

*BOILERMAKERS V. CHEVRON: ARE BOARD ADOPTED
ARBITRATION BYLAWS VALID UNDER THE DELAWARE
GENERAL CORPORATION LAW?*

ABSTRACT

*In recent years, corporations have been flooded with shareholder lawsuits, many of which are filed in multiple forums throughout the country. In response, corporations have attempted to quell these difficult and costly lawsuits through various provisions in their governing documents. In *Boilermakers v. Chevron*, the Delaware Court of Chancery held that under the Delaware General Corporation Law, a board of directors may unilaterally adopt a forum selection clause within the corporation's bylaws. This opinion has given corporations a green light to adopt forum selection bylaws, but it also invites the question: What else may a board of directors put in the bylaws in order to combat the difficulty and costs of intra-corporate disputes with shareholders?*

This Comment analyses the reasoning behind the Boilermaker's decision, applies the reasoning to an arbitration provision, and finds that unilaterally adopted arbitration provisions would also be upheld under the Delaware General Corporation Law. This Comment then goes on to discuss some of the potential roadblocks a corporation may encounter when considering or implementing an arbitration provision. Ultimately, this Comment concludes that an arbitration provision is a viable option to a corporation that has been saddled with shareholder disputes in multiple forums.

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I. INTRODUCTION

Almost invariably, when corporations are involved in intra-corporate disputes, shareholders file lawsuits in multiple forums to increase the likelihood of a "plaintiff-friendly" state rendering a decision.¹ Indeed, this "forum-shopping" makes it exceedingly difficult and costly for corporations to defend these suits and unnecessarily imposes legal and constitutional hurdles (such as collateral estoppel) on reviewing courts.²

Dicta within a 2010 opinion of the Delaware Court of Chancery—*Revlon, Inc. Shareholders Litigation*—seemed to provide approval of forum selection clauses within a corporation's governing documents.³ The court's decision incited corporations to enact these clauses in various forms.⁴ While it appeared that forum selection clauses in articles of incorporation were valid, one question still remained: whether a board of

¹See, e.g., *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960-61 (Del. Ch. 2010) (suggesting that corporations adopt charter provisions containing forum selection clauses for intra-corporate disputes to remedy the multi-forum shareholder litigation problem).

²See Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 344-45 (2013).

³*Revlon, Inc. S'holders Litig.*, 990 A.2d at 960 ("[C]orporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.").

⁴See Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 339 (2012) (finding that 58.6% of forum selection provisions are found in a corporation's charter while the remaining provisions are found in board adopted bylaws).

directors could unilaterally adopt a clause within the corporation's bylaws.⁵

In a recent decision—*Boilermakers v. Chevron*—the Delaware Court of Chancery held that board adopted forum selection bylaws, without shareholder consent, are statutorily and contractually valid under the Delaware General Corporation Law ("DGCL").⁶ The analysis underlying the *Boilermakers* decision invites the question: what other types of bylaws can be unilaterally adopted to help combat the increase in intra-corporate dispute litigation? By extension, may a board adopt an arbitration bylaw—regulating only intra-corporate disputes falling under state law—without shareholder consent? This Comment addresses this question looming over Delaware's bench and bar by first providing background to the *Boilermakers* decision.⁷ Then, this Comment analyzes a unilaterally adopted arbitration bylaw under the *Boilermakers* lens to see if such a provision could withstand judicial scrutiny.⁸ Finally, this Comment discusses the potential roadblocks a corporation may encounter should it decide to adopt such a clause.⁹

II. BACKGROUND: SHAREHOLDERS CHALLENGE FORUM SELECTION PROVISIONS

A recent study found that since the 2010 *Revlon* decision, twelve class action complaints have been filed in Delaware's Court of Chancery contesting the validity of board adopted forum selection bylaws.¹⁰ Of the twelve corporate defendants, ten voluntarily repealed the forum selection provision contained in their respective corporation's bylaws.¹¹ This left only the suits against Chevron Corporation and FedEx Corporation, which the Court of Chancery consolidated.¹² In addition, one class action suit contesting forum selection bylaws was filed in the United States District Court for the Northern District of California.¹³

⁵See *id.* at 345-46.

⁶*Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013).

⁷See *infra* Part II.

⁸See *infra* Part III.

⁹See *infra* Part IV.

¹⁰See Grundfest, *supra* note 4, at 345.

¹¹See *id.* at 346.

¹²See *id.* at 346-47 n.61.

¹³See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011).

A. *First to Respond*: Galaviz v. Berg

The United States District Court for the Northern District of California was the first to decide whether a forum selection bylaw adopted solely by a board of directors would be enforceable.¹⁴ The court denied the defendants' motion to dismiss for improper venue, finding that the forum selection provision, within the corporate bylaws, was contractually invalid.¹⁵ The court held that the lack of shareholder approval, in addition to the amendment of the bylaw after the alleged wrongdoing, was contrary to federal common law.¹⁶ Although, the court did mention that it would likely find a similar provision within a corporation's articles of incorporation, with shareholder approval, valid and enforceable.¹⁷ Nevertheless, the court declined to determine whether the board was authorized to adopt the bylaw under state law.¹⁸ Commentators questioned the decision in California¹⁹ as they waited for the Delaware courts to weigh in.

B. *The Delaware Court of Chancery Weighs in*:
Boilermakers v. Chevron

In *Boilermakers v. Chevron*, the Delaware Court of Chancery upheld the forum selection provisions within the bylaws of Chevron Corporation²⁰ and FedEx Corporation²¹ even though the companies'

¹⁴See *id.* at 1171.

¹⁵See *id.* at 1175. The adopted bylaw read as follows: "The sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation shall be the Court of Chancery in the State of Delaware." *Id.* at 1172 (internal quotation marks omitted).

¹⁶See *id.* at 1174-75.

¹⁷*Galaviz*, 763 F. Supp. 2d at 1175.

¹⁸See *id.*

¹⁹See Grundfest & Savelle, *supra* note 1, at 407 (finding that the *Galaviz* analysis directly contradicts corporate law and that much of corporate law would have to be rewritten for it to apply); Bonnie White, *Reevaluating Galaviz v. Berg: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws As Requirements Contracts*, 160 U. PA. L. REV. 390, 402-05 (2012) (stating that the *Galaviz* court failed to understand the contractual nature of a corporation, its directors, and its shareholders).

²⁰Chevron Corporation is incorporated in Delaware. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937 (Del. Ch. 2013). Under Section 109(a), Chevron's articles of incorporation authorize the board of directors to amend the corporation's bylaws without shareholder consent. *Id.* Chevron's forum selection bylaw states:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of

respective boards adopted them without shareholder consent.²² In this consolidated opinion granting the defendants' motion for judgment on the pleadings, the court deemed both corporations' forum selection bylaws to be statutorily and contractually valid on their face.²³

1. The Bylaws are Valid Under the DGCL

The shareholder-plaintiffs, in *Boilermakers*, first argued that the bylaws at issue violated Section 109(b) of the DGCL,²⁴ which regulates the subject matter of a corporation's bylaws.²⁵ After determining that the corporations' boards had statutory authority to adopt bylaws without shareholder consent,²⁶ the court found that the bylaws were valid within

the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].

Id. at 942 (italics omitted).

²¹FedEx Corporation is incorporated in Delaware and its articles of incorporation authorize the board to adopt bylaws without shareholder approval pursuant to Section 109(a). *Id.* at 942. FedEx's forum selection bylaw states:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].

Id. at 942.

²²*See id.* at 963. Under Delaware law, "any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors" DEL. CODE ANN. tit. 8, § 109(a) (2011).

²³*See Boilermakers*, 73 A.3d at 963.

²⁴*See id.* at 948.

²⁵"[A corporation's] 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." DEL. CODE ANN. tit. 8 § 109(b) (2011).

²⁶*See id.* § 109(a) (permitting a corporation's articles of incorporation to empower the board to unilaterally adopt bylaws); *supra* notes 20-21 and accompanying text.

the meaning of Section 109.²⁷ In doing so, the court thoroughly analyzed and rejected each of the plaintiffs' arguments.²⁸

First, by narrowly construing the meaning behind Section 109(b), the plaintiffs argued that litigation between directors and shareholders was an external matter not within the statute's scope.²⁹ In support of their argument, the plaintiffs distinguished the bylaws from what they deemed internal matters.³⁰ In addition, the plaintiffs proffered that judicial review of a corporation's internal governance is indeed external.³¹

In rejecting this argument, the court found that the bylaws only regulated internal matters.³² The court held that "the forum selection bylaws address[ed] the 'rights' of the stockholders, because they regulate where stockholders can exercise their right to bring certain internal affairs claims against the corporation and its directors and officers."³³ The court determined that the regulation of internal affairs claims "relates quintessentially" to the corporation's affairs.³⁴ By way of example, the court explained that a bylaw would regulate external matters if it attempted to regulate where a shareholder-plaintiff could bring a personal injury or breach of contract claim.³⁵

After rejecting the claim that the bylaws regulated external matters, the court discussed the shareholder-plaintiffs' second argument that "the bylaws [did] not speak to a 'traditional' subject matter"³⁶ First, the plaintiffs argued that the bylaws did not fall within common subjects of bylaws like stockholder meetings, board of directors, and officers.³⁷ Second, the plaintiffs argued that "the 'right to sue' [was] not

²⁷See *Boilermakers*, 73 A.3d at 951 ("[B]ecause the forum selection bylaws address internal affairs claims, the subject matter of the actions the bylaws govern relates quintessentially to 'the corporation's business, the conduct of its affairs, and the rights of its stockholders.'").

²⁸See *id.* at 963 (holding that the challenged forum selection bylaws are statutorily and contractually valid).

²⁹See Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings at 40, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (No. 7220-CS).

³⁰See *id.* at 41 (comparing the bylaws to the election of directors and stockholder decision-making).

³¹See *id.* at 42-43.

³²See *Boilermakers*, 73 A.3d at 951-52.

³³*Id.* at 950-51 (footnote omitted).

³⁴*Id.* at 951.

³⁵See *id.* at 952.

³⁶*Boilermakers*, 73 A.3d at 953.

³⁷See Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, *supra* note 29, at 44.

unique to stockholders" and therefore improper.³⁸ Finally, the plaintiffs offered support by arguing that regulating litigation is only proper for statutes and the judiciary.³⁹

Upon rejecting this argument, the court referred to the plaintiffs' view of proper subject matter as "cramped."⁴⁰ The court held that "regulat[ing] how stockholders may exercise their rights" is not a "novel" idea.⁴¹ In comparing the bylaws to those of other business entities, the court noted that forum selection provisions have been upheld "in the analogous contexts of LLC agreements and stockholder agreements."⁴² Notwithstanding this point, the court stated that Delaware's corporate law must adapt to current needs, and the law does not prohibit a matter merely because of its silence on the subject.⁴³ The court went on to compare the bylaws to a defensive measure known as a "poison pill"⁴⁴ and found the bylaws were enacted to protect the corporation from a perceived threat—multi-forum litigation.⁴⁵

To be sure, the court explained that these bylaws had even more controls than the "poison pill" to protect against misuse.⁴⁶ It found that the boards would be able to waive the bylaws if they determined that the bylaws would breach their fiduciary duties.⁴⁷ Further, the shareholders themselves could repeal the bylaws by a majority vote.⁴⁸ In addition, since the corporation would have to raise the forum selection bylaw in a foreign court, the court would be required to analyze it using the test articulated in *Bremen v. Zapata Off-Shore Co.*⁴⁹ In *Bremen*, the United

³⁸*Id.* at 45.

³⁹*See id.* at 45-46.

⁴⁰*Boilermakers*, 73 A.3d at 951.

⁴¹*Id.* at 952.

⁴²*Id.* at 953.

⁴³*See id.* (citing *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985)).

⁴⁴A "poison pill" is a defensive measure that a board of directors may adopt in reaction to a hostile takeover. *See* Brian J. McTear, *Has the Evolution of the Poison Pill Come to an End?* — *Carmody v. Toll Brothers, Inc.*; *Mentor Graphics, Inc. v. Quickturn Design Systems, Inc.*, 24 DEL. J. CORP. L. 881, 883 (1999). While the measure can take several forms, it generally involves a shareholder's rights to purchase new shares at a substantial discount when the provision is triggered. *See id.* at 884.

⁴⁵*See Boilermakers*, 73 A.3d at 953.

⁴⁶*See id.* at 954.

⁴⁷*See id.* at 954 n.86 ("Both bylaws begin: 'Unless the Corporation consents in writing to the selection of an alternative forum . . .'").

⁴⁸*See id.* at 954 (referring to 8 Del. C. § 109(a)). Under the statute, "the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote" and cannot be removed. DEL. CODE ANN. tit. 8, § 109(a) (2011).

⁴⁹*See Boilermakers*, 73 A.3d at 954 (noting that the Delaware Supreme Court explicitly adopted the *Bremen* test).

States Supreme Court held that a forum selection clause is prima facie valid and will only be held invalid if the contesting party can show it is "'unreasonable' under the circumstances."⁵⁰ For these reasons, the court found the bylaws to be statutorily valid.⁵¹

2. The Bylaws are Contractually Valid

After finding the bylaws to be statutorily valid, the court moved on to the issue of whether the bylaws were contractually valid.⁵² The plaintiffs argued that since the corporations' boards adopted the bylaws unilaterally, the stockholders did not assent to them.⁵³ Upon rejecting the plaintiffs' "vested rights"⁵⁴ argument, the court reiterated that when the articles of incorporation provide the board with the right to adopt bylaws unilaterally, the board may do so regarding any subject under 8 Del. C. § 109(b).⁵⁵ The court went on to hold that "the Chevron and FedEx stockholders have assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards."⁵⁶

The court then explained the rights shareholders have in regulating a corporation's board of directors.⁵⁷ The court also reiterated that the shareholders could repeal the bylaw.⁵⁸ In addition, the court noted that under the DGCL, stockholders have the ability to elect directors annually.⁵⁹ Finally, as in its statutory analysis, the court reemphasized the test established in *Bremen*, indicating that it serves as an additional

⁵⁰M/S *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

⁵¹See *Boilermakers*, 73 A.3d at 954.

⁵²See *id.*

⁵³See *id.* at 954-55 (implying that if the forum selection bylaw was not contractually valid, then all board adopted bylaws, without shareholder consent, would not be binding on stockholders).

⁵⁴See *Fed. United Corp. v. Havender*, 11 A.2d 331, 339 (Del. 1940) (rejecting the "vested rights" doctrine).

⁵⁵See *Boilermakers*, 73 A.3d at 955-56.

⁵⁶*Id.* at 956. The court confronted *Galaviz v. Berg* by stating its reasoning "rests on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders." *Id.*; see also *supra* note 19 and accompanying text.

⁵⁷See *Boilermakers*, 73 A.3d at 956.

⁵⁸See *id.*; see also DEL. CODE ANN. tit. 8, § 109(a) (2011) (providing shareholders with an irrevocable right to enact, amend, and repeal corporate bylaws).

⁵⁹See *Boilermakers*, 73 A.3d at 956-57; see also DEL. CODE ANN. tit. 8, § 211(b) (2011) (requiring an annual stockholder's meeting to elect the board of directors).

check on the forum selection clause because such a clause must be reasonable under the circumstances.⁶⁰

After holding that the bylaws were both statutorily and contractually valid, the court quickly rejected the plaintiffs' list of hypothetical situations.⁶¹ The court stated that those situations could only be answered if and when they occur.⁶²

III. ANALYZING ARBITRATION BYLAWS UNDER *BOILERMAKERS V. CHEVRON*

While *Boilermakers* has cleared the way for a corporation's board to adopt forum selection provisions in their bylaws, it also brings to question *whether a board of directors could enact an arbitration provision, regulating intra-corporate affairs, within its bylaws, absent shareholder consent.*⁶³ In an attempt to quell multi-forum litigation and rising litigation costs, a corporation may very well utilize an arbitration clause as a solution.⁶⁴ A board adopted arbitration bylaw will likely be upheld using the reasoning underlying the court's decision in *Boilermakers*.⁶⁵ The following analysis shows that an arbitration bylaw

⁶⁰See *Boilermakers*, 73 A.3d at 957; see also *supra* note 50 and accompanying text. To enforce the principles behind *Bremen*, the court also compared the forum selection bylaws to the forum selection clause found in *Carnival Cruise Lines, Inc. v. Shute*. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991) (holding that a forum selection clause on a purchased non-negotiable cruise line ticket was reasonable).

⁶¹See *Boilermakers*, 73 A.3d at 958. Although the court rejected the plaintiffs' hypotheticals as being improper, the court did analyze a few of them. See *id.* at 960-62 (discussing the flaws of the hypothetical situation in which certain defendants are not subject to personal jurisdiction, as well as the hypothetical situation in which a plaintiff allegedly would not be able to bring a claim against a corporation).

⁶²See *id.* at 963 ("The situational review *Bremen* requires, and the analogous protections of fiduciary duty review under cases like *Schnell*, exist to deal with real-world concerns when they arise in real-world and extant disputes, rather than hypothetical and imagined future ones.").

⁶³For purposes of this Comment, the hypothetical arbitration bylaw will only regulate intra-corporate disputes falling under state corporate law similar to the forum selection bylaws of *Chevron* and *FedEx*. See *supra* notes 20-21.

⁶⁴See Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 128 (2012) (concluding that arbitration may be a possible solution for corporations); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 67 (2013) (discussing the possibilities of a corporation using arbitration to combat frivolous shareholder lawsuits). But see G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 574 (1989) (concluding that arbitration would merely be "a complement to traditional court remedies").

⁶⁵See *Boilermakers*, 73 A.3d at 950-58.

regarding intra-corporate disputes would, at least on its face, be statutorily and contractually valid.

*A. Arbitration Bylaws are Valid under
Section 109(b)*

From the outset, it is important to recognize the differences between a forum selection provision and an arbitration provision. The *Boilermakers* court's decision relied, in part, on the fact that the forum selection bylaws were "process-oriented" and only regulated "where stockholders may file suit."⁶⁶ This cannot be said about arbitration. Arbitration would do more than simply regulate *where* a stockholder could file suit because it would also regulate *how* the stockholder proceeds with the suit.⁶⁷

That being said, these differences do not automatically remove arbitration bylaws from the scope of Section 109(b). Similar to the forum selection bylaws in *Boilermakers*,⁶⁸ arbitration bylaws: (1) are designed to regulate internal matters between the corporation, its directors, and its shareholders;⁶⁹ (2) are of a proper subject matter;⁷⁰ and (3) have sufficient controls on misuse.⁷¹

1. An Arbitration Bylaw would Regulate
Internal Matters

Much like the forum selection bylaws in *Boilermakers*, an arbitration bylaw would seek to regulate stockholders' rights in the context of intra-corporate disputes or claims.⁷² The bylaw would not, however, seek to regulate any external claims that a plaintiff-stockholder may bring against the corporation.⁷³ In essence, the validity of an arbitration bylaw would be based on the same logic set forth in *Boilermakers*.

⁶⁶*Boilermakers*, 73 A.3d at 951-52.

⁶⁷*See* 9 U.S.C. § 10(a) (2012) (providing specific circumstances in which a court may vacate an arbitrator's award); *id.* § 16 (allowing appeals of certain lower court orders); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (recognizing that parties have the freedom to modify arbitration agreements as they see fit).

⁶⁸*See supra* notes 20-21.

⁶⁹*See infra* Part III.A.1.

⁷⁰*See infra* Part III.A.2.

⁷¹*See infra* Part III.A.3.

⁷²*See Boilermakers*, 73 A.3d at 951.

⁷³*See id.* at 952.

2. Arbitration Bylaws are of a Proper Subject Matter

As a general matter, a bylaw is of a proper subject matter if it "relate[s] to the business of the corporation[], the conduct of their affairs, or the rights of the stockholders."⁷⁴ In determining the validity of a bylaw, a court must consider "the broad subjects that § 109(b) permits."⁷⁵ As previously mentioned, arbitration bylaws do not exactly fit the same mold as forum selection bylaws regarding subject matter,⁷⁶ but this does not mean an arbitration bylaw would be improper.

Just as forum selection provisions are not a novel subject matter,⁷⁷ neither is arbitration.⁷⁸ To be sure, the Supreme Court of Delaware has upheld arbitration provisions in the context of LLC Agreements.⁷⁹ In addition, a bylaw regulating *how* a stockholder exercises his rights is not a new concept.⁸⁰ For instance, the *Boilermakers* court compared the forum selection provision to an advance notice bylaw.⁸¹ The advance notice bylaw was enacted to regulate *how* a stockholder would make nominations or proposals.⁸² Similarly, an arbitration bylaw would regulate *how* a plaintiff-shareholder would bring an intra-corporate complaint.⁸³

An arbitration bylaw is procedural in nature.⁸⁴ An arbitration bylaw would not seek to limit a stockholder's rights to sue, but merely govern *how* that right is exercised.⁸⁵ In other words, an arbitration bylaw would only "deal with the rights and powers" of a plaintiff acting in his

⁷⁴*Id.* at 950.

⁷⁵*Id.*

⁷⁶*See supra* Part III.A.

⁷⁷*See Boilermakers*, 73 A.3d at 953 (noting that forum selection bylaw agreements have been held valid in the context of LLC agreements and shareholder agreements).

⁷⁸*See Shell*, *supra* note 64, at 525-28 (discussing the use of arbitration agreements within closely held corporations).

⁷⁹*See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999).

⁸⁰*See JANA Master Fund, Ltd. v. CNET Networks, Inc.* 954 A.2d 335, 344 (Del. Ch. 2008) (upholding a corporation's advance notice bylaw); *Burr v. Burr Corp.*, 291 A.2d 409, 410 (Del. Ch. 1972) (involving a bylaw that allowed majority shareholders to fill vacant directorships).

⁸¹*See Boilermakers*, 73 F.3d at 952 (stating that advance notice bylaws and forum selection bylaws promote order and efficiency).

⁸²*See id.*

⁸³*See id.* at 951.

⁸⁴*See id.*; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 (1974) (referring to arbitration as "specialized" forum selection); *see also Weitzel*, *supra* note 64, at 82 (discussing the flexibility and benefits of arbitration provisions).

⁸⁵*See Boilermakers*, 73 A.3d at 951-52 (finding that forum selection bylaws did not impede on a stockholder's right to sue).

capacity as a stockholder.⁸⁶ Further, the arbitration bylaw would not seek to change the remedies available to the stockholder.⁸⁷

Regardless of novelty, just because an arbitration bylaw has not been used before, does not mean that it is invalid.⁸⁸ Directors of a Delaware corporation "have the flexibility to respond to changing dynamics in ways that are authorized by [Delaware's] statutory law."⁸⁹ An arbitration bylaw would likely be included for the same reasons the Chevron and FedEx boards adopted forum selection bylaws.⁹⁰ Arbitration bylaws would be an option for a board that is looking to "bring order to [the] . . . filing of duplicative and inefficient derivative and corporate suits against the directors and the corporations."⁹¹ Just as the court found a similar purpose between the "poison pill" and forum selection bylaws,⁹² the court would likely find the same purpose behind an arbitration bylaw.⁹³

3. An Arbitration Bylaw would have Similar Controls over Misuse as Forum Selection Bylaws

With regard to controls over misuse, an arbitration bylaw would likely involve controls similar to those in forum selection bylaws. First, the board could reserve the right "to waive the corporation's rights under the bylaw in a particular circumstance in order to meet their obligation to use their power only for proper corporate purposes."⁹⁴ Second, the stockholders would have statutory rights to repeal the bylaw.⁹⁵ Finally, just as forum selection bylaws would need to be enforced by the foreign court where a claim is brought,⁹⁶ an arbitration bylaw would also be

⁸⁶*Id.* at 952.

⁸⁷*See id.*

⁸⁸*See id.* at 953.

⁸⁹*Boilermakers*, 73 A.3d at 953.

⁹⁰*See id.* at 943, 953 (finding the directors were attempting to solve the problem of multi-forum litigation regarding the same dispute); *see also* Weitzel, *supra* note 64, at 83-88 (discussing the flexibility and potentially positive effects of an arbitration agreement including cost reductions, speed, and expertise).

⁹¹*Boilermakers*, 73 A.3d at 952.

⁹²*See id.* at 953 (finding the poison pill to be used to protect against a perceived threat, that of a hostile takeover).

⁹³*See id.* at 952.

⁹⁴*Id.* at 954; *see also* Weitzel, *supra* note 64, at 82 (discussing a corporation's options regarding arbitration).

⁹⁵*See* DEL. CODE ANN. tit. 8, § 109(a) (2011) (making clear that a shareholder's rights regarding the enactment, amendment, or repeal of a bylaw cannot be modified).

⁹⁶*See Boilermakers*, 73 A.3d at 954 ("[A] corporation must raise the forum selection

subject to a foreign court's decision on enforceability.⁹⁷ For these reasons, arbitration bylaws are likely to be upheld as statutorily valid.

B. Arbitration Bylaws are Contractually Valid

Just as arbitration bylaws are likely statutorily valid, they are also likely to be upheld as contractually valid. As the *Boilermakers* court stated, "[B]ylaws constitute a binding part of the contract between a Delaware corporation and its stockholders."⁹⁸ When a corporation's articles of incorporation allow directors to adopt bylaws unilaterally, stockholders are considered to be "on notice."⁹⁹ The court explained further that when stockholders buy shares in a corporation, they "assent to not having to assent to board-adopted bylaws."¹⁰⁰ This presumption of contractual validity naturally flows to any adopted bylaw that is within the proper scope of 8 Del. C. § 109(b).¹⁰¹

It is hard to see how an arbitration bylaw could be ruled invalid under the DGCL. The above *Boilermakers* analysis,¹⁰² coupled with the broad subject matters permitted by 8 Del. C. §109(b)¹⁰³ and the presumption that bylaws are valid,¹⁰⁴ shows that arbitration bylaws would be statutorily and contractually valid under current Delaware law.

IV. ROADBLOCKS TO ARBITRATION BYLAWS

Although an arbitration bylaw is likely valid on its face under Delaware law, a board of directors must still consider several other factors when discussing whether an arbitration bylaw is right for the corporation. First, a board of directors must consider whether the

clause as a jurisdictional defense if it wishes to obtain dismissal of a case filed in a different forum outside of the state selected in the bylaws . . .").

⁹⁷See *Shell*, *supra* note 64, at 548 (reasoning that because state contract principles would apply, an arbitration agreement would be deemed invalid if it was enacted by fraud or its terms were unconscionable).

⁹⁸*Boilermakers*, 73 A.3d at 955.

⁹⁹*Id.* at 955-56.

¹⁰⁰*Id.* at 956.

¹⁰¹See DEL. CODE ANN. tit. 8, § 109(b) (2011) (defining the permissible scope of bylaws).

¹⁰²See *supra* Part II.B.1-2.

¹⁰³See DEL. CODE ANN. tit. 8, § 109(b) ("[B]ylaws 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.").

¹⁰⁴See *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) ("The bylaws of a corporation are presumed to be valid.").

arbitration bylaw will benefit the corporation and its needs.¹⁰⁵ Second, a board must consider whether a foreign court will enforce the arbitration bylaw.¹⁰⁶ Third, if a corporation is planning to go public, its board must consider the Security Exchange Commission's ("SEC") general policy against arbitration provisions within the governing documents of a corporation.¹⁰⁷

A. *Weighing the Advantages of an Arbitration Bylaw*

Under Section 141 of the DGCL, a corporation's board of directors is charged with managing the company's business and affairs.¹⁰⁸ While carrying out this task, a board must satisfy its fiduciary duties to the corporation and its shareholders.¹⁰⁹ In general, a director satisfies his duty of care when he makes informed business decisions.¹¹⁰ Further, a director is required to put the interests of the corporation and its shareholders ahead of his own to satisfy his duty of loyalty.¹¹¹ A board must closely examine both the advantages and disadvantages of arbitration to ensure that it is making an informed decision that is also in the best interests of the corporation and its shareholders.

Some of the corporate benefits of an arbitration bylaw are synonymous with those of a forum selection bylaw. For instance, an arbitration bylaw would help reduce litigation costs, especially in the case of multi-forum litigation and strike suits.¹¹² It would also allow for faster and more efficient adjudication of disputes.¹¹³ Additionally, an arbitration bylaw could provide consistency over disputes.¹¹⁴ With that being said, an arbitration provision has its drawbacks.¹¹⁵

¹⁰⁵See *infra* Part IV.A.

¹⁰⁶See *infra* Part IV.B.

¹⁰⁷See *infra* Part IV.C.

¹⁰⁸See DEL. CODE ANN. tit. 8, §141(a) (2011) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .").

¹⁰⁹See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.").

¹¹⁰See *id.* at 366 (finding that the defendant directors breached their duty of care by failing to reach an informed decision).

¹¹¹See *id.* at 361.

¹¹²See Weitzel, *supra* note 64, at 83-87 (discussing the positive impact arbitration would have on a corporation's litigation costs).

¹¹³See *id.* at 87-88 (arguing that arbitration has the potential to shorten the duration of shareholder disputes by years).

¹¹⁴See *id.* at 88-89 (finding a group of specialized arbitrators would be able to provide

One of the key benefits of a forum selection provision is that the mandatory forum will likely be the state of incorporation.¹¹⁶ Many corporations see a benefit in adjudicating before the courts of the state of incorporation because those courts are experts on the relevant law.¹¹⁷ This, of course, would not be the case with regard to arbitration.¹¹⁸

While an arbitration provision would remove the dispute from the expertise of the incorporating state's courts, it is possible to still acquire the expertise that a corporation and its shareholders may desire.¹¹⁹ It is likely that the arbitrators selected will be experts in their own respect.¹²⁰ These arbitrators will likely be former judges, law professors, or current business attorneys who not only know the law of the incorporating state, but who also have the respect of both sides of the dispute.¹²¹

The next problem that may arise is that an arbitration provision might lead to a lack of substantive law for corporations to rely on.¹²² In other words, by taking the dispute out of the courts, there will be a decrease in the interpretation and evolution of corporate law.¹²³ Again, this potential drawback is lacking. First, just like forum selection provisions, not every corporation is going to adopt an arbitration provision.¹²⁴ In fact, there are at least two corporations who think that

higher quality and more consistent dispositions of disputes, rather than judges who do not deal with corporate matters regularly).

¹¹⁵See *id.* at 90-96 (exploring the possibilities of arbitration eliminating litigation's deterrent effects on misconduct, favoring corporations over consumers, denying shareholders their day in court, atrophying the corporate law, lacking transparency, and being unsuitable for high-stakes disputes).

¹¹⁶See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 953 (Del. Ch. 2013) ("[The state of incorporation is] the most obviously reasonable forum . . .").

¹¹⁷See *Grundfest & Savelle*, *supra* note 1, at 334 (stating Delaware courts were the obvious forum for litigation involving Delaware chartered companies due to their expertise in the resolution of complex business disputes and in interpretation of Delaware law, at least until recently).

¹¹⁸See *infra* notes 123-32 and accompanying text.

¹¹⁹See *Wietzel*, *supra* note 64, at 88-89 (noting that the group of arbitrators involved in these disputes would be small and specialized).

¹²⁰See *Shell*, *supra* note 64, at 564 (suggesting expert arbitrators are just as capable as judges in determining corporate cases). *But see* Jennifer J. Johnson & Edward Brunet, *Arbitration of Shareholder Claims: Why Change is not Always a Measure of Progress* 18-23 (Lewis & Clark Law Sch. Legal Research Paper Series, Paper No. 11, 2008), *archived at* <http://perma.cc/3HQR-XTXT> (arguing that arbitrators are not experts).

¹²¹See *Wietzel*, *supra* note 64, at 88 (arguing that a small group of expert arbitrators will be able to provide more thorough and consistent opinions than federal judges who adjudicate very few intra-corporate claims).

¹²²See *Shell*, *supra* note 64, at 573-74 (noting that commentators against arbitration will likely argue that there will be a stall in "judicial development of [corporate] legal doctrines").

¹²³See *id.* at 573-74.

¹²⁴See *id.* at 574 ("[C]orporate law indicate[s] that arbitration of public shareholder

arbitration provisions are not beneficial.¹²⁵ Second, as one commentator has pointed out, this argument has been raised regarding arbitration in almost every area of the law, yet it has been proven untrue.¹²⁶ It seems that like most other areas of the law, arbitration provisions will likely only show up in the governing documents of some, rather than all, corporations.¹²⁷

Finally, there may be situations in which the corporation does want the dispute in front of a court.¹²⁸ There may be suits where the corporation wants a definitive ruling from a court.¹²⁹ There may also be situations where the cost benefits of arbitration simply are not applicable.¹³⁰ Further, there may be the situation in which large amounts of money are at stake and the corporation would simply be better off in a courtroom.¹³¹ That being said, a corporation could limit these disadvantages by exempting certain types of situations from the arbitration provision.¹³²

As do many things in life and law, arbitration provisions have their advantages and disadvantages. Due to this balancing act, it is important for the corporation's board to consider all relevant factors.¹³³ But just because a potential solution has drawbacks does not mean that it would

claims will be, at best, a complement to traditional court remedies."); *see also* Weitzel, *supra* note 63, at 94 ("Adoption of arbitration provisions will not be universal . . .").

¹²⁵*See infra* note 132 and accompanying text (providing two examples of corporations that may be against arbitration provisions).

¹²⁶*See* Shell, *supra* note 64, at 573-74 (finding commentator fears are unwarranted in more established areas of commercial arbitration).

¹²⁷*See supra* notes 124-26.

¹²⁸*See* Black, *supra* note 64, at 118-20 (comparing the types of disputes for which arbitration is preferred to those for which arbitration is not preferred).

¹²⁹*See* Weitzel, *supra* note 64, at 96 (noting that there are some who feel certain disputes are not suited for lax rules of arbitration).

¹³⁰*See* Shell, *supra* note 64, at 572-73 (discussing the lack of cost benefits when dealing with complex arbitration).

¹³¹*See* Weitzel, *supra* note 64, at 96 ("Because arbitrators are less confined by legal rules, and there are fewer options to overturn an erroneous decision, some have speculated that arbitration is poorly suited for high-stakes disputes.").

¹³²*See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). For example, the proposed arbitration bylaw submitted by a shareholder to Pfizer, Inc. had a provision excluding any "claim for damages in excess of \$3,000,000." Pfizer Inc., SEC No-Action Letter, 2012 WL 587597 (February 22, 2012), *archived at* <http://perma.cc/WW7F-4ZQ5>; Gannett Co., Inc., SEC No-Action Letter, 2012 WL 6859124 (February 22, 2012), *archived at* <http://perma.cc/4LMX-KA9X>.

¹³³*See* Black, *supra* note 64, at 118-19 (examining relevant factors to determine whether arbitration provisions should be adopted).

not benefit a corporation and its shareholders under certain circumstances.¹³⁴

*B. Will the Arbitration Bylaw be Enforced
in a Foreign Jurisdiction?*

An arbitration provision will be subject to a foreign jurisdiction's enforcement should a plaintiff-shareholder decide to file suit there.¹³⁵ A board must consider the provision's enforceability in order to make an informed decision.¹³⁶ A provision that is not enforceable will not only fail to solve the problem the board perceives, but will likely result in increased litigation costs.¹³⁷ That being said, arbitration has received approval from the Supreme Courts of the United States¹³⁸ and Delaware,¹³⁹ as well as from their respective legislatures.¹⁴⁰ Subsequently, this abundant approval has created a presumption to enforce arbitration bylaws.¹⁴¹

While arbitration provisions have received acceptance within the courts and Congress, there is little case law regarding the enforceability of arbitration provisions in the governing documents of a business.¹⁴²

¹³⁴*See id.* (showing benefits to arbitration provisions despite certain drawbacks).

¹³⁵*See* 9 U.S.C. § 2 (2012) ("[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

¹³⁶*See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006) (requiring a director to be informed of all material facts when making a decision to satisfy his duty of good faith).

¹³⁷*See* Shell, *supra* note 64, at 572 (predicting that "protracted litigation" will result when plaintiffs' lawyers resist arbitration).

¹³⁸*Compare* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (holding that forum selection clauses are "prima facie valid"), *with* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (noting a strong federal policy regarding arbitration).

¹³⁹*See* James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76, 79 (Del. 2006) (recognizing that Delaware favors arbitration).

¹⁴⁰*See* 9 U.S.C. § 2 ("[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); DEL. CODE ANN. tit. 10 § 5701 (2013) (Delaware's Uniform Arbitration Act); *see also* Shell, *supra* note 64, at 548 (noting that for an arbitration agreement to be exempt under the Federal Arbitration Act, the agreement must have been "unconscionable" or "induced by fraud").

¹⁴⁰*See* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986).

¹⁴²*See* Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 163 (3rd Cir. 2009) (finding the arbitration bylaw within a Pennsylvania law firm's bylaws unenforceable under Pennsylvania contract law); Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 287 (Del. 1999) (upholding the arbitration provision of an LLC); Corvex Management LP v. Commonwealth REIT, No. 24-C13-001111, 2013 WL 1915769, at *1 (Md. Cir. Ct. May 8,

Although none of the cases are exactly on point, each is worth a short analysis. The first of these cases dealt with an arbitration provision within the operating agreement of a Delaware LLC.¹⁴³

1. *Elf Atochem North America, Inc. v. Jaffari*

In *Elf Atochem North America, Inc. v. Jaffari*, the Delaware Supreme Court was asked to determine the applicability of an arbitration and forum selection provision requiring all claims arising from the LLC's operating agreement to be arbitrated in California.¹⁴⁴ Specifically, the court was asked whether a suit brought derivatively on behalf of the LLC was subject to the provision despite the fact that the LLC was not a signatory to the operating agreement.¹⁴⁵ The court upheld the provision, in part by relying on Delaware's presumption in favor of arbitration.¹⁴⁶ In addition, the court relied on Section 18-101(7) of the Delaware Limited Liability Act, which states that a limited liability agreement relates "to the affairs of a limited liability company and the conduct of its business."¹⁴⁷ The court further explained that the policy behind the Act was to provide an LLC's members with "maximum flexibility" when establishing the LLC's operating agreement.¹⁴⁸

2. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*

In *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, the Third Circuit Court of Appeals dealt with an arbitration bylaw in the governing documents of a Pennsylvania law firm.¹⁴⁹ In its opinion affirming the district court's denial of the defendant's motion to compel arbitration, the Third Circuit found that: (1) the presumption in favor of arbitration only applies once it has been determined that a valid agreement has been made under state law¹⁵⁰ and (2) under Pennsylvania contract law an express agreement to arbitrate is required.¹⁵¹ The court went on to hold

2013) (enforcing the unilaterally adopted arbitration bylaw of a publicly traded Real Estate Investment Fund).

¹⁴³*Elf Atochem*, 727 A.2d at 287.

¹⁴⁴*See id.*

¹⁴⁵*See id.*

¹⁴⁶*See id.* at 291-92.

¹⁴⁷*Elf Atochem*, 727 A.2d at 293.

¹⁴⁸*See id.*

¹⁴⁹*Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 158 (3d Cir. 2009).

¹⁵⁰*See id.* at 160.

¹⁵¹*See id.* at 163.

that there was not an express agreement to arbitrate.¹⁵² This holding was based on the lack of evidence showing that the plaintiff had ever received a copy of the bylaws or even knew about the arbitration provision.¹⁵³

Although the court rejected the provision in *Kirleis*, this case appears to be unique. The Third Circuit recognized this in *Century Indemnity v. Underwriters, Lloyd's, London*, in which it upheld an arbitration agreement even though one of the parties did not sign the contract containing the agreement.¹⁵⁴ The parties had entered into an agreement that incorporated the provisions of an earlier agreement between Century's predecessor and a third party.¹⁵⁵ The court distinguished *Kirleis* from this dispute because in *Kirleis*, there was a legitimate dispute as to whether the plaintiff had indeed received a copy of the bylaws that would have put her on notice regarding the arbitration bylaw.¹⁵⁶ To clarify, the court held the "express" and "unequivocal" standard is only applicable when determining whether there is "a genuine issue of material fact as to an arbitration agreement's existence."¹⁵⁷

3. *Corvex Management LP v. Commonwealth REIT*

The most recent case, *Corvex Management LP v. Commonwealth REIT*, involved a shareholder suit against a publicly traded real estate investment trust ("REIT") in Maryland.¹⁵⁸ In this case, the Circuit Court for Baltimore City found the arbitration bylaw, adopted without shareholder approval, was valid.¹⁵⁹ Relying heavily on the pro-arbitration policy throughout the country, the court rejected the Third Circuit's view that an agreement to arbitrate must be explicit.¹⁶⁰ The court went on to find a valid contract and therefore enforced arbitration on the plaintiff-shareholders.¹⁶¹

¹⁵²See *id.* at 165.

¹⁵³See *Kirleis*, 560 F.3d at 162, 165.

¹⁵⁴See *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 559 (3d Cir. 2009).

¹⁵⁵See *id.*

¹⁵⁶See *id.* at 529 & n.12.

¹⁵⁷*Id.* at 530-32.

¹⁵⁸See *Corvex Mgmt. LP v. Commonwealth REIT*, No. 24-C13-001111, 2013 WL 1915769, at *1 (Md. Cir. Ct. May 8, 2013).

¹⁵⁹See *id.* at *2.

¹⁶⁰See *id.* at *14-15.

¹⁶¹See *id.* at *27.

4. Statutory Support: The Federal Arbitration Act

Despite the minimal and conflicting case law, a few points can be made about an arbitration bylaw's validity under the Federal Arbitration Act ("FAA").¹⁶² First, the FAA preempts any state law that would conflict with the overall public policy favoring arbitration.¹⁶³ Second, a court should apply state law to determine whether an arbitration agreement exists.¹⁶⁴ Finally, due to the contractual nature of a corporation's bylaws, it is likely the FAA will cover arbitration bylaws, and courts will require the bylaws to be enforced.¹⁶⁵

In general, state contract law applies when determining whether an arbitration agreement exists.¹⁶⁶ With regard to a corporation's bylaws, a foreign court should apply the internal affairs doctrine.¹⁶⁷ Accordingly, even courts that have invalidated forum selection bylaws, such as the United States District Court for the Northern District of California¹⁶⁸, should uphold an arbitration provision contained in a Delaware corporation's bylaws. Since Delaware law would apply to companies incorporated in Delaware, a court would only have to find that an arbitration bylaw is part of a valid contract between the shareholders and the corporation.¹⁶⁹ This is supported by the fact that courts have upheld arbitration provisions in bylaws of private associations, labor organizations, religious groups, realty boards, and securities exchanges.¹⁷⁰

¹⁶²See Shell, *supra* note 64, at 542-60 (providing an in-depth discussion relating to the Federal Arbitration Act's applicability to arbitration agreements within corporate governance documents).

¹⁶³See *Southland Corp. v. Keating*, 465 U.S. 1, 16-17 & n.10 (1984) (holding that the FAA preempts any state law that attempts to take the power to enforce arbitration away).

¹⁶⁴See *Perry v. Thomas*, 482 U.S. 482, 493 n.9 (1987) (holding that state contract law will govern whether an agreement has been made). *But see* Shell, *supra* note 64, at 543 n.170 ("If state law devises a special contract rule to govern arbitration agreements, . . . the federal policy inherent in the FAA may preempt such a rule . . .").

¹⁶⁵See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch. 2013) (finding bylaws are part of a contract between a corporation and its shareholders); *see also* Shell, *supra* note 64, at 543-48 (discussing the views held by courts that a corporation's corporate governance documents are a contract).

¹⁶⁶See *Perry*, 482 U.S., at 493 n.9.

¹⁶⁷See *Boilermakers*, 73 A.3d at 938 (holding that in determining the validity of a bylaw, a court must apply the law of the state of incorporation).

¹⁶⁸See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011) (finding that the forum selection provision within the corporate bylaws was contractually invalid).

¹⁶⁹See *Boilermakers*, 73 A.3d at 963 (finding that the bylaws challenged by the shareholders were contractually valid under Delaware law); *see also supra* Part III.B.

¹⁷⁰See Shell, *supra* note 64, at 546-47 (finding that even if a court rejects the idea of a corporation's governance documents as a contract, the courts have upheld similar agreements

Since an arbitration bylaw is covered under the FAA, a court will be required to enforce the bylaw.¹⁷¹

C. Going Public? Not with an Arbitration Provision

In the case of a public corporation, the idea of enacting an arbitration bylaw becomes even more complex. In the context of an initial public offering, the SEC has refused to accelerate the registration documents of the petitioning corporation where an arbitration provision was included in its corporate governance documents.¹⁷² Further, the SEC has allowed two corporations to omit shareholder proposals to adopt arbitration bylaws within its annual proxy.¹⁷³ In both situations, the SEC simply agreed with the corporations that an arbitration bylaw would likely violate federal securities law.¹⁷⁴

It appears that the SEC is basing this policy on the "anti-waiver" provisions found within the Securities Act and the Securities Exchange Act.¹⁷⁵ Under these statutes, the SEC has taken a public policy stance against a public company requiring an investor "to waive access to a judicial forum for vindication of federal or state law rights."¹⁷⁶ It is not

in other contexts); *see also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 542, 550 (1964) (recognizing that a collective bargaining agreement is a unique contract with its own body of common law); Willard Alexander, Inc. v. Glasser, 290 N.E.2d 813, 814 (N.Y. 1972) (compelling arbitration in the context of labor organizations).

¹⁷¹*See* 9 U.S.C. § 2 (2013) ("A written provision . . . to settle by arbitration . . . shall be valid, irrevocable, and enforceable . . ."); *see also* Shell, *supra* note 64, at 524 ("[T]he [FAA has been transformed] from a procedural statute applicable only in federal court into a national charter favoring liberal enforcement of arbitration agreements.").

¹⁷²*See* Black, *supra* note 64, at 116 (discussing the SEC's overall policy against arbitration agreements); *see also* Weitzel, *supra* note 64, at 101 (discussing the SEC's opposition to arbitration agreements based on Section 29(a) of the Exchange Act).

¹⁷³*See* Pfizer Inc., SEC No-Action Letter, *supra* note 132; Gannett Co., Inc., SEC No-Action Letter, *supra* note 132.

¹⁷⁴*See* Pfizer Inc., SEC No-Action Letter, *supra* note 132; Gannett Co., Inc., SEC No-Action Letter, *supra* note 132. Interestingly enough, individual shareholders made both of the proposals, so this at least shows that there may be shareholders who support arbitration. *See* Pfizer Inc., SEC No-Action Letter, *supra* note 132; Gannett Co., Inc., SEC No-Action Letter, *supra* note 132.

¹⁷⁵*See* 15 U.S.C. § 77n (2012) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this sub-chapter or of the rules and regulations of the Commission shall be void."); *id.* § 78cc(a) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.").

¹⁷⁶Black, *supra* note 64, at 116 (citation omitted).

entirely clear why the SEC has taken this stance considering the other two branches of government's pro-arbitration opinion.¹⁷⁷

Although the SEC has not changed its policy on arbitration provisions, a corporation may still want to consider it, whether for the future or after going public. First, some commentators have noted that there appears to be a possible policy shift within the SEC.¹⁷⁸ For example, the SEC has allowed several foreign companies to trade in the United States even though their corporate governance documents have arbitration agreements.¹⁷⁹ This could signal a trend towards a pro-arbitration position.

What's more, it does not appear that the SEC has been enforcing this policy against entities that are already being publicly traded.¹⁸⁰ For instance, the trustees of CommonWealth REIT¹⁸¹ not only unilaterally adopted an arbitration bylaw, but they effectively enforced it within the state of Maryland.¹⁸² It could be said that the SEC has either overlooked this situation or simply cannot find a way to enforce its anti-arbitration policy.

Finally, there is the issue of the SEC impeding on what is essentially state law. While it is clear that the SEC has an interest in protecting investors,¹⁸³ it is not so clear that it should have a say on what

¹⁷⁷See *Shearson/Am. Express, Inc. v McMahon*, 482 U.S. 220, 228 (1987) (finding that the anti-waiver statutes do not apply to arbitration); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (finding that Section 2 of the Federal Arbitration Act is Congress's declaration of a liberal policy towards arbitration).

¹⁷⁸In at least one instance, the SEC considered changing its position on arbitration. See Black, *supra* note 64, at 116 (noting that under the leadership of Chairman Christopher Cox, the SEC considered a change to its anti-arbitration policy). *But see* Johnson & Brunet, *supra* note 120, at 15-16 (discussing why pressure from certain public servants caused the SEC to back out of endorsing arbitration proposals).

¹⁷⁹What is most intriguing about the SEC allowing these foreign companies to trade publicly is that almost all of them require arbitration outside of the United States, under foreign law, and in a foreign language. See Christos Ravnides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent Into Hades?*, 18 AM. REV. INT'L ARB. 371, 396-97 (2007). *But see* Black, *supra* note 64, at 118 (suggesting that this trend may have stalled).

¹⁸⁰See *infra* notes 184-85 and accompanying text.

¹⁸¹See *About Us*, COMMONWEALTH REIT, archived at <http://perma.cc/7QJ4-AZB5> (last visited Mar. 1, 2014) (stating that CommonWealth REIT is a real estate investment trust registered with the SEC and publicly traded on the New York Stock Exchange); see also CommonWealth REIT, Amended and Restated Bylaws (Dec. 22, 2013), archived at <http://perma.cc/UF7-X8NJ> (showing that CommonWealth REIT's bylaws require all disputes to be decided through arbitration).

¹⁸²See *Corvex Mgmt. LP v. CommonWealth REIT*, No. 24-C13-001111, 2013 WL 1915769, at *25-27 (Md. Cir. Ct. May 8, 2013).

¹⁸³See *The Investor's Advocate: How the SEC Protects Investors, Maintains Market*

the corporation may include in its governing documents. It is well settled that corporate law belongs to the states.¹⁸⁴ In the instance where a corporation wishes to adopt a provision—within their articles of incorporation or bylaws—that is valid under the incorporating state's law, the SEC should not become involved.¹⁸⁵

Ironically, the SEC's chosen strategy to enforce its anti-arbitration policy has in effect made a board adopted arbitration bylaw one of the only options available to a corporation.¹⁸⁶ By doing this, the SEC has actually taken more rights away from shareholders, rather than protecting them.

V. CONCLUSION

The decision in *Boilermakers v. Chevron* has cleared one hurdle for a corporation that is considering an arbitration bylaw. Even so, there are numerous factors that a board will still need to consider. It is likely that some corporations will find the cost savings, efficiency, and flexibility of arbitration to be a solution to intra-corporate disputes while others will not. Going forward, a board of directors should at the very least consider arbitration as an option to solve inefficient, and sometimes frivolous, shareholder lawsuits.

Michael Van Gorder

Integrity, and Facilitates Capital Formation, SEC. & EXCH. COMM'N, archived at <http://perm.a.cc/FKN8-3LB2> (last visited Apr. 13, 2014).

¹⁸⁴See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 90 (1987).

¹⁸⁵See *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (finding that the internal affairs doctrine is not only a conflicts of law principle, but is also required to satisfy due process under the Constitution).

¹⁸⁶See *Pfizer Inc.*, SEC No-Action Letter, *supra* note 132 (showing the SEC simply allowed the board to omit a shareholder proposal to adopt arbitration bylaws).

