How Much Of Delaware Law Can You Arbitrate?

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In *Should Corporate Law Go Private?*,[1] Dorothy Lund and Eric Talley call for Delaware corporations to embrace arbitration for internal affairs disputes and propose a new panel to adjudicate the resulting cases. The success of their idea depends on how far a governance agreement can go in channeling Delaware law claims into arbitration.[2] So far, the answer is "not everything, but quite a bit." Put differently, current law only allows Lund and Talley to partially implement their project.

I. GENERAL PRINCIPLES

Delaware courts follow federal law in favoring arbitration as a matter of public policy.[3] That policy does not authorize courts to create special rules of contract interpretation

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1. *See* Dorothy S. Lund & Eric L. Talley, *Should Corporate Law Go Private?*, 52 J. CORP. L. (forthcoming 2026).

2. The term "governance agreement" refers to an agreement between a corporation and a stockholder or putative stockholder under DEL. CODE. ANN. tit. 8, § 122 (2024). A governance agreement differs from a true stockholders agreement. Under the latter, stockholders agree on how to exercise their stockholder-level rights. Under the former, the counterparty gains governance rights that can be exercised against the corporation.

3. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (§ 2 of the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," which requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration"); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 626 (1985) (explaining that in construing an arbitration agreement within the coverage of the FAA, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"); Kuhn Constr., Inc. v. Diamond State Port Corp., 990 A.2d 393, 396 (Del. 2010) ("The public policy of Delaware favors arbitration."); SBC Interactive, Inc. v. Corp. Media Partners, 714 A.2d 758, 761 (Del. 1998) ("We begin our analysis with the premise that the public policy of Delaware favors arbitration."); Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908, 911 (Del. 1989) ("In short, the public policy of this state favors the resolution of disputes through arbitration.").

favoring arbitration, but it does require that any uncertainties or ambiguities be resolved in favor of arbitration.[4]

Delaware courts generally permit an arbitration clause to sweep in both contract claims and factually related non-contractual claims. A standard clause calls for arbitrating any claims "arising out of or relating to" the contract. Delaware courts treat those phrases as capturing "the broadest possible universe of claims."[5] Coverage extends to tort claims like unfair competition or misuse of trade name.[6]

By default, Delaware courts only enforce arbitration provisions against parties. But if a third-party beneficiary sues to enforce a claim under the contract, then the provision will apply.[7] Delaware decisions also enforce arbitration provisions against non-signatories under principles of estoppel.[8]

II. CORPORATE LAW CLAIMS

Section 115 of the Delaware General Corporation Law limits a corporation's ability to use its charter or bylaws to oust the Delaware courts of jurisdiction, including through arbitration. Enacted in 2015,[9] and amended in 2025,[10] Section 115 divides claims into two categories: (1) "internal corporate claims," defined as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery,"[11] and (2) all other claims.

For internal corporate claims, Section 115 allows the charter or bylaws to make Delaware state courts the exclusive forum. At the same time, Section 115 forbids the charter or bylaws from making the Delaware state courts an impermissible forum.

For all other claims, Section 115 permits the charter or bylaws to address claims that (1) involve stockholders suing derivatively or in their capacity as stockholders and (2) 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. As to those claims, the provision

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4. *See, e.g.*, Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475 (1989).

5. DeLucca v. KKAT Mgmt., L.L.C., 2006 WL 224058, at *10 (Del. Ch. Jan. 23, 2006) (classifying "arising out of, connecting with or simply relating to" as "terms often used by lawyers when they wish to capture the broadest possible universe"); *see also* Orix LF, LP v. Inscap Asset Mgmt., LLC, 2010 WL 1463404, at *7 (Del. Ch. Apr. 13, 2010) ("Delaware courts have found the use of both 'arising out of' and 'relating to' language in an arbitration provision to be a broad mandate."); Li v. Standard Fiber, LLC, 2013 WL 1286202, at *2 (Del. Ch. Mar. 28, 2013) ("Notably, it contains a broad arbitration provision: 'Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration . . . .'"); Smyrna v. Kent Cnty. Levy Ct., 2004 WL 2671745, at *2 (Del. Ch. Nov. 9, 2004) ("[T]here is no question that the arbitration clause found in the Agreement is broad, as it covers all claims 'arising out of' or 'related to' the Agreement.").

6. *See* Wilcox & Fetzer, Ltd. v. Corbett & Wilcox, 2006 WL 2473665, at *3 (Del. Ch. Aug. 22, 2006) (holding that an arbitration provision encompasses a factually related claim for misuse of trade name).

7. NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417, 431 (Del. Ch. 2007).

8. Fla. Chem. Co., v. Flotek Indus., Inc., 262 A.3d 1066, 1090 (Del. Ch. 2021); Ashall Homes Ltd. v. ROK Ent. Grp. Inc., 992 A.2d 1239, 1248–49 (Del. Ch. 2010); s*ee generally* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187 (2021) (analyzing the trend of courts enforcing forum selection clauses in arbitration agreements against non-signatories).

9. 80 Del. Laws, ch. 40, § 5 (2015).

10. 85 Del. Laws, ch. 48, § 4 (2025).

11. DEL. CODE ANN. tit. 8, § 115(a) (2026).

must allow a stockholder to sue in at least one court in Delaware that has jurisdiction over the claims, which could be a federal court.

Under this framework, a Delaware court cannot use its charter or bylaws to impose mandatory arbitration on stockholders. For internal corporate claims, stockholders must be able to sue in Delaware state court. For other claims, stockholders must be able to sue in a Delaware court.

III. THE GOVERNANCE AGREEMENT EXCEPTION

Section 122(18) of the DGCL authorizes governance agreements, and Lund and Talley seek to use that authority to implement their arbitration proposal. A governance agreement cannot contain a provision "contrary to the certificate of incorporation or [that] would be contrary to the laws of [Delaware] (other than § 115 of this title) if included in the certificate of incorporation."[12] A governance agreement is therefore free from Section 115 and can mandate exclusive arbitration.

Historically, Delaware courts resisted allowing arbitration provisions to sweep in fiduciary duty claims. In *Parfi*, an arbitration provision in an underwriting agreement encompassed any claims "arising out of or in connection with" the agreement.[13] The Delaware Supreme Court held that the provision did not cover a stockholder's claim that the directors breached their fiduciary duties by issuing shares under the agreement. The justices reasoned that the fiduciary duty claim was "[b]eyond the [s]cope" of the provision because the directors' duties did not "depend on the existence of the . . . Agreement."[14] The fiduciary duty claim rested instead on "an independent set of rights provided for in the Delaware corporation law," making that claim "independently and separately assertable" without the agreement.[15] The justices concluded that "[a]bsent a clear expression of an intent to arbitrate breach of fiduciary duty claims," a stockholder was not obligated to arbitrate a claim with an independent source.[16] Later decisions held that a broad arbitration provision that did not specifically mention fiduciary duty claims would still cover them if the agreement itself gave rise to the fiduciary duties, as in an employment agreement or brokerage agreement.[17]

Under the *Parfi* line of authority, an arbitration provision would only encompass fiduciary duty claims if the agreement itself gave rise to the fiduciary duties or if the provision clearly specified that it covered fiduciary duty claims. That line of authority suggested that if a controlling stockholder's fiduciary duties arose independent of the governance agreement, such as from majority stock ownership, then a general arbitration provision would not cover fiduciary duty claims.

In *Masimo*, the Court of Chancery held that after Section 122(18), the *Parfi* line of authority no longer applied to governance agreements.[18] The corporation in *Masimo*

12. DEL. CODE ANN. tit. 8, § 122(18) (2026).

13. Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 151 (Del. 2002).

14. *Id.* at 151, 155.

15. *Id.* at 156–58.

16. *Id.* at 160.

17. *See* Harris v. Harris, 2023 WL 193078, at *24–25 (Del. Ch. Jan. 16, 2023) (holding that a broad arbitration provision still covers fiduciary duty claims even if it does not specifically mention them); OTK Assocs., LLC v. Friedman, 85 A.3d 696, 721 (Del. Ch. 2014); Feeley v. NHAOCG, LLC, 62 A.3d 649, 656 (Del. Ch. 2012).

18. Masimo Corp. v. Kiani, 2026 WL 1080396, at *9 (Del. Ch. Apr. 21, 2026).

entered into an employment agreement with Joe Kiani, its CEO and largest stockholder, that also contained contractual governance rights. The employment agreement provided for exclusive jurisdiction in California state court for all claims arising out of or relating to the agreement. After a proxy contest resulted in a change of control at the board level, Kiani left the company and sued in California to recover his severance payments. The company responded by suing Kiani in Delaware and contending that the employment agreement resulted from breaches of fiduciary duty. Kiani moved to dismiss the case under the California forum selection provision.

The company relied on *Parfi* to escape the forum selection provision. The Court of Chancery reasoned that the employment agreement was a governance agreement for purposes of Section 122(18).[19] The court also held that the General Assembly's decision to exempt governance agreements from the scope of Section 115 meant that *Parfi* and its progeny no longer governed those contracts.[20] The California exclusive forum provision was therefore enforceable and binding, even though the claim against Kiani invoked fiduciary duties that existed independent of the governance agreement. The same reasoning should apply to arbitration provisions in governance agreements generally.[21]

IV. FIDUCIARY DUTY CLAIMS AND NON-PARTIES

In *Masimo*, both the plaintiff corporation and the individual defendant were parties to the governance agreement, presenting the ideal case for enforcement. A case one step removed from *Masimo* would involve a breach of fiduciary duty claim by non-party stockholders against a signatory defendant. A case two steps removed from *Masimo* would involve a breach of fiduciary duty claim by non-party stockholders and against non-signatory defendants like directors or officers.[22]

Fiduciary duty claims can be derivative or direct. In a derivative claim, the stockholder seeks to assert a corporate claim on the corporation's behalf. *Masimo* suggests that a stockholder asserting a derivative claim for breach of fiduciary duty could be forced into arbitration by a provision binding the corporation, because the stockholder steps into the shoes of the corporation for purposes of asserting the claim.[23]

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19. *Id.* at *12–13.

20. *Id.* at *10–11, 15–16.

21. *Id.* at *18.

22. A corporation could have its directors and officers join the agreement as parties, at a minimum for purposes of the arbitration provision. That would turn a suit against directors and officers into the one-step-removed scenario.

23. *See* Qlarant, Inc. v. IP Commercialization Labs, LLC, 2022 WL 2527278, at *2 (Del. Super. Ct. July 6, 2022) ("Since [the plaintiff] is seeking to claim the benefits of the [Asset Purchase Agreement] in the Maryland Action, it is estopped from denying the application of the forum selection provision."). The same would be true for a third-party beneficiary. *See* Cap. Grp. Cos. v. Armour, 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004) (observing that third-party beneficiaries who seek to "reap the benefits" of a contractual scheme are bound by the enforceable provisions found in the agreement); Javice v. JPMorgan Chase Bank, N.A., 2023 WL 4561017, at *2 n.2 (Del. Ch. July 13, 2023) ("[A] third-party beneficiary is bound by forum selection and other similar provisions when the third-party beneficiary seeks to enforce a right under the contract."); Douzinas v. Am. Bureau of Shipping, Inc., 888 A.2d 1146, 1153 (Del. Ch. 2006) ("The Douzinases may not press claims that involve identical factual contentions in two separate forums simply by sweeping into their complaint the Affiliates of ABS InfoLink. Under abundant authority, non-signatories are permitted to compel signatories to arbitrate disputes under a theory of equitable estoppel.").

Direct claims pose greater problems. A signatory defendant could argue that an arbitration provision should be enforced against the non-signatory stockholder under principles of estoppel. The idea would be that they purchased shares in a company with the governance agreement, so they should be estopped from rejecting the arbitration provision. For unaffiliated stockholders, however, that seems like too weak a connection. Even after Section 122(18), a claim by non-signatory plaintiffs against non-signatory defendants would seem to fall outside the arbitration provision.

Not all direct claims involve breaches of fiduciary duty. Stockholders may also assert rights they possess under the DGCL. The same difficulties in routing claims to arbitration would beset those claims.

There is one theoretical possibility. Under Section 122(18), a corporation may agree to provisions that "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)."[24]

As a matter of basic contract law, one would think that the "persons or bodies" would have to be parties to the agreement to be bound by the covenant. But that issue is litigable. The Delaware Limited Liability Company Act permits an LLC agreement to bind non-parties[25] and deviates from baseline contract law in other ways.[26] A 2024 amendment to the DGCL authorized merger agreements to impose "penalties,"[27] which baseline contract law forbids.[28] The same amendment authorizes a merger agreement to provide for the appointment of a stockholder representative whose actions "shall be irrevocable and binding

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24. DEL. CODE ANN. tit. 8, § 122(18) (2024).

25. Section 18-101(9) provides:

> A member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement whether or not the member or manager or assignee executes the limited liability company agreement. A limited liability company (including any protected series or registered series thereof) is not required to execute its limited liability company agreement. A limited liability company (including any protected series or registered series thereof) is bound by its limited liability company agreement whether or not the limited liability company (or any protected series or registered series thereof) executes the limited liability company agreement.

DEL. CODE ANN. tit. 6, § 18-101(9) (2026).

26. *See generally* Hassanein v. NTO Fund I, 2026 WL 2240127, at *5 (Del. Ch. Aug. 4, 2026) (identifying twenty-one ways in which the law governing LLC agreements deviates from contract law); Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391 (2018) (discussing how the laws governing Delaware LLCs are a unique combination of contract law, common law, and statutory rules).

27. DEL. CODE ANN. tit. 6, § 261(a)(1) (2024).

28. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (AM. L. INST. 1981) ("The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy."); RESTATEMENT (FIRST) OF CONTRACTS § 579 (AM. L. INST. 1932) ("A bargain for a penalty for the non-performance in the future of a contractual or other duty is illegal."); *see* Del. Bay Surgical Servs., P.C. v. Swier, 900 A.2d 646, 650–51 (Del. 2006) (evaluating whether a contractual provision requiring a $25,000 payment if either party terminated the contract early would be invalid as a penalty or enforceable as a liquidated damages provision); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (AM. L. INST. 1981) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large, liquidated damages is unenforceable on grounds of public policy as a penalty.").

on all such stockholders from and after the adoption of the agreement of merger," without the need for stockholders to become parties to the agreement.[29]

If Section 122(18) authorizes covenants that bind non-party stockholders, then the problem is solved. A covenant could require stockholders to arbitrate direct claims. Under Section 115, such a provision would violate Delaware law if it appeared in the charter or bylaws, but a governance agreement is bound by limitations on what can appear in the charter "other than § 115 of this title." But even if the path worked as a matter of logic, getting around Section 115 in this way might be too cute for a Delaware court to accept.

V. CARROTS AND STICKS

Although there does not appear to be a viable path to force non-signatory stockholders to arbitrate direct claims, the corporation could offer carrots and sticks.

Lund and Talley identify one possible carrot. They suggest that if a non-signatory stockholder plaintiff agrees to arbitrate and prevails, then the governance agreement should provide for a make-whole payment that can be distributed to the other stockholders. That carrot seems targeted more at equalizing outcomes between a court proceeding and arbitration, rather than making arbitration more attractive.

Another equalizer carrot would be class-wide arbitration. Foreclosing class-wide arbitration was once seen as a defense-side advantage, but when plaintiffs' firms proved willing to aggregate cases, the idea backfired. Providing for class-wide arbitration would make the arbitration remedy comparable to the judicial remedy.

Yet another equalizer carrot would be commitments on discovery. Proponents of arbitration once saw it as a way to reduce the burdens of discovery, but now many arbitrations proceed with the equivalent of litigation-style discovery. Plaintiffs' counsel would want commitments on discovery before agreeing to arbitration.

A carrot that goes beyond equalization could be some level of guaranteed fee reimbursement regardless of outcome. In public companies, law firms typically assert claims on contingency: They get a fee award if they win and nothing if they lose. To induce non-signatory stockholders to agree to arbitrate, a governance agreement might provide for plaintiffs' counsel to receive a low level of fee reimbursement for some portion of their hours regardless of outcome, plus reimbursement of some portion of the plaintiffs' expenses.[30]

Another carrot that goes beyond equalization could be expanded access to pre-suit books and records. In 2025, Delaware amended Section 220 of the DGCL to tighten stockholder access to books and records. Corporations could choose to provide more expansive access conditioned on stockholders agreeing to arbitrate any resulting claims.

A final carrot that goes beyond equalization could be speed of outcome. The Delaware Rapid Arbitration Act contains provisions designed to drive a result within 120 days from the arbitrator's appointment with a possible extension of up to sixty days by unanimous

29. DEL. CODE ANN. tit. 8, § 261(a)(2) (2024).

30. Perhaps $100 per hour would be a decent floor. A Vice Chancellor currently makes around $220,000. Assuming a 2,000-hour year, that works out to $110 per hour. Assuming a more realistic but still conservative 2500-hour year, that works out to $88 per hour. And Vice Chancellors do not get potential upside.

party agreement. The statute calls for forfeiture of 25% of the arbitrator's fee if the award is late, with the percentage increasing to 100% if the award is more than sixty days late.[31]

I leave it to the drafters of governance agreements to dream up sticks.

VI. WHO DECIDES WHAT GETS ARBITRATED?

One final note: Delaware courts may not be the ones determining whether a claim gets arbitrated. Delaware decisions follow federal law in holding that courts generally determine whether an arbitration clause applies.[32] But Delaware decisions also follow federal law in authorizing parties to delegate that decision to the arbitrator.[33] And consistent with federal law, when a delegation provision exists, Delaware decisions require a court to refer that issue to the arbitrator, even if the argument for arbitrating seems "wholly groundless."[34] This combination of rules means that an arbitrator will often decide what gets arbitrated, not a court.

VII. BENEFITS FOR DELAWARE

As Lund and Talley observe, their proposal could benefit Delaware by preserving the state's revenue stream while reducing growth in fixed costs. The Court of Chancery's caseload scales with the number of Delaware entities. Over the past five years, the court's caseload has grown steadily—even in the midst of the DExit controversy—at a compound annual growth rate of around 7.8%. To date, the Court of Chancery has addressed the growth by expanding the ranks of its magistrate judges and otherwise relying on its judicial officers to get the work done. Continued growth will require greater resources.

The coming decade is also expected to be one of exponentially increasing complexity. Artificial intelligence is only one of the many forces combining to drive secular change, with revolutions happening simultaneously in robotics, biotechnology, space exploration, and other technologies. Greater novelty generates more legal issues and the potential for more disputes. If anything, the rate of caseload growth is likely to increase further.

Only courts can deploy the state's monopoly on the use of force for purposes of dispute resolution. Arbitrators cannot, and arbitration also cannot replicate the courts' ability to provide a ready-to-go structure for rapid case initiation and truly emergent applications. Nor can an arbitrator easily force a recalcitrant party to participate; judicial involvement can be necessary to force a party to arbitrate and for third-party discovery.[35] Most significant, an arbitral award is not self-executing. Only after the award is reduced to judgment can a party deploy the state-maintained apparatus for enforcement and collection. For all other dimensions of a case, however, Lund and Talley's arbitral panel offers a viable

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31. DEL. CODE ANN. tit. 10, § 5806(b) (2026).

32. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (giving courts considerable leeway in arbitration); Fairstead Cap. Mgmt. LLC v. Blodgett, 288 A.3d 729, 750–51 (Del. Ch. 2023).

33. *See First Options*, 514 U.S. at 943 (deferring to an arbitrator's decision when the matter was submitted to arbitration); *Fairstead*, 288 A.3d at 750–51.

34. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 70 (2019) (rejecting the argument that courts should decide questions that a party claimed had been delegated to an arbitrator when court regarded basis for arbitration as wholly groundless); Gulf LNG Energy, LLC v. Eni USA Gas Mktg. LLC, 242 A.3d 575, 586 (Del. 2020) (following *Schein*).

35. *See Fairstead*, 288 A.3d at 745 (discussing party's efforts to avoid arbitration).

substitute. As the Delaware courts confront greater resource demands, facilitating arbitration may offer a win-win solution.

VIII. CONCLUSION

Lund and Talley have a provocative proposal, but it falls short under current law. The proposal likely works for signatory-versus-signatory claims of all stripes. It also likely works for some claims by affiliates of signatories and for derivative claims by non-signatory stockholders. At present, it does not work for direct claims by non-signatory stockholders. Implementing a system to encompass those claims will require convincing the Delaware Supreme Court that a covenant in a governance agreement can bind non-party stockholders. Alternatively, it will require developing a workable package of carrots and sticks that could induce non-signatory stockholders to arbitrate.