# A Collective Breach of Delaware's Unwritten Rules

Sarath Sanga*

Dorothy Lund and Eric Talley propose establishing a for-profit arbitral body as a substitute for Delaware's Court of Chancery.[1] They argue that such a body could match the adjudicatory authority of Chancery because it will be run by the most trusted experts. Its arbitrators will be retired Delaware judges, sophisticated Delaware lawyers, and leading Delaware academics. There will be, it seems, no shortage of Delaware expertise.

But expertise is cheap. There are hundreds, if not thousands, of brilliant corporate lawyers across the country. None are trusted the way Chancery is trusted. They may be experts in the law. Some probably know it better than Chancery. But they do not have the accumulated institutional trust that makes law valuable in the first place.

The confusion at the heart of this proposal, and indeed at the heart of contemporary debates on trust in institutions, is the idea that trust rests on expertise. It does not. Trust rests on "my conviction that you will do what is right (not just what is prudent)."[2] It is something an institution earns only by carrying out a public commitment for a long time.

Lately, trust in Delaware has been shaken. Twice in the past two years, Delaware's legislature reversed its courts in increasingly unorthodox ways. First, in February 2024, the Court of Chancery decided *West Palm Beach Firefighters' Pension Fund v. Moelis*, invalidating a stockholder agreement that gave a founder control over core board decisions.[3] Within weeks, the Corporation Law Council of the Delaware State Bar Association (the body that has reviewed statutory amendments for decades) proposed a legislative response.[4] The result was Senate Bill 313, which added a new Section 122(18) authorizing

* I thank Sion Bell for excellent research assistance. I am also grateful to Dorothy Lund and Eric Talley for the invitation to comment. In this field, the unwritten rule is that admiration is expressed through public disagreement. This comment observes the convention.

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

2. "So remarkable a tool is trust," Fried continues, "that in the end we pursue it for its own sake." CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 8 (1981).

3. *See generally* West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (invalidating a stockholder agreement).

4. Thomas W. Christopher et al., *The Delaware General Assembly to the Rescue: Proposed Legislative Fixes to Uncertainty Created by Three Significant Delaware Chancery Court Decisions*, WHITE & CASE (Apr. 15, 2024), https://www.whitecase.com/insight-alert/delaware-general-assembly-rescue-proposed-legislative-fixes-uncertainty-created-three [https://perma.cc/3D76-F543]; Jill E. Fisch & Anat Alon-Beck, *Does the* Moelis *Decision Warrant a Quick Legislative Fix?*, CLS BLUE SKY BLOG (June 10, 2024), https://clsbluesky.law.columbia.edu/2024/06/10/does-the-moelis-decision-warrant-a-quick-legislative-fix/ [https://perma.cc/N5V3-84JK]; Sarath Sanga & Gabriel Rauterberg, *Proposed Amendments to DGCL on Stockholder Contracting Would Create More Problems Than They Purportedly Solve*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2024), https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve/ [https://perma.cc/BFL4-WTCH].

the very agreement struck down in *Moelis*.[5] The bill took effect while the *Moelis* appeal was still pending before the Delaware Supreme Court.[6]

That process was fast by any standard. Chancellor McCormick, in a letter to the bar association that later became public, wrote that the proposal had "moved forward at a pace that forecloses meaningful deliberation."[7] Vice Chancellor Laster, the author of *Moelis*, posted his own objections publicly (since made private or deleted) on LinkedIn.[8] Over fifty corporate law professors, myself included, signed a letter urging the legislature to let the appellate process run its course.[9] Former Chancellor Chandler testified in the House that McCormick and Laster should stay in their lane.[10]

Less than a year later, the legislature moved again, this time even faster. Senate Bill 21, the most comprehensive statutory rewrite of this century, bypassed the Council altogether.[11] Among other things, it narrowed judicial review of controller transactions and displaced *In re Match Group*, which the Delaware Supreme Court had issued less than a year earlier.[12] This past February, in *Rutledge v. Clearway*, the Delaware Supreme Court upheld SB 21 against a state constitutional challenge, making it now, indisputably, Delaware law.[13] Whether it is good law is a question that is still being debated.

Against this backdrop, Lund and Talley offer their proposal. It goes like this. Use Section 122(18) to execute a stockholder agreement that contractually adopts Delaware law as it stood on a fixed measurement date. (The authors suggest January 1, 2025, shortly

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5. S.B. 313, 152d Gen. Assemb., Reg. Sess. (Del. 2024).

6. *Delaware Governor Signs Corporate Law Amendments into Law*, SIMPSON THACHER (July 18, 2024), https://www.stblaw.com/about-us/publications/view/2024/07/18/delaware-governor-signs-corporate-law-amendments-into-law [https://perma.cc/NJU6-V4YV].

7. Letter from Kathaleen McCormick, Chancellor of the Del. Ct. of Chancery, to the Del. State Bar Assoc. Exec. Comm. (Apr. 12, 2024), https://s3.documentcloud.org/documents/24692528/mccormick-ltr-to-dsba.pdf [https://perma.cc/68HK-3H2H].

8. Robert Anderson (@ProfRobAnderson), X (Jan. 21, 2025), https://x.com/ProfRobAnderson/status/1881742910376608042 [https://perma.cc/E9YY-QL3E].

9. *See* Sarath Sanga, Gabriel Rauterberg & Eric Talley, *Letter in Opposition to the Proposed Amendment to the DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 7, 2024), https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/ [https://perma.cc/R68B-WJLC] (illustrating the author's opposition to SB 313); *see also* Gabriel V. Rauterberg & Sarath Sanga, *Altering Rules: The New Frontier for Corporate Governance*, 42 YALE J. REGUL. 291 (2025) (discussing recent legislative reforms within Delaware law).

10. Testimony of William B. Chandler III on S.B. 313 Before the Del. House of Representatives, 152d Gen. Assemb. (June 20, 2024). Joel Friedlander published a pointed reply in the judges' defense. Joel Edan Friedlander, *The Political Significance of Former Delaware Chancellor Chandler's Criticism of Chancellor McCormick and Vice Chancellor Laster*, CLS BLUE SKY BLOG (Jan. 16, 2025), https://clsbluesky.law.columbia.edu/2025/01/16/the-political-significance-of-former-delaware-chancellor-chandlers-criticism-of-chancellor-mccormick-and-vice-chancellor-laster/ [https://perma.cc/CXA8-YMCB].

11. Law Review Staff, *Seismic Change Proposed in Delaware: Summarizing S.B. 21's Proposals and Initial Reactions from Legal Community*, VILL. L. REV. (Feb. 27, 2025), https://www.villanovalawreview.com/post/2989-seismic-change-proposed-in-delaware-summarizing-s-b-21-s-proposals-and-initial-reactions-from-legal-community [https://perma.cc/Y82D-PYBY]; Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/ [https://perma.cc/X3CL-EKQG].

12. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024). On SB 21, see Talley, Sanga & Rauterberg, *supra* note 11.

13. Rutledge v. Clearway Energy Grp. LLC, 360 A.3d 1271, 1291 (Del. 2026).

before SB 21 became law.) In the stockholder agreement, commit all internal corporate disputes to arbitration before a new for-profit Delaware LLC, the "Delaware Arbitration Board" (DAB). Staff the DAB with former Delaware judges and elite practitioners, and compensate them hourly or with equity in the DAB itself. Finally, let the DAB maintain its own arbitral code, hear appeals en banc, and charge participating corporations a subscription fee.

In a nutshell, the DAB is Chancery, privatized. Every feature the DAB is to have is a feature Chancery already has. The decisionmakers are retired Chancery judges. Appeals are "modeled after appeals to the Delaware Supreme Court." The substantive law is Delaware law (as of the measurement date). The authors present these choices as matching what Chancery provides. They are in fact describing what Chancery is.

What if the DAB itself has an internal dispute? The paper does not say. It cannot be resolved by the DAB, as the circularity would be untenable. Some other forum, then, must stand behind it. If the DAB is the Delaware LLC they describe, then that forum is none other than the Court of Chancery. The DAB, it turns out, cannot exist without the very institution it is designed to supplant.

Lund and Talley propose the DAB because some people have lost trust in Delaware. But what is trust, and where does it come from? How does an institution like Delaware earn and maintain it?

Delaware is famously conceptualized as a "product," a set of rules and adjudication procedures designed by the state and "sold" to corporations.[14] That was true enough forty years ago, but it is no longer the best way to see it. Delaware today is better understood as a *standard*.[15] Unlike a product, a standard does not have value on its own. The value comes from the fact that it is shared.

A useful analogy here is to the gold standard, which was a lot more than just a fixed ratio between bullion and paper currency. The gold standard was an intricate set of conventions for central bank governance, convertibility commitments, and expectations about domestic monetary policy. Countries on the gold standard had radically different internal practices. They had different reserves, trade balances, and fiscal and monetary policies. What was shared, then, was not a single one-size-fits-all answer to the monetary policy question but a set of expectations about how these systems would jointly produce international financial stability.

Delaware corporate law is a standard in this sense. It is hundreds of conventions, tested and refined over the past century. It is entire fairness and business judgment, enhanced scrutiny and deference, *Revlon* territory and not, the prongs of *MFW*, the meaning of "independence" and "loyalty," generations of law students trained on the cases, and countless others interacting under its rules.

Lund and Talley tell us that Delaware's traditional advantages are its expertise, case law, responsiveness, and predictability. So they are. But these are all byproducts of

14. *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (characterizing Delaware law as a product that states supply and firms purchase through incorporation).

15. *See* Sarath Sanga, *Network Effects in Corporate Governance*, 63 J.L. & ECON. 1, 2 (2020) (finding that firms are more influenced by each other's incorporation decisions than by changes in the law, consistent with their adopting "the standard corporate governance regime").

Delaware's singular root advantage, which is that every sophisticated participant in the American corporate ecosystem is arguing under the same set of rules and shared conventions.

Of all the reasons a standard might command the allegiance of a community, the one that matters most is trust. Trust, in this sense, is less about the wisdom in any given rule and more about a belief in the institution that produced it.

In recent work with Yehonatan Givati, I have tried to develop this intuition formally.[16] The core idea is that many institutions—such as courts, central banks, universities, and the press—exist to produce outputs that outsiders rely on but cannot verify. A Chancery opinion is one such output. A sophisticated reader may evaluate whether a single opinion applies the law correctly, but the opinion is only the observable part of a deeper set of unobservable institutional practices. The selection of vice chancellors, how chambers operate, the social norms between judges and lawyers—none of that is observable from the outside, but all of it contributes to the authority the opinion commands.

Trust is the outsider's reliance on that latent, submerged body of institutional practices. Over time, if the institution is faithful to its mandate, outsiders come to treat its outputs as authoritative in spite of this inability to verify what goes into them. The mandate, its enforcement, and the consistency of its outputs do the verification for them.

Where does the DAB fit into this framework? The Lund-Talley proposal is for an institution whose outputs are to command Chancery-like trust and confidence without any of the established submerged practice that sustains Chancery. There is no appointing tradition, no clerkship institution, no bar whose membership socializes the decisionmakers, and no academy whose citations matter to the arbitrators. Yet by design, the DAB will import the very people who populate the institution that has supposedly lost enough confidence to be discarded. What do we imagine those people will do when released from public scrutiny and supercharged with the profit motive?

The more interesting question is why two of the field's best scholars would propose such an idea. The answer lies in the measurement date they propose: January 1, 2025. If you found SB 21 alarming, the DAB lets you turn back the clock and erase it from your private legal regime. If you found Section 122(18) alarming, you can turn it back one more year and erase that too. Section 122(18), recall, is the very statute the DAB rests on. The DAB lets you saw off the branch upon which you sit.

If the root problem were with a specific rule, you could just contract around it and be done. Indeed, that is the point of Section 122(18). Even if the problem were with Chancery as a whole, the same Section 122(18) lets you take your disputes elsewhere.[17] You would not need an LLC and retired Chancery judges to do it.

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16. Yehonatan Givati & Sarath Sanga, A Theory of Trust in Institutions (Apr. 20, 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6615940 [https://perma.cc/8YLE-ECUY].

17. Forum selection for intra-corporate disputes has a short and garbled history in Delaware. Chancery blessed it in Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013). The legislature codified it two years later but added, unnecessarily in my view, that such provisions may not bar internal corporate claims from Delaware courts. DEL. CODE ANN. tit. 8, § 115 (2025). Now, Section 122(18) permits by contract what Section 115 prohibits by charter. *See generally* Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31 (2017) (discussing the rationale of utilizing forum selection clauses); *see also* J. Travis Laster, *How Much of Delaware Law Can You Arbitrate?*, 52 J. CORP. L. (forthcoming 2026) (explaining that a governance agreement under Section 122(18) is exempt from Section 115 and can mandate exclusive arbitration).

The DAB, then, is not a response to any particular rule or forum. It is a response, as the authors say, to the last two years of controversy, culminating in SB 21 and the "Pandora's Box of clientelist politics" it pried open.[18] That is close but still not how I would put it.

I would characterize the last two years as a collective breach of Delaware's unwritten rules. Trust and confidence in Delaware, as with any standard, rests on the restraint of its constituent actors. For legislators, that means not overriding pending cases. For sitting judges, that means not responding to critics in public. And for former judges, that means not speaking much at all. The convention of forbearance—of *not* acting even when you have the right to—is among the most powerful sources of trust and authority.

It is also among the hardest to maintain. With SB 313, the Council compressed its year-long process into weeks; with SB 21, the legislature dispensed with the Council altogether. Sitting judges commented publicly on pending legislation; a former judge criticized sitting ones; the bar organized against the bench; the academy organized against the legislature. Each acted, I assume, from a sincerely held theory of what the institution requires. Each move can make sense in isolation. But the kind of trust Delaware runs on comes from an expectation that such moves will not be made.

The DAB is the logical terminus of all this. When the process goes far enough, eventually it becomes plausible, even sensible, to propose scrapping the public thing for a private one. The only thing that made the Delaware standard valuable—that it was shared—is the one thing the DAB leaves behind.

*Moelis* may be wrongly decided, or not. SB 313 may be wise, or unwise. Ditto for *Match* and SB 21. Reasonable people, so I have been told, can disagree.

The issue here is not the substance of the law but the conduct of its guardians. Delaware's trust, perhaps more than anything else, was built on patience. Patience would tell the legislature to let the Supreme Court have the first crack at *Moelis* and the Council to actually deliberate before acting. It would also tell judges, sitting and former, to stop talking about each other in public.

My answer to the paper's title question—*Should Corporate Law Go Private?*—is no. The thing that makes law valuable cannot be transferred like a product from one hand to another. Trust in the institutions that guard the law does not reside in the substance of the law. It is locked up in the set of shared conventions that all of us, each for our own good reasons, have spent the last two years transgressing.

18. Lund & Talley, *supra* note 1, at 4.