selection clause was in a management services agreement. The defendants in the aiding and abetting claims were the entity that had been hired to provide management services and its two principals. Had *Harris* involved an arbitration clause (as opposed to a forum selection clause in favor of New Jersey), it would be hard to see how these claims do not concern at least a *collateral* issue that is *somehow* connected to the agreement with the clause and how there can be positive assurance that the arbitration clause is *not susceptible* of an interpretation that covers the asserted dispute. In *OTK*, where the forum selection clause was in a set of contracts with a controlling shareholder governing a restructuring and the gravamen of fiduciary duty claims was that the restructuring did not pass the entire fairness test, it would be even harder.

In both cases, the courts' principal argument seemed to be that the fiduciary duties exist *independent of* the contract.⁶⁵ But under the FAA, the mere fact that the claims at issue

L.Ed.2d 37 (1960); but see *Supak & Sons Manufacturing Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir.1979).

⁶⁵ *OTK* at 721 (In *Parfi*, "[t]he Supreme Court agreed that the claims arose 'from some or all of the same facts,' but held that the clause did not apply because the defendant's 'fiduciary duties to [plaintiff] consist of a set of rights and obligations that are independent of any contract. ... *OTK's* claims for breach of fiduciary duty parallel those of the plaintiffs in *Parfi*, and the same result should apply.") see also *id.* at 720 ("The remaining theory is that the Transaction Documents are invalid because of breaches of fiduciary duty and acts of aiding and abetting committed by the defendant directors and the Yucaipa Defendants. Under the internal affairs doctrine, that issue is governed by Delaware law, not by the terms of the Transaction Documents. ... The outcome will turn on the relationships between Morgans and its stockholders, on the one hand, and their fiduciaries and the alleged aiders and abettors, on the other. The language of the Transaction Documents may well be considered as a factual input in the analysis, but the governing legal doctrine will be Delaware common

are not based on any breach of the contract is insufficient to make them not touch the contract⁶⁶ and the opinions do not explain how they are otherwise independent.⁶⁷ In any case, for FAA purposes, independence is not the issue: the issue is whether the claims concern a collateral issue that is somehow connected to the agreement with the arbitration clause with any doubt to be resolved in favor of arbitration.

Indeed, although there are no cases dealing explicitly with transactional fiduciary duties, federal courts have taken an expansive view as to when an arbitration provision extends to fiduciary duty claims.⁶⁸ In *NBR Antitrust Lit. v. Crompton Corp., ParaTec Elastomers L.L.C.* ParaTec claimed that its two joint venturers who controlled ParaTec, Uniroyal and GIRSA, breached fiduciary duties to ParaTec by directing it to violate federal antitrust laws and sought indemnification for any liability. The Court of Appeals for the Third Circuit held that the fiduciary duty claims were subject to arbitration because the claim “related to” the joint venture agreement pursuant to which ParaTec was created and the joint venture agreement contained a broad arbitration clause.⁶⁹ In *Alemac Ins. Services, Inc. v. Risk Transfer, Inc.*,⁷⁰ Alema claimed that Rhoden, an employee, breached, and aided and abetted the breach of, fiduciary duties. Rhoden was employed at Alemac at the bequest of Risk Transfer⁷¹ and his duties entailed “overseeing Alemac’s interest for both the Business Consulting Contract as well as the Leprechaun Holdings Partnership.”⁷² The Leprechaun Holdings Partnership, in turn, was created by a partnership agreement that contained a broad arbitration clause that was held to apply to the claims against Rhoden. Finally, *Altresco Phillipines, Inc. v. CMS Generation Co.*⁷³ involved facts reminiscent of *Parfi* but arrived at the opposite conclusion. Plaintiffs claimed that CMS breached its fiduciary duty as shareholder of Luzon Power Associates, Inc. (LPA) by becoming involved in a competing project and then refusing to reduce its interest in LPA. The Court of Appeals for the Third Circuit held that the claims were subject to arbitration because the agreement detailing the

law, not New York contract law or related aspects of New York business tort and commercial law that apply to third party, arms’ length relationships.”).

⁶⁶ See supra TAN __ to __.

⁶⁷ In both *OTK* and in *Harris* at least with respect to the entity that provided the management services, it is hard to see how the plaintiffs could have pled the affirmative case without ever mention the contract containing the arbitration clause, a factor mentioned by *Feeley* for determining whether a claim touches on a contract.

⁶⁸ But see *Metropolitan Entertainment Co., Inc. v. Koplik*, F.Supp.2d 354 (D. Conn. 1998) (finding that arbitration clause did not apply to events occurring prior to the parties’ entering into the agreement where the facts underlying the claims did not touch on matters covered by the Shareholders’ Agreement and claims would exist even if there had never been an agreement).

⁶⁹ 207 Fed. Appx., 166 (3rd Cir. 2006).

⁷⁰ 2003 WL 220240070 (S.D.N.Y. 2003)

⁷¹ *Id.* at *1.

⁷² *Id.* at *5.

⁷³ 11 F.3d 140 (1997)

funding of LPA contained a broad arbitration clause. That agreement, the court reasoned, was “the very instrument by which CMS became a shareholder of LPA. It is that shareholder status upon which plaintiffs premise their ... claim for relief. As a consequence, that claim naturally touches upon” the agreement.⁷⁴

Harris and *OTK* are not, themselves, inconsistent with the FAA because neither involved an arbitration provision. They both involved forum selection provisions in favor of the courts of another state, provisions which are outside the scope of the FAA. Moreover, as we have discussed, both *Harris* and *OTK* offer alternative rationales for their outcome. In *OTK*, the entire contract was allegedly subject to rescission and in *Harris*, the (direct) claims at issue were brought by parties who were not parties to or bound by the contract.

But Delaware’s case law to date has not drawn a distinction between arbitration clauses and other forum selection clauses. Under the FAA, even *OTK*’s alternate argument against enforcement would not be valid in the arbitration context. While arbitration clauses in void contracts are unenforceable,⁷⁵ the situation is more complicated for contracts that are merely voidable. When the claim is that a contract as a whole is voidable, that is an issue for the arbitrator to decide.⁷⁶ A court may only decide the voidability issue when a party specifically alleges, and provides supporting evidence showing, that the arbitration clause at issue is voidable.⁷⁷ In other words, when, as in *OTK*, the claim is that breaches of fiduciary duty taint the contract as a whole, but not specifically the arbitration clause, it is for the arbitrator rather than the courts to resolve the issue of voidability.⁷⁸

Under the FAA, therefore, it is likely that broad arbitration clauses in transactional contracts between a corporation and a fiduciary will be held to extend to derivative breaches

⁷⁴ *Id.* at *4.

⁷⁵ *Sphere Drake Ins. Ltd. v. Clarendon Nat’l Ins. Co.*, 263 F.3d 26, 30 (2d Cir.2001).

⁷⁶ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (while challenges specifically the validity of the agreement to arbitrate are to be adjudicated by the court, challenges to the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid) must go to the arbitrator).

⁷⁷ See *Sphere Drake Ins. Ltd.*, 263 F.3d at 31 (citing *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1968)); *Adams*, 433 F.3d at 227 (“Only if a contract is ‘void,’ and not ‘voidable,’ can a party challenge the enforceability of an arbitration clause without alleging a particular defect with that clause.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, n.1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (holding that it is for the courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent

⁷⁸ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (while challenges specifically the validity of the agreement to arbitrate are to be adjudicated by the court, challenges to the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid) must go to the arbitrator).

of fiduciary duties by that fiduciary that are related to the transaction. It is also very likely that broad arbitration clauses in transactional contracts between a corporation and an alleged aider and abettor of breaches of fiduciary duties will be held to extend to derivative aiding and abetting claims. Finally, it is likely that a broad arbitration clause in a contract between a corporation and a director governing various aspects of the director's and the corporation's obligations would be held to extend to all derivative breaches of fiduciary duties by that director in that capacity. In sum, under the FAA, it is likely that arbitration clauses may subject most if not all derivative claims to arbitration, regardless of whether the contracts containing these clauses are stockholder agreements or not.⁷⁹

(b) Direct corporate law claims arising under state law

Mandatory arbitration provisions addressing direct claims face additional practical hurdles. For a contract to mandate arbitration of a direct claim, the shareholder who has the right to pursue these claims would have to be a party to the contract. A contract with an arbitration clause merely signed by the corporation does “not do the trick.”⁸⁰

The first problem with such a contract is that it is logistically difficult to get shareholders to agree to it. In contrast to the NVCA SPA, which is negotiated in the low transaction cost environment of a private company, the problem of securing investor agreement is virtually insurmountable for corporations that are already public and have a large number of shareholders who would have to agree. In our system of custodial ownership, most companies do not even know the identity of the beneficial holders of their shares.⁸¹

Logistical difficulties persist even for companies about to go public. While it is conceivable that corporations could bind the initial primary market purchasers of their stock to mandatory arbitration, binding subsequent secondary market purchasers is less straightforward. In private companies, trading of shares can be restricted unless a subsequent purchaser agrees to be bound by the mandatory arbitration provision. Public corporations, however, cannot condition trading on actual consent. Absent actual consent, the UCC requires either actual notice or a legend on a certificated security or the initial transaction statement for any restrictions to bind a subsequent purchaser of a security. But

⁷⁹ Because the *Parfi* line of cases, if their reasoning is applied to arbitration clauses, are likely inconsistent with the FAA, we do not regard the adoption of Section 122(18) and *Kiani* as watershed changes with regard to arbitration provisions regarding internal corporate disputes. But see Lund & Talley (“The landscape changed abruptly when DGCL §122(18) became law in 2024”).

⁸⁰ See *Harris*, supra note __

⁸¹ Kahan and Rock, *Hanging Chads*.

the automated systems that clear daily stock trades are not set up to insert any specific notifications into a retail purchaser's confirmation statement. As long as the clearing system is not changed to do so, the UCC's notice requirements cannot easily be met.⁸² If subsequent purchasers cannot be bound, it would do a company little good to subject direct internal affairs claims by its initial purchasers to mandatory arbitration.

As a result, it may be difficult to provide for mandatory arbitration of direct claims by shareholders of public corporations through traditional contracts. This difficulty may be the response to the rhetorical challenges posed by the courts in *Harris* and *OTK*: if it merely takes a provision in the transaction document to solve the problem of multi-forum litigation, why has the problem not been solved before the advent of forum selection bylaws? Because most multi-forum litigation happens in the wake of mergers⁸³ and the resulting suits were direct rather than derivative, *Harris* and *OTK* are right that a provision in the transaction document would not have solved the problem of multi-forum litigation even if the provision applied to derivative fiduciary duty claims.

One other issue is worth noting. Under Texas law, an arbitration provision may be unconscionable if it imposes costs on a plaintiff would be significantly greater than the costs of litigation. For many small shareholders, asserting a claim as an individual action may be prohibitively expensive. Thus, an arbitration bylaw covering direct suits that does not permit class actions or other consolidated proceedings, as in the Space X bylaw, could be held to be unconscionable.

2. Federal Securities Claims

Contracts opting for mandatory arbitration of federal securities claims raise some of the same problems as direct internal affairs claims. In principle, contractual provisions for mandatory arbitration of securities claims should be respected, whether applicable state law makes them enforceable or whether the FAA overrides such law. Thus, in *Shearson/American Express v. McMahon*, the U.S. Supreme Court held that Section 10(b) and Rule 10b-5 claims (and other claims under the Securities Exchange Act of 1934) were subject to a mandatory arbitration provision in a broker's customer agreement.⁸⁴ Later, in

⁸² Similarly, in the analogous case of voting rights, most corporate statutes provide that it takes actual notice or a conspicuous legend to bind a subsequent purchaser. *Hawkins v. Daniel* (Del. Ch. 2022), note 31.

⁸³ Cite

⁸⁴ 482 U.S. 220 (1987).

Rodriguez de Quijas v. Shearson/American Express, the Supreme Court extended its holding to claims arising under the Securities Act of 1933.⁸⁵

But, as we discussed above, there are practical problems in extending the reach of mandatory arbitration to the shareholders of public companies. For typical securities fraud class actions for violations of Rule 10b-5, plaintiffs purchased or sold securities in public markets and were not in direct contractual privity with the issuer. In that setting, there is no bilateral traditional contract between the shareholder and the issuer with a mandatory arbitration provision. (Whether a bylaw or charter provision can be a substitute for a direct contract through some sort of “deemed consent” theory—a result that the Space X bylaws are trying to accomplish by asserting that any purchaser of the company’s securities will be deemed to have notice of and to have consented to its various forum provisions—is discussed below.)

There are, however, two types of federal securities claims that could more easily be subjected to mandatory arbitration via traditional contract. First, 1933 Act claims under Section 11 and 12 can only be brought by shareholders who acquired shares from the issuer in the public offering.⁸⁶ As to these claims, binding subsequent purchasers is not necessary since subsequent purchasers have no standing to assert them in any case. Corporations could thus try to get their initial purchasers to agree to arbitration, for example by directing their underwriters to allocate shares only to investors who have signed such an agreement. The issue has not arisen because, until recently, the SEC discouraged mandatory arbitration provisions by refusing to accelerate the effectiveness of a registration statement with mandatory arbitration provisions.⁸⁷ Now that the SEC has reversed that policy, it remains to be seen whether some issuer will insert such a provision and whether, having done so, it will be enforced.

Second, in unusual cases, the corporation itself may have a securities law claim (which could be asserted by the corporation itself or derivatively by shareholders). A good example is the litigation arising from the option backdating scandal at UnitedHealth. According to the SEC’s complaint, UnitedHealth’s CEO, McGuire, caused the company to grant undisclosed, in-the-money stock options to himself and other UnitedHealth officers over a 12-year period.⁸⁸ As is typical in options back-dating,

⁸⁵ 490 U.S. 477 (1989).

⁸⁶ *Slack Technologies, LLC v. Pirani*, 598 U.S. 759 (2023). Slack left open the question whether the same tracing requirement applies to Section 12 claims.

⁸⁷ SEC Release No. 33-11389; 34-103988 (“Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions”)(September 19, 2025).

⁸⁸ <https://www.sec.gov/news/press/2007/2007-255.htm>

McGuire looked back over a window of time and picked grant dates for UnitedHealth options that coincided with dates of historically low quarterly closing prices for the company's common stock, resulting in grants of in-the-money options. [He then] signed and approved backdated documents falsely indicating that the options had actually been granted on these earlier dates when UnitedHealth's stock price was at or near these low points.⁸⁹

Because, in the option backdating context, the issuing corporation is the “seller” of the “security,” the corporation had standing to bring a 10b-5 action.⁹⁰ UnitedHealth shareholders filed derivative federal securities claims for violations of Rule 10b-5 against the officers who received backdated options and the directors who approved the option grants.⁹¹

Now suppose that the agreement granting McGuire stock options had included a mandatory arbitration clause. What effect would such a clause have had on the derivative federal claims?⁹² One issue would be whether this aspect of the contract was binding given McGuire’s conflicts of interest and influence over the board. Generally, a fiduciary’s transaction with the corporation will be voidable at the instance of the corporation unless it is fair or has been cleansed. But let’s assume that the stock option agreement had been properly approved by disinterested directors. As with state law derivative claims, there is a strong argument that the FAA would require that such an arbitration provision would be enforced and thus that the provision would be valid. As we will discuss below, this example shows one of the downsides of arbitration provisions: when they only apply to some of the claims, they further complicate the already complicated negotiation of a global settlement of state and federal, direct and derivative, claims.⁹³

B. Mandatory Arbitration via Charter or Bylaw Provisions

1. Internal Affairs Suits

⁸⁹ The triggering event for the SEC’s action and both state and federal direct and derivative actions was the 2006 Wall Street Journal article that specifically focused on the giant grants to UnitedHealth’s CEO William McGuire. Charles Forelle and James Bandler, *The Perfect Payday* WSJ March 18, 2006, <https://www.wsj.com/articles/SB114265075068802118>.

⁹⁰ Lewis D. Lowenfels, *Rule 10b-5 and the Stockholder's Derivative Action*, 18 Vand. L. Rev. 893 (1965); Richard A. Booth, *Direct and Derivative Claims in Securities Fraud Litigation*, working paper 2009, available at <https://digitalcommons.law.villanova.edu/wps/art133/>.

⁹¹ *In re UnitedHealth Group Inc. Shareholder Derivative Litig.*, 591 F. Supp. 2d 1023 (D. Minn. 2008).

⁹² It would not have affected the SEC’s ability to bring an action alleging violations of the securities laws or the direct claims brought under state and federal law because the suing shareholders were not parties to the contract.

⁹³ *Matsushita Elec. Ind. v. Epstein*, 516 U.S. 367 (1996).

(a) Delaware law

The 2000s saw a substantial increase in merger litigation. Virtually every large deal resulted in a lawsuit, often in multiple lawsuits brought in different judicial fora.⁹⁴ In response, and following dicta in a 2010 Chancery Court opinion suggesting that such provisions would be legal and effective,⁹⁵ many firms adopted bylaw provisions designating Delaware courts as the exclusive forum for litigation. Two Chancery Court opinions, *Boilermakers* in 2013 and *City of Providence* in 2014, upheld provisions that designated, respectively, the courts of Delaware and of North Carolina as exclusive fora.⁹⁶ In upholding these provisions, the courts noted that, even though stockholders had not approved these specific bylaws (which were unilaterally enacted by the boards), corporate bylaws constitute a “binding part of the contract between a Delaware corporation and its stockholders,” and stockholders had agreed to the “contractual framework” which gave directors the general power to adopt bylaws unilaterally.

But allowing Delaware corporations to require shareholders to litigate their claims in a foreign court proved to be too much. In 2015, the Corporation Law Council proposed, and the legislature adopted, a new Section 115 of the Delaware General Corporate Law (DGCL)⁹⁷ which read:

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

"Internal corporate claims" were defined to include both direct and derivative fiduciary duty claims as well as any other claims under the DGCL (but not federal securities claims).⁹⁸

⁹⁴ CITE

⁹⁵ *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (Laster, V.C.) (postulating that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes”).

⁹⁶ *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 954 (Del. Ch. 2013) (Strine, C.); *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014) (Bouchard, C.) (“I do not discern an overarching public policy of this State that prevents boards of directors of Delaware corporations from adopting bylaws to require stockholders to litigate intra-corporate disputes in a foreign jurisdiction.”); see also *Choupak v. Rivkin*, No. CV 7000-VCL, 2015 WL 1589610, at *19 n.3 (Del. Ch. Apr. 6, 2015), judgment entered (Del. Ch. May 12, 2015), and *aff'd* 129 A.3d 232 (2015).

⁹⁷ 80 Del. Laws ch. 40 (2015) (adding Section 115 to the DGCL)

⁹⁸ Section 115 has since been amended to add the following subsection:

(c) With respect to claims that are not internal corporate claims, the certificate of incorporation or bylaws may require stockholders, when acting in their capacity as stockholders or in

Section 115, by precluding a charter or bylaw provision that prohibits bringing internal corporate claims in Delaware courts, rendered a mandatory arbitration charter or bylaw provision covering internal corporate claims invalid under Delaware law.

(b) Texas and Other States

The corresponding provision in the Texas Business Organizations Code, TBOC §2.115, does not address arbitration provisions in public companies directly but simply authorizes a corporation to require in its governing documents an exclusive Texas judicial forum for “any internal entity claims,”⁹⁹ defined to include a claims relating to the rights, powers, and duties of a corporation’s governing authority, governing persons, officers, owners, and members or to its membership or ownership interests.¹⁰⁰ In a provision added in 2025, Section 2.115 was amended to permit firms to require “that one or more courts in this state having jurisdiction shall serve as the exclusive forum and venue for any internal entity claims.”¹⁰¹ The TBOC also permits mandatory arbitration in private (non-listed) companies but only with unanimous shareholder approval.¹⁰² There is no Texas case law interpreting Section 2.115.¹⁰³

In the absence of case law and an incomplete statutory framework, there are significant open questions. First, Section 2.115’s explicit endorsement of exclusive Texas state and federal forums could be interpreted as an implicit rejection of mandating exclusive *non-Texas* forums (judicial or arbitral) as is done explicitly in DGCL §115(c). Second, the statutory validation of arbitration provisions in private companies when approved unanimously by shareholders could be interpreted as either implicitly forbidding mandatory arbitration in public companies or as requiring unanimous shareholder approval of such provisions.

Space X’s bylaws may result in the clarification of these questions, either by judicial decision or by legislation. The Space X bylaws provide for mandatory arbitration of internal affairs disputes, but only in the event that a court refuses to transfer such claims to the Texas Business Court. With regard to internal affairs dispute, we would expect other courts to

the right of the corporation, to bring any or all such claims only in 1 or more prescribed forums or venues, if such claims relate to the business of the corporation, the conduct of its affairs, or the rights or powers of the corporation or its stockholders, directors or officers; provided that such requirement is consistent with applicable jurisdictional requirements and allows a stockholder to bring such claims in at least 1 court in this State that has jurisdiction over such claims.

⁹⁹ TBOC 2.115.

¹⁰⁰ TBOC, 1.105.

¹⁰¹ TBOC 2.115(b)(2). TEXAS 89TH LEGISLATURE > SENATE BILL 2411, 2025 Tex. SB 2411. Sidley, Texas Seeks to “Seize the Moment” by Enacting Major Changes to Business Organizations Code, <https://ma-litigation.sidley.com/2025/05/texas-seeks-to-seize-the-moment-by-enacting-major-changes-to-business-organizations-code/>

¹⁰² TBOC §21.202(a)(9). Discussed in Egan 4th edition at §2.5.3 n. 390, pp. 112-114.

¹⁰³ See Byron Egan 4th edition at 72-73.

require that they be brought in the Texas Business Court which has clear subject matter jurisdiction in the same way that courts have respected exclusive forum bylaws in Delaware corporations. But, with respect to the arbitration provisions in the Space X bylaws, the status is less clear, as discussed below in connection with arbitration of federal securities claims.

The situation in other states is also unclear. Like Texas, the Model Business Corporation Act permits the designation of the incorporating state's courts as the exclusive forum but does not address the enforceability of provisions designating some other forum as exclusive.¹⁰⁴ Nevada expressly permits the designation of its courts, on their own or in conjunction with the courts of other states, as exclusive forums,¹⁰⁵ and further provides that this provision "must not be interpreted as prohibiting any corporation from consenting, or requiring any corporation to consent, to any alternative forum in any instance." In 2013-14, two courts applying Maryland law found a mandatory arbitration bylaw to be valid and enforceable under Maryland law.¹⁰⁶ Subsequently, Maryland adopted a provision similar to Delaware DGCL §115(c) that provides that "[t]he charter or bylaws of a corporation may not prohibit bringing an internal corporate claim in the courts of this State or a federal court sitting in this State."¹⁰⁷ Most other states have no explicit provisions.

Delaware and Maryland are thus virtually alone in taking a clear stance that mandatory arbitration bylaws are invalid. In Texas and states that follow the Model Business Corporation Act, the statute does not expressly preclude mandatory arbitration, though the statute, by expressly permitting exclusive forum provisions only if they include that the incorporation state's court, could be read to imply a prohibition. Nevada's statute, by contrast, expressly disavows such an implication and seems most open to permitting mandatory arbitration. Courts in states that lack any applicable statutes may follow the rationale in *Boilermakers* and *City of Providence* and find more general provisions of their corporate laws validate all types of exclusive fora provisions, including mandatory arbitration bylaws, or may reject such provisions entirely. Whatever the current state of the law, states that try to compete for incorporations by offering provisions that favor management and controlling shareholders, can be expected to change their laws if needed.

¹⁰⁴ MBCA, Section 2.08 ("The articles of incorporation or the bylaws may require that any or all internal corporate claims shall be brought exclusively in any specified court or courts of this state and, if so specified, in any additional courts in this state or in any other jurisdictions with which the corporation has a reasonable relationship."); Wash. Rev. Code § 23B.02.080

¹⁰⁵ Nevada Revised Statutes § 78.046

¹⁰⁶ Del. Cty. Employees Ret. Fund v. Portnoy, 2014 WL 1271528 (D. Mass. 2014); Corvex v. Commonwealth REIT, 2013 WL 1915769 ((Md.Cir.Ct. 2013).

¹⁰⁷ Md. Code Ann., Corps. & Ass'ns § 2-113. Saba Capital Master Fund v. Clearbridge, 694 F.Supp.3d 394 (S.D.N.Y. 2023).

2. Federal Securities Claims

(1) Delaware law

Whether bylaws that mandate arbitration of federal securities claims would be valid under Delaware law is a bit complicated.¹⁰⁸ Analytically, there are two steps in the analysis. First, would a mandatory arbitration charter provision or bylaw be a proper subject for a charter provision or bylaw? And second, what limits are imposed by Section 115?

Under Section 102(b)(1), a charter may contain

Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State.

DGCL 109(b), in setting forth the power to adopt bylaws, adopts a similarly broad scope:

The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

The Delaware Supreme Court, in *Salzberg v. Sciabacucchi*, interpreted these provisions broadly to encompass forum selection bylaws not only for internal affairs disputes but also for some vaguely-defined set of other claims that arise “inside” the corporation and among corporate actors (“intra corporate disputes”).¹⁰⁹ Specifically, the court upheld an exclusive federal forum selection bylaw for 1933 Act claims (over which federal and state courts have concurrent jurisdiction) on the grounds that such a bylaw relates to “the management of the business and the conduct of the affairs of the corporation” and is a provision “creating, defining, limiting and regulating the powers of the

¹⁰⁸ While claims by the corporation against fiduciaries for violating the federal securities laws (and the parallel derivative claims) are possible under the federal securities laws, and there are some high profile examples, they are, in practice, rare. Richard Booth, *Direct and Derivative Claims in Securities Fraud Litigation* 4 Va. L. & Bus. Rev. 277 (2009). To see why, recall the option backdating scandal. SEC enforcement actions were brought, as were Delaware fiduciary duty actions, but few if any direct or derivative corporate claims even though the corporation was likely harmed by the improper pricing of options on corporate stock.

¹⁰⁹ *Salzberg*.

corporation, the directors, and the stockholders.”¹¹⁰ According to *Salzberg*, 1933 Act claims can be subject to a mandatory federal forum selection provision under Section 102(b)(1) because such provisions:

involve a type of securities claim related to the management of litigation arising out of the Board's disclosures to current and prospective stockholders in connection with an IPO or secondary offering. The drafting, reviewing, and filing of registration statements by a corporation and its directors is an important aspect of a corporation's management of its business and affairs and of its relationship with its stockholders.

Because mandatory arbitration provisions can be understood to be a particular type of “forum selection” provision, *Salzberg* implies that bylaws requiring mandatory arbitration would be permissible.

Section 115, as initially enacted, endorsed forum selection bylaws only for internal affairs disputes as long as they could be brought in a Delaware forum. In doing so, it precluded mandatory arbitration bylaws for internal affairs disputes but it did not address federal securities claims. In 2025, in response to *Salzberg*, Delaware amended Section 115 to add subsection (c) which provides that:

With respect to claims that are not internal [affairs] claims, the certificate of incorporation or bylaws may require stockholders, *when acting in their capacity as stockholders or in the right of the corporation*, to bring any or all such claims only in 1 or more prescribed forums or venues, if such claims relate to the business of the corporation, the conduct of its affairs, or the rights or powers of the corporation or its stockholders, directors or officers; provided that such requirement is consistent with applicable jurisdictional requirements and allows a stockholder to bring such claims in at least 1 court in this State that has jurisdiction.¹¹¹

The clear intention of Section 115(c), as confirmed by the synopsis, is that the same limitations that apply to forum selection provisions for “internal affairs” claims will also apply to non-internal affairs claims brought by stockholders when acting in their capacity as stockholders or in the right of the corporation: a federal or state court in Delaware must be among the selected fora.¹¹² The proviso was meant to assure that 1934 Act claims (as to

¹¹⁰ *Salzberg*.

¹¹¹ DGCL, §155(c) (emphasis added).

¹¹² Synopsis: “Sections 1, 3 and 4 of this Act amend §§ 102(f), 109(b) and 115 so that the same statutory safeguards that apply to certificate and bylaw provisions regulating internal corporate claims will also apply to certificate and bylaw provisions addressing the intra-corporate affairs claims permitted under the reasoning of the *Salzberg* decision.”

which there is exclusive federal jurisdiction) could be validly made subject to an exclusive forum provision designating the federal District Court for the District of Delaware while still affording plaintiffs a judicial forum where the claim could be brought. Accordingly, a bylaw that required arbitration of federal securities claims would be invalid under Section 115(c) because it would not allow a claim to be brought in at least one (federal or state) court in Delaware.

But there is another potential interpretation that makes the legal status of such bylaws less clear as far as direct federal securities claims are concerned. A strong argument can be made that direct securities claims are in the nature of “investor protection” and thus not brought by stockholders “acting in their capacity as stockholders.” After all, many securities claims are brought on behalf of a class of investors who are no longer shareholders (having sold their stock) or who were not yet shareholders when they were misled into buying the stock and similar claims can be asserted by holders of securities other than stock, such as options or bonds. If so, direct securities claims would not be subject to Section 115(c).

This was the argument made in the Chancery Court in *Salzberg*:

The *Boilermakers* distinction between internal and external claims answers whether a forum-selection provision can govern claims under the 1933 Act. It cannot, because a 1933 Act claim is external to the corporation. Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or defendant. The 1933 Act establishes a statutory regime that applies when a particular type of property—securities—is offered for sale in particular scenarios that the federal government has chosen to regulate. The cause of action belongs to a purchaser of a security, and it arises out of an offer or sale. The defined term “security” encompasses a wide range of financial products. Shares of stock are just one of many types of securities, and shares in a Delaware corporation are just one subtype. A claim under the 1933 Act does not turn on the rights, powers, or preferences of the shares, language in the corporation’s charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation. Under *Boilermakers*, a 1933 Act claim is distinct from “internal affairs claims brought by stockholders qua stockholders.”

Taking this view allows one to cobble together an argument for the validity of mandatory arbitration bylaws for federal securities claims. Under *Salzberg*’s interpretation of Section 102(b)(1), federal securities claims are a proper subject for bylaws or charter provisions because “[t]he drafting, reviewing, and filing of registration statements by a corporation and its directors is an important aspect of a corporation’s management of its

business and affairs and of its relationship with its stockholders.” This encompasses a presumably broader set of claims than the claims under Section 115(c) which are limited to claims by stockholders when they are acting in their capacity as stockholders or in the right of the corporation. Thus, the argument would go, claims that are sufficiently related to a corporation's management of its business and affairs to fall under Section 102(b)(1), but that are not brought by “stockholders acting in their capacity as stockholders,” can be made subject to an exclusive forum bylaw under *Salzberg*, but are outside the scope of Section 115(c)’s requirement that at least one court in Delaware is designated as a forum.

Although this argument as intellectual appeal, it is likely to fail. The synopsis for Section 115(c) states that the amendments were intended to make sure that “the same statutory safeguards that apply to certificate and bylaw provisions regulating internal corporate claims will also apply to certificate and bylaw provisions addressing *the intra-corporate affairs claims permitted under the reasoning of the Salzberg decision*.” Since *Salzberg* specifically covered federal securities claims, these claims (even if perhaps not other claims that fall under the *Salzberg* rationale) are intended to be within the scope of Section 115(c). As a result, it is unlikely that a mandatory arbitration bylaw for securities claims is valid under current Delaware law.

In any case, the argument that federal securities claims are outside the scope of Section 115 would not extend to derivative securities claims. Derivative securities claims are brought by plaintiff stockholders acting in its capacity as a stockholder or in the right of the corporation.¹¹³ They thus fall squarely within Section 115(c) which requires that they must be able to be brought in a court in Delaware.

(2) Texas law

As discussed above, Texas law is unclear as to whether and how non-Texas exclusive forum and arbitration bylaws can be adopted by public corporations.¹¹⁴ There is particular uncertainty under Texas law with regard to the validity of arbitration clauses for non-internal affairs disputes like federal securities law claims. The Space X IPO may generate some clarity. As noted, Space X’s bylaws provide that if a court refuses to transfer certain claims to the Texas Business Court, such claims are to be resolved by mandatory arbitration. The Space X’s bylaws specifically include federal securities claims, including claims under the Securities Exchange Act which are subject to exclusive federal jurisdiction, and purport to

¹¹³ While, in principle, these claims can be brought directly by the corporation, in practice that is rare. Richard Booth, *Direct and Derivative Claims in Securities Fraud Litigation* 4 Va. L. & Bus. Rev. 277 (2009).

¹¹⁴ See TAN – above.

require a court to transfer such claims to the Texas Business Court. Unlike in the case of internal affairs claims, a federal court in which such claims are filed might very well refuse to transfer them to the Texas Business Court (as that court would not have jurisdiction).¹¹⁵ This would then squarely invoke the validity of the alternate provision requiring that such claims be arbitrated.

The Space X registration statement states explicitly that anyone holding shares of Space X will be deemed to have agreed to the exclusive forum and venue and arbitration provisions set forth in Article X of the bylaws. Moreover, Space X Bylaw 10.2(i) claims that the bylaw itself constitutes a contract to which the shareholders are a party. It provides that the arbitration provision

constitutes an express agreement to arbitration by each shareholder, the Corporation, its directors, its officers and its controlling persons, and each underwriter of securities issued by the Corporation (if any). In accordance with Texas law's treatment of bylaws as a contract between shareholders and the Corporation, this agreement shall be treated as a written agreement to arbitrate all Other Disputes.¹¹⁶

Space X's bylaws thus raise several open issues. The first is, whether under Texas law, a bylaw can contain a forum selection provision that extends to non-internal corporate claims. Relatedly, there is an open question whether a bylaw may mandate arbitration and, if so, what sort of shareholder approval is required. If the answer to either question no, no further analysis is required.

If an arbitration bylaw extending to non-internal affairs disputes is valid under Texas law, a second issue is whether such a provision would be respected by non-Texas courts. Under general conflict of law rules, states apply the law of the state of incorporation to the internal affairs of the corporation. If mandatory arbitration bylaws are permitted in Texas, Texas law would thus control their validity as far as these bylaws relate to the company's internal affairs. As to internal affairs, such bylaws are likely to be enforced by courts in other

¹¹⁵ But see *Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022) (holding that a bylaw conferring exclusive jurisdiction over derivative claims to the Delaware Chancery Court violates federal law as applied to derivative securities claims subject to the exclusive jurisdiction of federal courts); but see *Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023) (en banc) (arriving at the opposite conclusion). Note that *Seafarers* and *Lee* dealt with derivative lawsuits that could, in principle, have been brought by the corporation itself and could then have been brought in federal court. Thus, the bylaws at issue did not foreclose all avenues for asserting the underlying claim. By contrast, if shareholders were to bring a direct claim against Space X under the Securities Exchange Act, enforcing the forum selection clause in favor of the Texas Business Court would completely foreclose any possibility of asserting the underlying claims.

¹¹⁶ Space X bylaw 10.2(i).

states, just as courts in other states have enforced bylaw provisions designating Delaware courts as exclusive fora for internal affairs disputes involving Delaware corporations.¹¹⁷

But securities claims are not part of a company's internal affairs. And it is far from clear whether the "charters/bylaws are contracts to which shareholders have consented" assertion in the Space X bylaws, and similar statements in the case law, extend to non-internal affairs claims. Indeed, the Chancery Court in *Salzberg* ruled that it does not and invalidated a forum selection bylaw for a securities claim. And although Delaware Supreme Court in *Salzberg* reversed, its decision was based on the wording of Section 102(b)(1)—which permits charters (and, via Section 109, bylaws) to contain "any provision for the management of the business and for the conduct of the affairs of the corporation"—and *not* on the "charters/bylaws are contracts to which shareholders have consented" rationale. Indeed, the Delaware Supreme Court opinion in *Salzberg* expressly separated the question of whether such provisions are valid under Delaware law from the question of whether other states (or federal courts) would enforce them. And with regard to the Space X bylaws, the courts likely to address the issue would be federal courts in which a 10b-5 claim is filed that cannot be transferred to the Texas Business court.¹¹⁸ Commentators expect that these issues will be sorted out as the provisions are challenged.¹¹⁹

3. The FAA

While the illegality of mandatory arbitration bylaws under Section 115 of the DGCL is clear as a matter of Delaware law, whether that section violates the FAA is more complex.¹²⁰ Under the FAA, a clause in a contract involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract ...".¹²¹ Under the FAA, state law can invalidate an arbitration agreement only so long as "that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."¹²² The FAA thus preempts any state law that "discriminat[es] on its face

¹¹⁷ See Helen Hershkoff & Marcel Kahan, [Forum-Selection Provisions in Corporate 'Contracts.'](#) 93 *Washington Law Review* 265 (2018).

¹¹⁸ Texas's General Arbitration Act endorses arbitration agreements. Texas Civ. Prac. & Rem. Code, Section 171.001(a)

¹¹⁹ Law 360 article; Alan Kaplinsky article.

¹²⁰ See Grundfest & Manash, 98 NYU L. Rev. 1106, 1149-1152.

¹²¹ 9 U.S. Code § 2

¹²² *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (quoting *Perry*, 482 U.S. at 492 n. 9, 107 S.Ct. 2520).

against arbitration” or indirectly “accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.”¹²³

But are corporate bylaw and charters “contracts” to start with or rather a separate species of constitutive documents, at least for FAA purposes? While bylaws and charters share some features with regular contracts—they are instruments of private ordering—they lack the type of consent that is classically required for contracts and involve the state to a degree that is at odds with private-ordering principles.¹²⁴ Despite these differences, many court opinions, including *Boilermakers* and *City of Providence* which validated exclusive forum bylaws prior to Section 115 (and did so in a manner that was compatible with the FAA) have referred to charters and bylaws as contracts¹²⁵—albeit peculiar ones. The parties to the “contract” formed by a charter or bylaw are the corporation, the shareholders, *and the state itself*¹²⁶ and the terms of the contract include the state’s corporation law, including any subsequent amendments,¹²⁷ as well as corporate laws more generally.¹²⁸

¹²³ *Kindred Nursing Ctrs. Ltd. Partnership v. Clark*, 581 U.S. 246, 251 (2017).

¹²⁴ Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts”*, 93 WASH. L. REV. 265, 269 (2018); Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223 (2021); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016).

¹²⁵ *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429 (1934); *Avondale Land Co. v. Shook*, 54 So. 268, 269 (Ala. 1911); *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 852 (Fla. 1971); *S. W. R. Co. v. Benton*, 58 S.E.2d 905, 917 (Ga. 1950); *Pac. Intermountain Exp. Co. v. Best Truck Lines, Inc.*, 518 S.W.2d 469, 472 (Mo. Ct. App. 1974); *State ex rel. Swanson v. Perham*, 30 Wash. 2d 368, 374, 191 P.2d 689, 693 (1948); see also 18 C.J.S. Corporations § 64 (2017); *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. Ch. 1930); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

¹²⁶ *Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) (“[A] corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders.”); *Lawson*, 152 A. at 727 (“[T]he charter of a corporation is a contract both between the corporation and the state and the corporation and its stockholders. It is not necessary to cite authorities to support this proposition.”); *Garey v. St. Joe Mining Co.*, 91 P. 369, 371 (“It is a well recognized principle of law that “the charter of a corporation having a capital stock is a contract between three parties and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state.”); *State ex inf. Dalton ex rel. Holekamp v. Holekamp Lumber Co.*, 340 S.W.2d 678 (1960); *Warren v. Fitzgerald*, 189 Md. 476, 485, 56 A.2d 827 (1948) (corporate charter is a “contract between stockholders” and “between the corporation and the State”).

¹²⁷ DEL. CODE ANN. tit. 8, § 394 (2017) (“This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation.”). See also *Hartford Acc. & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 24 A.2d 315, 321 (Del. Ch. 1942) (“[T]here is impliedly written into every corporate charter as a constituent part thereof the pertinent provisions of the State Constitution and statutes.”)

¹²⁸ *Hull v. Pfister & Vogel Leather Co.*, 294 N.W.18, 23 (Wis. 1940) (“The defendant corporation having been organized under the laws of Wisconsin, the general corporation laws of Wisconsin form a part of defendant's corporate charter and, therefore, constitute a part of the contract between the corporation and the stockholders.”)

Despite the numerous cases characterizing charters and bylaws as contracts, several scholars have taken the position that the FAA does not apply. Under one line of reasoning, charters and bylaws are not “real” contracts, regardless of what courts have said, because shareholders did not provide sufficient consent¹²⁹ or because they are governed by the distinct regulatory framework of corporate law rather than contract law.¹³⁰ Under another line, although charters and bylaws are contracts, arbitration provisions never become part of the contract because the state (as one of the parties to the contract) did not consent.¹³¹

Although neither of these arguments on its own is fully persuasive, combined they may have more force. To be sure, the state plays an unusually large role in the regulation of what terms are permitted in the charter or bylaw contract.¹³² State law not only limits the general scope of provisions in the charter or bylaws; it also regulates, in significant detail and with retroactive effect, what type of provisions within that scope are permitted or deemed to be included. But to say that the state is a party to the charter or bylaw “contract” and therefore can withhold its assent to arbitration is, in the modern age at least, a legal fiction. By regulating the content of a corporate charter or bylaw, the state does not become a party to the contract any more than the state would be a party to any other contract in the myriad other areas that are subject to significant regulation.

By regulating the content of charter and bylaw provisions, however, state law *defines* the scope of consent that shareholders are deemed to have provided. It is state law that provides that bylaws can be amended, if authorized by a charter provision, by the board without any shareholder vote.¹³³ It is also state law that determines that charter amendments require the recommendation of the board and approval of a majority of outstanding shares.¹³⁴ It is thus state law that defines when shareholders, *by merely holding stock* of a corporation, are *deemed to have agreed* to these provisions. And it is also state law that defines the limits of *deemed* consent by imposing limits on what provisions may be contained in the bylaws or the charter. Shareholders of Delaware corporations, for example, are not deemed to have consented to a bylaw provision denying shareholders the right to take actions by written consent (since such a provision can only be contained in the charter)¹³⁵ or to a charter provision providing for fee shifting in shareholder disputes (since such a provision is invalid).¹³⁶ This is why Space X’s unilateral declaration that anyone holding

¹²⁹ See, e.g., Lipton, *supra* note __, at 587

¹³⁰ Raz, *supra* note __, at 226

¹³¹ See Grundfest & Manash, 98 NYU L. Rev. 1106, 1154-64.

¹³² Hershkoff & Kahan, at 280.

¹³³ DGCL §109.

¹³⁴ DGCL §242.

¹³⁵ DGCL §228.

¹³⁶ DGCL §109(b).

its shares is deemed to consent to the dispute resolution bylaws is not, on its own, effective: the state, rather than an individual corporation, determines when shareholders will be deemed to consent. Because of this, the key legal question is whether, under Texas law, Space X's declaration will constitute sufficient shareholder consent.¹³⁷

But these corporate law limitations on what provisions may be contained in the charter or bylaws do not mean that shareholders can never consent to such limitations of their rights. Shareholders can, for example, provide for fee shifting, but to do so they must enter into a real contract with actual, rather than deemed, consent.¹³⁸

As several United States Supreme Court opinions have held, consent is the basis for the FAA.¹³⁹ When consent is actual, state law cannot adopt legal rules that make consent to arbitration clauses harder than consent to other elements of the contract. That is the import of Section 2 of the FAA, which limits the grounds for holding arbitration provisions unenforceable to “grounds as exist at law or in equity for the revocation of any contract.”¹⁴⁰ Thus, a state law could not provide that a minor obtains legal capacity to contract when she turns 18 but only obtain legal capacity to be bound by an arbitration provision when she turns 21.

But when consent is “deemed” or “constructive,” state law must necessarily have more leeway as deemed consent inherently does not apply equally to all types of provisions. Delaware, for example, could have opted for a variety of different regimes for what constitutes deemed consent in the context of forum and arbitration provisions, so long as it did not discriminate against arbitration provisions. It could have required that such provisions be contained in the charter (as initially suggested by the chancery court)¹⁴¹ or either in the charter or a shareholder-approved bylaw,¹⁴² or it could hold such provisions to

¹³⁷ Alan Kaplinsky & Joseph Shuster, SpaceX Becomes the First Major IPO Issuer to Implement the SEC's New Shareholder Arbitration Policy (“Several unresolved issues, including . . . Whether shareholders who purchase stock in or after an IPO have adequately consented to arbitration provisions contained in corporate governance documents;”), available at <https://www.consumerfinancemonitor.com/2026/06/15/spacex-becomes-the-first-major-ipo-issuer-to-implement-the-secs-new-shareholder-arbitration-policy/>.

¹³⁸ Rauterberg, 38 YJR 1124, 1128 (“Statutory rules that are mandatory for the charter and bylaws sometimes do not bind shareholder agreements.”) Such provisions would likely to specifically enforceable.

¹³⁹ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415–16 (2019) (“the first principle that underscores all of our arbitration decisions is that ‘[a]rbitration is strictly a matter of consent.’”); *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923 (2022) (consent is “the fundamental principle” of the FAA); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (id.).

¹⁴⁰ FAA, Section 2.

¹⁴¹ *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (Laster, V.C.) (postulating that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes”).

¹⁴² That’s the rule for staggered board provisions. DGCL 141(d).

be completely outside the permissible scope of charter and bylaw provisions. Any of these provisions would have defined, under the “bylaws/charters as contracts” rationale, whether and when shareholders are deemed to have consented to it. What Delaware could not do is duck the question of what it takes for shareholders to be deemed to have provided such consent and leave it to general principles of contract law.

There is nothing in the FAA that displaces state law requirements for consent to contractual provisions and the FAA should be neutral among these different possible state law regimes for adopting arbitration provisions. Rather, so long as a state does not discriminate among different types of forum provisions, the requirement for shareholder consent should pass FAA muster. Thus, if Delaware had never ventured down the road of permitting forum provisions in bylaws or if it had stuck with its case law in permitting any forum provision (including, presumably, mandatory arbitration bylaws),¹⁴³ there would be no FAA concerns.

The problem, for FAA purposes, is that Delaware adopted a statutory provision, Section 115, that discriminates between forum provisions: shareholders are only deemed to have consented to a bylaw or charter provision that designates Delaware (on its own or in conjunction with other states) as an exclusive forum. The saving grace, however, is that Delaware does not discriminate specifically against arbitration: it discriminates against any forum other than its own courts. Whether this saving grace is enough to save Section 115 from the FAA when the context is deemed, rather than actual, consent remains to be determined.

But now consider Space X bylaw 10.2(i) (“In accordance with Texas law’s treatment of bylaws as a contract between shareholders and the Corporation, this agreement shall be treated as a written agreement to arbitrate all Other Disputes.”) and the Space X S-1 that announces to all and sundry that by acquiring shares, a shareholder “will be deemed to have notice of and to have consented to these provisions” and “shall be deemed to have irrevocably and unconditionally waived any right it may have to a trial by jury in any Internal Dispute.”¹⁴⁴ Will this be sufficient to create a “contract” and whether any “contract” so created will be a contract for FAA purposes? That will be a question, in the first instance, of Texas law with substantial complexity. While Texas, like Delaware, recognizes principles of

¹⁴³ *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 954 (Del. Ch. 2013) (upholding bylaw provision selecting Delaware courts as exclusive forum); *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014) (upholding bylaw provision selecting North Carolina courts as exclusive forum).

¹⁴⁴ Space X S-1 at 63-64.

freedom of contracting in LLC and LPs, it does not do so in corporate law.¹⁴⁵ If, and only if, the Space X bylaw creates a contract under Texas law does the federal question arise as to whether, under the FAA, it is sufficiently a contract to be protected from discrimination. As our earlier discussion of the FAA makes clear, this is typically an easy question under the FAA in light of the strong federal policy in favor of enforcing arbitration provisions.

C. Summary

There is a range of legal uncertainty with regard to mandatory arbitration provisions. It is very likely that most derivative internal affairs and derivative securities law claims can be subjected to arbitration. Since these claims belong to the corporation, all it takes is a contract that binds the corporation to subject any derivative plaintiff to arbitration. There are several separate roads that would lead to that result. First, under *Kiani*, an arbitration clause in a stockholder agreement is enforceable, no further questions asked. This could at least bring any claims against controllers within the arbitration purview. Second, under one reading of *Parfi*, an arbitration clause in a contract (whether or not a stockholder agreement is enforceable) as to claims that are clearly within its scope is enforceable. In Texas and presumably most other jurisdictions which have not shown Delaware's aversion to choice of forum clauses in favor of arbitration or other states' courts with respect to internal affairs claims, contracting for arbitration should be even easier. As to federal securities claims, there are controlling US Supreme Court precedents that approve mandatory arbitration, thus avoiding the issues raised by the *Parfi* line of cases. Finally, and most importantly, under the FAA, a large set of derivative claims could likely be subjected to arbitration, including any claims related to transactional breaches of fiduciary duties and, possibly, any claims against directors. Even if Section 115 is valid, therefore, companies can, with a little extra effort, subject most if not all derivative fiduciary duty and derivative federal securities claims to arbitration.

By contrast, the situation with regard to direct claims is more uncertain. At least with regard to 1933 Act Section 11 and 12 claims which are limited to direct purchasers in a public offering, there is privity of contract and, as a result, a mandatory arbitration provision in an agreement signed by such purchasers would likely be enforceable.

With regard to shareholders who acquired shares in the secondary market, by contrast, it would be much more difficult to subject direct internal affairs and securities

¹⁴⁵ Byron Egan, *Egan on Entities* (4th edition) at 237-38. On the other hand, whatever the state of current Texas law on whether Space X's bylaws constitute a contract, the Texas courts or legislature can change the law to accommodate the Space X approach.

claims to arbitration. The main reason is practical: it is difficult to bind all shareholders of publicly traded corporation to such a provision via traditional contract.

The main avenue to bind them would therefore not be an individual contract but a charter or bylaw provision. But whether a bylaw (or charter) may contain a mandatory arbitration provision will depend, as an initial matter, on state law. In Delaware, such a provision is currently invalid. In Texas, its legal status is less clear.

A key issue is thus whether the FAA overrides state law restrictions. If Section 115 turns out to be invalid under the FAA as it applies to mandatory arbitration provisions—and there is a distinct possibility that it may be—then presumably pre-Section 115 case law would control the validity of arbitration clauses and under such law mandatory arbitration provisions would be presumptively valid. In Texas, if its law is interpreted to preclude mandatory arbitration, and such a restriction were to violate the FAA, there is no fall back to prior case law and the result may be either that all or that no forum selection provisions are valid.

Delaware, of course, could change its law to expand the availability of arbitration and will come under pressure to do so.¹⁴⁶ Texas likewise could clarify its law to permit mandatory arbitration. The next Parts will analyze the implications for state competition if arbitration of all internal claims is legally available. Part II will examine whether companies would want to opt for arbitration. Part III will discuss the effects on state competition if many companies opt for arbitration. Part IV will explore how Delaware should respond to the possible demand for arbitration.

II. The Demand For Arbitration

That arbitration is or may become legally available, of course, only matters to the extent that companies would adopt arbitration provisions for internal affairs and securities claims. From the perspective of defendants, arbitration of such claims offers several advantages.

A. Ability to Avoid Class Actions

¹⁴⁶ Berger & Matera, *supra* note __, at [6] (“With the federal constraint removed, Delaware may face increasing pressure to revisit [its prohibition of mandatory arbitration bylaws]”).

Probably the most significant advantage is that arbitration provisions can be designed to eliminate the ability of plaintiffs to pursue their claims in class actions.¹⁴⁷ In fact, unless an arbitration provision specifically permits class action arbitration, class action arbitration is not available.¹⁴⁸

For direct claims for breach of fiduciary duty and direct securities laws claims, eliminating class actions has several effects. First, for many small shareholders or market participants, without class actions or other consolidated action, pursuing a claim will not be financially viable. To that extent, potential damages are reduced.

To be sure, other shareholders and market participants, in particular institutional investors, may hold sufficient stakes in a company, or have engaged in sufficient trading activity, to make it financially viable to pursue a claim, in particular if their claim could be consolidated with the claims of other claimants.¹⁴⁹ Plaintiffs lawyers could try to organize these claimants, offering to pursue arbitration of their behalf with a contingent fee, similar to the class actions they currently file.

Plaintiffs' lawyers, however, may encounter two problems. First, with the exception of public pension funds, institutional investors have so far been reluctant to get involved in adversary proceedings against portfolio companies. Even the largest institutional investors do not serve as lead plaintiffs in securities lawsuits, file 14a-8 shareholder proposals, or wage proxy contests for the election of directors, and they almost always disavow any form of activism by reporting their large holdings on Schedule 13G rather than 13D.¹⁵⁰ Rather, at least with respect to corporate governance, they prefer less visible roles, voting in favor of shareholder resolutions and director nominees filed by others or pursuing behind-the-scenes "engagement" with portfolio companies. When it comes to litigation, they may be even less active. In two seminal empirical studies, James Cox and Randall Thomas have

¹⁴⁷ In the mass tort context, where defendants would otherwise face a large number of unconsolidated individual claims, defendants may benefit from class actions as they offer the opportunity to settle claims and obtain "peace" at comparatively low litigation expenses. But this is not the case if the context of internal affairs and securities claims where the number of separate claims that will be filed, if any, is likely to be low or moderate and where all claims would be filed in the same arbitration tribunal and could be consolidated.

¹⁴⁸ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

¹⁴⁹ Space X's bylaws prohibit consolidated claims regardless of forum. It is unclear whether such a prohibition is valid and what it entails. Obviously, the same lawyers can bring claims on behalf of a group of plaintiffs and these cases may end up in front of the same judge or arbitrator. If, as is typically the case, the cases involve the same operative effects, they will presumably be resolved in the same way whether they are consolidated or not.

¹⁵⁰ Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2095-2116 (2019)

shown that less than 30% of institutional investors with provable losses perfect their claims in securities class actions settlements.¹⁵¹

This passivity may be driven by more than a cost-benefit analysis related to the specific issue involved. The costs of filing a 14-8 proposal, applying to become lead plaintiff, and completing a form to obtain one's share of a class action settlement are small. While an analysis of the reasons for institutional passivity goes beyond the scope of this paper, the past record creates at least a concern that institutions would not be willing to take the affirmative step of initiating a direct internal affairs or securities claim in an arbitration even if the expected recovery exceeds the costs to the institution. To the extent that they fail to do so, potential damages are further reduced.

Second, the reduced number of claimants—due to the loss of many individual shareholders and the possible loss of at least some institutional shareholders—and the additional expense of having to corral the remaining individual and institutional investors will make it less attractive for plaintiff law firms to pursue arbitrations. At the margin, this will lead them to forego some claims that would have been economical to pursue if they could have been pursued on behalf of the entire class, reducing both defendants' exposure to damage claims and their litigation expenses.

B. Limited Discovery

Another advantage of arbitration for defendants is that discovery is more limited than in regular litigation. While parties may in principle take depositions from other parties to the litigation and request them to produce documents, the right to do so is generally not automatic but depends on the discretion of the arbitrator.¹⁵² Under the Commercial Arbitration Rules by the American Arbitration Association, for example, the arbitrator is supposed to “manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time

¹⁵¹ James D. Cox & Randall S. Thomas, Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements, 58 Stan. L. Rev. 411, 412, 415–16 (2005); James D. Cox & Randall S. Thomas, Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?, 80 Wash. U. L.Q. 855, 877 (2002)

¹⁵² Uniform Arbitration Act, Section 17(c) (“An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.”)

promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.”¹⁵³

There are significant additional limitations on third party discovery.¹⁵⁴ In regular civil cases, litigants can depose third parties or ask them to produce documents prior to trial.¹⁵⁵ While the FAA empowers arbitrators to “summon in writing any person to attend before them or any of them as a witness, and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case” and compel a witness “in the same manner provided by law for securing the attendance of witnesses,”¹⁵⁶ several circuit courts have held that subpoenas are only permitted in connection with an actual arbitration hearing but not for purposes of pre-hearing discovery.¹⁵⁷ And although the Uniform Arbitration Act adopted by a number of states grants arbitrators wider powers,¹⁵⁸ arbitrations can proceed under the more limited discovery rules under the FAA.

Separate from the limitations on discovery imposed by the arbitral forum, the mandatory arbitration provisions themselves may impose limitations. Thus, for example, Space X's bylaw 10.2(c) incorporates the limits on discovery provided by the Private Securities Litigation Reform Act: “The governing law expressly includes all requirements imposed by applicable law, including without limitation the pleading and discovery limitations of the Private Securities Litigation Reform Act.” One can anticipate other limits such as a provision that provides that “an email is not a document” for the purpose of document discovery.¹⁵⁹

¹⁵³ https://www.adr.org/media/ueonklrv/2026_commercial-arbitration-rules-mediation-procedures.pdf, Rule 23(a).

¹⁵⁴ See generally <https://www.grsm.com/insight/when-parties-arbitrate-the-powers-and-limitations-of-discovery-in-arbitration-under-the-federal-arbitration-act/>

¹⁵⁵ See, e.g., FCRP 45.

¹⁵⁶ 9 U.S.C. § 7

¹⁵⁷ *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017) “[a] plain reading of the text of section 7 reveals that an arbitrator’s power to compel the production of documents is limited to production at an arbitration hearing); *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017) (pre-hearing document subpoena found invalid); *Life Receivables Tr. v. Syndicate 102 at Lloyd’s London*, 549 F.3d 210 (2nd Cir. 2008) (document subpoena invalidated); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) (invalidating document subpoena); but see *COMSAT Corp. v. Nat’l Science Foundation*, 190 F.3d 269, 275-76 (4th Cir. 1999) (permitting pre-hearing discovery “under unusual circumstances” and “upon a showing of special need or hardship”).

¹⁵⁸ Uniform Arbitration Act, Section 17(d) (“If an arbitrator permits discovery under subsection (c), the arbitrator may ... issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding ... to the extent a court could if the controversy were the subject of a civil action in this State.”)

¹⁵⁹ Theodore Mirvis, www.law.upenn.edu/live/files/8956-omnicare-mirvis at pp. 18-19.

Discovery limitations, in turn, tend to benefit defendants in internal affairs and securities claims. First, discovery in these types of cases is sought predominantly by plaintiffs. Given the nature of the claim, defendants seek only limited information from plaintiffs. By contrast, plaintiffs rely to a significant extent on discovery to prove various elements of their claims, such as that a purported cleansing act was invalid (say because an interested party interfered in the special committee process) or that the defendants knew that a certain statement was materially false or misleading. Limiting discovery thus makes it harder for plaintiffs to prove their claims, reducing potential damages and, to the extent fewer claims are brought, litigation expenses. Second, to the extent that defendants incur expenses associated with discovery, limiting discovery reduces expenses independent of the effect on the claims. Third, the ability to impose document production costs on the other side and to inconvenience it with depositions increases the settlement value of a claim. Limiting discovery, in turn, reduces expected settlement payments.

C. Disadvantages of Arbitration

Despite these advantages, there are substantial reasons why companies may not avail themselves of arbitration even if it is available. First, it may jeopardize relationship with investors. If arbitration is to be pursued by contract, the other party to the contract may not agree. Thus, even to the extent it would be practicable to get shareholders and investors to agree to arbitrate direct internal affairs or securities claims, they may refuse to do so because they value the right to pursue their claims in court.

Shareholder and investor consent, of course, is not required to subject derivative claims to arbitration. It would not be required for direct claims either if companies could adopt bylaw provisions mandating arbitration of direct claims. But there nevertheless could be a market or governance reaction. To the extent that the right to pursue a claim in court is valuable, the stock price of a company should drop if that right is removed. And if shareholders value such right—and institutional investors have generally not favored mandatory arbitration¹⁶⁰—they could try to adopt precatory resolutions asking the company to repeal a mandatory arbitration bylaw (and not to subject derivative claims to arbitration), they could repeal such bylaws themselves, or they could even seek to replace some or all members of the board of directors in response to them having adopted such bylaws. The

¹⁶⁰ See Berger & Matera, *supra* note __, at 38 (“institutional investors have consistently expressed opposition to mandatory arbitration provisions. Such provisions—particularly when structured to preclude class or collective proceedings—are widely viewed as restricting shareholder rights and weakening mechanisms of accountability.”)

prospect of a possible fall on the stock price or shareholder opposition may induce companies not to pursue arbitration.

Second, to the extent that mandatory arbitration provisions eliminate class actions and render individual actions financially unviable, they may be unenforceable on the general contract law principle of the unenforceability of unconscionable provisions. As discussed above, under Texas law, the enforceability of arbitration provisions depends on the comparison between the costs to a claimant of litigation versus arbitration. Because derivative litigation and corporate and securities class actions do not typically cost either the representative plaintiff or class member anything out of pocket, while the costs of arbitration will typically be borne by the individual shareholder, the “unconscionability” constraint may be somewhat binding. This may be one reason why the Space X bylaws provide that the company will bear the costs of arbitration.¹⁶¹

Third, arbitration provisions embedded in broader contracts (such as transactional agreements, employment contracts, or shareholder agreements) may also be avoided because their coverage is too extensive. While subjecting shareholder suits to arbitration may be viewed as desirable, the parties may prefer other contractual disputes to be resolved by a court with the right to appeal, rather than through arbitration.¹⁶²

Fourth, in arbitration, the parties need to pay the arbitrator whereas the state pays for judges and the court system.

Finally, class actions can facilitate comprehensive resolution of claims and a release that binds all class members. Arbitration complicates global settlements (but does not preclude them) because it adds at least one more tribunal to the state and federal tribunals that already struggle to coordinate, and additional lawyers.¹⁶³

While mandatory arbitration of shareholder claims has not been available, mandatory arbitration of merger agreements—actual, bilateral contracts between sophisticated parties—has been available for decades. Indeed, Delaware’s Rapid Arbitration Act has even offered arbitration by judges of the Court of Chancery as an option.

A recent study casts some light on the attractiveness of arbitration.¹⁶⁴ Hoffman et al. examined 14,000 merger agreements between 2000 and 2026. They found that only around 8.6% chose arbitration. Of the transactions that were governed by Delaware law, only 2%

¹⁶¹ Space X bylaws 10.2(g).

¹⁶² Hoffman et al.

¹⁶³ *Matsushita Elec. Ind. v. Epstein*, 516 U.S. 367 (1996).

¹⁶⁴ Hoffman, David A. and Hwang, Cathy and Jennejohn, Matthew and Pedroso, Luiza, *Mergers & Arbitrations* (July 28, 2026). Available at SSRN: <https://ssrn.com/abstract=7198566> or <http://dx.doi.org/10.2139/ssrn.7198566>.

chose arbitration. Interviews with practitioners explain the clear preference for adjudication by the Delaware Court of Chancery versus arbitration based on the Court of Chancery's traditional virtues rather than the supposed virtues of arbitration:

Notably, interview participants report that they choose courts specifically because courts do not provide the privacy of arbitration: the threat of a drawn-out discovery process disciplines corporate counterparties who do not want to air their dirty laundry. Courts can also enforce judgments, which saves parties from the multi-step process of seeking a judgment in arbitration and enforcing it in court. But most importantly, parties trust courts for their substantive expertise: Judges, especially those in Delaware state courts, that bring to the case subject-matter expertise that litigators perceive arbitrators lack.¹⁶⁵

While these are interesting results, one cannot immediately generalize them to the attractiveness of mandatory arbitration of shareholder claims. First, during this period, mandatory arbitration of shareholder claims was not available. As a result, an arbitration provision in a merger agreement would likely result in splitting any subsequent shareholder litigation between two forums: the merger agreement would be resolved in arbitration while the shareholder litigation over the merger process, including aiding and abetting claims, would be resolved in Delaware Chancery Court or in another court system. While this undermines any generalizability, it may provide some evidence of the value to the company of a forum that can comprehensively resolve all claims. Indeed, the inability to opt into mandatory arbitration of shareholder claims through a merger agreement's arbitration provision may explain the rarity of arbitration provisions, a rarity that Hoffman et al find "odd."¹⁶⁶

Second, because the merger agreement is simply a bilateral contract, disputes between buyer and seller would not be brought as class actions in any event. Thus, to the extent that part of the attraction of mandatory arbitration is the ability to restrict or eliminate class actions, the results of the study may not predict a similar outcome. It is likewise unclear whether discovery in contractual disputes over merger agreements is one-sided.

Third, parties to a merger agreement may want to seek specific performance as a remedy and specific performance is harder to obtain via arbitration than via judicial injunction because enforcement of an arbitral award/remedy requires additional steps. Despite the infrequency of arbitration clauses in merger agreements, therefore, there may

¹⁶⁵ Id. at 9.

¹⁶⁶ Id. at 23.

be substantially greater demand for mandatory arbitration of internal affairs and securities claims.

Finally, and pointing in the other direction, the paucity of arbitration provisions in Delaware merger agreements might well change. Over the last couple of years, a tension has emerged in Delaware between judges who are steeped in the statute and its limits and lawyers who have embraced a “contractarian” approach to corporate law.¹⁶⁷ Some of the most controversial opinions have been in cases in which judges have refused to enforce contracts that are inconsistent with the requirements of the DGCL. Thus, for example, in *Moelis*, Vice Chancellor Laster rejected a stockholder governance agreement as inconsistent with the demands DGCL §141(a). In *Crispo*, Chancellor McCormick cast doubt on the enforceability of “lost merger premium” provisions in merger agreements. In *Activision Blizzard*, Chancellor McCormick held that a board’s approval of a materially incomplete merger agreement did not satisfy the requirements of DGCL §251. To the extent that this tension continues, an additional advantage of arbitration may be the ability to select arbitrators who are committed to “freedom of contract” with less of a sense of fidelity to the demands of the statute, or less knowledge of lines of Delaware precedent that limit contractual freedom.

III. Mandatory Arbitration and State Competition

In the last couple of years, competition for corporate charters has become invigorated as Texas and Nevada have challenged Delaware’s primacy and some high profile companies have left Delaware for Texas and Nevada or have chosen to go public in Texas or Nevada rather than in Delaware. SEC Chair Paul Atkins’ push for arbitration combined with Space X’s 2026 IPO, with its conditional mandatory arbitration provisions, will likely make mandatory arbitration an issue in the competition between Delaware, Texas and Nevada, may induce other states to compete actively for corporations, and will put pressure on Delaware to amend DGCL 115 to permit mandatory arbitration of internal affairs and federal securities claims. Assume, for the purposes of this Part, that companies have or will soon have the ability to opt for mandatory arbitration. How will mandatory arbitration affect state competition?

As we will show in this Part, mandatory arbitration, in particular mandatory arbitration of internal affairs claims, constitutes a fundamental threat for Delaware’s business model. Most importantly, mandatory arbitration threatens to undermine Delaware’s competitive

¹⁶⁷ Marcel Kahan & Edward Rock, *The New Political Economy of Delaware Corporate Lawmaking*, forthcoming, J. Corp. L. (2026)

advantage in the market for incorporations. Companies that opt for mandatory arbitration will obtain fewer benefits from being incorporated in Delaware compared to being incorporated in another state. Such companies may therefore opt not to incorporate in Delaware. Delaware, in other words, will suffer a loss of incorporations and franchise tax revenues. Second, even to the extent that corporations remain in Delaware, arbitration could significantly reduce the economic benefits to Delaware lawyers and other service providers. Delaware derives from being an incorporation haven. Third, the incidental benefits of litigation in the Delaware Chancery courts—enhancing the skills of Delaware’s expert judiciary and keeping the stock of precedents current—will decline.

While constituting a threat for Delaware, mandatory arbitration is an opportunity for states that seek to compete with Delaware for incorporations. If such other states permit mandatory arbitration bylaws or charter provisions and Delaware does not, these other states become relatively more attractive for companies interested in arbitration. If Delaware also permits mandatory arbitration bylaws or charter provisions, this would lessen Delaware’s competitive advantage and open up various competitive strategies to other states. However, as we explain, Nevada and Texas may turn out not to be the main beneficiaries from the weakening of Delaware’s position.

A. Arbitration and Delaware’s Competitive Advantages

(a) Judicial Quality as an Entry Barrier

The most important economic benefit Delaware derives from incorporations are the franchise tax revenues corporations pay to the Delaware fisc. In 2025 and 2026, these revenues amounted to, respectively, \$1.32 billion and \$1.33 billion,¹⁶⁸ almost 20% of the state’s total revenues.¹⁶⁹ These revenues constitute virtually free money. The costs to Delaware of running of hiring extra judges to serve corporations and of staffing its Division of Corporations pale in comparison to the revenues.

Delaware corporations must pay annual franchise taxes ranging from \$175 to \$250,000 (plus an annual report fee of \$50).¹⁷⁰ Delaware employs a complex system for calculating franchise taxes, where companies pay the lower of two rates: one determined by

¹⁶⁸ <https://www.delawarepublic.org/2026-05-19/may-defac-corporate-franchise-revenue-up-1-from-2025>. These figures do not include fees paid by LLCs and LPs.

¹⁶⁹ <https://budget.delaware.gov/budget/fy2026/documents/operating/financial-summary.pdf?ver=0115> (showing recommended budget with total forecasted general fund net revenues of \$6.7 billion for 2025 and \$6.8 billion for 2026). Including other fees, in particular franchise taxes paid by LLCs, revenues amount to an even large share of the budget.

¹⁷⁰ Title 5, Section 503(c)

the number of authorized shares and the other determined by the company's assets multiplied by the ratio of authorized to issued shares.¹⁷¹ The net impact of the system is that only companies that have large assets *and* need to have a large number of authorized shares pay high franchise taxes. Even multi-billion dollar companies have to pay only \$175 per year if they have fewer than 5,000 authorized shares or \$1,100 per year if they have fewer than 90,000 authorized shares. By contrast, a company with 30 million authorized shares would have to pay the maximum \$250,000 rate as long as it has as little as \$500 million in assets.¹⁷²

There are two types of companies that end up paying high franchise taxes: companies with publicly traded shares (over half of which are incorporated in Delaware), which tend to have significant assets and to require a large number of shares because they have a large number of shareholders with different stakes; and large (but not yet public) start-up companies with employees who receive shares as part of their compensation and which, even though they have many fewer shareholders than publicly-traded companies, need a large number of shares to achieve the desired ownership distribution between employees (who own small percentage stakes) and founders and investors (who own large stakes). Companies that have to pay large franchise taxes in Delaware could save themselves these fees by incorporating elsewhere. Most states charge only trivial franchise taxes to firms incorporated in the state, generally less \$1,000 per year.¹⁷³

The literature has pointed to a number of advantages that flow to companies from a Delaware incorporation. Traditionally topping the list are Delaware's well developed case law, its up-to-date statute, and its Court of Chancery staffed by high-quality judges who specialize in resolving internal corporate claims and who decide cases without juries. Additional benefits include familiarity with the law by lawyers, advisors, and market participants (making it easier to price stock of Delaware companies or obtain legal advice on Delaware corporate law) and the service quality of its Division of Corporations.¹⁷⁴

Mandatory arbitration of internal corporate claims would substantially reduce one of these advantages. For companies that opt into mandatory arbitration, the quality and expertise of its judiciary and the lack of jury trials would no longer provide much of an affirmative reason to incorporate in Delaware since arbitrators, rather than Chancery Court judges, would decide internal corporate claims.

¹⁷¹ Title 5, Section 503(a)

¹⁷² Marcel Kahan & Ehud Kamar, [Price Discrimination in the Market for Corporate Law](#), 86 *Cornell Law Review* 1205 (2001)

¹⁷³ *Id.* A recent exception is Nevada which charges \$____,000, an amount still much less than Delaware's fee.

¹⁷⁴ For example, most corporate certificates can be obtained in Delaware on the same day for the payment of a fee in the \$50 to \$200 range. See <https://corpfiles.delaware.gov/AugustFee2024.pdf>.

But the quality of the judiciary is not just one of several competitive advantages for Delaware. From a strategic perspective, it is by far the most important one. The reason is that, compared to the other advantages, judicial quality creates steeper entry barriers for other states if they wanted to try to attract incorporations. Judicial quality thus is more effective in insulating Delaware from competition.¹⁷⁵

Consider the other benefits that flow to companies from being incorporated in Delaware. First, Delaware has a modern corporate statute that it regularly updates. But other states can easily (and cheaply) adopt a modern corporate statute. In fact, they can just copy Delaware's.

Second, Delaware has a highly developed case law. But another state, in adopting Delaware's statute, could instruct its courts to look to Delaware precedents in resolving internal affairs claims. Arbitrators, whether applying Delaware or the other state's law, would then draw on the same set of precedents.

Copying Delaware law with such instructions would also go a great length towards reducing a third advantage: the network benefits from familiarity with the law by lawyers, advisors, and market participants. If another state has the same statute and follows Delaware's decisional law, the familiarity by lawyers, advisors, and market participants would extend to that other state, whether a company has opted for mandatory arbitration or not. In fact, whether arbitration proceeds under the laws of Delaware or another state, the arbitrator could be a retired Delaware judge or lawyer specializing in Delaware law.

Fourth, Delaware has a highly efficient Division of Corporations. Other states can create a similar infrastructure at a fairly moderate expense. Moreover, they could, just as Delaware already does, recoup at least some of the costs of running this infrastructure through fees for the services it provides.

Delaware's Chancery Court, on the other hand, cannot easily be copied. This is most evident as to the expertise of its judges. It takes a high volume of internal affairs litigation to develop and maintain this expertise and no other states comes even remotely close to Delaware, whether on an absolute or a per-judge basis.¹⁷⁶

Several other states, of course, have highly competent corporate lawyers and litigators who would become high quality corporate law judges, even if they lacked specific expertise in adjudicating corporate law disputes. But these lawyers may not want to become state trial court judges, even if the state created a specialty court. Top practitioners sacrifice

¹⁷⁵ Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1908 (1998).

¹⁷⁶ *Id.*

significant current income by joining the bench. Their reasons for doing so vary. But important attractions include the prestige of serving as a judge, the power to decide important disputes, and the enhanced income potential after leaving the bench. All of these factors are reasons to join the Chancery Court (or other high-prestige courts such as federal district or appeals courts). But, among state trial courts, the Delaware Chancery Court stands out in terms of prestige, high profile cases, and effect on future income. A judgeship on a start-up court patterned after the Chancery Court in, say, Rhode Island or Texas would carry substantially less prestige, involve the opportunity to decide many fewer significant disputes, and have less effect on future income than an appointment to the Chancery Court.

And even if these high-quality lawyers agreed to serve as judges, they would decide only questions of law, with questions of fact typically left to juries.¹⁷⁷ This has two implications. First, it reduces the benefits of having high-quality judges since many issues will not be decided by the judge; this makes the outcome less predictable. Second, it makes it more difficult to develop a body of case law that provides guidance to practitioners and judges. Since juries do not provide reasons but just an up-or-down verdict, less can be gleaned from a jury judgment than from a judicial opinion. Relatedly, as the Texas Business Court has noted, discussions by courts of appeals may not accurately reflect the applicable law if they are based on jury charges to which no objection was filed.¹⁷⁸

To be sure, states could in theory address these problems. They could pay their specialty corporate court judges much more than they pay other state trial court judges. They could even offer huge start-up bonuses to Delaware judges to induce them to move from Delaware to their state. They could change their constitutions to eliminate the right to trial by jury in internal affairs disputes. But such moves would create significant *political* problems in most states, making it difficult for states to compete with Delaware.¹⁷⁹

Finally, as discussed in more detail below, incorporating in Delaware means that a variety of other, non-internal affairs matters will be decided by Delaware judges operating in Delaware's highly regarded court system.

¹⁷⁷ See generally The Chancery Daily, A Bloop about Jury Trials, in Texas and Beyond, July 21, 2026 (noting that Delaware is an “outlier contrary to how most of the U.S. judicial system operates” in not conducting jury trials in internal affairs claims); *Haut v. Green Café Management*, 376 S.W.3d 171, 2012 (affirming jury verdict in breach of fiduciary duty litigation).

¹⁷⁸ *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corporation*, 709 S.W.3d 619, 641 (2025).

¹⁷⁹ Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev 679 (2002).

The high quality of the Delaware's judiciary is thus the most potent entry barrier that impedes other states' competition. Under mandatory arbitration, this entry barrier crumbles.

(b) Would Other States Compete—and if so, Which?

Most other states that have so far shown little interest in fashioning their corporate law to attract incorporations. Besides Delaware, Nevada has been most active in trying to attract incorporations. Recently, Texas has also started competing but that is likely motivated by its larger efforts to attract corporate headquarters rather than corporate charters per se. Neither Nevada nor Texas employ a strategy of cloning Delaware law that becomes particularly viable under mandatory arbitration.¹⁸⁰ If mandatory arbitration makes judicial quality irrelevant for resolving internal corporate claims, would other states react by upping their game or would they continue their present lethargic policies?

If other states do not react, Delaware would lose one source of competitive advantage for companies that opt for arbitration—having internal corporate claims adjudicated in the Chancery Court—but would retain the substantial other competitive advantages derived from the quality of its statute, wide familiarity with its law, and the service quality of its Division of Corporations. For companies that wanted to adopt mandatory arbitration, Delaware would become less attractive as an incorporation haven but probably still more attractive than other states. Delaware's market share within this group of companies would accordingly decline but probably remain high.

If other states do react by competing more aggressively, and in particular if they tried to clone Delaware law, Delaware's advantages become more modest and its market share losses would likely become more severe. The exact effects will depend on how many (and which) states actively compete. Specifically, Delaware will retain, at least over the short term, three advantages over competing states even for companies that would want to adopt a mandatory arbitration provision. First, Delaware will be the brand name. It will remain the

¹⁸⁰ Absent arbitration, given the significant benefits of having one's claims adjudicated in the Chancery Court and fact-intensive nature of Delaware law, a cloning strategy is not promising. See Kamar. To compete, there, states are more likely to pursue a product differentiation strategy. See Michal Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 99 Va. L. Rev. 935 (2012) (describing Nevada's competitive strategy); Pierluigi Matera, Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?, 27 Fordham J. Corp. & Fin. L. 73 (2022) (describing Wyoming's strategy); Kahan & Kamar, Myth, at 721-722 (Maryland) ; see generally Kahan, Revisited ("due to the multiplicity of settings and the heterogeneity of firms, different firms may be attracted to differing regimes. ... [I]t would thus seem feasible for states to offer a differentiated product attractive to a subset of public corporations [as several states do]); Lund & Talley ("we predict that forces of competition will push revenue-maximizing states to differentiate their product, rather than copy their rivals") (emphasis in original).

tried-and-true state with a reputation and historical record of having and maintaining its up-to-date corporate law,¹⁸¹ and adopting innovations somewhat earlier than other states. For companies already incorporated in Delaware, it will also benefit from inertia.

Second, Delaware would also provide the back-up legal protection against an arbitration that somehow goes astray. Under Delaware's Uniform Arbitration Act, the Court of Chancery may vacate an arbitral award when it is shown that "the award was procured by corruption, fraud or other undue means," when there was "evident partiality by the arbitrator," when "the arbitrators exceeded their powers," when the arbitrators failed to follow proper procedures "so as to prejudice substantially the rights of a party," or when there was not valid arbitration agreement.¹⁸² Although arbitration awards are generally enforced, Delaware courts have vacated awards, for example because an arbitrator was represented in other litigation by the law firm representing the defendant,¹⁸³ or because the award was in "manifest disregard" of the law.¹⁸⁴

The third advantage is tied to a non-corporate effect of the incorporation choice that is rarely mentioned in the state competition literature: by incorporating in a state, a corporation becomes subject to the that state's general personal jurisdiction. As a result, the corporation can be sued in that state on *any* claim, regardless of the claim's subject matter and where or how the claim arose.¹⁸⁵

General jurisdiction over corporations is fairly limited. In addition to the state of incorporation, only the state of a corporation's principal place of business has general jurisdiction.¹⁸⁶ Absent general jurisdiction, a corporation can be sued only in a state with specific jurisdiction over the claim at issue, which is based on the connection between the claim and the state or on consent.¹⁸⁷

¹⁸¹ See Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. Econ. & Org. 225 (1989) (arguing that Delaware, which obtains a large percentage of its revenues from incorporations, has a commitment to keep its law up to date); but see Bernard Black, Is Corporate Law Trivial?: A Political and Economic Analysis, 84 Nw. U. L. Rev. 542 (1990) (arguing that companies do not value commitment because they can cheaply reincorporate).

¹⁸² 10 Del. C. §5714(a).

¹⁸³ Beebe Med. Ctr. V. Insight Health Services, 751 A.2d 426 (Del. Ch. 1999)(Strine, VC).

¹⁸⁴ Travelers Ins. Co. v. Nationwide Mut. Ins. Co., 886 A.2d 46 (Del. Ch. 2005)(Lamb, VC)

¹⁸⁵ A related "bundling" involving the choice of place of incorporation occurs internationally with regard to corporate tax. Mitchell Kane and Edward Rock, Corporate Taxation and International Charter Competition, 106 Mich. L. Rev. 1229 (2008); Eric Talley, Corporate Inversions and the Unbundling of Regulatory Competition, 101 U. Va. L. Rev. 1649 (2015). As Kane and Rock explain, if the tax benefits of a given choice of domicile are significant and linked to state of incorporation, they will be an important factor in the decision.

¹⁸⁶ Daimler AG v. Bauman, 571 U.S. 117 (2014).

¹⁸⁷ Pennsylvania statute, Aybar re NY statute, way to deal with this by registering local subsidiary.

Because lawsuits are typically initiated by plaintiffs, and plaintiffs will tend to choose to bring a suit in a forum most favorable to their claim, companies generally do not want to expand plaintiffs' choice set. In particular, corporations would not want to submit to general jurisdiction in a forum that is favorable to plaintiffs and unfavorable to them.

Viewed through the lens of general jurisdiction, the incorporation decision can thus be broken down into two steps. First, a company would want to explore whether to incorporate in the principal place of business. Doing so would not expand the states in which the corporation is subject to general jurisdiction. Incorporating elsewhere would. Second, when a company decides not to incorporate in the principal place of business state, it must choose where to subject itself to general jurisdiction. At present, many public corporations are incorporated in their principal place of business,¹⁸⁸ a decision that may be partly driven by concerns over exposure to general jurisdiction in another jurisdiction.¹⁸⁹ Most public companies not incorporated in the headquarter state are currently incorporated in Delaware or, albeit to a (much) lesser extent, in Nevada.

How would this incorporation pattern change if more states started to compete actively for incorporations by making incorporating in them more attractive from a corporate law perspective? Consider first a corporation that has its principal place of business in one of these competing states. For such a corporation, limiting a plaintiff's jurisdictional choices would provide an additional reason to incorporate in the principal-place-of-business state. This consideration gives a "competing state" a substantial advantage in retaining domestic corporations that wanted to opt for mandatory arbitration regardless of whether it is otherwise generally favorable or unfavorable to plaintiffs.

By contrast, if the principal place of business state does not have an attractive corporate law, but other states do (for example, because they have adopted a Delaware cloning strategy), the choice is more complicated. In addition to comparing Delaware and the competing states along quality and price of the corporate law product they offer, a company would also have to evaluate the effect of submitting to general jurisdiction in one of these other states compared to submitting to general jurisdiction in Delaware.

Many states, even if they were to adopt an attractive corporate law, would not be attractive as states of general jurisdiction. California, Illinois, Pennsylvania, New York, and Louisiana, for example, rank as the five most pro-plaintiff states in products liability

¹⁸⁸ Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. Rev. 1559 (2002).

¹⁸⁹ While a fair number of states retain a significant share of corporations headquartered in the state, only Delaware and Nevada attract a significant number of public corporations headquartered out-of-state. CITE

lawsuits.¹⁹⁰ South Carolina, St. Louis, Missouri and Kink County, Washington, are regarded as additional “judicial hellholes.” Nevada has a history of high verdicts in car accident cases.¹⁹¹ Texas, though overall viewed as business-friendly, is regarded as unpredictable and has more verdicts exceeding \$10 million than any other state, mostly in Harris County (Houston) and Dallas County.¹⁹² For lawyers of a certain generation (ours), one of the best known Texas cases is *Texaco v. Pennzoil*, a 1985 record \$10.53 billion jury verdict (upheld by the Texas Court of Appeals and the Texas Supreme Court) against Texaco for tortiously interfering with a merger between Pennzoil and Getty Oil, a verdict that forced Texaco into bankruptcy and was more than five times as high as the largest previous verdict.¹⁹³

In comparison, if one has to subject oneself to general jurisdiction anywhere, Delaware is among the more attractive jurisdictions. It is a small state, with comparatively little variation across state judicial districts that can be exploited by plaintiffs. It has a constitutional provision requiring partisan balance in its judiciary. Its judiciary beyond the Chancery Court is highly regarded and efficient.¹⁹⁴ The state ranked first in a 2019 Legal Climate Survey conducted by the Chamber of Commerce (the most recent such survey available),¹⁹⁵ followed by Maine and Connecticut, albeit only 11th in 2017 (South Dakota, Vermont and Idaho—not coincidentally also small states—took the top spots that year). Texas and Nevada ranked, respectively, 38 and 29 in 2019 and 37 and 39 in 2017.

In competing for corporations with their principal place of business in a different state, states that generally have a legal climate favorable to corporations have a leg up over states that do not, and accordingly greater incentives to compete. The latter may succeed in retaining corporations headquartered in the state. They may also try to offer a differentiated product that is attractive to a specific subset of corporations and makes up for the otherwise unfavorable climate. But corporations may not want to subject themselves to general jurisdiction in a state with an unfavorable legal climate for its lawsuits generally just to get a law similar to Delaware’s and a lower price. States with a favorable legal climate similar to Delaware’s, however, may be effective competitors for out-of-state corporations, in

¹⁹⁰ <https://www.drugwatch.com/legal/plaintiff-friendly-states/>

¹⁹¹ <https://www.clearcounsel.com/is-the-nevada-the-proper-forum-for-your-lawsuit/>

¹⁹² <https://www.wshblaw.com/publication-navigating-hostility-understanding-the-most-challenging-states-for-insurers>

¹⁹³ <https://www.latimes.com/archives/la-xpm-1985-11-19-mn-7516-story.html>

¹⁹⁴ A competent and efficient judicial system is often valued by both plaintiffs and defendants, making litigating in Delaware a win-win strategy. To that extent, becoming subject to personal jurisdiction in Delaware when a case otherwise would not be brought there can be an affirmative benefit to corporations. How frequently this is the case outside the context of internal corporate claims is unclear.

¹⁹⁵ <https://instituteforlegalreform.com/2019-lawsuit-climate-survey/>

particular the large number of corporations that are satisfied with Delaware’s substantive law.

In sum, mandatory arbitration of internal corporate claims poses a significant threat for Delaware. It exposes Delaware to the potential for competition by other states that so far has been largely dormant. In particular, other states may adopt a cloning strategy of copying Delaware corporate statute, following Delaware’s case law, and notching up the quality of its corporate services. Whether and when other states will compete more actively is unclear. But the stakes for Delaware are high.

B. Arbitration and Loss of Business

While the most fundamental threat posed by arbitration is the loss of incorporations and franchise tax revenues due to emerging competition, Delaware stands to lose significant economic benefits from mandatory arbitration even to the extent that firms stay incorporated in Delaware. Incorporations are a significant source of business for Delawareans, most importantly for members of Delaware’s bar.

Delaware lawyers do very well. According to the Bureau of Labor Statistics, as of 2023, Delaware lawyers had the third-highest mean income in the nation (\$212,360), ahead of New York state (\$208,480) and behind only the District of Columbia (\$238,990) and California (\$213,860). The mean income for Delaware lawyers is virtually indistinguishable from the mean income for lawyers in the New York metro area (\$213,420).¹⁹⁶ Adjusted for the cost of living, Delaware lawyers earn more than lawyers anywhere else in the U.S.¹⁹⁷

Starting salaries of the top law firms provide further evidence that Delaware punches far above its weight. Starting salaries at large non-national Wilmington law firms —\$210,000 at Morris Nichols, Richards Layton, Young Conaway and Potter Anderson—approach those at Cravath (\$225,000).¹⁹⁸ While most prominent New York firms pay associates at the Cravath scale (both in their New York and non-New York offices), non-New York firms, including firms based in major regional centers, pay less. According to a study by BCG, only firms based in Los Angeles, the San Francisco Bay area, and Washington, DC, pay \$210,000

¹⁹⁶ <https://www.bls.gov/oes/2023/may/oes231011.htm#st>

¹⁹⁷ See <https://meric.mo.gov/data/cost-living-data-series> (showing 2025 cost of living index of 101.7 for Delaware, 124.7 for New York, 134.3 for DC, and 140.5 for California).

¹⁹⁸ <https://www.law360.com/pulse/articles/1828960/2-more-del-firms-increase-associate-starting-salary-to-210k>

or more. Firms in other locales, including the Chicago, Boston, and the Texas markets, pay below \$200,000.¹⁹⁹

The high income of Delaware lawyers ultimately rests on Delaware's status as incorporation haven. To be sure, as we have noted above, Delaware incorporation increases legal activity in Delaware not just with respect to internal affairs claims but across the board, and Delaware lawyers provide high-end legal advice on corporate matters outside the litigation context, such as the interpretation of complex corporate contracts. Nevertheless, a substantial portion of the high-end work performed by Delaware lawyers relates to internal corporate disputes.

And it is not just lawyers. Lawyers hire assistants, paralegals, and other professionals and rent office space. According to a 2019 study by the Delaware Bar Association, the legal industry contributed \$1.74 billion directly to Delaware's GDP and another \$731 million indirectly through as firms and employees make purchases in Delaware.²⁰⁰ The state, in turn, derives revenue from taxing this business activity.

For firms that adopt mandatory arbitration, the amount of legal work performed by Delaware lawyers related to internal corporate disputes would likely decline significantly. Specifically, mandatory arbitration would have three effects: claims brought in arbitration would be less likely to involve Delaware law firms; the resolution costs per claim would decline; and mandatory arbitration may result in fewer claims.

Currently, a high percentage of claims raising internal corporate claims are brought in Delaware courts. There are two reasons. First, many companies have adopted charter or bylaw provisions making Delaware courts the exclusive forum for internal affairs claims.²⁰¹ Such provisions have been held valid and enforceable by the courts of other states.²⁰² Second, even with respect to internal affairs claims that are not subject to an exclusive forum provision, bringing suit in Delaware courts offers advantages to plaintiffs who initiate lawsuits. One important advantage relates to personal jurisdiction. Internal affairs claims often involve multiple defendants—several if not all of the directors in a typical breach of fiduciary duty suits—making it advantageous to bring the suit in a court that has personal

¹⁹⁹ <https://www.bcgsearch.com/sp/bcg-reports/attorney-salary/attorney-career-guide-2025.php?shem=rimspswouoe>. See also https://www.nalp.org/reported_salaries_by_city_for_law_firm_jobs?shem=rimspswouoe (2013 study by NALP of mean salaries in various legal markets showing that only salaries in 6 California markets (Costa Mesa, Los Angeles, Menlo Park, Mountain View, Palo Alto, and Redwood City), Stamford, CT, Washington, DC, and New York City, NY, exceeded salary in Wilmington, DE).

²⁰⁰ <https://media1.dsba.org/public/Publications/LegalIndustryEconomicImpactStudy.pdf> at 1.

²⁰¹ DGCL 115, study

²⁰² Helen Hershkoff & Marcel Kahan, [Forum-Selection Provisions in Corporate 'Contracts,'](#) 93 *Washington Law Review* 265 (2018).

jurisdiction over all the parties. Delaware courts, as a result of Delaware's deemed consent statute, have personal jurisdiction not only over the Delaware corporation itself but also, as to internal affairs claims, over its officers and directors.²⁰³ And although Delaware lacks deemed-consent jurisdiction over controllers (another likely defendant in internal affairs suits), Delaware has used conspiracy as a basis for extending jurisdiction to them. While courts in some other state may also have personal jurisdiction over all defendants—all defendants may happen to be residents of the same state or may have participated in some conduct in a certain state to give that state specific jurisdiction—Delaware will typically be one of a small set of states with the requisite jurisdiction and, among those, the one where jurisdiction can be established most easily.

Relatedly, Delaware is also the home of an active plaintiffs' bar that is not only well-versed with Delaware substantive law but also with Delaware procedure. For a Delaware plaintiffs' firm, bringing a suit in Delaware will tend to be more economical than bringing a lawsuit in a different jurisdiction where it may have to hire a local firm and incur travel expenses. To be sure, many plaintiffs' law firms are located in other states. But that "other state" will often not be the state that happens to have personal jurisdiction over the defendants. Thus, even non-Delaware lawyers may find it more convenient to sue in Delaware than, say, in Texas or Ohio, whether because they have more familiarity with Delaware courts or because Delaware is more conveniently located to their home base. Finally, Delaware courts have awarded significant legal fees to plaintiff lawyers in meritorious suits that generated high recoveries.²⁰⁴

Lawsuits brought in Delaware courts, in turn, tend to generate business for Delaware lawyers. Delaware firms have substantial expertise in litigating internal corporate claims and defendants will often hire Delaware law firms to represent them (often multiple firms to avoid conflicts among different defendants). Even to the extent a defendant also hires a non-Delaware firm, and they often do for major disputes, they generally retain a Delaware firm to participate in the litigation. On the plaintiff side, Delaware law firms have not only significant

²⁰³ 10 Del. C. §3114.

²⁰⁴ Compare Dor, Gal and Grundfest, Joseph A., *Lodestar Multipliers in Delaware and Federal Attorney Fee Awards* (August 04, 2025). Stanford Public Law Working Paper, Available at SSRN: <https://ssrn.com/abstract=5379166> or <http://dx.doi.org/10.2139/ssrn.5379166> (arguing that Delaware awards high legal fees) with Prestipino, Gilda Sophie and Klausner, Michael D., *Attorneys' Fee Awards in Delaware: A Normative and Empirical Analysis* (January 25, 2026). Rock Center for Corporate Governance at Stanford University Working Paper, European Corporate Governance Institute - Law Working Paper No. 885/2025, Stanford Public Law Working Paper, Stanford Law and Economics Olin Working Paper No. 612, Available at SSRN: <https://ssrn.com/abstract=5708222> or <http://dx.doi.org/10.2139/ssrn.5708222> (disputing Dor and Grundfest's account as based on a few outlier cases and that arguing that Delaware fee awards reflect the percentage-of-the-benefit approach laid out by the Delaware Supreme Court, which aligns plaintiffs' lawyers' incentives with shareholders' interests in obtaining the largest recovery possible).

procedural and substantive knowledge of the legal issues pertaining to internal corporate claims but also have expertise in finding and developing valuable claims. Beyond legal fees, litigation in Delaware will also generate business for Delaware's hospitality industry as witnesses or out-of-state lawyers travel to the state.

If mandatory arbitration of internal corporate claims becomes prevalent, these benefits would likely shrink significantly. Under mandatory arbitration, the incentives to conduct the arbitration in Delaware and to hire Delaware lawyers are much lower than the corresponding incentives for adjudication in Delaware. In particular, the two main reasons—Delaware's rules on personal jurisdiction and exclusive forum provisions—that currently serve to channel corporate disputes involving Delaware corporation into Delaware courts would be absent. The specific knowledge that Delaware lawyers have about the details of Delaware procedure and judges would also be irrelevant in arbitration. And while there may be many Delaware lawyers who are experts on Delaware law and who would make attractive arbitrators—former judges come to mind—it is unclear whether arbitrators are picked for their subject matter expertise, some former judges have moved out of Delaware, and, even if the arbitrator is based in Delaware, the arbitration may not happen there and may not involve Delaware-based lawyers.

Mandatory arbitration would also be likely to reduce the costs of resolving internal corporate claims. One of the main attractions of arbitration compared to litigation are the lower costs.²⁰⁵ Even though parties to arbitration have to pay the arbitrator, whereas access to the judicial system is free, overall costs are often lower because discovery is more limited in arbitration than in litigation and because there is no right to appeal.²⁰⁶ While limited discovery and no appeal can be double-edged swords for the parties to a dispute—parties may value, and may be willing to pay for, more discovery and appeal rights—from the perspective of lawyers, the effect is clearly negative: lower legal fees.

Finally, mandatory arbitration may also result in fewer claims than litigation does. There is an intense scholarly debate about whether arbitration in general is pro-defendant.²⁰⁷ But even if it is not, the attractions of arbitration to defendants discussed in Part II—reduced discovery and limited class actions—will reduce the value of a claim, and hence the incentives to bring a claim, for plaintiffs.

²⁰⁵ See <https://law.pepperdine.edu/blog/posts/arbitration-vs-litigation-choosing-the-right-path.htm> (citing lower costs as one of three pros of arbitration).

²⁰⁶ *Id.*

²⁰⁷ See, e.g., Harry C. Katz, David Sherwyn, and Paul Wagner, Congress Was Wrong: Arbitration Is More Plaintiff-Friendly Than Litigation, and We Can Make It Even More Just, *ABA Journal of Labor & Employment Law*; David Horton and Andrea Cann Chandrasekher, *After the Arbitration Game: An Empirical Study of Claims Brought by Consumers*, *California Law Review*.

C. Intangible Benefits

Delaware also derives intangible benefits from having internal corporate claims adjudicated in the Delaware state courts. Delaware's Chancery Court is renowned for the high quality of its judiciary and for its expertise in corporate law. But expertise does not come from nowhere. Even though judges on the Delaware Chancery Court typically have had exposure to corporate disputes before they joined the bench, their work on the court significantly enhances their expertise, especially when it comes to the issue of adjudicating claims. More disputes also give Delaware more opportunity to develop and refine its case law, which in turn provides greater guidance to lawyers and makes incorporation in Delaware more attractive.²⁰⁸ Finally, having Delaware state courts adjudicate internal affairs claims assures that the state maintains control over the content of the law and, through the expert judiciary on the Chancery Court and the opportunity for error correction through appeals to the Supreme Court, minimizes the risk of error.

Mandatory arbitration would reduce these benefits.²⁰⁹ It will reduce the number of cases involving internal affairs claims adjudicated in the Chancery Court and thus lead to a corresponding decline in expertise. It will reduce the opportunity to develop and refine Delaware case law, both because fewer cases mean that there are fewer vehicles for doing so and because judges have a less comprehensive overview of what type of disputes arise. And it will diminish Delaware's control over the content of its law and its ability to correct errors in its application.

If mandatory arbitration would become the dominant way for resolving internal corporate claims, these effect on Delaware's judiciary and its case law would be severe.²¹⁰ But if mandatory arbitration is merely a significant but not dominant part of the landscape, these effects are likely limited and can be counteracted. Other things being equal, while judicial expertise increases with the case load, it does not increase linearly: a judge learns more from her first 100 cases than from the next batch of 100 cases. Moreover, if the case

²⁰⁸ Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va. L. Rev. 757 (1995); Berger & Matra, *supra* note __, at 33 ("The continuous flow of cases into Delaware courts sustains this process. Without that flow, the system would lose not only its capacity to resolve disputes, but also its ability to generate the doctrinal clarity that historically has been a critical factor supporting Delaware's comparative advantage.")

²⁰⁹ Manesh, Mohsen, *The Past, Present, and Likely Future of Shareholder Arbitration* (January 01, 2026). 71 Villanova Law Review (forthcoming 2026), Available at SSRN: <https://ssrn.com/abstract=6001095> or <http://dx.doi.org/10.2139/ssrn.6001095>; Berger & Matra, *supra* note __, at [34-35] ("A sustained migration of disputes into arbitration would reduce the volume of cases reaching Delaware courts, thereby weakening the iterative process through which doctrine evolves.")

²¹⁰ *Id.*

load declines, Delaware could shrink the size of its Chancery Court, just as it increased the size as its case load expanded. With a reduction in the size of the court, the case law per judge could be held stable. Finally, both trial court and Supreme Court judges could compensate for the lower case load by spending more time on each case and writing more and more elaborate opinions—thereby further reducing the effects of the lower case load on judicial expertise and also reducing the effects on the stock of precedents and the development of the case law.

D. Mandatory Arbitration of Federal Securities Claims

In contrast to mandatory arbitration of internal corporate claims, permitting mandatory arbitration of securities claims entails comparatively few downsides for Delaware. To be sure, mandatory arbitration bylaws would be a problem if they were valid in other states but not Delaware. But if they were also valid in Delaware, they would not undermine Delaware’s competitive advantage in the market for incorporations or lead to a potential loss of franchise tax revenues.

Second, mandatory arbitration of securities claims would have substantially less impact on Delaware lawyers. The most important reason is that Delaware is not the prime forum for litigation of federal securities law claims. The entire Third Circuit, which includes New Jersey, Pennsylvania and the Virgin Islands in addition to Delaware, saw only an average of 27 securities law filings a year between 2023 and 2025, well below the Second (58.67) and Ninth (83) Circuits though well above those in the First (9), Fifth (10) and Seventh (8) Circuits.²¹¹ Of these suits, a large number are filed in New Jersey and Pennsylvania.

As a result, securities claims are less likely to involve Delaware law firms than internal corporate disputes. Given the filing pattern, New York or California based firms will generally have more expertise in dealing with securities claims than Delaware firms. Moreover, since securities claims are filed in federal district court rather than Delaware state court (although state courts have jurisdiction over claims under the Securities Act of 1933, no such claims have been brought in the Delaware state courts between 2015 and 2025),²¹² the specific familiarity of Delaware firms with Delaware state procedural rules is irrelevant to the choice of law firms.²¹³

²¹¹ <https://www.cornerstone.com/wp-content/uploads/2026/01/Securities-Class-Action-Filings-2025-Year-in-Review.pdf>, Figure 21.

²¹² <https://www.cornerstone.com/wp-content/uploads/2026/01/Securities-Class-Action-Filings-2025-Year-in-Review.pdf>, Figure 16, note 1 to Figure 16.

²¹³ Although each federal District Court adopts a set of local rules specific to the district, procedures for litigating in federal district are for the most part uniform are set by the Federal Rules of Civil Procedure.

Finally, litigation of securities claims creates none of the intangible benefits that would be lost under mandatory arbitration of internal corporate claims. Securities claims are brought in federal, rather than state court. Securities litigation thus does not generate expertise for Chancery Court judges. Securities litigation also involves federal rather than Delaware law. If these cases are arbitrated instead of litigated, the resulting reduction in precedents may be undesirable from a social perspective but would present no particular problem for Delaware.

As a result of Delaware being less central to securities disputes than to internal affairs claims, and of Delaware law firms being less central to securities disputes filed in Delaware than to internal affairs claims filed in Delaware, there is less to lose for Delaware from arbitration of securities claims than from arbitration of internal corporate claims.

IV. How Should Delaware Respond to Demands for Arbitration?

As the law currently stands, there is already significant scope for arbitration. Under the FAA, even if not under Delaware law, most if not all derivative claims can be subjected to arbitration through a traditional contract. Direct claims by shareholders, however, cannot be easily subjected to arbitration via traditional contracts and Section 115 currently bars mandatory arbitration provisions in charters or bylaws.

But there is pressure to permit a wider scope for mandatory arbitration. With Space X's IPO, the question will gain even greater salience. Other companies may follow Space X and insert mandatory arbitration provisions into their charters or bylaws. Other states are likely to interpret their laws to permit arbitration bylaws or change them to do so. As we saw with the battle over SB21 in 2025, threats to leave Delaware can pressure Delaware to change its law.²¹⁴ Silicon Valley's long-standing demands for mandatory arbitration of shareholder claims, combined with its recent success with SB21, will encourage it to push to change §115.

How should Delaware respond to these pressures? Should it resist? Should it yield? If it chooses to fight, what tools does it have to push back against SEC and Silicon Valley pressure?

A. The choice may not be Delaware's

²¹⁴ See Kahan & Rock, Political Economy, *supra* note __

Before delving into these questions, it is important to recall that the choice as to arbitration may not be Delaware's. Section 115 has so far not been challenged for compatibility with the FAA. If it is, and its recent expansion to non-internal affairs claims makes a challenge more likely, we are not confident that it will survive. Delaware companies, following Space X's example, may adopt bylaws subjecting corporate claims to arbitration which will lead shareholders to challenge the validity of these provisions. And any such challenge would not have to work itself through the Delaware state court system before it could be taken up by the U.S. Supreme Court on certiorari—a path that is lengthy and highly contingent. If a company with a mandatory arbitration bylaw covering a Rule 10b-5 claim were sued on the premise that the bylaw is invalid under Delaware law, the federal district court in which the 10b-5 suit is brought would resolve the question whether the FAA preempts Section 115. If Section 115, as presently drafted, is preempted, then what?

B. The argument for yielding on DGCL §115

Setting aside the threat posed by the FAA, should Delaware revise Section 115 and if so, how? On one hand, one should not overstate Delaware's vulnerability in a world in which firms can opt for mandatory arbitration. Delaware's preeminence as a corporate law jurisdiction is a combination of many different factors: high quality law; high quality judges; a high quality court system that allows for the efficient adjudication of corporate and non-corporate disputes; an extremely efficient secretary of state's office; and a deep and expert ecosystem that develops the law as it encounters new issues. Duplicating these advantages is not trivial and so far, no state has made a concerted effort to do so.

To be sure, we have argued that for companies that would like to adopt mandatory arbitration, the advantages of Delaware incorporation are less pronounced. And other states may try to compete more aggressively for companies that would be interested in mandatory arbitration by replicating the features of Delaware law without its expert judiciary. But until other states do so, or even after, companies may prefer to stay in Delaware, either because they are not interested in a mandatory arbitration provision or because the advantages of being incorporated in Delaware outweigh the advantages of being incorporated in a state that permit such provisions.

Yet, these are not sufficient reasons for Delaware to adopt a wait and see approach. Some companies would likely opt for mandatory arbitration were they permitted to do so. For these companies, not providing this option makes Delaware less attractive. Other states have not taken a clear stance against mandatory arbitration similar to Delaware's. Under the *Boilermakers* and *Salzberg* rationale, companies in these states could already adopt

mandatory arbitration bylaws. Sooner or later, and probably sooner, Texas and Nevada will validate mandatory arbitration bylaws either by court decision or legislation and try to attract Delaware companies.

For Delaware, it would have been preferable if the issue of mandatory arbitration of internal corporate claims had never gained any traction. Delaware stands to lose a lot if mandatory arbitration becomes common. But for better or worse, the mandatory arbitration genie is out of the bottle. Why wait until companies migrate out of Delaware or other states start competing aggressively for companies interested in mandatory arbitration by replicating the features of Delaware law *sans* its expert judiciary? Why take the risk that a court may rule that Section 115 as currently drafted is preempted by the FAA? Rather than being seen as grudgingly giving in under threat from companies, competitive pressures, or federal preemption, amending Section 115 to permit arbitration—that is, giving companies and shareholders more of a choice—may be the best way to demonstrate Delaware’s self-confidence and quality.

The argument for not standing in the way of mandatory arbitration is especially strong for securities claims. Delaware has little to gain from having these disputes litigated rather than arbitrated. Moreover, these claims are beyond Delaware’s core competence and Delaware should have no strong view on how these cases should be dealt with. If Congress feels that securities claims belong in court, it does not need Delaware’s help. If Congress feels that these claims could be made subject to arbitration, it is not Delaware’s business to object. Importantly, permitting mandatory arbitration provisions in charters or bylaws would not necessarily make them enforceable. As we argued before, securities claims are not internal affairs disputes to which Delaware law applies. Whatever Delaware says about what provisions may be contained in a charter or bylaw, it won’t be the final arbiter. It is ultimately federal courts that will decide whether these provisions are binding on market participants asserting claims under federal law.

There are additional reasons for Delaware to be proactive. Allowing companies to choose arbitration when they are dissatisfied with Delaware could be a useful “safety valve” to release some of the pressure to change Delaware’s substantive law.²¹⁵ To the extent that firms leave Delaware because they are dissatisfied with Delaware judges, arbitration would allow them to opt for different judges, an option that may save Delaware from some significant and damaging headaches. Consider, for example, if Tesla had been permitted to opt for arbitration in 2015. In that case, the battles around Elon Musk’s compensation would have been carried on in arbitration or not at all.

²¹⁵ See Lund and Talley, *supra* note ____.

To see the advantages of this “safety valve,” consider the debate over the law governing controlling shareholders in connection with SB21. Some have argued that Delaware’s traditional approach to controlling shareholders is ill-suited to the needs of the most innovative Silicon Valley companies and should be changed. But changing the law governing controlled companies also has effects on the law governing the far more numerous dispersed ownership companies. Thus, for example, in the first opinion to interpret the 2025 amendments to DGCL §144, Vice Chancellor Will held that the application of DGCL §144(d)(2)’s new “heightened” presumption of “independence and disinterestedness when a corporation has a class of stock listed on a national securities exchange and the board determines that a director satisfies the exchange’s independence criteria” is not limited to the DGCL §144 safe harbors but carries over to determination of demand futility under Rule 23.1.²¹⁶ If this approach is adopted generally, it will have broad implications throughout corporate law.

In an alternative universe in which controlled companies could opt into arbitration, the pressure to change Delaware corporate law might well have been lessened. This would have allowed firms satisfied with the status quo to preserve it.²¹⁷ Just as free exit from Delaware allows dissident firms to move to states that they believe are better suited to their needs, so too allowing freer choice of adjudicative forum can reduce the pressure on the status quo by allowing dissidents to opt for the forum they prefer without changing the whole system.

C. The Structure of Mandatory Arbitration Provisions

While it would be mistake for Delaware to resist mandatory arbitration and rest on its other competitive advantages, mandatory arbitration needs proper guardrails. Mandatory arbitration could constitute a fundamental change in shareholder protection by making it significantly harder to pursue breach of duty claims.

Mandatory arbitration was not on the table when most companies incorporated in Delaware. Permitting mandatory arbitration bylaws would enable directors, the targets of breach of duty claims, to opt into mandatory arbitration without shareholder approval. This would constitute a substantial unilateral *ex post* change in shareholder rights. It is damaging for Delaware if shareholders buy stock in Delaware corporations expecting certain protections only to find out later that these protections have been undermined. While

²¹⁶ Ayers v. Foley, C.A. No. 2025-0650-LWW, Slip. Op. at 25 (Del. Ch. June 15, 2026).

²¹⁷ Alternatively, as Lund and Talley argue, arbitration would allow firms satisfied with the old, pre-SB21 law, to opt for it by opting for arbitration and specifying the applicable (pre-SB21) law. See *supra* note ____.

Delaware case law is in constant flux and it is expected that protections do not remain constant, significant *ex post* changes in shareholder rights—and mandatory arbitration would be significant—are a problem, especially given the other recent statutory changes in Delaware law that reduce shareholder protections.²¹⁸ This is true whether or not mandatory arbitration provisions would become valid due to statutory change, judicial decisions by the Delaware courts, or federal courts finding that Section 115 is preempted by the FAA.

Fortunately for Delaware, it has the ability to embrace mandatory arbitration in a manner that is sensitive to this concern. It could revise Section 115 to permit forum selection clauses—including mandatory arbitration—in charters but, *going forward*, not in bylaws.²¹⁹ Requiring shareholder approval recognizes the significance of mandatory arbitration provisions and the conflicts that such provisions create between boards and shareholders.

Alternatively, Delaware could also permit mandatory arbitration provisions to be contained in a shareholder-adopted bylaw, similar to the current approach to staggered board provisions.²²⁰ This requirement, as a requirement that arbitration provisions be in the charter, would assure that they have shareholder support. As between these options, we prefer requiring these provisions to be contained in the charter. For one, we see a benefit, if only a mild one, in requiring that the board of directors—a body with fiduciary duties to shareholders—recommend a mandatory arbitration provision and explain its reasoning to shareholder in a proxy statement. Second, given the significance of this provision, we think it should take the vote in favor by a majority of shares entitled to vote, and not just by a majority of shares voting, to adopt it.

Companies with dispersed shareholders will likely have no difficulty in getting approval for charter provisions designating Delaware as exclusive forum. Whether they will get shareholder approval for a mandatory arbitration charter provision is less clear. If they do not, the issue is off the table; if they do, it validates Delaware's approach.

The issue is different for companies with controlling shareholders. They could adopt mandatory arbitration charter provisions with little or no minority shareholder support. Doing so would undermine minority shareholder protection without their consent at companies where protection is arguably most needed. While Delaware could be accused of throwing these shareholders under the bus, it is unclear how much power Delaware has to

²¹⁸ Recent statutory amendments increased the ability to grant control rights to certain shareholders that would otherwise require a charter amendment without shareholder approval, reduced shareholder access to books and records, and made it easier to cleanse transactions and thus harder to prevail on entire fairness lawsuits. See generally Kahan & Rock, *Political Economy*, *supra* note ____.

²¹⁹ This echoes a proposal that Hal Scott made regarding arbitration of federal securities claims. Hal Scott, *Let shareholders Decide how to resolve disputes*, *Financial Times* July 26, 2007.

²²⁰ DGCL §141(d).

help them. In theory, Delaware could adopt a special requirement that mandatory arbitration charter amendments also receive the approval of a majority of minority shareholders or just maintain the current approach of outlawing them across the board.²²¹ But that would make it harder to adopt a mandatory arbitration provision than to reincorporate and companies in which boards and a controlling shareholder favor mandatory arbitration could just move jurisdictions.²²²

The approach we suggest—requiring charter provisions for mandatory arbitration provisions while grandfathering existing exclusive Delaware forum bylaws—would have the added benefit of insulating Section 115 against attacks under the FAA. Section 115, if revised as we suggest, would be compatible with the FAA since the FAA cannot plausibly be interpreted to require that states permit board adopted mandatory arbitration *bylaws* as opposed to shareholder adopted bylaw provisions. To be sure, Delaware law prior to the revisions we propose may violate the FAA. But to have standing to claim that the prior version of the Section 115 violates the FAA, someone would have to try to enforce a mandatory arbitration bylaw that was adopted before the revision and, to our knowledge, no company has adopted one.

Conclusion

This Article has examined the complex legal status of arbitration provisions and their implications for state competition for corporate charters. Despite foot-dragging by Delaware, most derivative corporate and securities claims can already be subjected to arbitration through contracts binding the corporation. Subjecting direct shareholder claims in public corporations to mandatory arbitration, by contrast, is often not feasible. Doing so

²²¹ This would like have to be by statute as the TripAdvisor case likely implies that the decision to adopt an arbitration provision, like the decision to reincorporate in a different (arguably less shareholder friendly) jurisdiction, would be reviewed under the business judgment rule absent some immediate effect on pending claims (e.g., eliminating a pending class action). *Maffei v. Palkon*, 2025 WL 384054, 2025 Del. LEXIS 51 (Del. 2025).

²²² In an earlier article, we have argued that Delaware's adoption of recent legislation departs from the traditional process, risks making Delaware seem more political, and therefore enhances the risk of federal preemption or states departing from the internal affairs conflict rule. We do not think that the legislative changes we propose entail similar departures or risks. For one, as we discuss, the initial legislation adopting Section 115 comported with the traditional process, and any amendments should do as well, in the process of adoption. In substance, the amendments we propose come closer to the common law as to the scope of permitted forum selection provisions and requiring that such provisions be contained in the charter would be a classic balanced approach that has characterized corporate legislation in the past. Finally, again as to substance, Delaware would be implementing the pro-arbitration policies of the Federal Arbitration Act. To the contrary, if anything, the current Delaware approach which permits designation of a Delaware court but not another state's court as exclusive could be seen as Delaware engaging in litigation-grabbing in a manner that shoes little comity to other states and could generate a retributive response.

through regular contracts with shareholders presents practical difficulties and mandatory arbitration charter or bylaw provisions are, under current law, either invalid or of uncertain validity. The SEC, however, has abandoned its historical opposition to mandatory arbitration and individual corporations, from Elon Musk's SpaceX to Silicon Valley firms, are interested to adopting mandatory arbitration provisions. In light of the change in the SEC's posture and the demand for mandatory arbitration by at least a subset of corporations, we expect that some states will revise or clarify their law to permit such provisions.

Mandatory arbitration of shareholder claims is thus poised to reshape corporate litigation and interstate competition for corporate charters. Arbitration poses serious threats to Delaware's preeminence. Most fundamentally, it erodes the entry barriers in the market for corporate charters that have long protected the enormous profits that Delaware derives from being the predominant domicile for large corporations. But even if other states do not choose to compete more aggressively with Delaware, mandatory arbitration will reduce its franchise-tax and legal-services revenues.

For Delaware, it would have been preferable if the issue of mandatory arbitration of internal corporate claims had never gained any traction. But for better or worse, the mandatory arbitration genie is out of the bottle. We propose that Delaware, rather than resist or adopt a wait-and-see approach, should proactively amend its law to permit mandatory arbitration. Since mandatory arbitration could significantly erode shareholder protection, however, Delaware law should require that new exclusive forum provisions of all sorts be contained in the charter, not just the bylaws. This approach would preserve corporate choice, mitigate federal preemption risk, and protect shareholders against unilateral, board-imposed changes to their litigation rights.

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