

The Brouhaha Over Intra-Corporate
Forum Selection Provisions:
A Legal, Economic, and Political Analysis

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Abstract: Three hundred publicly traded entities have adopted intra-corporate forum selection (“ICFS”) provisions either in their charters or as bylaw amendments, often without prior stockholder approval. These provisions have been adopted in response to a sharp increase in intra-corporate litigation outside the state of incorporation. The academic literature suggests that this increase is animated by economic incentives of the plaintiffs’ bar that can be inimical to stockholder interests. ICFS provisions are an effective private ordering mechanism for addressing this trend in a manner that responsibly protects stockholder rights.

Plaintiffs have nonetheless brought suit in Delaware challenging the validity of ICFS provisions. We review the governing law and demonstrate that ICFS provisions are valid subject matter for charters and bylaws. Stockholders are also on notice that boards have the authority to amend bylaws without prior stockholder consent, and the “vested rights” theory is long repudiated. Assertions that stockholders cannot be bound by ICFS bylaw provisions adopted without prior stockholder consent are thus incorrect. Speculative claims that ICFS provisions might later be exercised in a manner that violates a fiduciary duty or causes injustice will also not cause them to be invalidated: charter and bylaw provisions are presumed to be validly adopted and hypothetical speculation regarding instances of potential future abuse are insufficient to invalidate the provisions as adopted. This presumption is particularly powerful in the case of ICFS provisions where boards retain the option not to enforce those provisions if enforcement is later deemed inconsistent with fiduciary obligations.

ICFS provisions are also not self-enforcing. Foreign courts hearing petitions to enforce ICFS provisions will most frequently apply the rule established by the Supreme Court’s *Bremen* decision to protect the interests of foreign-filing stockholders. Absent a finding that plaintiffs’ rights under the chartering state’s laws cannot be adequately protected by courts in the chartering state, ICFS provisions are likely to be enforced in the very large majority of circumstances.

JEL classification: K22, K41

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I. Introduction

A brouhaha has erupted over the validity of intra-corporate forum selection provisions (“ICFS provisions”). These provisions are designed to operate when plaintiffs file intra-corporate claims outside the jurisdiction in which the corporation is chartered, *i.e.*, in a “foreign court.” In the event of a foreign filing, ICFS provisions give the corporation an opportunity to petition the foreign court to dismiss or transfer the claim so that it can be resolved in the courts of the chartering jurisdiction.¹ Three hundred publicly traded entities have adopted ICFS provisions as of September 30, 2012.² The overwhelming majority of these entities are Delaware chartered corporations seeking to resolve intra-corporate litigation in Delaware courts.³

ICFS provisions are not self-enforcing. Before a foreign-filed claim can be dismissed or transferred the defendant must petition the foreign court to enforce the ICFS provision and the foreign court must apply a series of tests designed to protect the interests of plaintiffs filing in the foreign forum. ICFS provisions do not guarantee that the foreign-filed claim will be dismissed and cannot preclude plaintiffs from initiating litigation in any forum they choose. ICFS provisions are thus nothing more than licenses that permit corporations to appear before foreign courts to petition for the dismissal of foreign-filed complaints so that the litigation can be

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¹ As a technical matter, ICFS provisions can designate any forum for the resolution of intra-corporate disputes, but as a practical matter they tend to designate the chartering state. *See*, Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 Del. J. Corp. L., at II.F. & Table 7 (2012) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042758 (documenting that all publicly traded entities that had adopted ICFS provisions as of June 30, 2011, had designated courts in their chartering state as the forum for the resolution of intra-corporate dispute.) Our review of data through September 30, 2012 is consistent with these earlier findings.

² *See* Table 1, *infra*. For reviews of earlier data, *see* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, and Claudia H. Allen, *Study of Delaware Forum Selection in Charters and Bylaws*, January 25, 2012 (hereinafter cited as “Allen Study”).

³ *See* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.F. & Table 7. In

pursued in the courts of the chartering jurisdiction. Further, nothing in the ICFS provision compels that the corporation oppose a foreign forum filing. As is the case with any forum selection provision in any contract, defendants retain the *de facto* option of simply not opposing plaintiffs' forum selection. The existence of an ICFS provision therefore does not pre-ordain an effort to enforce the provision in all circumstances.

ICFS provisions have nonetheless become exceptionally controversial. Litigation has been brought in Delaware Chancery Court and in a federal court in California challenging the validity of ICFS provisions.⁴ Leading proxy advisory firms oppose the adoption of ICFS provisions.⁵ The controversy is particularly heated when ICFS provisions are adopted by boards of directors of publicly traded corporations without prior stockholder approval.⁶ Opponents of ICFS provisions assert, among other concerns, that adoption without prior stockholder approval violates stockholders' "vested rights" to file intra-corporate claims in any jurisdiction they prefer⁷ and that ICFS provisions are not proper subject matter for bylaw provisions.⁸ Litigation over the validity of ICFS provisions, combined with proxy advisors' opposition, has substantially slowed the pace at which corporations are adopting ICFS provisions in corporate bylaws, although adoption rates in corporate charters, typically in conjunction with IPOs⁹, continue to increase.¹⁰

Concern over the validity and effects of ICFS provisions is, however, fundamentally misplaced and strategically exaggerated. Well-established principles of corporate and contract law support the adoption of ICFS provisions either as an amendment to a corporate charter or as a bylaw adopted without prior stockholder approval.¹¹ Established precedent also resoundingly

⁴ Shareholders have filed at least seventeen lawsuits against companies and their directors for adopting or proposing to adopt ICFS provisions in their corporate charters or bylaws. These lawsuits are discussed in greater detail at note 152, *infra*. At present, the litigation continues against only two entities, Chevron Corp. and Fedex. Chevron Corp.'s exclusive forum bylaw provision has been challenged both in Delaware Chancery Court and in the Northern District of California. See Verified Complaint, *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corp.*, No. 7220 (Del. Ch. Ct. filed February 6, 2012); Verified Shareholder Derivative Complaint, *Bushansky v. Armacost, et al.*, No. 12 1597 DMR (N.D. Cal. filed March 30, 2012). On August 9, 2012, the district court in California granted Chevron's motion to stay the federal action pending resolution of the substantively similar Delaware proceedings. See Order Granting in Part and Denying in Part Defendants' Motion to Abstain or Stay dated August 9, 2012, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal)

⁵ See note 147, *infra*.

⁶ The majority of ICFS-related lawsuits filed to date have challenged bylaw provisions adopted by boards without shareholder approval. See note 152, *supra*. In *Galaviz v. Berg*, the only decision to date to address the enforceability of ICFS provisions, plaintiffs challenged an exclusive forum provision adopted by Oracle's board of directors as a bylaw amendment without shareholder approval. See generally *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011). Although the *Galaviz* court refused to enforce the exclusive forum provision, *id.* at 1174, the logic of that decision does not withstand close scrutiny and there is reason to question whether that precedent will or should be followed. The *Galaviz* decision is discussed in Section V, *infra*.

⁷ See, e.g., Plaintiff Lisa Galaviz's Memorandum in Opposition to Nominal Defendant Oracle Corporation's Motion to Dismiss, Docket No. 39, at 6, *Galaviz v. Berg*, No. C-10-03392-RS (N.D. Cal. filed Nov. 10, 2010) ("an amendment to bylaws cannot unilaterally change pre-existing rights of shareholders").

⁸ See, e.g., Verified Complaint, at ¶¶ 53-58, *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corp.*, No. 7220 (Del. Ch. Ct. filed February 6, 2012).

⁹ See note 155, *infra* and accompanying text.

¹⁰ See Tables 1 and 2, *infra* and accompanying text.

¹¹ See Section III, *infra*.

rejects the “vested rights” theory.¹² Indeed, as propounded by opponents of ICFS provisions, the “vested rights” theory would invalidate all manner of bylaw amendments that have been commonly accepted and enforced for decades and, if accepted, would turn Delaware corporate law on its ear.¹³ Opponents of ICFS provisions also fail to recognize the legal protections provided by the courts of the foreign jurisdictions called upon to protect stockholders’ interests before enforcing a forum selection provision.

The suggestion that ICFS provisions are, to any extent, unusual contractual constructs is also contrary to fact. Forum selection provisions are widely used and frequently enforced,¹⁴ and there is no basis upon which courts can discriminate against ICFS provisions embedded into corporate charters or bylaws while simultaneously supporting the application of analogous provisions in a broad range of other contracts.¹⁵ Indeed, the recent increase in the incidence of ICFS provisions is most simply explained as an effort to restore an equilibrium that existed prior to the early part of this century when intra-corporate litigation was almost always heard in the courts of the chartering jurisdiction and when foreign filed intra-corporate claims were far scarcer than they are today.¹⁶ Thus, rather than be viewed as an innovation that seeks to unsettle established relationships, ICFS provisions are more accurately depicted as an effort to restore a pre-existing equilibrium that was unsettled by the recent dramatic shift to foreign litigation of intra-corporate disputes.¹⁷

A more compelling explanation for the current controversy over ICFS provisions looks to economic and political considerations rather than to legal concerns. Foreign-filed intra-corporate litigation has increased significantly in recent years.¹⁸ The academic literature suggests that competition among plaintiff counsel seeking to maximize their individual economic advantage is the dominant factor contributing to this growth, and that this competition is inimical to stockholders’ best interests.¹⁹ These foreign forum filings increase litigation costs, create the

¹² See Section III.B.2, *infra*.

¹³ See *id*.

¹⁴ See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at Section I (noting that forum selection clauses appear in 39.56 percent of the material contracts of publicly traded entities, and discussing benefits of these clauses); Theodore Eisenberg and Geoffrey P. Miller, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2076 (2009) (noting that forum selection provisions are now “routinely enforced”); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (declaring a forum selection clause “prima facie valid”). See also Section IV, *infra*.

¹⁵ See Section IV, *infra*.

¹⁶ See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at Section III.A.

¹⁷ For data documenting this recent shift see Section II.A., *infra*.

¹⁸ See Part II.A., *infra*.

¹⁹ See, e.g., Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 149, 151 (2011) (“Control over litigation and access to fees are an important motivating factor in this competition amongst plaintiff groups” and “[t]his type of litigation is highly susceptible to agency costs because the interests of counsel will not always align with the interests of their purported clients, the shareholders”); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1854-56 (2004) (“Our other findings (and economic theory) all suggest it is far more likely that plaintiffs’ attorneys are motivated primarily by self-interest and that their litigation efforts, shaped as they are by the incentives provided by Delaware law, produce little in the way of meaningful benefits for the shareholders that those attorneys purport to represent”); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory For Private Enforcement Of Law Through Class And Derivative Actions*, 86 COLUM. L. REV. 669, 680 (1986) (describing the central role of fees in motivating

opportunity for opportunistic settlements, generate the prospect of inter-jurisdictional inconsistencies, and often reflect a battle among plaintiff counsel for a “seat at the table” in the contest to collect a share of the attorneys’ fees that might be awarded in any litigation. This battle for control of fees further imposes costs on stockholders and corporations without generating commensurate benefits. Indeed, the academic literature has long pointed to the conflict between plaintiff counsel and the stockholders they purport to represent.²⁰ Plaintiff counsel may thus be the only constituency that systematically benefits from the expense and complexity generated by foreign litigation of intra-corporate claims. “In shareholder litigation, there is little reason to believe that competition between fora helps shareholders and every reason to suspect that the process caters to plaintiffs’ attorneys at the expense of shareholders, the intended beneficiaries of shareholder litigation.”²¹ Corporate directors can easily refer to this academic literature to support a decision to adopt and potentially later to enforce an ICFS provision. ICFS provisions, properly monitored and applied, can thereby ameliorate or even eliminate the costs imposed on stockholders by the dramatic increase in foreign forum litigation.

The potential benefits of ICFS provisions might, however, be unfamiliar to many stockholders because these provisions were rare in the extreme until recent years.²² They might also provoke a reflexive negative response from constituencies that systematically (and here incorrectly) oppose measures that increase management or board discretion on the theory that directorial discretion can be expanded only at stockholders’ expense.²³ Also, because plaintiff

shareholder litigation). *See also In re MCA, Inc. S’holder Litig.*, 785 A.2d 625, 639 (Del. 2001) (“It has been recognized that there is an inherent conflict when class counsel seeks to settle claims on behalf of a class whose claims have been asserted globally in different jurisdictions on different grounds. . . . Courts have recognized the problem inherent in this situation and have established standards to prevent class counsel from selling out the class merely to collect that fee.”); Brief of Special Counsel at 12-26, 31- 35, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL (Del. Ch. March 11, 2011) (discussing judicial scrutiny of potentially collusive class settlements in multi-jurisdictional litigation under both Delaware and federal law, as well as the role that courts should play in preventing such collusion).

²⁰ *See, e.g.*, Reinier Kraakman, Hyun Park, Steven Shavell, *When are Shareholder Suits in Shareholder Interests*, 82 GEO. L.J. 1733 (1994); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J. LAW, ECON. & ORG. 55 (1991); Robert S. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 168 (2004) (“If class counsel have tremendous discretion to run the litigation, they may do so in a manner that maximizes their benefit, even at the expense of the interests of their putative clients.”). *See also* articles cited in note 19, *supra*.

²¹ *See* Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, at 3 (copy on file with authors). *See also* Transcript of Proceedings at 16-17, *In re RAE Systems, Inc. S’holder Litig.*, No. 5848-VCS, at 16-17 (Del. Ch. Nov. 10, 2010) (“I believe in the value of the representative litigation process for investors. It is not in the interest of diversified investors to have. . . litigation in these different places. It doesn’t make any sense. I defy anyone to explain how it’s good for investors. It’s not.”).

²² *See* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.C. & Tables 2, 3.

²³ *See, e.g.*, Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784 (2006); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Lucian A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002). This logic is, however, misplaced in the context of ICFS provisions. To be sure, ICFS provisions enhance managerial discretion, but they do so in a manner that likely promotes the best interests of stockholders and is always subject to monitoring by the courts. Put another way, the adoption of an ICFS provision does not involve a zero-sum process in which enhanced managerial discretion inevitably disadvantages stockholders. To the contrary, ICFS provisions can benefit stockholders by ameliorating or eliminating a series of significant agency problems that arise in the context of intra-corporate

counsel have powerful incentives to encourage a regime that permits complex, inter-jurisdictional competition to flourish at the expense of stockholders as a group, plaintiff counsel can be expected to invest in litigation designed to slow or derail the adoption and enforcement of ICFS provisions - - as indeed they already have.²⁴

More precisely, much of the consternation over ICFS provisions may result from a lack of awareness of the numerous safeguards that protect plaintiffs who file intra-corporate claims in foreign courts. Any effort to enforce an ICFS provision will be rigorously scrutinized under a three-part test. At the first level of scrutiny, the foreign court, respecting the internal affairs doctrine, applies the chartering jurisdiction's domestic law to judge the initial validity of the adoption of the ICFS provision. At the second level of scrutiny, the foreign court applies its own law to determine whether the motion to enforce the ICFS provision should be granted. The United States Supreme Court's decision in *M/S Bremen v. Zapata Offshore Co.*²⁵ defines the most widely used standard for resolving these disputes. Under the rule of *Bremen*, the ICFS provision will be enforced only if: (1) the forum selection clause was not induced by fraud or over-reaching; (2) trial in the designated forum will "not be so gravely difficult and inconvenient that [plaintiff] will for all practical purposes be deprived of his day in court"; and (3) enforcement of the forum selection provision "will not contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or judicial decision."²⁶ At the third level of scrutiny, the foreign court applies the law of the chartering jurisdiction to consider whether, under the specific facts of the litigation at hand, enforcing the ICFS provision would breach a fiduciary duty that the board owes to the corporation or to stockholders, or otherwise leads to a result that could be viewed as inequitable.

Significantly, these safeguards cannot be applied until an actual case or controversy arises. This basic observation suggests a fundamental distinction between judging the validity of an ICFS provision when it is simply adopted but not yet enforced, and judging the same provision as it might later be applied. Sensitivity to this distinction is well established in Delaware law, which contains a strong presumption that a bylaw subject only to hypothetical abuse should not be invalidated and should not be deemed "unreasonable and unfair on its face."²⁷ Boards are instead provided the opportunity to interpret and apply the otherwise valid bylaw fairly and properly.²⁸ This rule of construction is consistent with the broader principle that bylaws are presumed valid, and that courts interpret bylaw language in a manner that avoids the need to strike down the bylaw.²⁹

Delaware courts thus commonly draw a sharp distinction between the validity of a bylaw or contract provision as initially adopted and its validity as it might later be applied. The entire evolution of poison pill jurisprudence reflects this distinction: a clear body of law confirms that

litigation because of the potential conflict between the interests of stockholders as a group, and the interests of plaintiff counsel.

²⁴ See note 152 *supra*.

²⁵ 407 U.S. 1 (1972).

²⁶ *Id.* at 15-18.

²⁷ *Stroud v. Grace*, 606 A.2d 75, 95 (Del. 1992), *aff'g* in part and *rev'g* in part 1990 WL 176803 (Del. Ch. Nov. 1, 1990).

²⁸ *Id.* at 95.

²⁹ *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985); *Oberly v. Howard Hughes Med. Inst.*, 472 A.2d 366, 385-386 (Del. Ch. 1984) (citations omitted).

boards may establish shareholder rights plans but that the subsequent decision to implement a plan is subject to judicial review under an intermediate level of scrutiny that recognizes the risks that the plan might be used for entrenchment rather than to promote the stockholders' best interests.³⁰ The presumption is not that the plan is invalid upon adoption because it might, under some undefined and hypothetical set of later-evolving circumstances, be improperly applied. In fact, the intermediate level of scrutiny applied by the courts cannot be brought to bear until the poison pill is actually threatened to be triggered and the court is aware of facts and circumstances surrounding the pill's potential application.³¹

Precisely the same distinction governs ICFS provisions. The effects of an ICFS provision are impossible to predict in the abstract as of the date the provision is adopted,³² and there are myriad situations in which enforcing an ICFS provision would be entirely reasonable and proper. The hypothetical contingency that there might be some conjectural circumstance in which it is improper to enforce an ICFS provision provides no *ex ante* basis upon which to conclude that ICFS provisions are facially invalid. This is particularly true in light of the fact that all ICFS

³⁰ For a recent overview of the evolution of poison pill jurisprudence see *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 95-101 (Del. Ch. 2011); Paul H. Edelman & Randall S. Thomas, *Selectica Resets the Trigger on the Poison Pill: Where Should the Delaware Courts Go Next?*, 87 IND. L.J. 1087 (2012); Gary A. Bornstein, *Recent Developments in Poison Pill Litigation*, 856 PLI/Lit 767 (2011).

³¹ This distinction between the validity of a provision as adopted and as applied is pervasive in the law. For example, courts considering a statute's constitutionality commonly draw a distinction between finding that a statute is facially invalid and that it is invalid as applied. See generally, Richard H. Fallon, Jr., *Commentary: As Applied and Facial Challenges and Third Party Standing*, 113 HARVARD L. REV. 1321 (1999-2000) (observing that facial challenges are relatively rare). See also *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-51 (2008) (discussing the preference for as-applied challenges as opposed to facial challenges and recognizing that, "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases"); *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 328-39 (2006) (discussing the Court's preference for as-applied challenges); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 55-56 (2006) ("The Court has explained that the act of striking down a statute on its face stands in tension with several traditional components of the federal judicial role, including a preference for resolving concrete disputes rather than abstract or speculative questions; a deference to legislative judgments and a reluctance to resort to the 'strong medicine' of constitutional invalidation unless absolutely necessary"); David H. Gans, *Strategic Facial Challenges*, 85 B. U. LAW REV. 1333, 1348 (2005) ("As-applied adjudication, of course, carries with it important benefits. . . . [I]t ensures that courts do not make uncertain speculations about how a law operates outside of the facts generated by the controversy before it"); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid-Rule Requirement*, 48 AM. U. L. REV. 359, 361 (1998) ("As the Supreme Court has made clear on numerous occasions, facial challenges are appropriate, if at all, only in exceptional circumstances").

Notably, the Supreme Court recently upheld the controversial "show-me-your-papers" provision of Arizona's immigration law against a facial challenge that it conflicted with federal law. The provision requires state and local law enforcement officers, upon reasonable suspicion, to check the immigration status of anyone stopped for any crime, no matter how minor. Writing for the court majority, Justice Anthony Kennedy explained that Congress had done nothing to bar states from "communicating" with federal immigration authorities, and that the "show-me-your-papers" provision was therefore consistent with federal immigration law. *Arizona v. U.S.*, 132 S. Ct. 2492, 2508 (2012). However, the Court warned that its ruling could change depending on how the law is actually enforced on the ground. Justice Kennedy suggested there would be clear constitutional problems if the law was used to target racial or ethnic minorities, or to detain people for an unreasonable period of time while checking their immigration status. *Id.* at 2509-2510.

³² Possible exceptions to this rule arise if a complaint is actually filed in a foreign court before the board adopts an ICFS provision. These and other related contingencies are addressed *infra* at Sections III.B.2 & IV.C.

provisions have to be tested by the foreign courts who will be asked to rule on motions to enforce those provisions.

In framing our analysis we recognize that there are at least 51 jurisdictions in which corporations are chartered in the United States, and that for each of these chartering jurisdictions there are at least 50 other jurisdictions in which foreign intra-corporate claims might be filed. Thus, there are at least 2,550 (51 x 50) pairs of home state – foreign state jurisdictions that might be analyzed in connection with the potential enforcement of an ICFS provision.³³ For purposes of this article, we focus on Delaware chartered corporations facing intra-corporate litigation in California. We focus on the Delaware-California pair because life is short and because the available data suggest that the overwhelming majority of ICFS provisions adopted to date have been adopted by Delaware chartered entities designating Delaware as the forum in which disputes are to be resolved.³⁴ The available data also suggest that corporations headquartered in California most frequently adopt ICFS provisions, and that the rate of ICFS adoption by California-headquartered firms is greater than would be expected, by a statistically significant degree.³⁵ The literature further suggests that California is among the more aggressive jurisdictions in refusing to dismiss claims on grounds of inappropriate forum.³⁶

Analysis of the Delaware-California pair thus captures the modal conflict likely to arise and requires that we analyze a body of state law that is relatively hostile to granting a motion to dismiss for inappropriate forum. By demonstrating that the adoption of ICFS provisions should be upheld under Delaware law, even if adopted as bylaw provisions without prior stockholder approval, and that ICFS provisions should, in the vast majority of circumstances, be subsequently enforced by the California state courts, or by federal courts sitting in California or elsewhere, we construct an analysis that should be persuasive on an *a fortiori* basis for other litigation pairs.

Part 2 reviews data documenting that the frequency of intra-corporate litigation is increasing, as is the incidence of filings in foreign forums, and summarizes the literature indicating that this trend is inimical to stockholders' best interests. Part 2 also suggests that forum selection provisions are particularly effective solutions to the foreign filing problem, especially when the intra-corporate litigation is filed exclusively in a foreign forum. Part 2 further presents data indicating that the pendency of the Delaware litigation challenging ICFS provisions has dramatically reduced the rate at which boards of directors have been amending bylaws to include ICFS provisions. Firms conducting IPOs, however, continue to include ICFS provisions in their charters at a healthy pace. Part 3 analyzes Delaware law governing the validity of ICFS provisions adopted either as charter amendments or as bylaw provisions without prior stockholder approval. Part 4 reviews the law governing enforcement of ICFS provisions, with particular emphasis on federal law, and the law of the states of Delaware and California. Part 5 analyzes the single reported decision to date considering the enforcement of an ICFS provision and suggests that this case is wrongly decided in part. Part 6 concludes.

³³ If claims were filed in multiple foreign jurisdictions, the number of potential home state – foreign state combinations would be larger.

³⁴ See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.F. & Table 7.

³⁵ *Id.*

³⁶ See Section IV.B.2, *infra*.

II. The Foreign Forum Problem and the ICFS Solution

Foreign-filed intra-corporate litigation has increased significantly in recent years. The academic literature suggests that competition among plaintiff counsel seeking to maximize their individual economic advantage is the dominant factor contributing to this growth, and that this competition generates litigation phenomena inimical to stockholders' best interests. Plaintiff counsel may be the only constituency that systematically benefits from the expense and complexity generated by the growth of foreign forum intra-corporate litigation.

Delaware courts and corporate counsel have developed a range of strategies in an effort to address the problems caused by foreign forum litigation, but these strategies have not been uniformly effective. Efforts by Delaware's judiciary to address these challenges are particularly ineffective when intra-corporate claims are pending exclusively in a foreign forum and there is no claim over which Delaware's courts can assert jurisdiction. Corporations seeking in good faith to address the potential conflicts and inefficiencies generated by the growing trend toward foreign forum intra-corporate litigation may thus heed the advice of a leading scholar who observes that "the use of charter amendments and bylaws making Delaware the exclusive forum for fiduciary litigation involving Delaware corporations represents the best conceptual answer to a real and growing problem."³⁷

A. The Increase in the Incidence of Foreign Forum Litigation

Until the last decade or so, the dominant perspective was that plaintiffs and defendants preferred Delaware as the forum for the resolution of intra-corporate disputes involving Delaware-chartered entities because Delaware's courts were broadly perceived as having a comparative advantage both in the resolution of complex business disputes and in the interpretation of Delaware law.³⁸ Investors, corporations, and counsel could thus assume that the state of incorporation, particularly if it was Delaware, would be the forum for the resolution of all intra-corporate disputes. In this equilibrium, intra-corporate forum selection provisions would be surplusage, and the incidence of such provisions would be rare.

This equilibrium began to unravel in the early part of this century as plaintiff counsel started filing a larger number of intra-corporate claims against Delaware-chartered entities in courts outside of Delaware.³⁹ The trend is perhaps best documented in the field of merger

³⁷ John C. Coffee, *Forum Selection Clauses and the Market for Settlements*, N.Y.L.J. (Online), May 17, 2012 at 5.

³⁸ See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at III.A. See also Roberta Romano, *THE GENIUS OF AMERICAN CORPORATE LAW* 41 (1993) (survey of data from the late 1960s through 1987 "make[s] plain that plaintiffs do not perceive it to be undesirable to litigate in Delaware and instead take advantage of its valuable asset of legal capital"); John Armour, Bernard Black and Brian Cheffins, *Is Delaware Losing Its Cases?*, at 7 (Northwestern Law & Econ. Research Paper No. 10-03, February 2012 Draft), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578404 ("for years, the conventional wisdom. . . has been that most corporate cases involving Delaware public companies were brought in Delaware"); Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 91 (1990); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1926 (1998).

³⁹ Jennifer Johnson, *Securities Class Actions in State Court*, 80 U. CINN. L. REV. 349, 374 Figure 8 (examining Delaware state law class actions filed in 2010, and finding that for 93 of the 196 companies sued in state court, plaintiffs avoided Delaware altogether); Armour, et al., *Is Delaware Losing Its Cases?*, *supra* note 38. See

litigation where plaintiffs commonly claim that boards have violated a fiduciary duty by failing to negotiate an adequate price for the corporation's shares and by failing to make adequate disclosures to stockholders. Daines and Koumrian document that in 2011, 96 percent of all mergers and acquisitions valued at or over \$500 million were subject to litigation.⁴⁰ In 2007, 53% of the comparable population was subject to litigation.⁴¹ These data are troubling because "[f]rom a public policy perspective, it's plausible to think there are problems with deals, but it's really hard to believe there are problems with 100% of the deals."⁴²

Daines and Koumrian further observe that "[t]he costs of these suits is pretty clear. Companies typically agree to pay plaintiffs' lawyers fees (about \$1.2 million on average in the last two years) and must usually cover their own legal costs. What is less clear is how shareholders are benefiting from this litigation."⁴³ In 2010 and 2011 "a modest 5 percent of settlements produced more cash for shareholders, while more than 80 percent of suits required only additional disclosures."⁴⁴ Of the 162 situations in which litigation was settled on a disclosure-only basis, only 2 transactions were later voted down by stockholders after they received the additional disclosures mandated by the settlement. But even in those two instances there is no showing that the additional information caused the vote to fail. Thus "[u]nless one believes that "disclosure only" settlements truly benefit shareholders and justify million dollar fee awards (in which case this author would like to sell you a bridge to Brooklyn at a very cheap price), then such litigation gives off at least a faint odor of collusion... with shareholders ultimately bearing the costs of both sides" of the litigation.⁴⁵

Significantly, a large portion of this litigation involves foreign-filed claims against Delaware-chartered entities. Of the transactions involving Delaware-chartered corporations challenged in 2011, 72% involved filings in Delaware and in at least one other foreign state or federal court, 17% involved filings exclusively in foreign courts, and only 10% involved filings exclusively in Delaware.⁴⁶ Put another way, in 2011, the foreign forum problem arose in 90% of all merger and acquisition litigation valued at \$500 million or more involving Delaware chartered entities. In the large and growing world of merger litigation, foreign forum litigation is now the norm.

also Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 60 (2009); Sara J. Lewis, Note, *Transforming the Anywhere but Chancery Problem into the Nowhere but Chancery Solution*, 14 STAN. J.L. BUS. & FIN. 199, 199 (2008) ("it's now twice as likely as it was previous that the [merger and acquisition] litigation will be brought and litigated outside of Delaware..."); Ted Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M & A Journal 17 (2007).

⁴⁰ Robert M. Daines and Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions*, Cornerstone Research, March 2012 Update, at 2, Figure 1.

⁴¹ *Id.*

⁴² Daniel Fisher, *Lawyers Challenge "Almost Every Merger" Cornerstone Study Shows*, Forbes, April 26, 2012 at 1 (quoting Professor Robert Daines).

⁴³ Daines and Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, NYT Dealbook, June 8, 2012.

⁴⁴ *Id.*

⁴⁵ Coffee, *Forum Selection Clauses and the Market for Settlements*, *supra* note 37, at 1.

⁴⁶ Daines and Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions*, *supra* note 40, at 6 Table 5.

Data gathered by Cain and Davidoff are in accord. In a study of takeover-related litigation spanning the years 2005 through 2009, Cain and Davidoff document both a dramatic increase in the percentage of merger transactions that are challenged in court, growing from 38.7% in 2005 to 94.2% in 2011,⁴⁷ and an increase in the percentage of those cases filed in multiple jurisdictions, rising from 8.6% in 2005 to 47.4% in 2011.⁴⁸ Similarly, Johnson reports that in a sample of 193 merger and acquisition lawsuits in 2012 involving Delaware chartered entities, 60% encountered filings in foreign state courts and 24% encountered filings in foreign federal courts.⁴⁹

Consistent findings are reported by Armour, Black, and Cheffins who document that Delaware's share of stockholder suits against directors of Delaware corporations dropped sharply in the last 15 years.⁵⁰ Their analysis of merger litigation concludes that "through 2001, Delaware was often the sole forum, and was always a forum, when a shareholder suit arising from a large M&A transaction was filed. From 2002 on, it has rarely been the sole forum, and is sometimes not a forum at all. . . The proportion of large M&A transactions where Delaware had sole or shared influence fell sharply over 2002-2006, reaching a low of under 30% in 2006."⁵¹ They also document that "[d]uring the late 1990s a large majority of all suits involving Delaware companies undergoing LBOs . . . were filed in Delaware, but this proportion fell below 50% in 2005 and has generally continued to fall since then."⁵² In an analysis of judicial opinions relating to litigation against corporate directors, they find that "[i]n 1995, over 80% of the cases. . . involving directors of Delaware companies were heard in Delaware. This proportion dropped to below 50% by 2004 and has remained below 50% since, dipping below 30% in 2005 and 2008."⁵³ And, in a study of option backdating cases filed in 2006 and 2007, they find that only 11% of the lawsuits against Delaware chartered corporations were filed in Delaware.⁵⁴

Myers' analysis of backdating litigation finds that 96% of "filings against Delaware firms were filed outside Delaware" and also reports that "the pattern [of foreign filings] is not one unique to Delaware, although it may be more intense in Delaware."⁵⁵ Significantly, "just 2.6% of firms (and 0.9% of Delaware firms) faced [backdating] litigation only in the state of incorporation."⁵⁶ Myers' analysis of the 100 largest mergers between 2009 and 2011 finds that 98 of them attracted lawsuits, and that "each firm was sued 6.3 times on average."⁵⁷ For Delaware chartered defendants in this sample, 53% of cases were filed outside of Delaware, and

⁴⁷ Cain and Davidoff, *Takeover Litigation in 2011* Table A (Litigation Rates Over Time) (February 6, 2012) (unpublished Working Paper Series), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998482.

⁴⁸ *Id.*

⁴⁹ Jennifer Johnson, *Securities Class Actions in State Court*, *supra* note 39, at 374 Figure 8 (Filings by State of Incorporation).

⁵⁰ Armour, et al., *Is Delaware Losing Its Cases?*, *supra* note 38, at 8 ("Delaware courts have been losing market share, likely since the late 1990s, but are not seeing fewer cases in absolute numbers").

⁵¹ *Id.* at 19-20.

⁵² *Id.* at 20.

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 23.

⁵⁵ Myers, *Fixing Multi-Forum Shareholder Litigation*, *supra* note 21, at 11-12.

⁵⁶ *Id.* at 14.

⁵⁷ *Id.* at 12.

for non-Delaware chartered entities, 35% of claims were filed outside the state of incorporation.⁵⁸

Recent developments also suggest that plaintiff counsel have cultivated a new strategy for challenging merger agreements. Rather than resolve matters quickly, typically for “therapeutic” disclosures and attorneys’ fees, plaintiff counsel will now “keep the litigation alive post-close. They take extensive discovery, especially against the executives of the acquirer, who now control the purse strings. This phenomenon occurs even in situations where objective factors suggest a lack of merit to the claims: e.g., high premium; no contesting bidders; overwhelming shareholder approval; customary deal terms.”⁵⁹ Defense counsel explain that these suits have their own nuisance value, and can be profitable even though they cannot delay a transaction. These lawsuits “subject executives of the acquirer to discovery (often not covered by the target’s D&O insurance policy). . . [and] the acquirer. . . usually does want to minimize the waste of its own executives’ time, along with public exposure of confidential acquisition materials. Therefore, even post-close suits have some ‘go away’ value to the surviving company.”⁶⁰ Defense counsel also observe that plaintiff counsel may be pursuing these post-close claims in order to increase the value of pre-close settlements. “Now that some plaintiffs’ lawyers have shown that they will persevere, even in a weak case, for years, acquirers (and perhaps even the target’s directors) may just say ‘pay them and get rid of it’ before the deal closes. In this sense, a plaintiffs’ lawyer rationally could pursue a frivolous case, at great expense, post-close, even with low odds of getting a recovery, in order to improve the profitability of the rest of his inventory.”⁶¹

The trend toward foreign forum litigation against Delaware-chartered entities has also recently become manifest in a new category of class action litigation. These lawsuits seek to enjoin the “say-on-pay” votes on executive compensation mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act⁶² based on allegedly incomplete and misleading proxy disclosures.⁶³ The lawsuits also challenge disclosures in connection with a required vote in amending executive equity compensation plans, such as a vote to increase the number of shares available for issuance.⁶⁴ By seeking to enjoin an upcoming shareholder vote, the lawsuits place pressure on the issuer to settle the lawsuit, without regard to the merits of the complaint, provided that the price of the settlement is less than the cost that would be incurred by

⁵⁸ *Id.* at 13.

⁵⁹ Boris Feldman, *Litigating Post-Close Merger Cases* (posted Nov. 9, 2012), available at <http://blogs.law.harvard.edu/corpgov/2012/11/09/litigating-post-close-merger-cases/>. For examples of these lawsuits, see *In re McAfee, Inc. S’holder Litig.*, No. 110-CV-180413 (Santa Clara County Superior Court); *In re Epicor Software Corp. S’holder Litig.*, No. 30-2011-00465495 (Orange County Superior Court); *Sullivan v. Actel Corp.*, No. 110-CV-184257 (Santa Clara County Superior Court); *Jarackas v. Applied Signal Technology, Inc.*, No. 111-CV-191643 (Santa Clara County Superior Court).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, July 21, 2010, 124 Stat. 1376, principally enacted chapter 53 of Title 12, 12 U.S.C.A. § 5301 et seq., chapter 108 of Title 15, 15 U.S.C.A. § 8201 et seq., chapter 109 of Title 15, 15 U.S.C.A. § 8301 et seq., and enacted and amended numerous other sections and notes in the Code.

⁶³ See, e.g., Class Action Complaint, *Gordon v. Symantec Corp., et al.*, No. 1-12-cv-231541 (Cal. Super. filed September 4, 2012).

⁶⁴ See, e.g., *Knee v. Brocade Communications Systems, Inc., et al.*, No. 1-12-cv-220249 (Cal. Super. filed March 7, 2012).

rescheduling the proxy vote and litigating the challenge presented by plaintiffs.⁶⁵ Plaintiff counsel have filed at least 20 such lawsuits in the past year.⁶⁶ Although the complaints raise fiduciary duty claims that are necessarily governed by the laws of the company's chartering state,⁶⁷ they are being filed in the state where the company's principal place of business is located, and not in the state of incorporation.⁶⁸

Plaintiffs have had mixed results in prosecuting these cases, but they have achieved sufficient success to suggest that it is rational for them to continue filing such claims into the 2013 proxy season, and some commentators expect that this trend will only pick up steam.⁶⁹ For example, a California court enjoined Brocade Communications Systems, Inc.'s shareholder vote after plaintiffs alleged that the company's proxy statement omitted material facts regarding a proposal to increase the number of shares in an equity options plan.⁷⁰ In a settlement reached shortly after the injunction was granted, Brocade agreed to issue supplemental disclosures regarding the proposal and agreed not to oppose plaintiff counsel's request for attorneys' fees in the amount of \$625,000.⁷¹ Plaintiffs have also obtained settlements in cases involving Martha Stewart Living Omnimedia, Inc., NeoStem, Inc. and WebMD, LLC for amounts between \$125,000 and \$450,000.⁷² Indeed, as long as the courts are unable quickly and cheaply to

⁶⁵ See Katten Muchin Rosenman LLP, *A New Wave of Say-on-Pay and Executive Compensation Proxy Litigation* (posted Oct. 29, 2012), available at http://www.kattenlaw.com/files/Publication/22aebcbb-2e2b-47fe-87ec-5a4729bda023/Presentation/PublicationAttachment/a0624bdd-5647-4842-bd02-2e85da96f7a3/A_New_Wave_of_Say_on_Pay_and_Executive_Compensation_Proxy_Litigation.pdf.

⁶⁶ See Katten Muchin Rosenman LLP, *"Say on Pay" and Executive Compensation Litigation: Plaintiffs' New Racket* (posted Oct. 31, 2012), available at <http://www.dandodiar.com/2012/10/articles/executive-compensation/say-on-pay-and-executive-compensation-litigation-plaintiffs-new-racket/>.

⁶⁷ See, e.g., Class Action Complaint, at ¶¶ 33-43, *Gordon v. Symantec Corp., et al.*, No. 1-12-cv-231541 (Cal. Super. filed September 4, 2012).

⁶⁸ See, e.g., Class Action Complaint, *Gordon v. Symantec Corp., et al.*, No. 1-12-cv-231541 (Cal. Super. filed September 4, 2012); *Knee v. Brocade Communications Systems, Inc., et al.*, No. 1-12-cv-220249 (Cal. Super. filed March 7, 2012). See also Katten Muchin Rosenman LLP, *A New Wave of Say-on-Pay and Executive Compensation Proxy Litigation*, *supra* note 65.

Notably, Symantec Corporation recently opposed a motion to enjoin its shareholder vote on executive compensation based in part on a forum selection provision in the company's bylaws which mandated that all intra-corporate disputes be resolved in Delaware's Chancery Court. See Defendant Symantec Corporation's Opposition to Plaintiff's Motion for Preliminary Injunction, *Gordon v. Symantec Corp., et al.*, No. 1-12-cv-231541 (Cal. Super. October 9, 2012). The California court denied the injunction but did not address the forum selection argument. See Minute Order, *Gordon v. Symantec Corp., et al.*, No. 1-12-cv-231541 (Cal. Super. October 17, 2012).

⁶⁹ See Katten Muchin Rosenman LLP, *A New Wave of Say-on-Pay and Executive Compensation Proxy Litigation*, *supra* note 65.

⁷⁰ See Stipulation of Settlement, at 2:10-13, *Knee v. Brocade Communications Systems, Inc., et al.*, No. 1-12-cv-220249 (Cal. Super. July 26, 2012).

⁷¹ See Stipulation of Settlement, at 2:13-22 and 8:12-14, *Knee v. Brocade Communications Systems, Inc., et al.*, No. 1-12-cv-220249 (Cal. Super. July 26, 2012).

⁷² See Katten Muchin Rosenman LLP, *A New Wave of Say-on-Pay and Executive Compensation Proxy Litigation*, *supra* note 65. Plaintiffs have also obtained a settlement with H&R Block, but the amount of attorneys' fees that has been requested and awarded in connection with that settlement is unknown. See Proxy Statement on Schedule 14A, filed by H&R Block, Inc. on August 31, 2012, available at <http://www.sec.gov/Archives/edgar/data/12659/000119312512377695/d404775ddefa14a.htm>.

In contrast, plaintiffs voluntarily dismissed a case against Amdocs after defendants opposed plaintiffs' motion for preliminary injunction and filed a motion to dismiss. Plaintiffs also failed to enjoin shareholder meetings of Ultratech, Inc. and AAR. See Katten Muchin Rosenman LLP, *A New Wave of Say-on-Pay and Executive Compensation Proxy Litigation*, *supra* note 65.

dismiss actions that have little or no merit, plaintiffs have the ability to impose costs on defendants, even if only in the form of litigation expenses.⁷³ To the extent that multi-forum litigation enhances plaintiffs' ability to impose litigation costs without regard to the merits of the underlying claim, it enhances plaintiff counsel's ability to extract settlements unrelated to the merits, thereby harming shareholder interests.

B. Causes and Consequences of the Foreign Forum Trend

The dominant view in the academic literature is that the foreign forum phenomenon is driven by plaintiff attorney incentives that are adverse to stockholder interests.⁷⁴ Cheffins, Armour, and Black⁷⁵ offer a detailed analysis of the micro-economics of the plaintiff bar as it relates to the foreign forum phenomenon and conclude that competition among attorneys specializing in shareholder litigation has "intensified over the past fifteen or twenty years in ways that likely contributed to both the out of Delaware trend in litigation venue and the rising incidence of shareholder suits challenging large M&A and other corporate transactions."⁷⁶ They document significant break ups and spin offs from major plaintiff firms leading to a "proliferation of experienced, well-resourced lawyers and firms able to litigate thoroughly major lawsuits and to bring these suits in multiple venues."⁷⁷ At the same time, the lead plaintiff provision of the PSLRA made it more difficult for smaller law firms to capture lead counsel status in class action securities proceedings, so these attorneys had an incentive to migrate "increasingly into corporate litigation."⁷⁸ Simultaneously, a broad trend in the state courts made it easier for out of state attorneys to pursue foreign intra-corporate claims outside of Delaware.⁷⁹ The confluence of these three forces resulted in a situation where the pure dynamics of plaintiff law firm competition - - and not any change in the views that any courts take as to the merits of underlying claims or as to the proper amount of fees to be awarded - - could help explain the increased incidence of foreign forum litigation.

Three other, larger economic incentives were also at work in a manner that, when combined with the institutional developments affecting plaintiff counsel's economic incentives, further promoted the growth of foreign forum litigation for reasons unrelated to stockholder welfare. In particular, plaintiff counsel have incentives to maximize aggregate fee awards in any

⁷³ See, e.g., Transcript of Proceedings at 33-35, 58-61, *Boilermakers Local 154 Retirement Fund v. Priceline.com*, No. 7216-CS (Del. Ch. Ct. May 29, 2012) (discussing the significance of avoided defense costs as a factor in determining appropriate attorneys' fees for plaintiff counsel). For a theoretical treatment of the same phenomenon, see Joseph A. Grundfest and Peter H. Huang, *The Unexpected Value of Litigation*, 58 STAN. L. REV. 1267, 1310 (2006).

⁷⁴ See, e.g., *id.* at 29. See also Weiss & White, *File Early, Then Free Ride*, *supra* note 19, at 1854-56 ("Our other findings (and economic theory) all suggest it is far more likely that plaintiffs' attorneys are motivated primarily by self-interest and that their litigation efforts, shaped as they are by the incentives provided by Delaware law, produce little in the way of meaningful benefits for the shareholders that those attorneys purport to represent"); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 19, at 680 (describing the central role of fees in motivating shareholder litigation); Coffee, *Forum Selection Clauses and the Market for Settlements*, *supra* note 37, at 3 (suggesting that "the expected differential in fee awards may be the critical variable motivating the exodus").

⁷⁵ Brian Cheffins, John Armour, and Bernard Black, *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427 (2012).

⁷⁶ *Id.* at 431.

⁷⁷ *Id.* at 431.

⁷⁸ *Id.* at 431.

⁷⁹ *Id.* at 432.

litigation. Delaware courts have, however, in recent years, developed a reputation among some plaintiff counsel as being parsimonious in the award of attorneys' fees.⁸⁰ Regardless of whether this perception is accurate, plaintiff counsel holding this view will calculate that "by filing claims based on Delaware law in foreign jurisdictions, litigants avoid recent attempts by the Delaware courts to raise pleading standards and actively police plaintiffs' attorney fees while accepting the underlying validity of Delaware's position with respect to the corporate law."⁸¹ An alternative perception suggests that Delaware courts are parsimonious in awarding fees only in cases that appear to have little merit, and that they will be more likely to dismiss claims outright in weak cases, but that they award significant fees in strong cases that are competently litigated.⁸² Plaintiff counsel who accept this perspective have an incentive to bifurcate their Delaware intra-corporate litigation inventory by filing weaker claims in foreign forums and bringing their stronger suits in Delaware.

To the extent that either description is correct, it suggests a potentially dangerous competitive mechanism that can operate in a manner inimical to stockholder interests. If the competition for litigation deal flow is across the board (i.e., for high quality cases as well as for low quality claims), then in order to maintain a flow of intra-corporate Delaware litigation into Delaware's own courts, Delaware's judiciary would have an incentive to increase fee awards and to adopt a range of other pro-plaintiff attorney positions, as distinct from pro-stockholder positions, regardless of the judiciary's view of the merits of the underlying complaints, simply to

⁸⁰ For example, Armour, Black and Cheffins point to Chancery's decision in *In re Cox Commc'ns Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005), where the agreed-upon plaintiff attorneys' fees in a settled class action arising from a going private buyout was reduced from \$5 million to \$1.275 million. They also report that their discussions with attorneys specializing in corporate litigation indicate there has in fact been dissatisfaction among plaintiff counsel with the approach of Delaware's judiciary to the approval of attorneys' fees in a wide range of settlements. Armour, et al., *Is Delaware Losing Its Cases?*, *supra* note 38, at 29. See also John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act* 34 (Northwestern University Law School Law and Economics Research Paper No. 10-04, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677400 (observing that Delaware courts had earlier expressed views that plaintiff counsel could interpret as inimical to their interests in obtaining higher fee awards); David Marcus, *Half a Loaf is still Plenty of Bread*, DEL. L. WEEKLY 1 (May 29, 2001) (discussing a reduction in a plaintiff fee award from \$24.75 million to \$12.3 million). Subsequent to *Cox*, plaintiff counsel's award for fees and costs in *In re Instinet Group Inc. Shareholders Litigation*, No. 1289-N, 2005 WL 3501708, at *1 (Del. Ch. Dec. 14, 2005), was reduced from \$1.623 million to \$450,000. Indeed, Armour, Black and Cheffins describe *Cox* as "the first in a line of cases involving not only fee cuts but outspoken rhetoric against certain aspects of the plaintiffs' bar." Armour, et al., *Is Delaware Losing Its Cases?*, *supra* note 38, at 35. Commentary viewed by plaintiff counsel as unflattering provides yet another incentive for them to avoid Delaware courts for reasons unrelated to the best interests of stockholders.

⁸¹ Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, *supra* note 19, at 141. See also Armour, et al., *Is Delaware Losing Its Cases?*, *supra* note 38, at 29.

⁸² See, e.g., Matthew D. Cain and Stephen M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 1 (Jan. 1, 2012) (unpublished Working Paper Series), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758 (finding that entrepreneurial plaintiff attorneys drive competition by bringing suits in jurisdictions which have previously awarded more favorable judgments and higher fees and by avoiding unfavorable jurisdictions). In a symposium at Columbia Law School held in November 2011, Chancellor Leo Strine noted that Delaware courts had previously awarded numerous million dollar plus attorneys' fee awards to plaintiff counsel who had litigated successful cases there. *Id.* at 2. A month later, Chancellor Strine awarded more than \$304 million in attorneys' fees to plaintiff counsel in the *Southern Peru Copper Corporation* shareholder derivative litigation, an action in which plaintiff shareholders were awarded \$1.347 billion in damages plus pre-judgment interest. *In re Southern Peru Copper Corp.*, No. 961-CS, 2011 WL 6382006, at *1 (Del. Ch. Dec. 20, 2011).

provide an incentive for plaintiff counsel to file actions in Delaware courts.⁸³ If foreign courts respond in an effort to retain intra-corporate claims then they too have an incentive to increase fee awards. The result is a “fee spiral” in which competing jurisdictions offer increased fee awards simply to attract filings without regard to the best interests of the corporation’s stockholders. Alternatively, if the Delaware courts effectively segment the market then plaintiff counsel will price discriminate by filing their weaker claims in foreign forums. In that equilibrium, Delaware courts lose the ability to monitor and discipline the incidence of lower-quality intra-corporate claims. Again, the result does not promote stockholder interests.

The internal battle among plaintiff counsel for control of fees generated by a lawsuit provides a second set of incentives that promote the foreign forum trend.⁸⁴ As Delaware’s Court of Chancery has observed, plaintiffs’ counsel may file multiple lawsuits as part of a rational business model designed “to get a seat at the table ... because it gives them a better shot at the action and better leverage in terms of fees.”⁸⁵ In these circumstances, the battle can be less between plaintiff and defendant, and more among multiple coalitions of plaintiff counsel wrestling for control of fee awards. From this perspective, foreign forum litigation can arise even if Delaware courts award attorneys’ fees at rates equal to or better than the rates awarded by foreign courts because counsel filing foreign complaints rationally calculate that either: (1) their larger share of a smaller fee in a foreign filed action (whether or not resulting from a collusive settlement) will exceed their smaller share of a larger fee in the Delaware proceeding; or (2) by filing the foreign action, they will be able to extract a larger share of the Delaware settlement even if the foreign claim leads to no settlement in the foreign court. This intra-counsel competition for control of the fee award does not systematically promote stockholder welfare.

Competition for control of the fee award generates a parallel concern that plaintiff counsel have an incentive to enter into sweetheart settlements in which some attorneys resolve claims cheaply and quickly, undercutting the efforts of other firms willing to litigate the matter more aggressively, all in an effort to assure that they receive compensation for bringing the claims, even if they are not willing actively to pursue them. Thus, this “intense competition within a fragmented plaintiffs’ bar has produced the perverse phenomenon of ‘phantom litigation’ in which rival plaintiffs’ firms do battle to be named lead counsel but then do not

⁸³ See, e.g., Armour, et al., *Delaware’s Balancing Act*, *supra* note 81, at 49 (suggesting that one way to “reverse the out-of-Delaware trend” is for “Delaware courts [to] move back towards their former fee-friendly posture”); Cain & Davidoff, *A Great Game*, *supra* note 83, at 4 (“[W]hen attorneys face a choice in where to bring litigation, they respond to lower prior fee awards and settlement rates in one particular state by moving to other state jurisdictions to file. In other words, attorneys are highly responsive to the incentives provided by differential fee awards and settlements . . . across multiple jurisdictions.”).

⁸⁴ Vice Chancellor J. Travis Laster made this point in *In re Cox Communications*, when he described the recurrence of “hastily-filed, first-day complaints that serve no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics.” 879 A.2d 604, 608 (Del. Ch. 2005). See also Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, *supra* note 19, at 149 (“Control over litigation and access to fees are an important motivating factor in this competition amongst plaintiff groups”).

⁸⁵ Rick Alexander and Daniel Matthews, *The Multi-Jurisdictional Stockholder Litigation Problem and the Forum Selection Solution*, 26 BNA Corporate Counsel Weekly 19, May 2011, at 2 (quoting *In re Burlington N. Santa Fe S’holder Litig.*, No. 5043-VCL, at *34 (Del. Ch. Oct. 28, 2010) (Laster, V.C.) (transcript)). See also Transcript of Proceedings dated August 9, 2012, at 6, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (chastising plaintiff counsel for filing a duplicative lawsuit against Chevron in the Northern District of California in order to have “a seat at the table so that you could get an attorney’s fee”).

actively litigate the case following that contest. Motions are not made, discovery is not taken, and depositions are not scheduled.”⁸⁶ Again, this form of competition reflects the parochial interests of competing plaintiff counsel in a manner that does not promote the interests of the corporation or its stockholders.

The third set of incentives is hardly unique to intra-corporate litigation, and reflects the standard litigant’s desire to secure a tactical advantage through the application of an alternative set of procedural rules⁸⁷ or by having a case resolved before a judge less familiar with the relevant law so as to generate increased delay or uncertainty that can be used to gain leverage in settlement negotiations.⁸⁸ To the extent that foreign filings are motivated by an incentive to have cases heard by judges who cannot resolve matters on as timely a basis or who are likely to generate uncertainty in their rulings (at least in comparison with the rulings that would be expected in a Delaware court), the shift to foreign courts again disadvantages stockholders. The resulting larger settlements would not reflect the stronger merits of any underlying claims. They would instead constitute payments made simply to avoid delay and uncertainty. This problem of delay and uncertainty is most apparent in merger and acquisition litigation where there is time pressure to close the transaction and where the fees demanded by attorneys in “disclosure only” settlements are small relative to the cost of delay in closing the transaction at issue.

The calculus associated with the incentive to identify the venue with the most pro-plaintiff procedural rules is not as clear. There, the effect would be contingent on the merits of the associated action. If the claim is meritorious, and if the procedural rules in the foreign court facilitate the pursuit of the meritorious complaint, then the shift to the foreign forum can promote stockholder interests. On the other hand, if the claim is without merit, but is allowed to survive because of a foreign forum’s procedure, then the shift to a foreign forum is unambiguously harmful for stockholders and for the corporation. Broad generalizations are thus not possible.

The most vigorous defense of the current regime is mounted by Stelman who asserts that “shareholder plaintiffs’ option to be heard in alternative forums, under alternative procedural rules, creates a ballast against excessive partisanship in Delaware’s own adjudication. Given Delaware’s financial and prestige-based stakes in promoting its successful chartering business, a bias in favor of manager/controller friendly rules is likely to result (because directors or officers, or otherwise founders/controllers select the state of incorporation). Hence, allowing ordinary shareholders freedom of choice regarding forum most likely exerts a salutary, equilibrating effect on Delaware corporate law.”⁸⁹

The problem with this argument is that it is, at best, speculative, incomplete, and fails to consider the costs imposed by the current regime. Putting aside the fact that the author presents no example of Delaware’s courts engaging in “excessive partisanship” and fails to address recent

⁸⁶ Coffee, *Forum Selection Clauses and the Market for Settlements*, *supra* note 37, at 1.

⁸⁷ See, e.g., Order Granting in Part and Denying in Part Defendants’ Motion to Abstain or Stay dated August 9, 2012, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (stating that plaintiff’s decision to file an action in federal court despite the pendency of a state court action “suggested an attempt to ‘gain a tactical advantage from the application of federal court rules’” (quoting *McCreary v. Celera Corp.*, No. 11-1618 SC, 2011 WL 1399263, at *5 (N.D. Cal. Apr. 13, 2011)).

⁸⁸ For an explanation of a mechanism by which increased procedural uncertainty generates greater settlement values for plaintiffs, see Grundfest and Huang, *The Unexpected Value of Litigation*, *supra* note 74, at 1310.

⁸⁹ Stelman, *Regulatory Competition*, *supra* note 39, at 64-65.

Delaware decisions favoring shareholder-plaintiffs through substantial recoveries and fee awards,⁹⁰ the author fails even to analyze the larger equilibrium suggested by her model. In particular, in order for inter-jurisdictional forum competition to have a salutary and equilibrating effect on Delaware corporate law, foreign courts must systematically reach decisions that differ from those that would be reached by Delaware courts in a manner that would systematically benefit stockholders - - as distinguished from decisions that would systematically benefit the attorneys whose actions can drive the inter-forum competition in a manner that is inimical to stockholder interests. Stevelman fails, however, to explain how or why foreign forums are better able to defend against techniques that promote counsel interests over stockholder interests, particularly in light of their apparent failings to do so to this point. Put another way, even if one accepts Stevelman's unsubstantiated hypothesis, the analysis fails to consider the possibility that foreign forums have their own problems in addressing intra-corporate litigation in a manner that promotes stockholder interests. Indeed, had foreign forums been successful in protecting stockholder interests from the agency problems created by plaintiff attorney incentives, then the substantial academic literature analyzing the adverse consequences of those problems would have no reason to exist. Much in the same vein, the analysis also fails to weigh the costs and benefits of the current regime against the costs and benefits of the regime that would result if intra-corporate litigation was aggregated in the state of incorporation.

Stevelman's analysis further fails to consider the operation of ICFS provisions, which cannot be enforced unless the foreign forum concludes that stockholder interests are adequately protected by proceedings in the designated forum. Thus if Delaware's courts ever became "excessively partisan," foreign forums could respond by refusing to enforce ICFS provisions. Stevelman's analysis fails to explain how or why the foreign courts that, in theory, would be so successful in protecting stockholder interests (as opposed to plaintiff counsel interests) under the current regime would be unable to protect stockholder interests when considering the enforcement of ICFS provisions.

C. Judicial Perspectives on the Challenges Caused by the Increased Incidence of Foreign Intra-Corporate Litigation

The effects of foreign forum litigation are far from benign and are well documented in a large literature.⁹¹ Delaware Chancery Court recently summarized some of these adverse effects

⁹⁰ See, e.g., *In re Southern Peru Copper Corp.*, No. 961–CS, 2011 WL 6382006, at *1 (Del. Ch. Dec. 20, 2011) (awarding more than \$304 million in attorneys' fees to plaintiff counsel; plaintiff shareholders were awarded \$1.347 billion in damages plus pre-judgment interest); *In re Del Monte Foods Co. Shareholders Litig.*, No. 6027–VCL, 2011 WL 2535256, at *16 (Del. Ch. June 27, 2011) (awarding interim \$2.75 million fee to the plaintiffs' attorneys following plaintiffs' successful motion for a preliminary injunction); Daines & Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions*, *supra* note 40, at 13 (noting that the \$25.25 million in fees awarded to plaintiff counsel in *In re Del Monte Foods Co. Shareholders Litig.*, No. 6027–VCL (Del. Ch.), was "[b]y far, the highest fee" awarded in 2010 and 2011); Transcript of Settlement Hearing dated February 21, 2011, at 46, *In re Alberto-Culver Co. Shareholder Litig.*, No. 5873–VCS (Del. Ch.), available at <http://www.delawarelitigation.com/uploads/file/int76%282%29.pdf> (awarding \$3.25 million in attorneys' fees based on settlement for which shareholders received no monetary benefit). We do not criticize Professor Stevelman for excluding reference to these particular fee awards, which were handed down after publication of her article.

⁹¹ See, e.g., Mirvis, *Anywhere But Chancery*, *supra* note 39; *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940 (Del. Ch. 2010); Armour, et al., *Is Delaware Losing Its Cases?*, *supra* note 38; Joseph A. Grundfest, *Choice of Forum in Intra-corporate Litigation*, Francis G. Pileggi Distinguished Lecture in Law (2010); Transcript of Courtroom Status Conference dated December 17, 2010, *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No.

as follows: “Defense counsel is forced to litigate the same case—often identical claims—in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions.”⁹² Worse still, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved.”⁹³ It thus comes as little surprise that some courts outside of Delaware clearly appreciate the plaintiff counsel economics that drive this litigation and view these foreign forum claims as “vexatious and reactive.”⁹⁴

Courts also recognize that if the multi-jurisdictional litigation results in an early settlement, then any court can be precluded from reaching any decision of consequence, “except for the ultimate decision to bless the settlement.”⁹⁵ And, if settlements in one court are denied collateral estoppel by another court,⁹⁶ then litigants will lose the ability to obtain repose, which is a central objective of any resolution through settlement. Thus, the collusive settlement problem, which is broadly appreciated by the judiciary and academia,⁹⁷ permits of no easy solution (absent an enforceable ICFS provision): courts either look the other way and rubber stamp each others’ settlements, or they second-guess the decisions of sister courts. Neither is a comfortable equilibrium.

5890–VCL (Del. Ch.); David Marcus, *Multiforum Mayhem*, *The Deal Magazine*, Jan. 11, 2011; Mark Lebovitch, Jerry Silk & Jeremy Friedman, *Making Order Out of Chaos: A Proposal to Improve Organization and Coordination in Multi–Jurisdictional Merger–Related Litigation* (2011), available at http://www.blbglaw.com/misc_files/MakingOrderoutofChaos.

⁹² Moreover, in shareholder derivative actions or class actions, the costs of the litigation – on both the plaintiff and defense sides – are ultimately borne by the shareholders. *See Coffee, Forum Selection Clauses and the Market for Settlements, supra* note 37, at 1.

⁹³ *In re Allion Healthcare Inc. Shareholders Litig.*, No. 5022–CC, 2011 WL 1135016, at *4 (Del. Ch. March 29, 2011). Courts are also concerned with the possibility of “piecemeal litigation” which occurs “when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results.” *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656F.3d 966, 979 (9th Cir. 2011) (quotation omitted).

⁹⁴ Order Granting in Part and Denying in Part Defendants’ Motion to Abstain or Stay dated August 9, 2012, at 8, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (quoting *R.R. St. & Co.*, 656 F.3d at 981).

⁹⁵ *Coffee, Forum Selection Clauses and the Market for Settlements, supra* note 37.

⁹⁶ *Louisiana Municipal Police Employees’ Retirement Sys. v. Pyott*, No. 5795–VCL, 2012 WL 2087205, at *16–*18 (Del. June 11, 2012) (applying Delaware law and finding that a prior dismissal of a derivative action for failure to make pre-suit demand does not estop a different shareholder’s subsequent derivative suit; alternatively, holding that collateral estoppel would not apply because the first, dismissed case had been filed by a “fast-filer” who rushed to the courthouse without making adequate pre-suit investigation and thus did not adequately represent the corporation’s interests).

⁹⁷ Alexander and Matthews, *The Multi-Jurisdictional Stockholder Litigation Problem and the Forum Selection Solution, supra* note 86, at 2; *Coffee, Forum Selection Clauses and the Market for Settlements, supra* note 37, at 1; Brief of Special Counsel at 2-8, 27-30, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890–VCL (Del. Ch. March 11, 2011) (discussing forum shopping, reverse auctions, and collusive settlements in multi-jurisdictional class actions); *In re MCA, Inc. S’holder Litig.*, 785 A.2d 625, 639 (Del. 2001) (“It has been recognized that there is an inherent conflict when class counsel seeks to settle claims on behalf of a class whose claims have been asserted globally in different jurisdictions on different grounds. . . . Courts have recognized the problem inherent in this situation and have established standards to prevent class counsel from selling out the class merely to collect that fee.”); *Stepak v. Tracinda Corp.*, No. 8457, 1989 WL 100884, at *6 (Del. Ch. Aug. 21, 1989) (UNPUBLISHED) (“Where there are two or more attorneys purporting to act on behalf of the same or overlapping classes there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate, and a risk that the blessed plaintiff will be accommodating in exchange for an agreement that includes legal fees”).

Further, because the plaintiff firm that files first may be awarded the coveted role of lead counsel, thereby capturing the largest slice of the attorney fee pie, plaintiff counsel is incentivized to file complaints as quickly as possible, even if those complaints are poorly investigated, have little merit, and are unlikely to survive a motion to dismiss.⁹⁸ These fast-filed complaints impose real costs on the corporation and its stockholders, who must ultimately underwrite the costs of defense for even meritless litigation.⁹⁹ In some situations where plaintiffs file in multiple jurisdictions, there is evidence that later-filed complaints repeat the claims stated in earlier-filed complaints, at times copying allegations “word for word, character for character.”¹⁰⁰ This pattern of conduct indicates that counsel has done no independent research in support of its claims and suggests that the foreign-filed complaint has again been brought for the sole purpose of helping a plaintiff law firm secure a seat at the table, if and when the time comes to split attorneys’ fees, and not to promote the interests of the corporation or its stockholders.

Courts have also observed that plaintiffs will file claims in federal courts based on diversity jurisdiction, citing no violations of federal law, and adding “straw distinctions” in an effort to sustain an essentially duplicative claim in that federal foreign forum.¹⁰¹ These filings suggest an attempt to “gain a tactical advantage from the application of federal court rules.”¹⁰²

In sum, the trend toward litigating intra-corporate claims in foreign forums imposes clear costs on corporations and their stockholders. Only plaintiff counsel appear to benefit systematically from the complexities generated by foreign filed intra-corporate litigation, and the literature is bereft of any rigorous articulation of a theory whereby stockholders benefit from this style of litigation.

D. The Limits of Judicial and Legislative Self Help

Courts, counsel, litigants, and state legislatures can attempt to address the challenges raised by the foreign forum problem, but even if each constituency engages its best efforts, corporations have reason to consider ICFS provisions as a superior solution.¹⁰³ At the judicial

⁹⁸ *Pyott*, 2012 WL 2087205, at *18-*19 (discussing the “fast-filing problem”).

⁹⁹ *Id.* at *19. ICFS provisions also have the potential to create a “fast-filing” problem in the state of incorporation. *See* note 144, *infra*.

¹⁰⁰ Transcript of Proceedings dated August 9, 2012, at 3, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.).

¹⁰¹ Order Granting in Part and Denying in Part Defendants’ Motion to Abstain or Stay dated August 9, 2012, at 8, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (citing *Clark v. Lacy*, 376 F.3d 682, 687 (7th Cir. 2004)). To be sure, when plaintiffs file in federal court and assert claims that have exclusive federal jurisdiction, the analysis may differ. *See Kreiger v. Atheros Commc’ns, Inc.*, 776 F. Supp. 2d 1053, 1058-61 (N.D. Cal. 2011) (allowing federal claims to proceed while staying duplicative state law class actions).

¹⁰² *McCreary v. Celera Corp.*, No. 11-1618 SC, 2011 WL 1399263, at *5 (N.D. Cal. Apr. 13, 2011) (Conti, J.)

¹⁰³ For a more detailed discussion of potential solutions to the multi-jurisdictional challenge, see generally Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused this Problem, and Can it be Fixed?*, 889 PLI/Lit 101, 141-149 (2012) (discussing potential solutions and advocating a “State of Incorporation Rule”); Lebovitch, et al., *Making Order Out of Chaos*, *supra* note 92, at 7-10 (proposing a new system for selecting lead counsel in the Delaware Court of Chancery, but acknowledging that such a system “would not solve all multi-jurisdictional issues,” and that the proposed system could result in the “unusual” circumstance of having a deal litigation find its leadership issues resolved in the Delaware Court of Chancery, but proceed in a different forum on the merits); Myers, *Fixing Multi-Forum Shareholder Litigation*, *supra* note 21 (proposing federal legislation that would mandate a stay of proceedings in federal court when a similar case is pending in the state of incorporation,

level, when multiple lawsuits are filed in different jurisdictions based on the same alleged misconduct, foreign courts could voluntarily defer to courts of the chartering jurisdiction in matters related to the corporation's internal affairs.¹⁰⁴ This form of collective deference would be tantamount to a judicial pronouncement of an intra-corporate forum selection provision. It would, however, be effective only in situations where there was at least one claim pending in a court of the chartering jurisdiction.

Courts could also increase communication among judges and counsel involved in multi-jurisdictional litigation so as to streamline proceedings, minimize inefficiency, and quickly consolidate proceedings in a single forum.¹⁰⁵ Alternatively, courts could strictly enforce a "first to file" rule¹⁰⁶ or give preference to the plaintiff (and its counsel) with the largest economic interest in the case.¹⁰⁷

Each of these proposed solutions is, however, discretionary, and there is no guarantee that individual judges will coordinate their actions sufficiently to aggregate litigation in the courts of the chartering jurisdiction, or to enforce any other standard rule. Indeed, some judges may be offended by requests to defer to other courts,¹⁰⁸ or may insist that litigation proceed in their

and providing for removal of state actions to federal court where they could also be stayed, but not considering the probability that such legislation would be enacted).

¹⁰⁴ The comparative advantage that each state has in the interpretation and application of its state laws is discussed in detail in Section II.E., *infra*. If a foreign action is dismissed in favor of proceedings in the state of incorporation, the courts of the chartering state could permit the plaintiffs in the dismissed action to intervene in its proceedings. Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 38 (citing Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 31-32, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011)). *See also* Transcript of Proceedings dated August 9, 2012, at 10, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (granting motion to stay federal action in favor of substantially similar state court action, on the condition that plaintiff in the federal action be permitted to intervene in the state court action).

¹⁰⁵ *See, e.g.*, Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 38-39 (and cases collected at notes 177-183).

¹⁰⁶ *See, e.g.*, Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 14 & n.53. However, courts have criticized the first-filed rule on the ground that it encourages plaintiff counsel to race to the courthouse with sloppily prepared and factually questionable complaints. *Id.* at 14-15 n.53 (stating that "[p]erhaps it is time for the reversal of the traditional presumption in favor of first filers in the derivative suit context," and noting that one way to deal with prematurely filed complaints is to dismiss the complaint with prejudice as to the lead plaintiff (citing *King v. Verifone Holdings, Inc.*, 994 A.2d 354, 364 & n.34 (Del. Ch. 2010)), *rev'd*, 12 A.3d 1140 (Del. 2011); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 957 (Del. Ch. 2007) ("[T]he fact that a particular plaintiff filed the first complaint in a wave of hastily-crafted class action complaints attacking a just-announced transaction has no rational force in determining where a motion to enjoin that transaction should be heard."); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 608 (Del. Ch. 2005) ("It is exemplary of hastily-filed, first-day complaints that serve no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics"). *See also* Pyott, 2012 WL 2087205, at *18-*19 (discussing the "fast-filing problem"). Some commentators suggest that Delaware's shift away from a first-to-file rule may have contributed to the growth of intra-corporate litigation against Delaware firms in foreign forums. *See, e.g.*, Armour et al., *Delaware's Balancing Act*, *supra* note 81, at 32-38; Myers, *Fixing Multi-Forum Shareholder Litigation*, *supra* note 21, at 19.

¹⁰⁷ *See, e.g.*, *TCW Technology Partnership v. Intermedia Communications*, Nos. 18336, 18289, 18293, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000); *Hirt v. U.S. Timberlands Service*, Nos. 19575, 19577, 19578, 19584, 19592, 19608, 19613, 19632, 2002 WL 1558342, at *2 (Del. Ch. June 9, 2002); *Wiehl v. Eon. Labs*, No. 1116-N, 1117-N, 1119-N, 1125-N, 1134-N, 1136-N, 1139-N, 2005 WL 696764, at *3 (Del. Ch. May 22, 2005).

¹⁰⁸ *See* Brief of Special Counsel at 3, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL (Del. Ch. March 11, 2011); *see also* Transcript of Oral Argument at 87, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL

courts due to perceived public policy concerns or convenience factors, notwithstanding the pendency of related claims in the chartering jurisdiction.

Defense counsel can employ several techniques to advance one forum over another, including motion practice and tactical settlement negotiations, but these techniques are also hardly guaranteed to succeed, and some are more a response to the foreign forum problem than a solution to that problem.¹⁰⁹ In particular, defense counsel who are predominantly concerned with consolidating actions and less concerned with the locus of the litigation can file a “single forum” motion¹¹⁰ in each jurisdiction where plaintiffs have filed suit that “explicitly ask[s] the judges in each jurisdiction to confer with one another and agree upon where the case should go forward.”¹¹¹ Single forum motions have been filed in at least sixteen Delaware cases with eleven different parallel jurisdictions,¹¹² but are criticized because they divest defendants of tactical decision-making authority with respect to the forum.¹¹³ Single forum motions are, moreover, entirely ineffective in the increasing number of instances in which litigation is filed exclusively in a foreign forum.

Defense counsel interested in promoting one forum over another can file a motion to stay or dismiss the foreign proceeding in favor of the proceeding in the chartering state (assuming such an action exists). The grounds for such a motion can vary, but may include, under appropriate circumstances: (1) the fact that the charter state action was first-filed;¹¹⁴ (2) a *forum non conveniens* argument;¹¹⁵ (3) improper venue; (4) lack of subject matter jurisdiction; (5) failure to state a claim on which relief can be granted; (5) a request for abstention;¹¹⁶ or (6) the

(Del. Ch. Feb. 3, 2011)) (“And as all litigators know, and as I’ve mentioned before, it is never an easy task to say to a judge, ‘We don’t want to be in your courtroom.’ There is always concern about collateral consequences from that.”).

¹⁰⁹ Defendants also have the option of doing nothing, and implicitly consenting to fight multiple battles on multiple fronts. However, it would be rare in the extreme for any defendant to want to defend the same or similar claims in more than one forum for the obvious reason that it is inefficient and costly, and exposes the defendant to the risk of multiple inconsistent resolutions of identical claims. See Brief of Special Counsel at 3, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL (Del. Ch. March 11, 2011) (citing *Topps*, 924 A.2d at 953 (“Presented with the inefficient prospect of litigating identical issues in two courts simultaneously, the defendants now seek to have this court refrain from hearing the injunction motion in order to avoid an unseemly and wasteful duplication of effort”) and *In re Wyeth S’holders Litig.*, C.A. No. 4329-VCN, at 20-21 (Del. Ch. Apr. 7, 2009) (TRANSCRIPT) (“I understand [the] point that there may be some unnecessary duplication. I don’t think there’s a whole lot that I can do about that. That’s just the nature of the beast of having litigation going on in multiple venues at the same time.”)).

¹¹⁰ The “single forum” motion is also known as the “Savitt motion.” Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 17 & n.62.

¹¹¹ *Allion Healthcare*, 2011 WL 1135016, at *4 n.12. Chancellor Chandler noted shortly before he left the bench that it was his personal preference for parties engaged in a jurisdictional battle to file a single forum motion to resolve the dispute. See *id.* See also Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 17-18.

¹¹² See Theodore N. Mirvis, *Multi-Jurisdictional Issues in Stockholder/Deal Litigation*, at 22 (P.L.I. June 12, 2012), available at http://www.pli-online.org/programs/malit12/pdf/06-28-12_1600_Mirvis.pdf (citing C. Barr and Kathaleen St. J. McCormick, “*The Delaware Court of Chancery Endorses the Forum Motion as a Solution to Multi-Jurisdictional Litigation*” (Fall 2011)).

¹¹³ See Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 18, ns. 67 & 68.

¹¹⁴ See note 106, *supra*, for criticism of the first-to-file rule.

¹¹⁵ *Forum non conveniens* motions are discussed in greater detail in Section IV.A.3., *infra*.

¹¹⁶ Defendants can ask federal courts to abstain from hearing certain claims that are governed by state law and that are similar or identical to claims then pending in state court. For example, the *Colorado River* doctrine allows federal courts to abstain from exercising jurisdiction in favor of parallel state litigation where doing so would serve

general notion that a chartering state court is a more appropriate forum to address an important matter of the chartering state's corporation law than a foreign court.¹¹⁷ A drawback of a motion to stay or dismiss is that it risks "alienat[ing] potential fact-finders by openly fleeing one court for another."¹¹⁸ Motion practice can also be costly and unpredictable. On occasion, a court outside the chartering state will decide to resolve an intra-corporate dispute, or the chartering state court will stay its own proceeding in favor of a foreign proceeding.¹¹⁹ Where a motion to stay is employed, moreover, the problem may be deferred but not resolved because there is always a risk that the stayed proceeding will be resumed. Even if litigation in the chartering state proceeds and disposes of the litigation, in whole or in part, the parties will still need to engage in motion practice to determine the *res judicata* effect of the final judgment in the litigated action, and there is the risk that collateral estoppel will not be respected.¹²⁰

Furthermore, recent scholarship suggests that the traditional doctrines used to resolve multi-forum intra-corporate disputes, such as the first to file rule and *forum non conveniens*, "developed historically in ways that have not adequately accounted for the nature of representative litigation or the importance to the market of the consistent development of the law governing private commercial relationships."¹²¹ Those doctrines "are out-dated and often unprincipled tools for addressing the modern multi-forum litigation problem, and fail to provide what commercial actors need most: a simple authoritative answer that resolves their disputes and can guide future transactions."¹²²

the interests of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citation omitted). A district court in Northern California, relying on the *Colorado River* doctrine, recently stayed litigation against Chevron Corporation challenging a board-adopted forum selection provision in the corporation's bylaws, where similar proceedings were concurrently pending in Delaware state court. *See generally* Order Granting in Part and Denying in Part Defendants' Motion to Abstain or Stay dated August 9, 2012, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.). A more detailed discussion of the *Colorado River* doctrine can be found in a number of academic writings. *See, e.g.*, Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be With Us—Get Over It!!*, 36 CREIGHTON L. REV. 375 (2003).

Similarly, the Class Action Fairness Act of 2005 expanded the scope of federal court jurisdiction over class actions, but "expressly excepted 'those class actions that solely involve claims that relate to matters of corporate governance arising out of state law.'" Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 16 n.57 (quoting S. REP. NO. 109-14, at 45 (2005)). Arguments for abstention may prove ineffective in some instances, because federal courts have disagreed as to whether they have discretion to stay federal securities law claims. *Id.* at 16 & n.58.

¹¹⁷ *Id.* at 15 & n.56.

¹¹⁸ *See* Brief of Special Counsel at 3, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL (Del. Ch. March 11, 2011); *see also* Transcript of Oral Argument at 87, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) ("And as all litigators know, and as I've mentioned before, it is never an easy task to say to a judge, 'We don't want to be in your courtroom.' There is always concern about collateral consequences from that.").

¹¹⁹ Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 16-17 & ns. 59-61.

¹²⁰ *See, e.g.*, *Pyott*, 2012 WL 2087205, at *16-*18 (applying Delaware law and finding that a prior dismissal of a derivative action for failure to make pre-suit demand does not estop a different shareholder's subsequent derivative suit; alternatively, holding that collateral estoppel would not apply because the first, dismissed case had been filed by a "fast-filer" who rushed to the courthouse without making adequate pre-suit investigation and thus did not adequately represent the corporation's interests).

¹²¹ Leo E. Strine, Jr., Lawrence A. Hamermesh, Matthew C. Jennejohn, and Jeffrey M. Gorris, *Rationalizing Parallel Litigation in Corporate and Commercial Disputes*, at 4 (July 18, 2012) (copy on file with authors).

¹²² *Id.* at 5.

If defense counsel attempt to resolve competing claims by settling in a single jurisdiction and then seek to have that settlement preclude all other actions, several additional issues arise. Although this form of forum shopping by defendants may be appropriate, and although Delaware Chancery Court has recognized that “the forum shopping issue, in and of itself, is not necessarily problematic at all, and indeed may be ‘unquestionably proper or [] part of the zealous advocacy expected of attorneys,’ “ it “does highlight the potential, at least, for collusive settlements or ‘reverse auctions’— even if what defense counsel is ultimately doing is simply attempting to litigate its case in one jurisdiction only, wherever that may be.”¹²³ Second, in the event the defendants settle in one forum to the exclusion of others, “the unfavored forum's plaintiffs' lawyers then often flock to Delaware to oppose the settlement (and vice versa).”¹²⁴ Finally, “there are the post-settlement or post-litigation issues as well: class certification, approval of attorneys' fees and then dividing those attorneys' fees between the various plaintiffs' counsel,” all of which cost time and money to resolve.¹²⁵

Some commentators have suggested that state legislatures could enact legislation requiring that plaintiffs file intra-corporate claims in the defendant-corporation's chartering state.¹²⁶ A new statutory provision might require “ ‘that claims relating to (i) director or officer conduct (which includes fiduciary duties owed to stockholders), (ii) the interpretation or application of any section of this title, or (iii) any other matters arising out of the internal affairs of the corporation, be raised exclusively in the state of incorporation.’ ”¹²⁷ This type of provision would alleviate concerns about the enforceability of forum selection provisions and minimize costs stemming from multi-jurisdictional litigation. It is, however, far from clear that such a measure would be politically sustainable, and opponents would be certain to challenge its constitutionality: the internal affairs doctrine governs the substance of corporate governance but does not preclude foreign courts from applying the substantive law of the chartering state.¹²⁸ Further, legislation of this form, unless clearly structured as an “opt-out” provision around which corporations could contract, would not be tailored to the needs of each corporation's particular circumstance.

Finally, some commentators suggest that “where lawsuits are filed contemporaneously in parallel forums, the courts should give effect to the parties' expressed choice of law that is to govern the relationship – namely, the law of the chosen state of incorporation in the corporate context . . . by applying a rebuttable presumption that the litigation should proceed in the courts of that state.”¹²⁹ This presumption would funnel litigation into the chartering state if a lawsuit was currently pending there, and would “better calibrate the connection between legal

¹²³ *Allion*, 2011 WL 1135016, at *4 (quoting *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No. 5890–VCL (Report of Special Counsel) (Mar. 11, 2011), at 2)). *See also* Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 22-23 (noting that “ ‘it is readily understood that defendants can play multiple plaintiffs against each other to create the reverse-auction effect’ ” (quoting Transcript of Courtroom Status Conference at 19, *NightHawk*, C.A. No. 5890-VCL)).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 36.

¹²⁷ *Id.*

¹²⁸ *See, e.g., Baker v. Impact Holding, Inc.*, No. 4960-VCP, 2010 WL 1931032, at *2 (Del. Ch. May 13, 2010) (enforcing forum selection provision that mandated jurisdiction in a foreign forum, even where the dispute at issue related to the internal affairs of a Delaware corporation).

¹²⁹ *Id.* at 6.

institutions and the economic relationships they are meant to support.”¹³⁰ However, a rebuttable presumption could not prevent plaintiffs from filing litigation exclusively in a foreign forum.

E. The ICFS Solution

ICFS provisions rely on private ordering to attempt to cause intra-corporate litigation to be aggregated in the chartering state’s courts in a manner that protects stockholder rights.¹³¹ Unlike other approaches to the foreign forum problem, ICFS provisions address the challenge posed when litigation is filed exclusively in a foreign forum, and can eliminate much of the adverse consequences currently associated with intra-corporate foreign forum litigation. That is not to claim, however, that ICFS provisions are without their own costs, particularly in the early years of their adoption and enforcement while the judicial system is still working through the learning curve by developing precedent governing the implementation of these novel provisions.

Several neutral principles support the adoption and enforcement of ICFS provisions. Courts and agencies commonly certify questions regarding the interpretation of a foreign state’s laws to that state’s courts for resolution. This practice arises from the simple observation that each state has a comparative advantage in the interpretation of its own state’s laws.¹³² Precisely the same rationale supports the adoption of ICFS provisions: they act as *de facto* certification provisions that automatically refer matters governed by laws of the chartering state to the courts of the chartering state.

¹³⁰ Strine, et al., *Rationalizing Parallel Litigation in Corporate and Commercial Disputes*, *supra* note 122, at 5-6.

¹³¹ See, e.g., Micheletti & Parker, *Multi-Jurisdictional Litigation*, *supra* note 104, at 35 (“Proponents of private ordering strongly favor this approach because it would provide each company, on a company-by-company basis, the ability to decide whether to adopt such a provision, and would not constitute a ‘one-size-fits-all’ solution”).

¹³² See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (“Certification procedure. . . allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response”); *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 398 (1988) (certifying two questions to the Virginia Supreme Court); Beth A. Hardy, Note, *Federal Courts-Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217, 219 (1990) (“certification presents the best way to accommodate a reasonable balance between principles of federalism and the expeditious relief required when constitutionally protected rights are potentially at stake”); 17A C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4248, n.30 (3d ed. 2011) (identifying the “many” states that have adopted certification procedures). Also, when the Securities and Exchange Commission was faced with a question of Delaware law it turned for resolution to the Delaware courts, and not to the courts of New Jersey, Pennsylvania, Maryland, or of any other state. See, e.g., S.B. 62, 144th Gen. Assem., Reg. Sess. (Del. 2007) (amending the Delaware State Constitution to permit the Supreme Court of Delaware to hear and determine questions of law certified to it by (in addition to the tribunals already specified therein) the United States Securities and Exchange Commission); *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008) (resolving two questions of Delaware law certified to the Delaware Supreme Court by the S.E.C.). Similarly, when the Ninth Circuit was faced with a question that arose under California law, it turned to the California courts, and not to Chancery in Delaware. See, e.g., *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) (certifying question to the California Supreme Court). This approach is entirely consistent with Chancellor Strine’s observation that the equilibrium solution for forum battles is to have each state “stay in its lane” and exercise jurisdiction only over cases that call upon the court to interpret the corporate laws of its own jurisdiction, absent special circumstances. See, e.g., Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 685 (2005) (expressing the hope that the federal government would leave internal corporate governance to Delaware and “stay in its lane”).

Courts rely on certification practice even when the public interest in the consistent resolution of disputes is not as strongly expressed as it is in the context of the “internal affairs doctrine,” which requires that disputes regarding a corporation’s internal affairs¹³³ be governed by the laws of the state of incorporation.¹³⁴ This rule of law is intended, among other matters, to ensure certainty, predictability and uniformity of result, protect the justified expectations of the parties, implement the relevant policies of the state with the dominant interest in the decision of the particular issue, and minimize disputes regarding the governing law.¹³⁵ In the case of

¹³³ *McDermott, Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987) (“Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders”). See also RESTATEMENT (SECOND) OF CONFLICTS § 302 cmt. a (1971) (defining internal affairs as “the relations *inter se* of the corporation, its shareholders, directors, officers or agents”). Internal affairs include: steps taken in the course of the original incorporation, the election or appointment of directors and officers, the adoption of bylaws, the issuance of corporate shares, preemptive rights, the holding of directors' and shareholders' meetings, methods of voting including any requirement for cumulative voting, shareholders' rights to examine corporate records, charter and bylaw amendments, mergers, consolidations and reorganizations and the reclassification of shares. *Id.* Matters which may also affect the interests of the corporation's creditors include the issuance of bonds, the declaration and payment of dividends, loans by the corporation to directors, officers and shareholders, and the purchase and redemption by the corporation of outstanding shares of its own stock. *Id.*

¹³⁴ As the United States Supreme Court noted as early as 1933: “It has long been settled doctrine that a court – state or federal – sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile.” *Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 130 (1933). See also *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (“The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands”); *CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69, 89 (1987) (“No principle of corporation law is more firmly established than a state's authority to regulate domestic corporations”); *McDermott*, 531 A.2d at 215,216 (“The internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs. . . A review of cases over the last twenty-six years, however, finds that in all but a few, the law of the state of incorporation was applied without any discussion”); *Topps*, 924 A.2d at 958 (“As the United States Supreme Court, the Delaware Supreme Court, and the New York Court of Appeals all recognize, a state has a compelling interest in ensuring the consistent interpretation and enforcement of its corporation law. . . The authority of a state to regulate the internal affairs of the corporations it charters is one of the oldest and most firmly established doctrines in American corporation law”); RESTATEMENT (SECOND) OF CONFLICTS § 302; Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 39 (2006) (“In its modern form, the internal affairs doctrine is a choice of law rule, widely accepted among states, that selects the law of the incorporating state to govern disputes over the corporation's internal affairs”).

In rare instances, some states may refuse to follow the internal affairs doctrine. *McDermott, supra*, 531 A.2d at 217-18 (holding that application of the internal affairs doctrine is “mandated by constitutional principles, except in the rarest situations”). In addition, some states impose their own local requirements on certain foreign corporations. See, e.g., Cal. Corp. Code § 2115 (2001); N.Y. Bus. Corp. Law §§ 1317-1320 (2002). The California quasi-corporation code provision, Section 2115, has, however been challenged as a potential violation of the internal affairs doctrine. See *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1116 (Del. 2005) (finding that Section 2115 violated the United States Constitution and that the internal affairs of Delaware corporations are to “be adjudicated exclusively” in accordance with Delaware law); *Lidow v. Superior Court*, 141 Cal. Rptr. 3d 729, 737 (Cal. Ct. App. 2012) (stating in *dicta* that matters of internal corporate governance fall within a corporation's internal affairs, and should be adjudicated exclusively under the laws of the chartering state).

¹³⁵ See *McDermott*, 531 A.2d at 216 (noting policy behind the internal affairs doctrine is to “serve[] the vital need for a single, constant and equal law to avoid the fragmentation of continuing, interdependent internal relationships”; “validate[] the autonomy of the parties in a subject where the underlying policy of the law is enabling”; and “facilitate[] planning and enhance[] predictability” (quoting P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L. J. 1, 98 (1985)) (internal quotation marks omitted); RESTATEMENT (SECOND) OF

Delaware-chartered corporations, the incentive to have intra-corporate disputes resolved by Delaware courts is arguably even greater because of the high regard in which Delaware's courts are held¹³⁶ and the efficiency with which they resolve complex business disputes.¹³⁷ Even the proxy advisory firm ISS, which frequently opposes ICFS provisions, recognizes that “[t]here is merit to the notion that Delaware judges should be the ones to apply Delaware law to Delaware companies, given their expertise and intimate familiarity with the state’s body of corporate law.”¹³⁸

Courts thus recognize that foreign forum litigation undermines the policy goals of the internal affairs doctrine.¹³⁹ They accordingly defer to foreign jurisdictions if the action implicates the internal affairs of a foreign corporation,¹⁴⁰ and refuse to defer to foreign filed

CONFLICTS § 302 cmt. b; Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, *supra* note 135, at 40-41.

¹³⁶ The expertise of Delaware's courts is the subject of a great deal of commentary. *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1480 (2009) ("Delaware courts have been applauded for their high degree of competence and for the integrity of the state's judiciary."); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1362, 1385 (2000) (collecting references; noting the Delaware Court of Chancery's expertise and "long history of able judges."); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 277 (1985); Armour, *Is Delaware Losing Its Cases?*, *supra* note 38, at 2. *See also* U.S. Chamber of Commerce, *State Liability Systems Survey* (2012), available at http://www.uschamber.com/sites/default/files/reports/lr_FinalWeb_PDF.pdf (ranking Delaware's court system first among all 50 states for every year from 2002–2012, considering factors such as judges' impartiality and competence, overall treatment of tort and contract claims, and handling of class action lawsuits).

¹³⁷ *See State Liability Systems Survey*, *supra* note 136, at 18-19 (ranking Delaware third in timeliness of summary judgment or dismissal and second in the discovery process); *In re Compellent Techs., Inc., S'holder Litig.*, C.A. No 6084-VCL, at *15 (Del. Ch. Jan. 13, 2011) (Laster, V.C.) (transcript) ("Expedited deal litigation, in particular, is something where we develop substantial expertise"); William H. Rehnquist, Chief Justice of the United States, *The Prominence of the Delaware Court of Chancery in the State- Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) ("Corporate lawyers across the United States have praised the expertise of the Court of Chancery . . .").

¹³⁸ *See Mirvis, Multi-Jurisdictional Issues in Stockholder/Deal Litigation*, *supra* note 113, at 28 (quoting ISS Governance, *2012 US Corporate Governance Policy Updates*, available at http://www.issgovernance.com/files/ISS_2012ExecutiveSummary20111117.pdf).

¹³⁹ *Topp*, 924 A.2d at 958-59 ("[v]enerable authority recognizes that a chartering state's interest in promoting an efficient and predictable corporation law can be undercut if other states do not show comity by deferring to the courts of the chartering state when a case is presented that involves the application of the chartering state's corporation law. . . The important coherence-generating benefits created by our judiciary's handling of corporate disputes are endangered if our state's compelling public policy interest in deciding these disputes is not recognized and decisions are instead routinely made by a variety of state and federal judges who only deal episodically with our law.")

¹⁴⁰ *Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 451-52 (Del. Ch. 2007) (recognizing that Delaware has an "important interest in affording comity to the courts of other jurisdictions when a dispute arises under foreign business law" and granting motion to stay Delaware action in favor of prior-pending German action, where action required application of German law); Order Granting in Part and Denying in Part Defendants' Motion to Abstain or Stay dated August 9, 2012, at 7, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (noting that "Delaware judges are more familiar with Delaware law than judges in California," and that "[g]iven the high likelihood that this entire case is governed by Delaware law, there is wisdom in letting Delaware judges decide these issues"); Transcript of Proceedings dated August 9, 2012, at 12, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) ("I think the Delaware judge is in the best position to say whether or not this flies under Delaware law, or not").

actions if the dispute concerns the internal affairs of a domestically chartered corporation, unless substantial litigation has already occurred in the foreign venue.¹⁴¹ ICFS provisions that designate the chartering jurisdiction as the forum for the resolution of intra-corporate disputes, as is today the dominant case,¹⁴² are thus a natural extension of the internal affairs doctrine and certification practice, and promote precisely the same judicial objectives.

On a more granular level, ICFS provisions generate benefits that are difficult to achieve through other docket control mechanisms. They can reduce litigation costs by diminishing the incentive for plaintiff counsel to file multiple duplicative lawsuits in different jurisdictions,¹⁴³ though ICFS provisions cannot preclude plaintiffs from filing such actions.¹⁴⁴ By aggregating claims in the chartering state's courts they eliminate the possibility of the collusive auction that can generate "sweetheart" settlements,¹⁴⁵ eliminate all concern regarding the collateral estoppel effects of foreign court judgments, obviate the need for courts to look over each others' shoulders to second-guess the *bona fides* of individual settlements, and eliminate the risk of inconsistent outcomes.¹⁴⁶ Further, to the extent that ICFS provisions ameliorate the agency problems that arise between plaintiff counsel and the stockholders as a group, they reduce the incentives to engage in fee competition through the filing of multiple actions in multiple forums and help focus plaintiff counsel's energies on litigating the merits of the underlying claim, rather than on procedural maneuvers designed to maximize individual firms' claims for fees.

Although ICFS provisions can be adopted with relatively little cost to a corporation, they are not costless, particularly in the early phase of litigation over the provisions' validity and enforcement. Mechanically, the costs of inserting ICFS provisions into charters or bylaws prior to an IPO are quite low. Once a corporation is publicly traded, the mechanical costs of adopting an ICFS provision as a bylaw without prior stockholder approval are also quite low, and the

¹⁴¹ See, e.g., Transcript of proceedings dated Nov. 7, 2011, *Parcell v. Southwall Technologies, Inc., et al.*, No. 7003-VCL (Del. Ch. filed Nov. 1, 2011); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 118 (Del. Ch. 2009) (denying motion to stay Delaware action in favor of concurrently filed federal action pending in New York where the action "raises important issues regarding the standards governing directors and officers of Delaware corporations, and Delaware has an ongoing interest in applying our law to director conduct in the context of current market conditions"); *Topps*, 924 A.2d at 958.

¹⁴² Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.F & Table 7 (2012).

¹⁴³ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991) ("[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended....")

¹⁴⁴ ICFS provisions could exacerbate the problem of "fast-filed" complaints by incentivizing multiple groups of plaintiff counsel to compete to file the first complaint in the designated jurisdiction.

¹⁴⁵ The risk of collusive "sweetheart" settlements has been well-documented in the context of multi-jurisdictional class actions. See notes 86 and 123, *supra*.

¹⁴⁶ In granting a motion to stay the Chevron bylaw litigation pending in federal court in favor of the parallel Delaware state court action, the district court noted "special concerns about piecemeal litigation because the Delaware action is slightly procedurally advanced, it contains substantially similar parties and identical underlying issues – which could possibly lead to inconsistent results, and different results could potentially affect thousands of individuals due to the class nature of the Delaware action." See Order Granting in Part and Denying in Part Defendants' Motion to Abstain or Stay dated August 9, 2012, at 6, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.). See also *Krieger v. Atheros Commc'ns, Inc.*, 776 F. Supp. 2d 1053, 1062 (N.D. Cal. 2011) (staying plaintiff's state-law class action claims where "permitting the class claims to proceed in parallel could waste significant judicial resources and create a risk of conflicting results that could impact thousands of shareholders").

marginal costs of seeking shareholder approval for a bylaw or charter ICFS provisions can also be quite low if the approval is sought as an “add on” through a proxy solicitation that would occur in any event.

But the true costs of adopting these provisions arise in the context of the litigation that occurs over their validity and enforcement, and the opposition likely to arise from shareholder advocacy groups. As is already apparent, proxy advisory groups tend to oppose ICFS provisions,¹⁴⁷ and firms considering their adoption should factor into the calculus the additional costs that are likely to arise because of these firms’ opposition¹⁴⁸ and opposition from

¹⁴⁷ Both Glass Lewis and CII currently recommend voting “against” proposals that seek to establish an exclusive forum. *See, e.g.*, Council of Institutional Investors, Corporate Governance Policies, at 1.9, available at [http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20\(2\).pdf](http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20(2).pdf) (accessed August 20, 2012) (“U.S. companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum”); Glass Lewis & Co., Proxy Paper Guidelines, 2012 Proxy Season, at 34, available at <http://www.summitinvestmentpartners.com/PDFs/ProxyVotingPolicy1.pdf> (accessed August 20, 2012) (“Glass Lewis believes that charter or bylaw provisions limiting a shareholder’s choice of legal venue are not in the best interests of shareholders. . . For this reason, we recommend that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision”). Glass Lewis also recommends that shareholders vote against a governance committee chair (or the chairman of the board, if there is no committee) if, during the prior year, the board adopted an exclusive forum provision without shareholder consent or if the board is currently seeking shareholder approval of a forum selection clause pursuant to a bundled bylaw amendment rather than as a separate proposal. Glass Lewis & Co., Proxy Paper Guidelines, 2012 Proxy Season, at 11, 16-17, available at <http://www.summitinvestmentpartners.com/PDFs/ProxyVotingPolicy1.pdf> (accessed August 20, 2012). ISS previously recommended voting against exclusive venue proposals unless the company had in place specified best-practices governance features. *See, e.g.*, ISS, U.S. Corporate Governance Policy (2012 Updates), at 13, available at http://www.issgovernance.com/files/ISS_2012US_Updates20111117.pdf (accessed August 20, 2012). However, in 2012 ISS modified its position and now recommends voting case by case on ICFS provisions, taking into account whether the company has been materially harmed by shareholder litigation outside its jurisdiction of incorporation based on disclosures in the company’s proxy statement, and whether the company has in place the following good governance features: (1) an annually elected board;(2) a majority vote standard in uncontested director elections; and (3) the absence of a poison pill, unless the pill was approved by shareholders. *Id.* Notwithstanding their revised policy, during the 2012 proxy season ISS recommended “against” all of the management proposals to adopt forum selection provisions and “for” the four shareholder proposals that sought to repeal forum-selection bylaws already in place. *See* Frank Aquila and Anna Kripitz, “Forum-Selection Provisions in Delaware” (posted August 27, 2012), available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202568858164&ForumSelection_Provisions_in_Delaware.

¹⁴⁸ It is valuable to observe in this regard that none of the materials generated by the proxy advisory firms in opposition to the ICFS provisions accurately characterize the operation of ICFS provisions or discuss the reasons, if any, why enforcement proceedings before foreign forums will fail adequately to protect stockholder interests. The proxy advisory firms also fail to describe or to consider that the current regime operates more to protect the interests of plaintiff counsel than of stockholders as a distinct constituency. *See, e.g.*, Council of Institutional Investors, Corporate Governance Policies, at 1.9, available at <http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20%282%29.pdf> (accessed August 20, 2012) (stating, without any additional discussion, that “U.S. companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum”); ISS U.S. Corporate Governance Policies, 2012 Updates, at 13, available at http://www.issgovernance.com/files/ISS_2012US_Updates20111117.pdf (accessed August 20, 2012) (recommending, without any reference to the judicial framework for evaluating ICFS provisions, a “case-by-case” vote on exclusive forum provisions, taking into account whether the company has been materially harmed by shareholder litigation outside its jurisdiction of incorporation, and whether the company has the following good governance features: (1) an annually elected board;(2) a majority vote standard in uncontested director elections; and (3) the absence of a poison pill, unless the pill was approved by shareholders); Glass Lewis & Co., Proxy Paper

stockholders.¹⁴⁹ The strength of this opposition may, however, decline over time as stockholders become better informed regarding the operation of ICFS provisions and the benefits that can accrue to stockholders as a consequence of the provisions' enforcement become more apparent.¹⁵⁰

In addition, during the initial period of litigation over the validity and enforcement of ICFS provisions, plaintiff counsel will likely challenge these provisions quite aggressively because they threaten plaintiff law firm economics, regardless of their effects on stockholders.¹⁵¹ Indeed, the recent challenges to ICFS provisions mounted in Delaware¹⁵² are a clear example of

Guidelines, 2012 Proxy Season, at 34, available at <http://www.summitinvestmentpartners.com/PDFs/ProxyVotingPolicy1.pdf> (accessed August 20, 2012) (stating its belief that ICFS provisions are “not in the best interests of shareholders” and will discourage the use of shareholder derivative claims, and recommending a vote against such provisions).

¹⁴⁹ See note 4, *supra* and note 152 and Section V, *infra* for a discussion of current and recent shareholder litigation challenging ICFS provisions. See also Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.G. & Table 8 (discussing results of shareholder votes on director-supported proposals to adopt ICFS provisions during the 2011 and 2012 proxy seasons).

¹⁵⁰ Stockholders may already be discovering the benefits of ICFS provisions. In May 2012, shareholders at Chevron Corp. defeated a proposal to repeal a board-enacted exclusive forum bylaw provision, with approximately 61 percent of votes cast voting against the proposal. See “Chevron Highlights 2011 Performance, Corporate Responsibility and Future Growth at Annual Meeting of Stockholders” (posted May 30, 2012), available at <http://www.bloomberg.com/article/2012-05-30/a08wHJ35ocS4.html>. On June 8, 2012, shareholder at United Rentals voted to reject a similar proposal, with 64 percent of votes cast voting against the proposal. See United Rentals, Inc., Current Report on Form 8-K filed June 8, 2012, at 4, available at <http://www.sec.gov/Archives/edgar/data/1067701/000119312512265068/d364614d8k.htm>. To put these numbers in context, approximately three out of five shares voted on the shareholder proposals at these two issuers were cast in favor of retaining the ICFS bylaw provisions adopted by the board.

¹⁵¹ The existence of legal transition costs is a well-known phenomenon, and boards can legitimately address the presence of these costs when deciding whether and how to adopt an ICFS provision. See, e.g., Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. Rev. 789 (2002). Commentators have applied these transition cost concerns to the specific problems posed by ICFS provisions. See, e.g., David Hernand & Thomas Baxter, *Under Fire: Continued Attacks on Exclusive Forum Provisions May Slow Adoption*, Wall St. Lawyer, Vol. 16, Issue 4, April 2012, at 1.

¹⁵² In February 2012, shareholders filed twelve class action lawsuits in Delaware Chancery Court challenging ICFS bylaw provisions adopted by directors without shareholder consent. Those lawsuits are *Boilermakers Local 154 Retirement Fund v. Priceline.com*, No. 7216; *Boilermakers Local 154 Retirement Fund, et al. v. Danaher Corp.*, No. 7218; *Boilermakers Local 154 Retirement Fund, et al. v. Curtiss-Wright Corp.*, No. 7219; *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corp.*, No. 7220; *Sutton v. Autonation, Inc.*, No. 7221; *Singh v. Navistar Int'l Corp.*, No. 7222; *Stead v. Franklin Resources, Inc.*, No. 7223; *City of Sunrise General Employees' Pension Plan v. Superior Energy Services, Inc.*, No. 7224; *Laborers' Local No. 1174 Pension Fund v. SPX Corp.*, No. 7225; *ICLUB Investment Partnership v. Fedex Corporation*, No. 7238; *Neighbors v. Air Products & Chemicals, Inc.*, No. 7240; *Schellman v. Jack In The Box Inc.*, No. 7274.

Ten of the twelve defendants - Air Products and Chemicals, AutoNation, Curtiss-Wright, Danaher, Franklin Resources, Jack in the Box, Navistar International, Priceline.com, SPX, and Superior Energy Services — voluntarily removed the forum selection provisions from their bylaws and subsequently sought and obtained dismissal of the complaints on mootness grounds. See Katie Wagner, “Exclusive-Forum Provisions Spur a Backlash,” at 10 (Agenda May 7, 2012). Chevron and FedEx Corp. continue to litigate the actions in Delaware Chancery Court.

In addition, four companies — Calix, Cameron International, Fairchild Semiconductor International and Hittite Microwave Corporation — were sued for simply *proposing* to adopt exclusive-forum provisions in their charters or bylaws. These four lawsuits are *Rebhun v. Calix, Inc., et al.*, No. 7444 (Del. Ch. Ct. filed April 19, 2012); *Everhard v. Cameron International Corporation*, No. 7415 (Del. Ch. Ct. filed April 11, 2012); *Jones v. Fairchild Semiconductor International, Inc., et al.*, No. 7408 (Del. Ch. Ct. filed April 9, 2012); and *City of Sunrise Firefighters Retirement Fund v. Hittite Microwave Corp et al.*, No. 7426 (Del. Ch. Ct. filed April 13, 2012).

this phenomenon. These litigation cost risks, however, may well be transitional: once the courts establish that ICFS provisions are legally adopted and can be efficiently enforced, litigation costs may decline significantly, although situations may still arise where foreign forums refuse to enforce ICFS provisions even in situations where they would seem clearly enforceable.¹⁵³

F. The Effects of the Pending Delaware Litigation and Other Recent Developments

The data indicate that the pending Delaware litigation has influenced the rate at which ICFS provisions are being adopted.¹⁵⁴ Table 1 describes ICFS adoptions by corporations as

Calix, Fairchild and Hittite withdrew the proposals in advance of an impending shareholder vote, and the lawsuits were subsequently dismissed as moot. *See, e.g.,* Stipulation and Order of Dismissal, *Everhard v. Cameron International Corporation*, No. 7415 (Del. Ch. Ct. filed May 21, 2012). *See also* Katie Wagner, “Exclusive-Forum Provisions Spur a Backlash,” at 1 (Agenda May 7, 2012); Calix, Inc., Definitive Additional Materials (Schedule 14A) (April 24, 2012), available at <http://www.sec.gov/Archives/edgar/data/1406666/000119312512178684/d338925ddefa14a.htm>; Fairchild Semiconductor International, Inc., Definitive Additional Materials (Schedule 14A) (April 12, 2012), available at <http://sec.gov/Archives/edgar/data/1036960/000119312512160035/d333115ddefa14a.htm>; *compare* Hittite Microwave Corp., Proxy Statement at 1 (Schedule 14A) (April 6, 2012), available at <http://www.sec.gov/Archives/edgar/data/1130866/000104746912004014/0001047469-12-004014-index.htm>, with Hittite Microwave Corp., Proxy Statement at 1 (Schedule 14A) (April 18, 2012), available at <http://www.sec.gov/Archives/edgar/data/1130866/000104746912004441/a2208849zdef14a.htm>.

Cameron modified its ICFS proposal to address concerns raised in the litigation, and submitted its modified proposal to a shareholder vote on May 11, 2012. *See* Cameron International Corp., Proxy Statement at 2 (Schedule 14A) (April 18, 2012), available at <http://www.sec.gov/Archives/edgar/data/941548/000104746912004443/a2208934zdefa14a.htm>. Shareholders rejected the proposal, with 45.9 percent of shares cast voting in favor, and 54.1 percent of shares cast voting against. *See* Cameron International Corp., Current Report at Item 5.07(5) (Form 8-K) (May 15, 2012), available at http://sec.gov/Archives/edgar/data/941548/000110465912037393/a12-12198_18k.htm.

¹⁵³ *See* Section V, *infra* for a discussion of the decision in *Galaviz v. Berg* refusing to enforce an ICFS provision.

¹⁵⁴ The litigation has also influenced the content of ICFS provisions. To date, the vast majority of forum selection provisions adopted in corporate charters or bylaws copy the language that first appeared in the Netsuite IPO. *See* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Provisions*, *supra* note 1, at II.E. & Table 6. Corporations that follow the Netsuite model have adopted forum provisions with language similar to the following: “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 DGCL, 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 Article VI, Section 8.” Netsuite, Inc., Amended and Restated Certificate of Incorporation at 3 (Form S-1/A) (Nov. 29, 2007). The Netsuite precedent is clearly dominant and appeared in almost 92 percent of the corporate charter and bylaw provisions adopted as of June 30, 2011. *See* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Provisions*, *supra* note 1, at II.E. & Table 6.

Like the majority of corporate entities with ICFS provisions, Chevron Corporation originally adopted an exclusive forum bylaw provision that followed the language used in the Netsuite IPO. *See* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Provisions*, *supra* note 1, at Data Appendix Table A-1, row 38. However, on March 28, 2012, Chevron amended this language in response to a class action lawsuit challenging the validity of its exclusive forum bylaw. *See* Verified Complaint at ¶ 1, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220, 2012 WL 485390 (Del. Ch. Feb. 6, 2012); *see also* note 152, *supra*. The new bylaw provision reads as follows: “Unless the Corporation consents in writing to the selection of an alternative forum, the sole and

distinct from LLCs and LLPs, and further disaggregates the corporate adoptions by separately counting the presence of ICFS provisions in charters and bylaws, and counting the instances in which ICFS provisions have been withdrawn, typically because of the pendency of litigation. The counts are also presented separately for four distinct time periods: (1) the period beginning at the inception of the database in October of 1991 through to the date of issuance of the Delaware Chancery Court's decision in *Revlon* observing, in *dicta*, that corporations might adopt ICFS provisions in their corporate charters; (2) the period between the *Revlon* decision and the date on which Chevron Corporation publicly announced that its board had amended Chevron's bylaws to include an ICFS provision without prior stockholder approval; (3) the period following the Chevron announcement but preceding the filing of the Delaware complaints challenging the validity of ICFS provisions; and (4) the period from the filing of the Delaware complaints through September 30, 2012, the cut-off date for this article's analysis. Table 2 presents the same data normalized to show monthly adoption rates.

As is immediately apparent from Table 2, monthly adoption rates of ICFS provisions in corporate charters have been monotonically increasing over the entire study period, and even increased from a rate of 6.3 adoptions per month post-Chevron and pre-Delaware complaints, to 9.3 per month after the filing of the Delaware complaints. The adoption rate among IPO issuers also continues to be robust. Of the 45 U.S. venture-backed companies involved in the largest IPOs measured by deal size from July 2011 through June 2012, 21 (46.7%) included exclusive forum provisions in their governing documents. Of these 21 companies, 18 (85.7%) included an exclusive forum provision in their certificate of incorporation, 2 (9.5%) included an exclusive

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 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 Article VII." See By-Laws of Chevron Corporation at Article VII, attached as Exhibit 3.1 to Current Report (Form 8-K) (Mar. 29, 2012) (emphasis added).

Given Chevron's size, prominence, and the impact of its initial decision to adopt a forum selection bylaw provision, *see* Tables 1 & 2 *infra*, the language of its amended bylaw may influence the content of future forum selection provisions, and may serve as a template for further modifications of the Netsuite language. In fact, a review of recently adopted ICFS provisions reveals that a number of other companies have adopted a modified version of the Netsuite precedent that, like the amended Chevron bylaw, accounts for the jurisdictional limitations of Delaware state courts and clarifies that the ICFS provision will not apply if Delaware courts cannot obtain personal jurisdiction over an indispensable party named as a defendant. *See, e.g.*, Phillips 66, Amended and Restated Certificate of Incorporation, at 5, attached as Exhibit 3.1 to Current Report (Form 8-k) (May 1, 2012) (forum selection provision requires that intra-corporate disputes be filed in Delaware Chancery Court, but provides that "if and only if the Court of Chancery of the State of Delaware dismisses any such action for lack of subject matter jurisdiction, such action may be brought in another court sitting in the State of Delaware."); Reorganized Syms Corp., Certificate of Incorporation at C-1-13, attached as Exhibit C to Current Report (Form 8-K) (Sept. 6, 2012) (forum selection provision designating Delaware Chancery Court as the forum for the resolution of intra-corporate disputes is "subject to said Court of Chancery of the State of Delaware having personal jurisdiction over the indispensable parties named as defendants therein.").

forum provision in their bylaws, and 1 (4.8%) included an exclusive forum provision in both its certificate of incorporation and bylaws.¹⁵⁵

In contrast, the rate of bylaw adoption has fallen off a cliff. From an adoption rate (not including the effects of withdrawals of ICFS provisions) of 4.1 ICFS bylaw provisions per month in the period following Chevron but preceding the Delaware complaints, the bylaw adoption rate has declined to 1.7 per month since the filing of the Delaware complaints. The same data calculated to include the effect of withdrawals shows a decline from 4.1 adoptions per month to 0 adoptions per month. Evidently, even without a ruling on the facial legality of ICFS provisions, the simple pendency of the litigation has had a chilling effect on board behavior. Put another way, litigation and the threat of litigation here clearly matters.

¹⁵⁵ See Wilson Sonsini Goodrich & Rosati, http://www.wsgr.com/publications/PDFSearch/IPO-Survey-2012_web.pdf. All 21 companies with forum selection provisions in their organic document were chartered in Delaware and designated Delaware as the jurisdiction for the resolution of intra-corporate disputes. *Id.*

Table 1

**Incidence of Intra-Corporate Forum Selection Provisions:
Pre-Revlon, Revlon-Chevron, Chevron-Delaware Complaints, Post-Delaware Complaints
October 7, 1991 to September 30, 2012¹⁵⁶**

	PRE-REVLON (10/07/91 - 3/15/10)	REVLON - CHEVRON (3/16/10 - 9/29/10)	CHEVRON- DELAWARE COMPLAINTS (9/30/10 - 2/06/12)	POST DELAWARE COMPLAINTS (2/07/12- 9/30/12)	TOTAL
CORPORATIONS NET	8	19	171	65	263
CHARTERS NET	3	14	104	65	186
CHARTERS ADDED	3	14	105	67	189
CHARTERS DELETED	0	0	<1>	<2>	<3>
BYLAWS NET	5	5	67	0	77
BYLAWS ADDED	5	5	68	12	90
BYLAWS DELETED	0	0	<1>	<12>	<13>
LLCS AND LLPS	8	6	14	9	37
TOTAL	16	25	185	74	300

¹⁵⁶ To identify organic documents of publicly traded entities containing intra-corporate forum selection provisions, we searched the Morningstar Document Research database (“Morningstar”), an archive of SEC filings dating to January 1, 1994. The search spanned the seventeen and one half year period from January 1, 1994, through September 30, 2012, the sample cut-off date for this article’s analysis. This protocol is virtually identical to the one applied in Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at Data Appendix, but with a more recent cut-off date.

The exhibits to SEC filings and the bodies of the main filings were searched separately using Morningstar’s “Data Search – Exhibits” and “Data Search – Filings Search” functions. On the “Data Search – Exhibits” page, we entered the terms (i) “(exclusive! or sole!) w/8 (court or forum or jurisdiction)” in the “Exhibit Body Word Search” field, and (ii) “bylaws or by-laws or incorporation or operating or LLC or LP or limited” in the “Exhibit Title Word Search” field. We then manually reviewed each of the search results to identify publicly traded entities with forum selection provisions in their organic documents. We excluded from our data (i) all non-organic documents, (ii) organic documents of private firms, (iii) organic corporate documents whose forum selection provisions do not apply to intra-corporate disputes, and (iv) duplicate documents. We also excluded trust agreements and their corresponding investment funds from our data and analysis.

We also conducted a separate full-text search of the body of SEC filings to capture instances where a filing refers to, but does not attach as an exhibit, an organic document with forum selection provisions. On the “Data Search – Filing Search” page, we limited our search to Forms S-1, S-1/A, 10-K, 10-K/A, 10-Q, 10-Q/A, 8-K and 8-K/A that included the following text search query: “(exclusive! or sole! or select!) w/8 (court or forum or jurisdiction).”

Table 2

**Intra-Corporate Forum Selection Clauses: Monthly Adoption Rates
Pre-Revlon, Revlon-Chevron, Chevron-Delaware Complaints, Post-Delaware Complaints
October 7, 1991 to September 30, 2012¹⁵⁷**

	PRE-REVLON (10/07/91 – 3/15/10) 221.5 MONTHS	REVLON – CHEVRON (3/16/10 – 9/29/10) 6.5 MONTHS	CHEVRON- DELAWARE COMPLAINTS (9/30/10 – 2/06/12) 16.5 MONTHS	POST DELAWARE COMPLAINTS (2/07/12- 9/30/12) 7 MONTHS	TOTAL 251.5 MONTHS
CORPORATIONS NET	0.036	2.923	10.364	9.286	1.046
CHARTERS NET	0.014	2.154	6.303	9.286	0.740
CHARTERS ADDED	0.014	2.154	6.364	9.571	0.751
CHARTERS DELETED	0	0	<0.061>	<0.286>	<0.012>
BYLAWS NET	0.023	0.769	4.061	0.000	0.306
BYLAWS ADDED	0.023	0.769	4.121	1.714	0.358
BYLAWS DELETED	0	0	<0.061>	<1.714>	<0.052>
LLCS AND LLPS	0.036	0.923	0.848	1.286	0.147
TOTAL	0.072	3.846	11.212	10.571	1.193

¹⁵⁷ See note 156, *supra*.

III. The Validity of ICFS Provisions in Charters and Bylaws

The validity of an ICFS provision, when adopted, whether incorporated into the charter or bylaws, is informed by the subsequent judicial scrutiny that foreign courts apply if later called upon to enforce that provision. Only at that later stage in the litigation can courts have access to the full set of facts and circumstances necessary to judge the legality and fairness of the ICFS provision as it is to be applied. The validity of an ICFS provision as adopted and as later enforced are therefore co-determined. Courts assessing a provision's validity as of its adoption (*i.e.*, whether it is valid on its face) must consider the subsequent judicial scrutiny that is unavoidable if the corporation seeks to enforce the provision. By the same token, a court later ruling on the enforcement of the provision will legitimately look back to consider its validity as of its time of adoption. After all, if a provision is invalid as adopted it cannot later be enforced.

Delaware law presumes that a bylaw, when adopted, is valid.¹⁵⁸ In the event of a later challenge to the application of the bylaw the court will try to construe the bylaw “in a manner consistent with the laws.”¹⁵⁹ Delaware’s courts “exercise caution [before] invalidating corporate acts based on hypothetical injuries.”¹⁶⁰ Indeed, Delaware’s Supreme Court has emphasized that it is “error to invalidate a bylaw on a hypothetical abuse and that the board should have a reasonable opportunity to interpret the otherwise valid bylaw in a fair and proper manner.”¹⁶¹ Delaware courts therefore “typically decline to decide issues that may not have to be decided or that create hypothetical harm.”¹⁶² Courts applying Delaware law to adjudicate the validity of an ICFS provision as adopted therefore need not speculate as to every conceivable circumstance that might later arise in connection with a future effort to enforce that provision under conditions that are unknown and unknowable as of the date of the provision’s adoption.

Examples abound of charter, bylaw, or contractual provisions that are valid when adopted but that may or may not be upheld as applied because of facts and circumstances surrounding their application. Bylaw amendments can thus be “statutorily valid [when and as adopted] but

¹⁵⁸ *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 238 (Del. 2008); *Franz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985); *Orloff v. Shulman*, No. Civ. A. 852-N, 2005 WL 3272355, at *13 (Del. Ch. Nov. 23, 2005); *Hollinger Intern., Inc. v. Black*, 844 A.2d 1022, 1079-1080 (Del. Ch. 2004) (discussing *Franz Mfg.*, 501 A.2d at 407); *Oberly v. Howard Hughes Medical Inst.*, 472 A.2d 366, 385-86 (Del. Ch. 1984).

¹⁵⁹ *AFSCME*, 953 A.2d at 238; *Franz*, 501 A.2d at 407; *Hollinger*, 844 A.2d at 1079-1080; *Kirby v. Kirby*, No. 8604, 1987 WL 14862, at *6 (Del. Ch. July 29, 1987); *Burr v. Burr Corp.*, 291 A.2d 409, 411 (Del. Ch. 1972).

¹⁶⁰ *AFSCME*, 953 A.2d at 238 (quoting *Stroud*, 606 A.2d at 79); *Openwave Systems Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 240 (Del. Ch. 2007) (“Delaware law does not permit challenges to bylaws based on hypothetical abuses”); *Diceon Electronics, Inc. v. Calvary Partners, L.P.*, No. Civ. A. No. 11862, 1990 WL 237089, at *2-*3 (Del. Ch. Dec. 27, 1990) (dispute concerning validity of bylaw was not ripe for review, where proposed bylaw was not invalid on its face and had not been applied in an improper manner).

¹⁶¹ FOLK ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW §109.9 (2008-1 Supp.) (citing *Stroud*, 606 A.2d at 95).

¹⁶² 3 STEPHEN A RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE OFFICERS 3498 (6th ed. 2009) (citing *Stroud*, 606 A.2d 75; *USACafes v. Office*, No. 8186, 1985 WL 44685, at *5 (Del. Ch. Oct. 28, 1985) (denying a motion for preliminary injunction seeking to enjoin a bylaw amendment because the harm threatened by the bylaw was speculative and, if it ever became real, “a prompt determination from the Court on the validity of the contested bylaw amendments “could be obtained); *Highland Capital, Inc. v. Longview Fibre Co.*, No. 11321, 1990 WL 3973, at *5 (Del. Ch. Jan. 22, 1990); *Diceon Electronics*, 1990 WL 237089, at *2-*3; *General DataComm Indus. v. Wisconsin Inv. Bd.*, 731 A.2d 818, 820-22 (Del. Ch. 1999); *Bebchuk v. CA, Inc.*, 902 A.2d 737, 741-44 (Del. Ch. 2006)).

unenforceable [when and as applied] because they were inequitable.”¹⁶³ For example, bylaw provisions allowing boards to regulate their own size without prior stockholder consent are common.¹⁶⁴ When directors exercise their discretion to expand a board’s size, their actions will not be enjoined if the courts find that the board “was not selfishly motivated to retain power” and that it acted “in a good faith effort to protect its incumbency, not selfishly, but in order to thwart implementation of [a] recapitalization that it feared, reasonably, would cause great injury to the Company.”¹⁶⁵ If, however, a board expands its size in a manner that “timed the utilization of these otherwise valid powers. . .for the primary purpose of impeding and interfering with the efforts of the stockholders’ power to effectively exercise their voting rights in a contested election for directors,”¹⁶⁶ then its actions will be enjoined even if the underlying bylaws are identical. Delaware courts thus recognize that in some situations a bylaw provision that allows directors, on their own volition, to expand or contract the size of the board, “could result in some degree of stockholder disenfranchisement;” nonetheless, the courts will not preliminarily enjoin adoption of these provisions because “if the directors abuse their power, the shareholders are not without appropriate judicial remedies.”¹⁶⁷

Advance notice charter or bylaw provisions¹⁶⁸ are also “common” and “frequently upheld.”¹⁶⁹ These provisions are “designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations.”¹⁷⁰ Nonetheless, “when advance notice bylaws unduly restrict the stockholder franchise or are applied inequitably, they will be struck down.”¹⁷¹ When

¹⁶³ 3 RADIN, THE BUSINESS JUDGMENT RULE, at 3491 (analyzing *Hollinger*, 844 A.2d 1022).

¹⁶⁴ *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 656, 658 (Del. Ch. 1988) (upholding board decision to add two new members to board of directors), overruled on other grounds by *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, 1 A.3d 281 (Del. 2010); *Openwave Systems*, 924 A.2d at 242-44 (holding board members acted in good faith in reducing number of board seats).

¹⁶⁵ *Blasius Indus.*, 564 A.2d at 656, 658. See also *Openwave Systems*, 924 A.2d at 242-44.

¹⁶⁶ *MM Companies v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003). See also *IBS Financial Corp. v. Seidman & Assocs. L.L.C.*, 136 F.3d 940, 949 (3d Cir. 1998) (applying New Jersey law on the assumption that it mirrors Delaware law).

¹⁶⁷ *Henley Group, Inc. v. Santa Fe Southern Pacific Corp.*, No. 9569, 1988 WL 23945, at *19. *Accord Siegman v. Tri-Star Pictures, Inc.*, No. 9477, 1989 WL 48746 (Del. Ch. May 5, 1989), aff’d in part and rev’d in part on other grounds sub. nom., *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319 (Del. 1993).

¹⁶⁸ “An advance notice bylaw is one that requires stockholders wishing to make nominations or proposals at a corporation’s annual meeting to give notice of their intention in advance of so doing.” *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 344 (Del.Ch. 2008).

¹⁶⁹ *Openwave*, 924 A.2d at 238-39. See also *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 n. 38 (Del. 1995) (bylaws upheld in hostile takeover situation); *Stroud*, 606 A.2d at 95 (Del. 1992) (upholding advance notice bylaw provisions); *Accipiter Life Scis. Fund, L.P. v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006) (upholding validity of 10 day advance notice provision).

¹⁷⁰ *Openwave*, 924 A.2d at 238-39 (citing *Unitrin*, 651 A.2d at 1388 n. 38 (bylaws upheld in hostile takeover situation); *Stroud*, 606 A.2d at 95 (upholding advance notice bylaw provisions); *Accipiter Life Scis. Fund, L.P. v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006) (upholding validity of 10 day advance notice provision)). See also *In re Gaylord Container Corp. Shareholders Litig.*, 753 A.2d 462, 480-81 (Del. Ch. 2000); *Nomad Acquisition Corp. v. Damon Corp.*, Nos. 10173, 10189, 1988 WL 383667, at *8 (Del. Ch. Sept. 20, 1988); *Kidsco Inc. Dinsmore*, 674 A.2d 483, 488-89 (Del. Ch. 1995), aff’d 670 A. 1338 (Del. Nov. 29, 1995).

¹⁷¹ *Openwave*, 924 A.2d at 239; *Lerman v. Diagnostic Data, Inc.* 421 A.2d 906, 912, (Del. Ch. 1980) (declining to “address the question of whether the 70-day [advance notice] requirement is unreasonable, and thus invalid, on its face,” but holding that, under the particular facts and circumstances of the case, the board’s action in amending the bylaws, “whether designedly inequitable or not, has had a terminal effect “on a bid because a

an advance notice provision is challenged on grounds of a “hypothetical abuse,” on the other hand, it is error to invalidate that bylaw.¹⁷²

Most significantly, perhaps, the entire corpus of poison pill jurisprudence is built on this distinction. In *Moran v. Household Int'l*,¹⁷³ Delaware’s Supreme Court explained that when judging the validity of a poison pill as adopted, and not as triggered or as threatened to be triggered, “we have a defensive mechanism adopted to ward off possible future advances and not a mechanism adopted in reaction to a specific threat.”¹⁷⁴ Because the pill was perceived as a form of “pre-planning for the contingency of a hostile takeover” it was viewed as reducing the risk that, under pressure of a takeover bid, management will fail to exercise reasonable business judgment.¹⁷⁵ The court emphasized, however, that while the directors were protected by the business judgment rule in adopting the pill, “that does not end the matter” because “[t]he ultimate response to an actual takeover bid must be judged by the Directors’ actions at that time, and nothing we say here relieves them of their basic fundamental duties to the corporation and its stockholders. Their use of the Plan will be evaluated when and if the issue arises.”¹⁷⁶ The court thus upheld the board’s adoption of the poison pill despite recognizing that the pill could be applied in an improper or inequitable manner at some later date.

ICFS provisions are analytically identical. Those provisions are a form of “pre-planning for the contingency of” foreign filed intra-corporate litigation. The presence of an ICFS provision merely creates an option for the board later to act, consistent with its fiduciary duties, to petition a foreign court to dismiss the action in favor of proceedings in Delaware. Thus, to paraphrase the Delaware Supreme Court’s *Household* ruling in the context of ICFS litigation, “[t]he ultimate response to an actual [foreign filing] must be judged by the Directors’ actions at that time, and nothing that [any court can say as of the date of adoption] relieves them of their basic fundamental duties to the corporation and its stockholders. The use of the [ICFS provision] will be evaluated when and if the issue arises.”

A facial challenge to the validity of ICFS provisions must therefore rely only on facts ascertainable on the face of the provision or as of the date of adoption. There are a finite number of theories that can support such a claim. First, a plaintiff might contend that ICFS provisions are invalid *ab initio* because they are not proper subject matter for charters or bylaws or, in the case of ICFS provisions adopted as bylaws without shareholder consent, that shareholders have a vested right in the ability to file in foreign courts without the corporation having the ability to petition to enforce a forum selection provision. As demonstrated below, these arguments fail under Delaware law. We support that conclusion by first analyzing the validity of an ICFS provision adopted in a corporate charter and then by analyzing the validity of the provision adopted as a bylaw without prior stockholder approval. Second, a plaintiff might advance the categorical proposition that there exists no possible set of circumstances under which the enforcement of an ICFS provision is valid. As demonstrated in Section IV, this proposition is at

shareholder could not possibly comply with a 70-day advance notice provision with only 63 days remaining to the election).

¹⁷² *Stroud*, 606 A.2d at 96.

¹⁷³ 500 A.2d 1346 (Del. 1985).

¹⁷⁴ *Id.* at 1350.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1357.

odds with established United States Supreme Court precedent and must fail. Third, plaintiffs might assert that directors violate a fiduciary duty by adopting an ICFS provision because facts and circumstances knowable as of the date of adoption establish that the board has breached a fiduciary duty simply by adopting the provision. This proposition also fails, but for economy of exposition we address that question in Part IV in conjunction with the fiduciary analysis that accompanies review of any ICFS provision when it is later sought to be enforced.

A. ICFS Provisions in Corporate Charters

ICFS provisions adopted in the corporate charters of publicly traded entities are typically adopted prior to or in conjunction with the corporation's initial public offering in a manner that does not require public stockholder approval.¹⁷⁷ Because public stockholders then acquire their shares with full knowledge that they will be bound by an ICFS provision, they cannot complain that they lacked prior notice or that they possessed any vested rights allowing them to sue in any foreign jurisdiction without having to respond to a challenge to their selection of a foreign forum.

Section 102(b)(1) of Delaware's General Corporation Law provides that a corporate charter may contain "any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders ... if such provisions are not contrary to the laws of this State."¹⁷⁸ While the literature suggests that "it seems clear that a Delaware Chancery forum selection provision will be enforced if it appears in a company's charter,"¹⁷⁹ and while a *dictum* supports this conclusion,¹⁸⁰ our analysis tests this proposition more rigorously before reaching the identical conclusion.

The broad language of Section 102(b)(1) has been held by Delaware's Supreme Court to confer "in the most general language, the right to include in a certificate of incorporation any provision deemed appropriate for the conduct of corporate affairs."¹⁸¹ The certificate may also alter default rules found in the Delaware General Corporation Law, even if those provisions do not expressly authorize variation by a certificate of incorporation.¹⁸² The single express limitation on the scope of a charter provision is that it may not be "contrary to the laws" of Delaware. Even so, a charter provision may "embody in the [certificate] a provision departing

¹⁷⁷ See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.D. & Tables 4, 5. At least eleven companies have, post-IPO, submitted to a shareholder vote a proposal to amend the company's charter to add an exclusive forum provision. *Id.* at II.G. & Table 8. Shareholders at six of these companies approved the exclusive forum provision, although in one instance the provision was bundled with other corporate governance proposals. *Id.* Stockholders at two companies voted to reject the proposed exclusive forum charter amendment. *Id.* In addition, four companies have been sued for simply proposing to adopt exclusive forum provisions in their corporate charters or bylaws. See note 125, *supra*.

¹⁷⁸ 8 Del. C. §102(b)(1).

¹⁷⁹ Charles M. Nathan, *Designating Delaware as the Exclusion Jurisdiction for Intercorporate Disputes* (posted May 11, 2010), available at http://www.lw.com/upload/pubContent/_pdf/pub3523_1.pdf.

¹⁸⁰ *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 n.8 (Del. Ch. 2010).

¹⁸¹ *Sterling v. Mayflower Hotel Corp.*, 93 A. 2d 107, 117 (Del. 1952).

¹⁸² *Jones Apparel Group, Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 847-48 (Del. Ch. 2004). See also, FOLK, FOLK ON THE DELAWARE GENERAL CORPORATION LAW §102.9 (2008-1 Supplement).

from the rules of common law provided it does not transgress a statutory enactment or public policy settled by the common law or implicit in the General Corporation Law itself.”¹⁸³

The legality of a forum selection provision under Delaware law is readily established. Delaware courts have already twice upheld the validity of forum selection provisions in the context of LLC operating agreements.¹⁸⁴ In neither case was there any suggestion that a forum selection provision might violate any provision of Delaware law. Further there is no precedent, statutory provision, or other aspect of Delaware law that appears to suggest that forum selection provisions are in any sense illegal. Indeed, Vice Chancellor Laster’s suggestion in *Revlon* that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, these corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes,”¹⁸⁵ would make little sense if the court perceived any danger at all that a forum selection provision might violate the law. Or, framed differently, when was the last time a Vice Chancellor publicly suggested that corporations commit illegal acts, even in *dictum*?

But simple legality is not enough. Directors of Delaware corporations cannot be contractually bound to violate their fiduciary duties.¹⁸⁶ The mere adoption of an ICFS provision cannot, however, violate any fiduciary duty because the board is under no obligation to petition the foreign court to dismiss a foreign-filed complaint under all circumstances. The board therefore always retains the discretion necessary to exercise its fiduciary obligations in connection with the decision of whether, when, where, how, and why to seek enforcement of an ICFS provision.¹⁸⁷ If an attempt to enforce an ICFS provision suggests a later fiduciary breach, then the courts of the foreign state can refuse to enforce it.

¹⁸³ *Sterling*, 93 A. 2d at 118.

¹⁸⁴ *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 288-89 (Del. 1999); *Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149 (Del. Ch. 2006). See also *Cardiff Equities, Inc. v. Super. Ct.*, 83 Cal.Rptr.3d 699, 703 (Cal. Ct. App. 2008) (discussing trial court order enforcing arbitration provision in partnership agreement, but declining to reconsider that portion of the order).

¹⁸⁵ *Revlon*, 990 A.2d at 960.

¹⁸⁶ See, e.g., *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936 (Del. 2003) (“To the extent that a [merger] contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable” (quoting *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1993)); *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 106-107 (Del. Ch. 2011) (finding no solicitation provision “pernicious” where it arguably required “an abdication by the board of its duty to determine what its own fiduciary obligations require at precisely that time in the life of the company when the board’s own judgment is most important”); *Topps*, 926 A.2d at 91-92 (granting injunction precluding enforcement of standstill agreement that included a fiduciary out, where enforcement of agreement “seems likely, after trial, to be found a breach of fiduciary duty”).

¹⁸⁷ The dominant form of ICFS provision has two variants. In the first version, the ICFS provision expressly provides that the corporation can, in writing, consent to the selection of an alternative forum. See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.E. & Table 6. See also note 154, *supra*. In the second version, no such express language appears. *Id.* The distinction between these two variants is, however, easily exaggerated. In every litigation involving potential enforcement of a forum selection provision, the defendant always retains the *de facto* option of consenting to the forum selected by the plaintiff simply by not challenging the plaintiff’s venue decision. Thus, regardless of whether an ICFS provision provides for an express ability to consent to an alternative forum, the corporation always retains the ability not to challenge a plaintiff’s forum selection. See, e.g., *Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549 (4th Cir. 2006) (in jurisdictions that mandate enforcement of forum selection provisions through a Rule 12(b)(3) motion to

This leaves open the question of whether an ICFS provision is a provision “creating, defining, limiting and regulating the powers of the . . . stockholders.”¹⁸⁸ This inquiry might, as an initial matter, be considered superfluous because the only express limitation on the scope of a charter provision is that it may not be “contrary to the laws” of Delaware and it has already been demonstrated that an ICFS provision does not, in and of itself, “transgress a statutory enactment or public policy settled by the common law or implicit in the General Corporation Law itself.”¹⁸⁹ That alone could be considered sufficient to support the validity of a charter provision. But proceeding to this next level of scrutiny, even if unnecessary, does not change the result.

Charter provisions are interpreted as though they are contract provisions,¹⁹⁰ and inasmuch as contract rights can legitimately be regulated through forum selection provisions,¹⁹¹ it follows that stockholders’ rights to pursue intra-corporate claims can also be regulated through ICFS provisions. To be sure, this conclusion would arguably not follow (or not hold as strongly) if the forum selection provision sought to regulate the right to pursue causes of action that were not intra-corporate in nature because then the provision would not be seeking to regulate the stockholder’s rights as a stockholder and would be extended beyond the contract that defines and governs the stockholders’ rights. Thus, ICFS provisions do not purport to regulate a stockholder’s ability to bring a securities fraud claim or any other claim that is not an intra-corporate matter, and the dominant forms of ICFS provisions are drafted expressly to preclude such applications. In any event, reviewing courts always retain the ability to prevent such an application of an ICFS provision.

Finally, it is instructive to observe that many commonly employed charter provisions have far greater effects on stockholder rights and powers than do ICFS provisions. Charters can, for example, create classes of non-voting shares,¹⁹² classes of shares that have no dividend

dismiss for improper venue, “a defendant will have to raise the forum selection issue in her first responsive pleading, or waive the clause” (citing Fed. R. Civ. P. 12(h)(1)); *Tri-State Employment Servs., Inc. v. Mountbatten Sur. Co. Inc.*, 295 F.3d 256, 261 n.2 (2d Cir. 2002) (forum selection clause waived where defendant failed to raise any challenge to venue in a pre-answer motion or responsive pleading and represented to the court that it was the proper forum); *Krape v. PDK Labs Inc.*, 194 F.R.D. 82, 86 (S.D.N.Y. 1999) (“[A] party’s . . . representations to the court that it is the proper forum may waive its right to subsequently raise the claim that venue lies elsewhere”); *In Re Deleas Shipping Ltd.*, 1996 A.M.C. 434 (W.D. Wash. 1995) (reasoning that a party waives its right to the benefit of a forum selection clause where it “has taken actions inconsistent with it, or delayed its enforcement, and other parties would be prejudiced”).

¹⁸⁸ 8 Del. C. §102(b)(1).

¹⁸⁹ *Sterling*, 93 A. 2d at 118.

¹⁹⁰ See *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation’s shareholders; therefore, our rules of contract interpretation apply”); *Centaur Partners IV v. National Intergroup Inc.*, 582 A.2d 923, 928-29 (Del. 1990) (same); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 171 (Del. Ch. 2005) (same). See also *Openwave*, 924 A.2d at 239 (“Delaware courts have repeatedly held that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate bylaws”).

¹⁹¹ See Section IV, *infra*.

¹⁹² See 8 Del.C. § 151(a) (“Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof. . . which classes or series may have such voting powers, full or limited, or no voting powers. . . as shall be stated and expressed in the certificate of incorporation or of any amendment thereto”); Model Bus. Corp. Act § 6.01(c)(1) (2007) (authorizing variations in the voting rights of various classes or series of shares, provided they are set forth in the corporation’s articles of incorporation); *Winston v. Mandor*, 710 A2d 835, 839 (Del. Ch. 1997) (The corporation may limit the rights (including the right to vote) of holders of a preferred or other particular class of shares by express limitation in its certificate of incorporation, a specific certificate of designations

rights,¹⁹³ and redeemable shares that can be repurchased at set prices and therefore lose the right to participate in equity appreciation beyond the repurchase price.¹⁹⁴ ICFS provisions, by contrast, have far more modest effect because they simply create the option for the board later to seek, subject to review by a foreign court, dismissal of a foreign filed claim, and do not obligate the board to take such action. In addition, enforcement of an ICFS provision often promotes the best interests of stockholders as a group.¹⁹⁵ The form of regulation of stockholder power inherent in an ICFS provision is thus well within the bounds of charter provisions that have long been accepted by the markets and the courts.

B. ICFS Provisions in Corporate Bylaws

Although ICFS provisions can enter corporate bylaws through various mechanisms of action, the greatest controversy arises when boards of corporations that are already publicly traded amend the bylaws to include an ICFS provision without prior stockholder approval.¹⁹⁶ Because this mechanism is subject to the strongest legal challenge, and because the other mechanisms are *a fortiori* valid if adoption absent prior stockholder consent is valid, we direct our analysis to that most contested scenario.

The business judgment rule provides a rebuttable presumption that when directors adopt or amend bylaws they do so “in the good faith belief that such action [is] in the best interests of the company and its stockholders.”¹⁹⁷ Boards adopting ICFS provisions can establish their good faith by relying on much more than this presumption: they can refer directly to the substantial literature documenting the magnitude and adverse implications of the foreign forum problem.¹⁹⁸

A successful facial challenge to the adoption of a bylaw provision without prior stockholder consent cannot, however, rely on speculation as to later events that might render

or other form of resolution”); *Topkis v. Delaware Hardware Co.*, 2 A.2d 114, 128 (Del. Ch. 1938) (sustaining demurrer to complaint challenging amendment to certificate of incorporation that transferred voting power from no-par common stock to preferred stock not inequitable as to holders of no-par stock).

¹⁹³ See 8 Del.C. § 151(a); *Capano v. Wilmington Country Club*, No. CIV.A. 18037-NC, 2001 WL 1359254, at *6 (Del. Ch. Nov.1, 2001) (noting that restrictions on voting rights and dividends must be included in the certificate of incorporation).

¹⁹⁴ 8 Del.C. § 151(b) (“Any stock of any class or series may be made subject to redemption by the corporation at its option or at the option of the holders of such stock or upon the happening of a specified event. . . Any stock which may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation, at such time or times, price or prices, or rate or rates, and with such adjustments, as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to subsection (a) of this section”). See generally *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973 (Del. Ch. 2010) (interpreting the terms of a corporation’s redemption provision).

¹⁹⁵ See Section II.E., *supra*.

¹⁹⁶ Corporations can also adopt ICFS provisions as part of their bylaws prior to an IPO. Alternatively, corporations can seek stockholder approval prior to amending the bylaws to include an ICFS provision. At least one company has been sued in Delaware Chancery Court for simply proposing to submit a board-supported exclusive forum bylaw provision to a shareholder vote. That case, *City of Sunrise Firefighters Retirement Fund v. Hittite Microwave Corp et al.*, No. 7426 (Del. Ch. Ct. filed April 13, 2012), is discussed in greater detail at note 152, *supra*.

¹⁹⁷ *American Int’l Rent-A-Car v. Cross*, No. 7583, 1984 WL 8204, at *3 (Del. Ch. May 9, 1984). See also *Williams v. Geier*, 671 A.2d 1368, 1378 (Del. 1996) (holding that the board’s action in recommending a charter amendment to the stockholders for approval was protected by the business judgment rule).

¹⁹⁸ See Sections II.B & II.C., *supra*.

enforcement of the provision unjust.¹⁹⁹ The challenge must instead rest on technical arguments that ICFS provisions: (1) are not proper subject matter for bylaws pursuant to Section 109(b) of the DGCL; (2) violate stockholders' vested rights if adopted without prior stockholder approval; or (3) are inherently inequitable or constitute breaches of fiduciary duty without regard to later emerging facts. This section addresses the first two arguments, and defers consideration of the third to Part IV where it is considered in conjunction with other fiduciary duty concerns.

1. ICFS Provisions as Permissible Subject Matter Under Section 109(b)

Section 109(b) of the Delaware General Corporation Code provides that “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.”²⁰⁰

ICFS provisions are not inconsistent with the law,²⁰¹ and the vast majority of corporate charters of publicly traded firms are not likely to preclude ICFS provisions.²⁰² ICFS bylaw provisions therefore cannot be invalidated under Section 109(b) as “inconsistent with law or with the certificate of incorporation.”

As for the question of whether ICFS bylaw provisions “relat[e] 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” in a manner that constitutes proper subject matter for a bylaw, and that does not require inclusion in the corporation’s charter, the leading precedent on point is the Delaware Supreme Court’s recent opinion in *CA, Inc. v. AFSCME Employees Pension Plan*.²⁰³ There, CA sought to narrowly define the scope of shareholder-enacted bylaws permissible pursuant to Section 109(b) in order to preclude a vote on a precatory stockholder proposal calling for conditional reimbursement of expenses incurred by stockholders nominating a short slate.²⁰⁴ CA reasoned that Section 109(b) could not be read in isolation from Section 102(b)(1), and because “Section 102(b)(1) contemplates that any provision that limits the broad statutory power of directors must be contained in the certificate of incorporation,”²⁰⁵ any provision that limits “the substantive decision-making authority of CA’s board to decide whether or not to expend corporate funds for a particular purpose”²⁰⁶ must also appear in a charter amendment, and not as a bylaw provision.

The Supreme Court made short shrift of this argument:

Implicit in CA’s argument is the premise that *any* bylaw that in *any* respect might be viewed as limiting or restricting the power of the board of directors

¹⁹⁹ See Section III, *supra*.

²⁰⁰ 8 Del. C. §109(b).

²⁰¹ See Section IV, *infra*.

²⁰² In searching public filings for the terms “(exclusive! or sole!) w/8 (court or forum or jurisdiction),” we did not find any reference to charter or bylaw provisions that precluded the adoption of ICFS provisions. That is not surprising, given the numerous benefits that can accrue to corporations and their stockholders when an ICFS provision is validly adopted and enforced. See Part II.E., *supra*.

²⁰³ 953 A.2d 227 (Del. 2008).

²⁰⁴ *Id.* at 229-30.

²⁰⁵ *Id.* at 234.

²⁰⁶ *Id.* at 234.

automatically falls outside the scope of permissible bylaws. That simply cannot be. That reasoning, taken to its logical extreme, would result in eliminating altogether the shareholders' statutory right to adopt, amend or repeal bylaws. Bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders. In that sense, most, if not all, bylaws could be said to limit the otherwise unlimited discretionary power of the board. Yet, Section 109(a) carves out an area of shareholder power to adopt, amend or repeal bylaws that is expressly inviolate. Therefore, to argue that the Bylaw at issue here limits the board's power to manage the business and affairs of the Company only begins, but cannot end, the analysis needed to decide whether the Bylaw is proper subject for shareholder action. The question left unanswered is what is the scope of shareholder action that Section 109(b) permits yet does not improperly intrude upon the directors' power to manage corporation's business and affairs under Section 141(a).²⁰⁷

The straightforward extension of this reasoning in the context of ICFS litigation supports the conclusion that just as many bylaws "might be viewed as limiting or restricting the power of the board of directors," ICFS bylaws "might be viewed as limiting or restricting the power of" stockholders. But that simple fact does not make them invalid subject matter for director-adopted bylaws, as it "only begins, but cannot end, the analysis."

The court proceeded to explain that "there is a general consensus that bylaws that regulate the process by which the board acts are statutorily authorized" and that "purely procedural bylaws do not improperly encroach upon the board's managerial authority under Section 141(a)."²⁰⁸ *AFSCME* thus stands for the proposition that a shareholder-enacted bylaw provision that "establishes or regulates a process for substantive director decision-making," even if "infelicitously couched as a substantive-sounding mandate," is proper subject matter for a bylaw and need not be included in the corporation's charter.²⁰⁹ However, "whether or not a bylaw is process-related must necessarily be determined in light of its context and purpose."²¹⁰

Under this "context and purpose" test, ICFS provisions would seem clearly to constitute proper subject matter for bylaws: they relate entirely to the "process and procedures" by which decisions are made and do not govern the substance of those decisions. In particular, ICFS provisions relate exclusively to the process governing the selection of the forum in which an

²⁰⁷ *Id.* at 234 (emphasis in original).

²⁰⁸ *Id.* at 235.

²⁰⁹ *Id.* at 235-36. Put another way, the Delaware Supreme Court's logic suggests that categorizing a shareholder-enacted provision as "procedural" is a sufficient condition for its inclusion as a bylaw provision rather than as a mandatory charter provision. Further, inasmuch as the court recognized that the board of directors has broader managerial authority to enact bylaws pursuant to 8 Del.C. § 141, *id.* at 235, *AFSCME* also stands for the proposition that a purely procedural provision, whether adopted by directors or shareholders, is proper subject matter for the bylaws. The court in *AFSCME* did not address, and did not have to address, the broader question of the characteristics that necessarily require inclusion as a charter provision rather than as a bylaw.

²¹⁰ *Id.* at 236-37. Consistent with this view, about eighty years ago Chancery explained that "as the charter is an instrument in which the broad and general aspects of the corporate entity's existence and nature are defined, so the by-laws are generally regarded as the proper place for the self-imposed rules and regulations deemed expedient for its convenient functioning to be laid down." *Gow v. Consolidated Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933).

intra-corporate dispute will be decided. Because the substantive resolution of these intra-corporate disputes are, pursuant to the internal affairs doctrine, governed by the laws of the chartering state, ICFS provisions cannot at all influence the substantive law governing the resolution of the underlying disputes. Further, because the question of forum selection is inherently procedural, and not substantive, most foreign courts in which a claim might be filed will apply their own domestic procedural law to resolve the forum selection dispute.²¹¹

ICFS provisions can also be framed as relating to the rights and powers of the corporation's directors and officers, as distinct from the stockholders, because ICFS provisions govern the procedures by which the conduct of directors and officers will be judged in the event of an intra-corporate dispute. This alternative characterization of the effects of ICFS provisions frames their operation in a manner more closely analogous to the fact pattern addressed in *AFSCME* because it focuses on the relationship between the authority delegated to the board to manage the corporations' affairs pursuant to Section 141(a), which is "a cardinal precept of the DGCL,"²¹² and the scope of permissible bylaw provisions. In the *AFSCME* litigation, the bylaw provision at issue was problematic because it clearly sought to constrain the board's authority to exercise its discretion in accordance with Section 141(a). In contrast, ICFS provisions expand the board's procedural ability to manage the corporation's affairs by creating the option – not the obligation – to move in a foreign court for the dismissal or transfer of a foreign filed intra-corporate claim.

AFSCME's reliance on the "process and procedures" distinction to define a permissible domain for shareholder-enacted bylaw provisions fails, however, to address a potential textualist critique relying on a distinction between the wording of Sections 102(b)(1) and 109(b). Section 102(b)(1), describes charter provisions as "*creating, defining, limiting and regulating* the powers of the corporation, the directors, and the stockholders. . . ." In contrast, Section 109(b) describes bylaws as "*relating* to the . . . rights or powers of . . . stockholders, directors, officers or employees." If ICFS provisions do not merely "relate" to stockholder powers, but so fundamentally "create, define, limit or regulate" those powers, can it then be argued that ICFS provisions must be addressed in the charter and may not reside in the bylaws?

AFSCME seems to answer this question in the negative on two separate grounds. First, by observing that procedural provisions are proper subject matter for bylaws, *AFSCME* indicates that a procedural provision "relates" to rights and powers as that term is used in Section 109(b).

²¹¹ This is not always the case. While "[m]ost courts. . . correctly recognize that [enforcement of forum selection provisions] is a matter of federal law," see 14D WRIGHT & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1, a minority of federal courts determine the enforceability of forum selection provisions under the substantive state law that governs the contract, *id.* See also note 238, *infra* (discussing the split). The minority view appears inconsistent with the decision of the United States Supreme Court in *Stewart Organization, Inc. v. Ricoh Corporation*, which held that, when a Section 1404(a) analysis is possible, forum selection clause enforceability is a procedural matter wholly subject to federal law. 487 U.S. 22, 27 (1988). Further, the fact that a minority of courts view the question of enforceability of forum selection provisions as substantive for purposes of their internal decision-making processes is not determinative of whether ICFS provisions are viewed as procedural for purposes of Delaware corporate law. The latter question is uniquely within the purview of Delaware courts pursuant to the internal affairs doctrine, and it is for the Delaware courts to determine the proper subject matter of bylaws under Delaware corporate law. The substance-procedure distinction under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) is thus instructive, but not dispositive.

²¹² *AFSCME*, 953 A.2d at 232, n.7.

Because ICFS provisions are procedural they would, on this interpretation, be proper subject matter for a bylaw and would not, as a mandatory matter, have to be included in the corporation's charter.²¹³ Or, framed differently, a finding that a provision is procedural, not substantive, may satisfy a sufficient but unnecessary condition for inclusion as a by-law, separate and apart from the consideration of the bylaw's effect on the exercise of directorial discretion.

Second, *AFSCME* suggests that this textualist analysis may rely on too talmudic a parsing of the statutory text. In *AFSCME*, the court speaks of the “general consensus that bylaws that regulate the process by which the board acts are statutorily authorized.”²¹⁴ Note that the Supreme Court here describes bylaws (which are governed by Section 109) as “regulating” (the language of Section 102(b)) and not as “relating” (the language of Section 109(b)) to the relevant process. The court may thus be signaling that if the underlying matter is procedural, it makes no difference whether the provision is viewed as “relating to” or “regulating” the process because, at the end of the day, the matter is procedural.²¹⁵ Alternatively, the Court may be signaling that, as a practical matter, there is no operative difference between the locution of Section 109(b), which permits a provision that “relates” to powers, and the locution of Section 102(b)(1), which permits a provision that “creates, defines, limits, or regulates” powers, because the terms “relate” and “regulate” can be used interchangeably in the context of Sections 102(b)(1) and 109(b). In any event, all these interpretations of the statutory language and relevant case law support the conclusion that ICFS provisions are proper subject matter for bylaws.

The conclusion that ICFS provisions are proper subject matter for bylaws is further supported by reference to other bylaw provisions that are widely used and that have effects far more substantive than those of an ICFS provision. The Delaware Supreme Court made clear that bylaws can have a significant effect on stakeholders without running afoul of the DGCL.²¹⁶ For example, bylaw provisions commonly permit directors to expand or contract the size of the board,²¹⁷ and advance notice provisions governing nominations to the board are frequently upheld even though they can profoundly influence the outcome of board elections.²¹⁸ Each of these provisions has the potential to constrain stockholder rights in a substantive manner that is far more intrusive than would ever likely arise as the result of enforcing an ICFS provision.

2. ICFS Provisions and Vested Rights Claims

Opponents of ICFS bylaw provisions adopted without prior stockholder consent complain that “there is no element of mutual consent to the forum choice at all, at least with respect to

²¹³ This analysis does not suggest that every board-enacted bylaw provision must be procedural in order to be valid. *ACFSCME* considered a shareholder-enacted bylaw provision, not a director-enacted bylaw provision, and its reasoning is to be evaluated in that context. The validity of a director-enacted bylaw provision that governs the substance of a board's business decisions is thus not addressed by *AFSCME*. However, because ICFS provisions are procedural in nature, we need not address the separate question of whether a provision that regulates substantive decisions must be included in the corporate charter or whether it can be properly included in the bylaws.

²¹⁴ *Id.* at 235.

²¹⁵ Consistent with this interpretation, the Chancery Court has observed that bylaws “may pervasively and strictly regulate the process by which boards act, subject to the constraints of equity.” *Hollinger*, 844 A.2d at 1080 at n. 136. Note that here the court uses the word “regulate” and not “relate” to describe the permissible scope of bylaw provisions.

²¹⁶ *See Franz Mfg.*, 501 A.2d at 407.

²¹⁷ *See* note 164, *supra*.

²¹⁸ *See* note 169, *supra*.

shareholders who purchased their shares prior to the time the bylaw was adopted.”²¹⁹ This assertion is, however, nothing more than a repackaged version of the “vested rights” theory which asserts that boards cannot modify bylaws in a manner that arguably diminishes or divests pre-existing shareholder rights absent stockholder consent. This theory has been roundly rejected for decades by courts in Delaware and in California.²²⁰ An exception to this conclusion might arise when plaintiffs have arguably perfected a right by filing at least one complaint in a foreign forum prior to adoption of an ICFS provision. But even then, absent additional information regarding the circumstances surrounding the litigation, current precedent does not compel the invalidation of that ICFS provision as adopted, though it might influence the willingness of a foreign court to enforce the provision as applied.

As explained by Delaware Supreme Court Justice Jack Jacobs, then serving as Vice Chancellor, “where a corporation’s by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment.”²²¹ Indeed, Section 109(a) “provides that the power to adopt, amend or repeal bylaws shall be in the shareholders entitled to vote, except that the certificate of incorporation may also confer that power upon directors. . . Therefore, although the by-laws are a contract between the corporation and its stockholders. . . the contract was subject to the board’s power to amend the by-laws unilaterally.”²²² Stockholders are thus on notice prior to acquiring their shares that the charter grants to the board the right to amend the bylaw without a prior stockholder vote. By purchasing those shares, stockholders effectively consent to the grant of that power to the board, within the

²¹⁹ *Galaviz*, 763 F. Supp. 2d at 1171; Verified Complaint, at ¶ 74, *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corp.*, No. 7220 (Del. Ch. Ct. filed February 6, 2012). For further discussion of the *Galaviz* decision and an explanation of why it is wrongly decided in part, see Section V, *infra*.

²²⁰ *Kidsco*, 674 A.2d at 492-93 (rejecting plaintiffs’ argument that they had a vested contract right to proceed under an existing bylaw, and that the directors therefore lacked power to amend it); *Roven v. Cotter*, 547 A.2d 603, 608 (Del. Ch. 1988) (“if a director has actual or implied notice that his right to hold office may be extinguished, he has no [] vested right” in his position); *Tu-Vu Drive-In Corp. v. Ashkins*, 61 Cal. 2d 283, 288 (1964) (holding shareholder who acquires his shares subject to the power of the corporation to alter its contract and impose restrictions on transfer had no vested right to retain shares free of restriction upon alienation); 4 JAMES D. COX AND THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 25:4 (3d ed. 2011) (“In Delaware, the vested-rights doctrine is generally recognized as a dead letter, and no contemporary decision is likely to be resolved on this basis”); MARSH, FINKLE AND SONSINI, MARSH’S CALIFORNIA CORPORATE LAW § 17.02 (“Vested Rights”) (current through 2012-1 Suppl.) (“It would thus seem that the ‘vested rights’ doctrine does not exist in the state of California, and it is highly unlikely that it will be adopted in the future, since it has been largely eroded or abandoned in most of those states which originally espoused it”); 3 FOLK, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 394.2.2 (2008-1 Supp.) (“because of the statutorily reserved power to amend the corporate charter, very probably ‘the only ‘vested right’ left is that specified in [8 Del.C. § 394],” which prohibits a statutory charter amendment from “[taking] away or [impairing] any remedy ... against any corporation or its officers for any liability which shall have been previously incurred.”) See also COX AND HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 25:4 (3d ed. 2011) (discussing the “disappearing concept of vested rights” and observing that “the modern trend in the cases recognizes that there are no particular rights under the share contract that can be separated and held to be constitutionally vested”).

²²¹ *Kidsco*, 674 A.2d at 492 (citing *Roven*, 547 A.2d at 608). Justice Jacobs also observed that “no ‘contractual’ right to maintain an existing by-law has ever been recognized, except in the compelling (and quite different) context of a directors’ individual indemnification rights that became perfected before the board amended its by-laws to eliminate those rights.” *Id.* at 492 n.6 (citing *Salaman v. National Media Corp.*, C.A. No. 92C-01-161, 1992 WL 808095 (Del. Super. Oct. 8, 1992)).

²²² *Kidsco*, 674 A.2d at 492 (citing *Centaur Partners, IV v. National Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990), for the proposition that bylaws are contracts between corporations and shareholders).

limits of Section 109(b) and subject to review under Delaware law. Thus, in the view of the Delaware courts, there is prior notice and mutual assent to the grant to the board of the authority to amend the bylaws without a prior stockholder vote.

Justice Jacobs further observed that because the stockholders were on notice that the bylaws were subject to amendment without prior shareholder action, any reliance on the pre-existing bylaw provision was not “justifiable” and therefore could not support a claim for injunctive relief or recovery.²²³ Moreover, the plaintiffs had challenged a bylaw amendment relating to the process for calling stockholder meetings, but as of the date the board amended the bylaw, plaintiffs had failed to accumulate the number of shares necessary to have a right to call a meeting under the pre-existing bylaw. Plaintiffs had thus failed to perfect their demand right as of the date the board amended the bylaws. So, even “assuming without deciding that a vested right to proceed under the original by-laws might arise in some circumstances, no such right arose here.”²²⁴

The logic of this decision directly supports the conclusion that, as long as the corporation’s charter or bylaws put stockholders on notice that a board reserves the right to amend the bylaws without a stockholder vote, stockholders have no vested right in the continued existence of bylaws that exclude ICFS provisions. Reliance on the continued existence of such bylaws would be unjustified, and because stockholders have typically taken no steps to perfect the right to sue in a foreign jurisdiction as of the date a board adopts an ICFS provision, they have not perfected the right that they claim is being violated. Indeed, in *Kidsco*, plaintiffs incurred substantial expense in accumulating their stock position and in objecting to the corporation’s conduct. Those expenditures were, however, insufficient either to support a claim of reliance or to demonstrate that a claim had been perfected. In the case of a board-adopted ICFS provision, the plaintiffs will typically have incurred no expense at all in reliance on the non-existence of the ICFS provision as of the provision’s date of adoption.

If the logic of *Kidsco* itself is insufficient to put the question to rest, three additional arguments against the vested rights theory as applied to forum selection provisions are easily articulated. First, forum selection bylaw provisions are perhaps unique among all bylaws in that they can never be enforced by the corporation unless the corporation triggers prior judicial scrutiny designed to assure that the provision does not violate any legitimate stockholder rights. This fact stands in stark contrast to all other bylaw provisions that allow boards to act without first petitioning for judicial relief. For example, changing the notice period for calling a special shareholder meeting or expanding or contracting the size of the board can all be accomplished without first petitioning a court. Plaintiffs can, after the fact, challenge these actions, but the board is not required to obtain judicial approval as a precondition to its actions. The implementation of forum selection bylaw provisions are thus subject to safeguards that do not apply in the case of other bylaw provisions.

Kidsco also fails to consider the implications of Section 109(a) of the Delaware General Corporation Law which grants to stockholders the “power to adopt, amend or repeal bylaws.”

²²³ *Id.* at 493 n.7.

²²⁴ *Id.* at 493.

That power cannot be divested by the board.²²⁵ It follows that if stockholders object to a board's decision to adopt a forum selection bylaw provision, they then have the unalterable authority to undo the board's decision.²²⁶ An ICFS provision is thus not as onerous as the contract of adhesion upheld by the United States Supreme Court in *Carnival Cruise* because there the passengers had no mechanism by which to change their tickets' terms and conditions once they had purchased the tickets. In the case of an ICFS provision, however, Section 109(a) makes that sort of change possible.

Finally, the decision to recognize a vested right in a bylaw provision would, as a practical matter, lead to an entirely unworkable governance regime. Consider the simple situation of a bylaw provision that allows a board, *sua sponte*, to expand or contract its size. If a board then expands its size from, say, eight directors to nine, is the ninth director a director only as to shareholders who acquire after the board has been expanded? This is, of course, an entirely untenable situation, and any effort to respect the purportedly "vested" rights of shareholders in a board with eight members would, as a practical matter, prevent any expansion of the board without prior stockholder approval. The logical implication of a rule recognizing "vested" rights in bylaw provisions would thus create multiple categories of investors, some bound and others not bound, by various bylaw provisions. The practical effect would be to eliminate the ability of the board to amend bylaws without shareholder action. But this conclusion would clearly be contrary to the statutory design of the corporate governance regime which, on its face, allows boards to amend bylaws without prior stockholder approval.²²⁷ It thus comes as little surprise that plaintiffs in the *Kidsco* action were unable to cite to any precedent supporting their "vested rights" theory.²²⁸ No such precedent exists, and there is good reason for the absence of such precedent.

California law reaches an identical conclusion. In *Tu-Vu Drive-In Corp. v. Ashkins*,²²⁹ California's Supreme Court reversed a lower court decision holding that a shareholder in a closely held corporation possessed a "vested right to retain her shares free of restrictions upon alienation," where restrictions on transfer were adopted by board action, without shareholder

²²⁵ The shareholders' power to amend the bylaws "is legally sacrosanct, i.e., the power cannot be non-consensually eliminated or limited by anyone other than the legislature itself." *AFSCME*, 953 A.2d at 232. Or, as Delaware's Supreme Court has explained, "the DCGL empowers both the board of directors and the shareholders of a Delaware corporation to adopt, amend or repeal the corporation's bylaws." *Id.* at 231.

²²⁶ See Bonnie White, Case Note, *Reevaluating Galaviz v. Berg: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws as Requirements Contracts*, 160 U. PA. L. REV. PENNUMBRA 390, 406 (2012), available at <http://www.pennumbra.com/casenotes/5-2012/White.pdf>. ("It is particularly fair for board-adopted bylaws to bind shareholders because shareholders have at least two protections from undesirable amendments: they can either repeal the bylaw with a majority vote, or can bring a derivative suit for breach of fiduciary duty if the adoption of a bylaw would not be protected as a valid business judgment").

²²⁷ 8 Del. C. § 109(a) ("any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors"); Cal. Corp. Code § 211 ("Bylaws may be adopted, amended or repealed either by approval of the outstanding shares. . . or by the approval of the board"); Model Bus. Corp. Act § 10.20(b) (2007) ("A corporation's board of directors may amend or repeal the corporation's bylaws, unless (1) the articles of incorporation . . . reserve that power exclusively to the shareholders. . . or (2) the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw").

²²⁸ *Kidsco*, 674 A.2d at 492.

²²⁹ 61 Cal. 2d 283 (1964) (Tobriner, J.).

approval, and after the shareholder had purchased her stock.²³⁰ The court observed that a shareholder in a California corporation “acquires his shares subject to the power of the corporation to alter its contract with him pursuant to statutory authority.”²³¹ Because the statute authorizes boards to amend bylaws without prior shareholder approval, the shareholder has no vested right in preventing a restriction upon alienation provided that the restriction was consistent with the California statute and with the corporation’s charter, as was the case in *Tu-Vu*. “It would thus seem that the ‘vested rights’ doctrine does not exist in the state of California, and it is highly unlikely that it will be adopted in the future, since it has been largely eroded or abandoned in most of those states which originally espoused it.”²³²

An exception to the invalidity of the “vested rights” theory arises, as *Kidsco* observes, if actions have been taken that would cause a right to vest. For example, if bylaws guarantee indemnification rights to a director, and if litigation is initiated against that director, the board then cannot *sua sponte* amend its bylaws to extinguish the corporation’s obligation to indemnify the director because the obligation has already been triggered.²³³ The closest analogy in the ICFS context arises if a board adopts an ICFS provision after it has been sued in a foreign forum. In that event, the analysis would hinge on whether the board is seeking to enforce the provision in the action that has just been filed - - a fact pattern that would trigger the fiduciary duty analysis to be addressed in Part IV of this article - - or whether the board, having been illuminated about the challenges presented by foreign forum litigation, decides to adopt the ICFS provision solely to address future claims yet to be filed. In that latter instance, the board’s decision would not implicate the vested rights analysis in the least.

IV. The Law Enforcing Forum Selection Provisions

Forum selection provisions are commonly used, widely respected, and routinely enforced across a broad range of commercial and corporate agreements.²³⁴ The notion that forum selection clauses “oust” a court of jurisdiction has been discarded in favor of the view that enforcement is a discretionary declination of jurisdiction in recognition of the parties’ choice of an alternative

²³⁰ *Id.* at 285.

²³¹ *Id.* at 288 (citing *Wilson v. Cherokee Drift Min. Co.*, 14 Cal. 2d 56, 58 (1939) (upholding assessment of five cents per share levied by the board on the outstanding stock, where articles of incorporation permitted assessments) and *Silva v. Coastal Plywood & Timber Co.*, 124 Cal. App. 2d 276, 278 (1954)).

²³² MARSH, FINKLE AND SONSINI, MARSH’S CALIFORNIA CORPORATE LAW § 17.02 (“Vested Rights”) (current through 2012-1).

²³³ See, e.g., *Salaman*, 1992 WL 808095, at *6 (holding board could not amend bylaws without shareholder consent where to do so would terminate plaintiff’s right to indemnification, which had vested when lawsuits were filed against him).

²³⁴ See 14D WRIGHT & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1, at n. 5 (3d ed. 2012 update) (collecting cases); Eisenberg & Miller, *The Market for Contracts*, *supra* note 13, at 2077 (“Courts today enforce choice-of-law provisions unless they bear no reasonable relationship with the state, violate an important public policy, or are otherwise unenforceable under ordinary contract principles”); *id.* at note 31 (observing that “enforcement is generally favored under the Restatement (Second) of Conflicts of Law § 80 (1971) providing that the parties’ agreement as to the place of the action is to be given effect unless it is unfair or unreasonable”); *E. & J. Gallo Winery v. Adina Licores S.A.*, 446 F.3d 984, 992 (9th Cir. 2006) (“It is therefore clear that the Supreme Court has established a strong policy in favor of the enforcement of forum selection clauses. . . Forum selection clauses are increasingly used in international business. When included in freely negotiated commercial contracts, they enhance certainty, allow parties to choose the regulation of their contract, and enable transaction costs to be reflected accurately in the transaction price.”).

forum.²³⁵ Federal and state courts generally view forum selection clauses as presumptively valid and place the burden on the party opposing enforcement to demonstrate that enforcement would be unfair or inequitable.²³⁶

The procedural law of the foreign jurisdiction in which the claim is filed generally governs litigation over the enforcement of forum selection provisions.²³⁷ Because foreign claims can be filed in federal or state court, and because federal law today strongly influences state law governing forum selection disputes,²³⁸ we first review the relevant federal precedent. We then review the relevant Delaware law because Delaware, though not the forum in which enforcement

²³⁵ See, e.g., *Bremen*, 407 U.S. at 12 (“The argument that [forum selection] clauses are improper because they tend to ‘oust’ a court of jurisdiction is hardly more than a vestigial legal fiction”); *P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003); *Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 510 (2d Cir. 1998) (A mandatory forum-selection clause does not “oust the jurisdiction” of the court); *Smith, Valentino & Smith, Inc. v. Super. Ct.*, 551 P.2d 1206, 1209 (1976) (“While it is true that the parties may not deprive courts of their jurisdiction over causes by private agreement, it is readily apparent that courts possess discretion to decline to exercise jurisdiction in recognition of the parties’ free and voluntary choice of a different forum”) (internal citations omitted). See also 17A Am. Jur. 2d Contracts § 259 (2012) (“In enforcing a forum-selection clause, a court is not attempting to limit the plaintiff’s usual right to choose its forum, but is enforcing the forum that the plaintiff has already chosen”).

²³⁶ See, e.g., *Bremen*, 407 U.S. at 10; *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1075 (11th Cir. 1987) (en banc) (“Where, as here, the non-movant has not shown that it would be unjust to honor a forum selection clause that it has freely given, ‘the interest of justice’ requires that the non-movant be held to its promise.”) (Tjoflat, J., concurring). See also notes 245, 246, 273, 300, 309, 310, and 338, *infra*.

²³⁷ See, e.g., *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010) (“As an agreement purporting to modify or waive the venue of a federal court, a forum selection clause implicates what is recognized as a procedural matter governed by federal law”); *Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 292-93 (Del. 1999) (applying Delaware law to determine enforceability of California forum selection and arbitration provisions); *Baker*, 2010 WL 1931032, at *2 (applying Delaware law to determine enforceability and applicability of Texas forum selection provision); *America Online, Inc. v. Super. Ct.*, 108 Cal.Rptr.2d 699, 707 (Cal. Ct. App. 2001) (applying California law to determine enforceability of Virginia forum selection clause).

There is, however, a split among the courts on this question. Some federal courts sitting in diversity have applied state law rather than federal procedural law when ruling on the enforceability of a forum selection provision. See, e.g., *Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 201 (3d Cir. 1983), overruled on other grounds as stated in *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 n.22 (3d Cir. 1983) (“It is not entirely clear why, absent a [federal] statute ... the enforceability of a forum selection clause should properly be divorced from the law which in other respects governs the contract”), *cert. denied*, 464 U.S. 938 (1983); *Abbott Laboratories v. Takeda Pharmaceutical Co., Ltd.*, 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears”). In addition, at least one commentator has suggested that enforceability determinations in both state and federal court should be governed by the chartering state’s laws pursuant to the internal affairs doctrine. Sara Lewis, *Transforming the “Anywhere but Chancery” Problem into the “Nowhere but Chancery” Solution*, *supra* note 39, at 204-206. Our analysis is, however, invariant to the resolution of this dispute because under federal jurisprudence and the laws of Delaware, California, and most other states, forum selection provisions are favored and likely to be upheld in the majority of instances. See Sections IV. A & IV.B., *infra*. See also *Instrumentation Associates, Inc. v. Madsen Electronics (Canada) Ltd.*, 859 F.2d 4, 7 n.5 (3d Cir. 1988) (declining to decide whether federal law, the law of the forum state, the law of Canada, or one of its provinces applies, since “[a]ll of these jurisdictions look favorably on forum selection clauses”).

In contrast, because of the operation of the internal affairs doctrine, the law of the state of incorporation governs the resolution of any dispute as to the validity of the ICFS provision as adopted, see Section III, *supra*, and any dispute as to the board’s compliance with its fiduciary obligation, see Section IV.C., *infra*.

²³⁸ See notes 300 and 308, *infra*.

disputes are likely to arise in our analysis, has the most developed body of state law addressing the enforcement of forum selection provisions in the context of internal business organization disputes. We then examine California state law, which is the modal foreign forum in which enforcement litigation is likely to arise. Delaware procedural law will not, of course, govern the enforcement of forum selection provisions by California state courts, but California courts will rationally consider Delaware precedent as guidance.

A. Federal Precedent

There is considerable confusion among the federal courts as to the proper procedural mechanism for enforcing forum selection provisions. Enforcement disputes have, depending on the facts of the case and the federal court resolving the dispute, been litigated pursuant to Rule 12(b)(1), Rule 12(b)(3), Rule 12(b)(6), 28 U.S.C. § 1404(a), 28 U.S.C. § 1406, or the common law doctrine of *forum non conveniens*.²³⁹ The legal standard applied in enforcement proceedings can depend on the type of procedural mechanism employed, the type of provision at issue (permissive or mandatory),²⁴⁰ or both. Motions to dismiss mandatory forum selection provisions are often resolved according to the test articulated by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*²⁴¹ and later strengthened in *Carnival Cruise Lines, Inc. v. Shute*.²⁴² Motions to transfer either permissive or mandatory provisions are frequently resolved pursuant to the Section 1404(a) transfer analysis, as mandated by *Stewart Organization, Inc. v. Ricoh Corporation*.²⁴³ Motions to dismiss permissive forum selection provisions are often addressed through the common law doctrine of *forum non conveniens*. However, once one cuts through the procedural confusion relating to the precise legal standard by which federal courts resolve forum selection disputes, the pragmatic observation is that these provisions will, one way or the other, be enforced in the majority of circumstances and most often in accord with the rule of *Bremen*.

1. The Rule of *Bremen* and *Carnival Cruise*

In *Bremen*, the Supreme Court held for the first time that a forum selection clause “is prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”²⁴⁴ To demonstrate that enforcement is unreasonable, the opposing party would have to present proof that : (i) the clause’s formation was induced by fraud or over-reaching; (ii) “trial in the contractual forum will be so gravely difficult and

²³⁹ See, e.g., Claire M. Specht, *12(b) What? Slater and Enforcing Forum Selection Clauses Through Dismissal*, 53 B.C. L. REV. E-SUPPLEMENT 111, 115-118 (2012) (discussing the circuits’ various approaches to enforcing forum selection clauses through dismissal); 14D WRIGHT, MILLER, ET AL., FED. PRAC. & PROC. § 3803.1, at notes 72 & 73, 79-84 and accompanying text (3d ed. 2012 update) (discussing split among lower federal courts with respect to the proper procedural mechanism for enforcing forum selection provisions); Ved P. Nanda, David K. Pansius, 1 *Litigation of International Disputes in U.S. Courts* § 7:16 (2012 update) (same). See also *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 475 (2d Cir. 2011) (noting that “neither the Supreme Court, nor this Court, has ‘specifically designated a single clause of Rule 12(b)’—or an alternative vehicle—‘as the proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause’” and that judgments dismissing cases on the basis of a forum selection clause have been upheld under 12(b)(1), 12(b)(3), and 12(b)(6)).

²⁴⁰ Permissive and mandatory provisions are discussed in greater detail *infra*, at notes 281-283 and accompanying text.

²⁴¹ 407 U.S. 1 (1972).

²⁴² 499 U.S. 585 (1991).

²⁴³ 487 U.S. 22 (1988).

²⁴⁴ *Bremen*, 407 U.S. at 10.

inconvenient that [plaintiff] will for all practical purposes be deprived of his day in court”; or (iii) enforcement of the clause would “contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.”²⁴⁵

The mere fact that the selected forum is inconvenient is an insufficient basis for refusing to enforce the forum selection clause, particularly where the inconvenience was foreseeable at the time of contracting,²⁴⁶ and when the selected forum is neither “remote” nor “alien.”²⁴⁷ It is also reversible error to place the burden of proof on the party seeking enforcement of the forum selection clause to demonstrate that “the balance of convenience was strongly in its favor.”²⁴⁸ Instead, the party opposing the forum selection provision bears the “heavy burden of showing not only that the balance of convenience is strongly in favor of [a forum other than the one designated in the agreement]. . .but also that a trial in [the designated forum]. . .will be so manifestly and gravely inconvenient. . .that it will be effectively deprived of a meaningful day in court. . .”²⁴⁹ Although *Bremen* involved a suit in admiralty, subsequent decisions have extended the holding to non-admiralty actions²⁵⁰ and have identified a more detailed series of factors relevant to *Bremen*’s reasonableness test.²⁵¹

In *Carnival Cruise* the Supreme Court extended *Bremen*’s presumption of validity to encompass forum selection provisions embedded in cruise line tickets and other standardized form contracts that are commonly viewed as contracts of adhesion. “Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”²⁵² The Court further observed that “[i]ncluding a reasonable forum clause in a form contract of this kind well may be permissible” and beneficial for several reasons, including the ability to avoid litigation in multiple forums.²⁵³ The Court thus declined to hold a non-negotiated forum-

²⁴⁵ *Id.* at 15-18.

²⁴⁶ *Id.* at 16-18; *see also* 14D WRIGHT & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1, at n.12 (3d ed. 2012 update) (collecting cases).

²⁴⁷ *Bremen*, 407 U.S. at 17.

²⁴⁸ *Id.* at 18 (citation omitted).

²⁴⁹ *Id.* at 19.

²⁵⁰ *D’Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708, 711 (D.R.I. 1983). *See also In re Fireman’s Fund Insurance Cos., Inc.*, 588 F.2d 93, 95 (5th Cir. 1979); *Fireman’s Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294, 1296-97 (1st Cir. 1974); *Richardson Engineering Co. v. International Business Machines Corp.*, 554 F.Supp. 467, 468-69 (D. Vt. 1981), *aff’d* 697 F.2d 296 (2d Cir. 1982); 14D WRIGHT & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1, at n.46 and accompanying text (3d ed. 2012 update) (noting that the Supreme Court’s citation to cases that were not limited to admiralty or international trade “led many lower federal courts to hold that the doctrine announced in that case is the proper doctrine to apply to forum selection clauses generally”).

²⁵¹ These factors include: (1) the law governing the construction of the contract; (2) the jurisdiction in which the contract was executed; (3) the jurisdictions in which the transactions have been or are to be performed; (4) the availability of remedies in the designated forum; (5) the public policy of the initial forum state; (6) the location of the parties, the convenience of prospective witnesses, and the accessibility of evidence; (7) the relative bargaining power of the parties and the circumstances surrounding their dealings; (8) the presence or absence of fraud, undue influence or other extenuating (or exacerbating) circumstances; and (9) the conduct of the parties. *D’Antuono*, 570 F.Supp. at 712.

²⁵² *Carnival Cruise*, 499 U.S. at 593.

²⁵³ The Court noted that the forum selection provision in the cruise line ticket limited the number of fora in which a cruise line might otherwise be subject to suit; eliminated confusion over the appropriate forum, thereby

selection clause in a form ticket contract unenforceable simply because it was not the subject of bargaining.²⁵⁴ The Court also found that because Florida – the forum designated in the cruise line ticket – was neither alien nor sufficiently remote from Washington, where the action was filed (even though the plaintiffs had never traveled to Florida and Florida’s only connection to the litigation was that it was the location of the cruise line’s corporate headquarters), the inconvenience of the parties was not, in and of itself, sufficient to invalidate the forum selection clause.²⁵⁵

It follows that under the rule of *Bremen* and *Carnival Cruise*, ICFS provisions are *prima facie* valid and should be enforced in the vast majority of instances.²⁵⁶ ICFS provisions are not “induced by fraud or over-reaching.” They are, instead, in the case of Delaware corporations, the result of the natural operation of Delaware corporate law. Even in the case of bylaw provisions adopted without prior stockholder approval, the stockholders are on notice that boards of directors have the authority to amend the bylaws without prior stockholder consent, no vested rights are breached, and the stockholders have mechanisms through which they can reverse or challenge the board’s decision.²⁵⁷ Indeed, stockholders are on notice of the fact that intra-corporate litigation in the state of incorporation is always a possibility and, until relatively recently, such litigation was very much the norm.²⁵⁸ ICFS provisions thus cannot be framed as “induced by fraud or over-reaching.” Nor is litigation in the state of incorporation “remote” or “alien” to the resolution of intra-corporate disputes.

Trial in the contractual forum, Delaware in the case of our ICFS analysis, will also never be so “gravely difficult and inconvenient that [plaintiff] will for all practical purposes be deprived of his day in court.” In *Carnival Cruise*, the plaintiff resided in the State of Washington and the Supreme Court did not view an appearance in Florida as being so gravely difficult and inconvenient as to deprive the plaintiff of his day in court. Every state in the continental United States is, however, closer to Delaware than Washington is to Florida.²⁵⁹ It follows that if the plaintiffs in *Carnival Cruise* could be required to appear in Florida (where Florida’s only nexus to the transaction is that it was the cruise line’s headquarters state) then plaintiffs in intra-corporate disputes can be required to appear in Delaware. Further, as a practical matter, regardless of the venue in which the dispute is to be resolved, the costs and expenses of discovery will be incurred largely where the witnesses and documents are located, and are thus

avoiding unnecessary and costly litigation; and presumably, by saving the cruise line money, resulted in reduced fares for passengers. *Id.* at 593-94.

²⁵⁴ *Id.* at 593.

²⁵⁵ *Id.*

²⁵⁶ Even the court in *Galaviz v. Berg*, despite invalidating an ICFS provision adopted by Oracle’s board of directors without shareholder consent, recognized that if the principles enunciated in *Bremen* were controlling, “there would be little basis to decline to enforce the venue provision of Oracle’s bylaws.” *See Galaviz*, 763 F. Supp. 2d at 1174. For a more detailed discussion of *Galaviz* and the reasons why it was wrongly decided in part, see Section V, *infra*.

²⁵⁷ *See* Section III.B., *supra*. *Accord Galaviz*, 763 F. Supp. 2d at 1173 (neither party suggested that the bylaw adopted without prior stockholder consent was the subject of fraud or undue influence).

²⁵⁸ *See* Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at III.A.

²⁵⁹ Simple inspection of a map of the United States will confirm this observation. The Google driving feature in Google maps lists the distance between Washington State and Florida as 3,035.9 miles (measured from the geographic centers of each state). The distance from every other state to Delaware is shorter. In particular, the distance from California to Delaware, the states of greatest interest for the present analysis, is 2,893.4 miles.

invariant to the forum selection decision.²⁶⁰ Moreover, there is ample history of plaintiffs and plaintiff law firms from around the country frequently and voluntarily litigating intra-corporate matters in Delaware with no complaint that an appearance in Delaware is “gravely difficult and inconvenient,” even in December.

As for whether enforcement of the clause might contravene a “strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision,”²⁶¹ there is no federal policy at odds with enforcement of a forum selection provision that would cause an intra-corporate dispute to be heard in the state of incorporation.²⁶² To the contrary, the strong federal preference for arbitration argues, *a fortiori*, in favor of the enforcement of ICFS provisions. The Supreme Court has itself described an arbitration provision as a form of a forum selection provision.²⁶³ Forum selection provisions cause disputes to be litigated in open court, subject to public scrutiny, in a forum that generates reviewable precedent through procedures that have full due process guarantees. Arbitral proceedings have none of these features.²⁶⁴ Enforcement of a

²⁶⁰ See, e.g., *Topps*, 924 A.2d at 961-63 (“the fact that a foreign corporation may have its records and principal place of business in New York does not affect a decision to decline jurisdiction under the internal affairs doctrine,” particularly given that “the discovery will take place in a location convenient to the party producing the documents and being deposed” (quoting *Prescott v. Plant Industries, Inc.*, 88 F.R.D. 257, 262 (S.D.N.Y.1980)).

²⁶¹ *Bremen*, 407 U.S. at 15-18.

²⁶² Some commentators suggest that federal law may pose an obstacle to the enforcement of ICFS provisions, given that “[b]oth the diversity jurisdiction statute and, more specifically, the Securities Litigation Uniform Standards Act of 1998 (SLUSA) seem to entitle the plaintiff to choose at its option between state and federal court.” See Coffee, *Forum Selection Clauses and the Market for Settlements*, *supra* note 34, at 2. However, federal law is clear that parties can waive their right to pursue claims related to the contract in a forum that might otherwise have concurrent jurisdiction by consenting to a forum selection provision. See, e.g., *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216-17 (3d Cir. 1991) (holding forum selection clause waived the defendant’s right to remove on diversity of citizenship grounds, and reasoning that “by consenting to ‘submit’ to ‘any court’ of competent jurisdiction ‘at the request of the Company,’ and to comply with all requirements necessary to give ‘such court’ jurisdiction, [the defendant] agreed to go to, and stay in, the forum chosen by [the plaintiff]”); *Cowatch v. Sym-Tech Inc.*, 253 Fed.Appx. 231, 234 (3d Cir. 2007) (UNPUBLISHED) (holding defendant waived federal diversity jurisdiction by agreeing to state court forum in forum selection clause); *Lighthouse MGA, LLC v. First Premium Ins. Group, Inc.*, 448 Fed.Appx. 512, 515 (5th Cir. 2011) (UNPUBLISHED) (“In more than one case, this court has reviewed a forum selection clause that purported to give state courts exclusive jurisdiction over actions connected to the contract and held that the forum selection clause was an enforceable waiver of a party’s right to have disputes connected to the contract heard in a federal forum,” including disputes that could have otherwise been filed in federal court on the basis of diversity jurisdiction). Delaware law is in accord. See *Elf Atochem*, 727 A.2d at 295 (enforcing forum selection and arbitration provisions in LLC agreement that designated California forum; although Delaware law vested jurisdiction in Delaware Chancery Court to hear type of action at issue, “for the purpose of designating a more convenient forum, we find no reason why the members cannot alter the default jurisdictional provisions of the statute and contract away their right to file suit in Delaware”). Accordingly, an ICFS provision is valid even if it precludes a party from bringing an action in federal court on the basis of diversity jurisdiction or pursuant to SLUSA’s “Delaware carve-out,” which grants concurrent jurisdiction to state and federal courts for a subset of securities class actions.

²⁶³ *Scherk v. Alberto Culver, Co.*, 417 U.S. 506, 519 (1974).

²⁶⁴ As the Supreme Court has stated, “[a]rbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.” *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965). See also *Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO*, 263 F. Supp. 488 (C.D. Cal. 1967) (“It is well established that rules of evidence as applied in court proceedings do not prevail in arbitration hearings”); Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85-87 (1992) (noting that arbitrators, unlike judges, are not bound by substantive law or

forum selection provision can therefore be viewed as superior, from a public policy perspective, to the enforcement of an arbitration provision.

Even if one looks to California's public policy in the context of a federally filed foreign action, there is no support for the proposition that "it would violate fundamental California public policy to require resolution of shareholder derivative actions in a corporation's home state."²⁶⁵ California has no fundamental public policy giving it an interest in the interpretation of another state's corporate laws in a matter governed by the internal affairs doctrine as applied to a publicly traded corporation. Indeed, even California's controversial quasi-corporation statute²⁶⁶ does not reach the publicly traded corporations that are the focus of this analysis. The more detailed examination of California precedent presented below supports an identical conclusion.²⁶⁷

Further, the contract of adhesion that was enforced in *Carnival Cruise* was more susceptible of challenge than an ICFS provision. The ticket purchasers in *Carnival Cruise* had no mechanism whatsoever by which they could cause the cruise line to delete or amend the forum selection provision. Stockholders in Delaware corporations, however, can, pursuant to Section 109(a), cause the corporation to delete or to amend an ICFS bylaw after it has been adopted by the board.²⁶⁸ They also have the right pursuant to SEC Rule 14a-8 to petition the board to delete or to amend the forum selection provision.²⁶⁹ The plaintiffs in *Carnival Cruise* thus had less bargaining power *vis a vis* the cruise line than stockholders have in addressing the merits of a forum selection provision adopted in a bylaw without prior stockholder approval. It therefore follows that if differential bargaining positions were insufficient to invalidate the forum selection provision in *Carnival Cruise*, they are also insufficient to invalidate an ICFS provision.

formal rules of evidence, and are rarely subject to judicial review); Rex R. Perschbacher & Debra Lynn Basset, *The End of Law*, 84 B.U. L. REV. 1, 29-30 (2004) (noting that "arbitration uses very different procedures"). In addition, arbitrations typically conclude with a terse, non-explanatory written award that is not disclosed to the public; published opinions are rare. See Brunet, *Arbitration and Constitutional Rights*, *supra*, at 84-85. See also Perschbacher & Basset, *The End of Law*, *supra*, at 29-30. One commentator describes arbitration as "a private proceeding conducted out of public view, and with no precedential value," hence they "resolve[] disputes without contributing to the body of law and without providing information to the public." Perschbacher & Basset, *The End of Law*, *supra*, at 30. See also Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002) ("Whatever else arbitration may be, it is not 'law'--the kind of findable, studiable, arguable, appealable, Restateable kind of law that has characterized the Contract area for over a century").

²⁶⁵ Galaviz, 763 F. Supp. 2d at 1173.

²⁶⁶ See Cal. Corp. Code § 2115. In 2005, the Delaware Supreme Court found that Section 2115 violated the United States Constitution and that the internal affairs of Delaware corporations are to "be adjudicated exclusively" in accordance with Delaware law. See *VantagePoint*, 871 A.2d at 1116. Although the statute remains good law in California, one California court recently signaled its disagreement with Section 2115. In that case, *Lidow v. Superior Court*, 141 Cal. Rptr. 3d at 737, the California Court of Appeal, in the published portion of an opinion, stated in *dicta* that matters of internal corporate governance fall within a corporation's internal affairs, and should be adjudicated exclusively under the laws of the chartering state. This dispute is, however, irrelevant in the context of this article's analysis because Section 2115 does not, by its very terms, apply to publicly traded corporations.

²⁶⁷ See IV.B.2. *infra*.

²⁶⁸ 8 Del. G.C.L. §109(a).

²⁶⁹ Rule 14a-8 provides an opportunity for a shareholder owning a certain amount of a company's securities to submit a proposal for inclusion in a company's proxy materials, provided the shareholder complies with certain procedural requirements and the proposal does not fall within one of thirteen substantive bases for exclusion. 17 C.F.R. § 240.14a-8.

2. Section 1404(a) and the *Stewart* Decision

In *Stewart*, the Supreme Court addressed enforcement of a forum selection provision in the context of a motion to transfer pursuant to Section 1404(a). Section 1404 permits transfers from one district court to another where the action might have originally been filed “[f]or the convenience of parties and witnesses, [and] in the interest of justice.”²⁷⁰ In the usual 1404(a) motion the burden is on the movant to establish that the suggested forum is more convenient.²⁷¹ However, when a 1404(a) motion seeks to enforce a valid, reasonable choice of forum clause, “the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute.”²⁷² In these circumstances, “deference to the filing forum would only encourage parties to violate their contractual obligations, the integrity of which are [sic] vital to our judicial system.”²⁷³

Accordingly, “[t]he presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus” when considering a motion to transfer venue under Section 1404(a),²⁷⁴ and in the views of a concurring Justice, “a valid forum selection clause [should be] given controlling weight in all but the most exceptional cases.”²⁷⁵ Although a forum selection clause does not obviate the need for judicial analysis of the factors set forth in Section 1404(a), and does not necessarily determine the ruling on the motion for transfer, “the venue mandated by a choice of forum clause rarely will be outweighed by other Section 1404(a) factors.”²⁷⁶

Stewart's 1404(a) analysis thus favors enforcement of forum selection provisions in a manner that echoes *Bremen*.²⁷⁷ The analysis regarding the convenience of the parties under 1404(a) parallels the analysis of whether appearance in the selected forum would be gravely difficult and inconvenient under *Bremen*. Indeed, for reasons identical to the analysis under *Bremen* and *Carnival Cruise*, it should rarely be the case that litigation in the state of incorporation would be “sufficiently inconvenient” to cause the court to deny enforcement of the ICFS provision. In the context of an intra-corporate dispute, each of the litigants has some presence in or contact with the chartering state, and documents or witnesses relevant to the litigation may be located there. In addition, at least in the modal case of a Delaware entity with

²⁷⁰ 28 U.S.C. § 1404(a).

²⁷¹ *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Stewart*, 487 U.S. at 29. See also 15 WRIGHT, MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3854.1 (3d ed. 2012 update).

²⁷⁵ *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring).

²⁷⁶ 15 WRIGHT, MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3854.1 (3d ed. 2012 update) (quoting *P & S Business Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003)). Some courts treat plaintiff's consent to a choice of forum clause as a waiver of future complaints as to the convenience of litigating in the chosen forum. See notes 293-296 and accompanying text, *infra*.

²⁷⁷ David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 977 (2008) (“both approaches favor clause enforcement”); see also *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, No. 06-20561, 2007 WL 1425851, at *3 (5th Cir. 2007) (“Forum selection clauses are generally enforced”); *E. & J. Gallo Winery*, 446 F.3d at 992 (“It is therefore clear that the Supreme Court has established a strong policy in favor of the enforcement of forum selection clauses”); see also 14D WRIGHT & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1, at notes 5 & 6 (3d ed. 2012 update) (collecting cases).

a Delaware forum selection clause, all of the individual officers and directors of the entity will be subject to service of process in Delaware.²⁷⁸ Finally, the intra-corporate claims will be governed by the chartering state's corporation laws. Transferring the action to the chartering state, which is already familiar and experienced with those laws, thus promotes judicial economy.²⁷⁹ It follows that if ICFS provisions are analyzed within the context of 1404(a) transfer jurisprudence, they should again be enforced in the large majority of circumstances.

3. *Forum Non Conveniens*

The federal courts distinguish between permissive and mandatory forum selection clauses. Permissive clauses authorize but do not require litigation to proceed in a designated forum.²⁸⁰ Mandatory clauses seek to vest jurisdiction exclusively in the designated forum. A motion to dismiss a case pursuant to a permissive forum selection clause may be judged under the doctrine of *forum non conveniens*.²⁸¹ In contrast, mandatory clauses are generally evaluated either under the rule of *Bremen* or the Section 1404 transfer analysis of *Stewart*. The vast majority – if not all – ICFS provisions adopted to date contain unambiguous language stating the jurisdiction in which the litigation is to proceed and are therefore mandatory.²⁸² ICFS provisions should therefore rarely, if ever, be subject to a *forum non conveniens* analysis. Nonetheless, for the sake of completeness, we review the doctrine of *forum non conveniens* as it applies to ICFS litigation, and demonstrate that ICFS provisions should again be broadly enforced even under this standard.

Federal courts conduct the *forum non conveniens* analysis in two steps.²⁸³ First, to grant a motion to dismiss, a court must determine that an adequate alternative forum exists.²⁸⁴ An alternative forum is typically “available” where the foreign court could have jurisdiction over the matter and the defendant is “amenable to process” there.²⁸⁵ There can be little doubt that an

²⁷⁸ See 10 Del. C. § 3114(a), (b).

²⁷⁹ See, e.g., *Keymark Enterprises, LLC v. Eagle Metal Products*, No. 08-cv-00662, 2008 WL 4787590, at *4 (D. Colo. 2008) (“There is a relative advantage in having a Texas court determine questions of Texas law. This factor weighs in favor of transfer.”); *Trout Unlimited v. U.S. Dept. of Agriculture*, 944 F.Supp. 13, 19 (D.D.C. 1996) (“Transfer of this action to the district court in Colorado, which is already thoroughly familiar and experienced with law that may be relevant to this action, will therefore promote judicial economy”).

²⁸⁰ See, e.g., *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 980 (2d Cir. 1993). A forum selection clause that states that “all claims or causes of action relating to or arising from this Agreement shall be brought in a court in the City of Richmond, Virginia” is mandatory because “the use of the term ‘shall’ is one of requirement.” *Slater v. Energy Services Group Intern., Inc.*, 634 F.3d 1326, 1330 (11th Cir. 2011). A clause stating that “[t]his Agreement is governed by Irish Law and the Irish Courts” is permissive because it contains no specific language of exclusion evidencing an intent by the parties to give the Irish Courts exclusive jurisdiction or make Ireland an obligatory venue for their disputes. See, e.g., *Global Seafood Inc. v. Bantry Bay Mussels Ltd.*, 659 F.3d 221, 222 (2d Cir. 2011).

²⁸¹ Permissive forum selection provisions may also be reviewed as part of a Section 1404(a) transfer analysis. See, e.g., *MK Systems, Inc. v. Schmidt*, No. 04 Civ.8106 RWS, 2005 WL 590665, at *5 (S.D.N.Y. March 10, 2005).

²⁸² The dominant form of ICFS provisions states that “the Court of Chancery of the state of Delaware shall be the sole and exclusive forum. . . .” See Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.E. & Table 6. See also note 154, *supra*. Accordingly, these provisions are mandatory and are not subject to forum non conveniens analysis.

²⁸³ *Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 510 (2d Cir. 1998).

²⁸⁴ *Id.* at 506-07.

²⁸⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 262 n.22 (1981).

alternative forum is available in the case of ICFS litigation, and in the vast majority of circumstances there is no issue regarding the ability to serve process on defendants.²⁸⁶

If an adequate alternative forum exists, the court then considers a series of private and public interest factors relevant to the *forum non conveniens* determination.²⁸⁷ Private interest factors include the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing ones, the possibility to view potentially relevant evidence, and all other practical problems that make trial of a case easy, expeditious and inexpensive.²⁸⁸ Public interest factors include administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action, the avoidance of unnecessary problems in conflict of laws, the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty.²⁸⁹ Although a plaintiff's choice of forum is typically accorded deference in a *forum non conveniens* analysis, it may be overturned when "the balance [of relevant considerations] is strongly in favor of the defendant."²⁹⁰

The existence of a valid forum selection provision designating an alternative forum is a factor weighing in favor of dismissal under the traditional *forum non conveniens* analysis.²⁹¹ By consenting to the provision, the plaintiff has acknowledged that it might be subject to suit in the designated forum with respect to claims arising out of the agreement.²⁹² In other words, "[b]y agreeing to the forum selection term, [the plaintiff] would have effectively 'chosen' to litigate its contract-related claims in [the designated forum]" and should not be permitted to avoid its contractual obligations.²⁹³ A forum selection provision would thus alter the *forum non conveniens* analysis by "vitiat[ing] any presumption that [plaintiff's choice of forum] is a convenient forum for this litigation."²⁹⁴ In that situation, plaintiff's choice of forum would "be given no weight at all" in the *forum non conveniens* analysis.²⁹⁵

In addition, several private and public interest factors argue in favor of dismissing a foreign-filed intra-corporate claim in favor of a suit filed in Delaware, the state of incorporation. If parallel litigation is already pending in Delaware, then dismissal of the foreign claim in favor of the Delaware suit promotes judicial economy and avoids duplicative proceedings. Even if no parallel litigation is pending, Delaware courts will have greater expertise in the interpretation of

²⁸⁶ All officers and directors of Delaware-chartered corporations, by virtue of their positions, consent to service of process in Delaware, regardless of their place of residence. *See* 10 Del. C. § 3114(a), (b). *See also* Section IV.C., *infra* (discussing the enforceability of ICFS provisions when there is no jurisdiction over an indispensable party).

²⁸⁷ *Piper Aircraft*, 454 U.S. at 241 n.6.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (dismissing action).

²⁹¹ *J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co., Ltd.*, No. 3:08-cv-31-J-32MCR, 2009 WL 55010, at *8 (M.D. Fla. Jan. 7, 2009); *Cf. Ibar Ltd. v. American Bureau of Shipping*, No. 97 Civ. 8592(LMM), 1998 WL 274469, at *4 (S.D.N.Y. May 26, 1998) (New York arbitration forum clause evidences agreement that New York is a convenient forum over New Jersey "not only for arbitration, but also for enforcement of the arbitration agreement").

²⁹² *J.C. Renfroe & Sons*, 2009 WL 55010, at *8.

²⁹³ *Kultur Intern. Films Ltd. v. Covent Garden Pioneer, FSP., Ltd.*, 860 F.Supp. 1055, 1066 n.3 (D.N.J. 1994).

²⁹⁴ *Id.* at 1065-66 & n.3.

²⁹⁵ *Id.* at 1066.

Delaware corporate law.²⁹⁶ Further, in light of Delaware’s substantial experience in the resolution of intra-corporate disputes, and the speed with which Delaware courts can operate in resolving these disputes,²⁹⁷ dismissal in favor of Delaware courts could accelerate litigation and “make trial of a case easy, expeditious and inexpensive.”²⁹⁸ And, for all of the reasons articulated in conjunction with application of the rule of *Bremen* and *Carnival Cruise*, requiring that the litigation proceed in Delaware would be neither unfair nor unjust, and would not frustrate the reasonable expectations of any party to the litigation.

B. State Precedent

Most state courts consider forum selection clauses to be *prima facie* valid, and uphold them provided they are not unreasonable, unfair, or unjust under the circumstances.²⁹⁹ Nonetheless, not all courts offer the same level of assurance to the parties. As Eisenberg and Miller note:

Some courts retain jurisdiction over cases in which the parties have selected another state’s forum if they conclude that their own tribunals would be more convenient. Some are more willing to reject forum selection clauses on grounds that they contravene public policy, are unreasonable, fail to establish personal jurisdiction in the forum, or fail to accomplish “substantial justice.” Some approve forum selection clauses only grudgingly,

²⁹⁶ See notes 136 and 138, *supra*.

²⁹⁷ See note 137, *supra*.

²⁹⁸ *Piper Aircraft*, 454 U.S. at 241 n.6 (discussing private interest factors of forum non conveniens analysis).

²⁹⁹ See, e.g., *Wilmot v. McNabb*, 269 F. Supp. 2d 1203, 1210 (N.D. Cal. 2003) (“Colorado courts have expressed a preference for upholding forum selection clauses”); *Water & Sand Intern. Capital, Ltd. v. Capacitive Deionization Technology Systems, Inc.*, 563 F. Supp. 2d 278, 283 (D.D.C. 2008) (under District of Columbia law, to demonstrate that contractual forum selection clause is unreasonable, defendant must show that: (1) clause was induced by fraud or overreaching, (2) contractually selected forum is so unfair and inconvenient as, for all practical purposes to deprive plaintiff of remedy or of its day in court, or (3) enforcement would contravene strong public policy of forum in which action is filed); *In re N. Parent, Inc.*, 221 B.R. 609, 620 (Bankr. D. Mass. 1998) (under Illinois law, forum selection clauses are *prima facie* valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances); *International Sport Divers Ass’n, Inc. v. Marine Midland Bank, N.A.*, 25 F. Supp. 2d 101, 106 (W.D.N.Y. 1998) (under Connecticut law, when the forum selected in contractual forum selection clause is reasonably appropriate, and there is no indication that the parties had such greatly disproportionate bargaining power that the agreement could be regarded as unconscionable, the tendency is to give effect to such agreements); *Profl Ins. Corp. v. Sutherland*, 700 So. 2d 347, 350 (Ala. 1997) (noting that “in the wake of the United States Supreme Court’s decision in *M/S Bremen*, 407 U.S. 1 (1972). . .many jurisdictions were influenced to reconsider their positions on the issue” and that “the view that forum selection clauses such as those at issue in this case are *per se* invalid and unenforceable is now only held in a small minority of jurisdictions”); *Constructores Asociados de Vivienda Y Urbanizacion, S.A. de C.V. v. Bennett Motor Exp., LLC*, 706 S.E.2d 726, 728 (Ga. Ct. App. 2011) (forum selection clauses are *prima facie* valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances); *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 461 (Md. 1996) (“After [*Bremen*], the literature abounds with decisions, from both Federal and State courts, declaring such clauses valid, putting the burden on the party resisting the clause to show that it is unreasonable, and ultimately enforcing the clauses”); *DiRuocco v. Flamingo Beach Hotel & Casino, Inc.*, 557 N.Y.S.2d 140, 141 (N.Y. App. Div. 1990) (“it is now well established that such agreements should be enforced ‘absent a showing that they result from fraud or overreaching, that they are unreasonable or unfair, or that their enforcement would contravene some strong public policy of the forum’” (citing *Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 656 F.Supp. 464, 467 (S.D.N.Y. 1987)).

reject them in particular types of cases, exercise discretion over whether to enforce them, or refuse to enforce them at all.³⁰⁰

Federal courts appear less receptive than some state courts, California included, to public policy arguments against enforcement of forum selection provisions.³⁰¹ However, as explained below, the circumstances surrounding intra-corporate forum selection provisions should lead even the most reticent state courts to respect the operation of ICFS provisions in the vast majority of circumstances.

Rather than survey the laws of all fifty states as they relate to ICFS provisions, this article focuses on two: Delaware and California. Delaware is the jurisdiction with the most developed body of law regarding the enforcement of forum selection provisions in the context of intra-entity disputes. It is also the jurisdiction most frequently designated in ICFS provisions, and its precedent is likely to be cited by other courts addressing the question.³⁰² California is the state in which most Delaware-chartered corporations with ICFS provisions are headquartered and is the modal jurisdiction in which enforcement disputes over ICFS provisions are likely to arise.³⁰³

1. Enforcement in Delaware

Delaware courts, like their federal counterparts, disagree as to the proper procedural mechanism for enforcing forum selection provisions. The Delaware Court of Chancery favors motions to dismiss for improper venue under Court of Chancery Rule 12(b)(3).³⁰⁴ The Superior Court is in conflict, with some judges holding the correct standard is under 12(b)(6) and others holding it is 12(b)(3).³⁰⁵ Adding to the confusion, Delaware's Supreme Court has, at least on

³⁰⁰ Eisenberg & Miller, *The Market for Contracts*, *supra* note 14, at 2090.

³⁰¹ See, e.g., *Haynsworth v. The Corporation*, 121 F.3d 956, 969 (5th Cir. 1997) (finding forum selection clause that designated England as the exclusive forum was appropriate, even where plaintiff raised claims under the U.S. and state securities laws; "Careful weighing of these considerations leads us to join the majority of courts that have considered this issue in concluding that the antiwaiver provisions of U.S. securities laws do not bar enforcement of the [forum selection/choice of law] clause. The same reasoning compels an identical conclusion as to the antiwaiver provisions of the Texas Securities Act and the DTPA [Texas Deceptive Trade Practice-Consumer Protection Act]."); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) ("It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his country's* tort law or *his country's* statutory law or *his country's* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading."); see also *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229-32 (6th Cir. 1995) (forum selection clause was not invalid on grounds that it deprived investors of remedy or that enforcement of clause would be unreasonable in light of public policy behind Ohio's securities statutes); *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (rejecting the claim that the federal securities statutes render the forum selection and choice of law clauses void).

³⁰² Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.F & Table 7.

³⁰³ *Id.*

³⁰⁴ *Troy Corp. v. Schoon*, No. C.A.1959-VCL, 2007 WL 949441, at *2 (Del. Ch. March 26, 2007) ("The court will consider a motion to dismiss based upon a forum selection clause under Rule 12(b)(3) (improper venue), rather than Rule 12(b)(6) (failure to state a claim)"); *HealthTrio, Inc. v. Margules*, No. 06C-04-196, 2007 WL 544156, at *2 (Del. Super. Jan. 16, 2007) ("The Delaware Court of Chancery has held that the proper procedural rubric for addressing a forum selection clause is under Rule 12(b)(3), improper venue").

³⁰⁵ *Simon v. Navellier Series Fund*, No. 17734, 2000 WL 1597890, at *6 (Del.Ch. Oct. 19, 2000) (recognizing the split). Compare *Simm Associates, Inc. v. PNC Nat'l Bank*, No. 98C-02-219-WTQ, 1998 WL 961764, at *3 (Del.

one occasion, dismissed an action based on a forum selection provision under Rule 12(b)(1) for lack of subject matter jurisdiction.³⁰⁶

Irrespective of the procedural mechanism employed to enforce a forum selection clause, Delaware courts have consistently applied the rule of *Bremen*.³⁰⁷ Echoing that decision, the Delaware Court of Chancery explains that forum selection clauses are “presumptively valid and have been regularly enforced.”³⁰⁸ “A forum selection clause will be enforced unless the party objecting to its enforcement can establish: ‘(i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.’”³⁰⁹ Inconvenience or additional expense is not the test of unreasonableness; rather, a provision is unreasonable only when its enforcement would seriously impair the plaintiff’s ability to pursue its cause of action.³¹⁰ Given the fact-intensive nature of the inquiry, the Delaware Supreme Court has emphasized that the reasonableness of a forum selection clause is to be determined on a case-by-case basis.³¹¹ Applying these principles, Delaware courts have actively enforced forum selection clauses that operate to divest Delaware courts of jurisdiction, even when venue in Delaware would otherwise be proper.³¹²

Super. Oct.8, 1998) (UNPUBLISHED) (holding that Rule 12(b)(6), and not Rule 12(b)(3), should govern motions) with *Double Z Enterprises, Inc. v. General Marketing Corp.*, No. C.A. 97C-08-076, 2000 WL 970718, at *2-*3 (Del. Super. June 1, 2000) (treating a motion based on a forum selection clause that limited plaintiff to a particular venue as one under Rule 12(b)(3)).

³⁰⁶ *Elf Atochem*, 727 A.2d at 287 n.1, 289, 296.

³⁰⁷ *Alstom Power, Inc. v. Duke/Fluor Daniel Carribbean S.E.*, No. 04C-02-275, 2005 WL 407206, at *1 (Del. Super. Ct. Jan. 31, 2005) (UNPUBLISHED); *Eisenmann Corp. v. Gen. Motors Cor.*, No. 99C-07-260, 2000 WL 140781, at *7 (Del. Super. Ct. Jan. 28, 2000); *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 216 (Del. Super. Ct. 1978). In fact, the *Bremen* decision significantly influenced the state approach to the enforcement of forum selection clauses. See, e.g., *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 358 (3d Cir. 1986) (“it is not surprising to note that the Supreme Court’s discussion [in *Bremen*] has strongly influenced the state courts” (citing *Hauenstein & Bermeister, Inc. v. Met-Fab Industries, Inc.*, 320 N.W.2d 886, 889–91 (Minn. 1982)); Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265, 276 (2009) (“Although *Bremen* arose under the federal courts’ admiralty jurisdiction, the Supreme Court’s analysis had an enormous influence on the enforceability of forum selection clauses in subsequent state court litigation”) (internal citation omitted).

³⁰⁸ *Capital Gp. Cos. v. Armour*, No. 22-N, 2004 WL 2521295, at *6 (Del. Ch. Oct. 29, 2004, revised Nov. 3, 2004).

³⁰⁹ See *Baker*, 2010 WL 1931032, at *3 (quoting *Hadley v. Shaffer*, No. Civ.A. 99-144-JJF, 2003 WL 21960406, at *4 (D. Del. Aug. 12, 2003)); see also *Eisenmann Corp. v. Gen. Motors Cor.*, No. C.A.99C-07-260-WTQ, 2000 WL 140781, at *7 (Del. Super. Jan. 28, 2000) (Unless the forum selection clause “is shown by the resisting party to be unreasonable under the circumstances,” such clauses are *prima facie* valid (citing *M/S Bremen*, 407 U.S at 10)).

³¹⁰ *Elia Corp.*, 391 A.2d at 216. But c.f. *Aveta, Inc. v. Colon*, 942 A.2d 603, 610-615 (Del. Ch. 2008) (declining to enforce Delaware forum selection provision where contract would be governed by Puerto Rican law, the transaction was negotiated in Puerto Rico, all of the necessary documents and witnesses were located either in Puerto Rico or at Aveta’s headquarters in New Jersey, many of the witnesses were not subject to compulsory process in Delaware, the defendant did not have tremendous resources at his disposal and had no contacts whatsoever with Delaware, and public policy concerns weighed in favor of a different forum).

³¹¹ *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010).

³¹² *Id.* at 1145 (“where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties’ contract and enforce the clause, even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result”); *Elf Atochem*, 727 A.2d at 287 (dismissing an

Although no Delaware court has as yet directly addressed the enforceability of an ICFS provision, Delaware Chancery Court has on several occasions signaled its support for the enforcement of forum selection provisions as they relate to intra-enterprise disputes. Vice Chancellor Laster’s opinion in *In re Revlon, Inc. Shareholders Litigation*³¹³ suggested in *dictum* that corporations might consider adopting intra-corporate forum selection clauses in their charters.³¹⁴ Although the opinion did not address forum selection provisions adopted by the board as bylaw amendments, it did note that at least one public company had adopted such a bylaw.³¹⁵

Less than two months later, in *Baker v. Impact Holding, Inc.*,³¹⁶ Vice Chancellor Parsons held that a director of a Delaware corporation who was not a party to a shareholder agreement (SHA) containing a forum selection provision designating Texas as the forum for the resolution of all disputes relating to the SHA, was bound by that forum selection provision. The director, Bradley Baker, argued that the forum selection provision violated Delaware public policy by divesting Delaware courts of jurisdiction over cases involving the internal affairs of a Delaware corporation.³¹⁷ The court rejected this argument, finding that “Delaware does not have an overarching public policy that prevents the stockholders of Delaware corporations from agreeing to exclusive foreign jurisdiction of any matter involving the internal affairs of such entities.”³¹⁸ In other words, “no public policy of the State of Delaware invalidates the SHA’s Forum Selection Clause.”³¹⁹

Baker thus establishes that Delaware public policy elevates the parties’ contractual decision to litigate in another forum over Delaware’s interest in resolving a dispute that arises under Delaware corporate law. It follows that if a forum selection provision names the state of incorporation as the selected forum, then the argument for enforcing the forum selection provision is stronger still: in that instance, respect for contractual choice and the interests of the forum in the interpretation of its domestic corporate law converge and both militate in favor of enforcing the forum selection provision.

The court also rejected Baker’s argument that the forum selection provision could not bind him because he was not a signatory to the SHA. The court applied a three part test to determine whether a non-signatory should be bound by a forum selection clause: “First, is the forum selection clause valid? Second, are the [nonsignatories] third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the. . .

action brought in Delaware “on the ground that [an] [a]greement validly predetermined the fora in which disputes would be resolved”); *Baker*, 2010 WL 1931032, at *2 (“Delaware courts routinely enforce such forum selection clauses, even where they mandate exclusive foreign jurisdiction”); *In re IBP, Inc. S’holders Litig.*, No. CIV.A.18373, 2001 WL 406292, at *9 n. 21 (Del. Ch. Apr.18, 2001) (UNPUBLISHED) (“Delaware courts have not hesitated to enforce forum selection clauses that operate to divest the courts of this State of the power they would otherwise have to hear a dispute”).

³¹³ 990 A.2d 940 (Del. Ch. 2010).

³¹⁴ *Id.* at 960 n.8.

³¹⁵ *Id.* The possibility of a bylaw forum selection provision was suggested by Theodore Mirvis, a partner at Wachtell, Lipton, Rosen & Katz, as early as 2007. Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, *supra* note 39, at 17.

³¹⁶ 2010 WL 1931032.

³¹⁷ *Id.* at *1.

³¹⁸ *Id.* at *2.

³¹⁹ *Id.*

agreement?’³²⁰ The court answered all questions in the affirmative. As to the first point, the court noted that forum selection clauses are “ ‘presumptively valid’ ” and that Baker had not overcome this presumption.³²¹ As to the second point, the court identified two ways that a party can be closely related to the contract: (1) the party receives a direct benefit from the contract, whether pecuniary or non-pecuniary; or (2) it was foreseeable that the party would be bound by the agreement.³²² The court found that Baker had received a benefit from the SHA in the form of a seat on the board of directors.³²³ As to the third point, the court found that Baker’s claim - that he was entitled to a seat on the board of directors under the SHA - unquestionably arose from the SHA.³²⁴

Baker thus also puts to rest the possibility that stockholders might successfully contend that they are not bound by an ICFS provision because they are not signatories to the charter or bylaws. Stockholders are clearly closely related to the charter and bylaws because both documents directly regulate or relate to the definition of their rights and powers, and it is eminently foreseeable that stockholders would be bound by the charter and bylaws.³²⁵ Further, any intra-corporate claim would, by definition, arise from the parties’ standing in relation to the governing documents – namely, the charter and bylaws. Thus, presuming that the ICFS provision is valid, the stockholders will be bound even if not signatories.

Finally, Delaware Chancery Court has enforced forum selection provisions in the operating agreements of at least two Delaware LLCs. *Elf Atochem North America, Inc. v. Jaffari*³²⁶ involved a dispute over the enforcement of an arbitration provision and a California forum selection provision contained in a Delaware LLC’s operating agreement.³²⁷ The Supreme Court affirmed a lower court judgment enforcing the provisions.³²⁸ The Court observed that while Delaware statutes did vest Delaware courts with non-exclusive jurisdiction over the claims at issue, there was no reason why members of an LLC could not alter the statutory default jurisdictional provisions.³²⁹ The statutory language was thus viewed as a default provision around which the parties could contract. The court further noted that its decision was “bolstered by the fact that Delaware recognizes a strong public policy in favor of arbitration,” and that “doubts on the issue of whether a particular issue is arbitrable will be resolved in favor of arbitration.”³³⁰

Similarly, in *Douzinis v. American Bureau of Shipping, Inc.*, then Vice Chancellor Strine relied on an arbitration provision in a Delaware LLC operating agreement to dismiss a derivative suit alleging breach of fiduciary duty.³³¹ The court distinguished *Parfi Holding AB v. Mirror*

³²⁰ *Id.* at *3 (quoting *Capital Gp. Cos. v. Armour*, No. Civ.A. 422-N, 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004, revised Nov. 3, 2004)).

³²¹ *Id.* (quoting *Capital Gp. Cos.*, 2004 WL 2521295, at *6).

³²² *Id.* at *4.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ See Section III, *supra*.

³²⁶ 727 A.2d 286.

³²⁷ *Id.* at 288-289.

³²⁸ *Id.*

³²⁹ *Id.* at 294-95.

³³⁰ *Id.* at 295.

³³¹ *Douzinis v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149 (Del. Ch. 2006).

Image Internet, Inc.,³³² in which Delaware’s Supreme Court had held that an arbitration provision contained in an underwriting agreement did not require that fiduciary duty claims be subject to arbitration. The court observed that “the Supreme Court was clearly influenced by the fact that the arbitration agreement was not contained in the basic contract of the entity – the corporation’s charter – that gave rise to the fiduciary relationship and that, as a result, other stockholders who were not parties to the underwriting agreement would have been able to litigate the exact claims the plaintiffs would have been required to arbitrate.”³³³ The situation in *Douzin* obviously differed because the arbitration provision was included in the LLC’s operating agreement.

Elf Atochem and *Douzin* thus suggest that ICFS provisions contained in the corporation’s charter or bylaws are incorporated into the “basic contract of the entity” and, because they apply to all shareholders equally, are likely to be enforced in Delaware. *Elf Atochem* also suggests that litigants can contract around jurisdictional provisions of a statute by consenting to an ICFS provision. The provision would then be enforceable even if it precluded a litigant from filing suit in a court that might otherwise have non-exclusive jurisdiction over the claims at issue. Thus *Elf Atochem* confirms that a litigant waives his right to file suit in an alternative jurisdiction when he consents to a forum selection provision.³³⁴

2. Enforcement in California

In California, “[t]he enforceability of a forum selection clause is properly raised by a motion to stay or dismiss under . . . section 410.30, as it is a request to the court to decline jurisdiction.”³³⁵ Like Delaware and federal courts, California courts presume that mandatory³³⁶ forum selection provisions are valid and place a heavy burden on the party seeking to overturn the provision to demonstrate that the provision is unfair or unreasonable under the circumstances of the case.³³⁷ “Claims that the previously chosen forum is unfair or inconvenient are generally

³³² 817 A.2d 149 (Del. 2006).

³³³ *Douzin*, 888 A.2d at 1149.

³³⁴ See note 263, *supra* (citing cases that hold a forum selection provision can properly waive a party’s right to file claims related to the contract in a court that might otherwise have jurisdiction).

³³⁵ *Lu v. Dryclean-U.S.A. of California, Inc.*, 14 Cal.Rptr.2d 906 n.1 (Cal. Ct. App. 1992) (quoting *Furda v. Superior Court*, 207 Cal. Rptr. 646, 650 (Cal. Ct. App. 1984)). Section 410.30 provides: “When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.” Cal.C.C.P. § 410.30(a).

³³⁶ Like their federal counterparts, California courts have drawn a distinction between a mandatory and a permissive forum selection clause for purposes of analyzing whether the clause should be enforced. *Intershop Communications AG v. Superior Court*, 127 Cal. Rptr.2d 847, 850 (Cal. Ct. App. 2002). If the clause is merely permissive and does not expressly mandate litigation exclusively in a particular forum, the traditional *forum non conveniens* analysis applies. *Olinick v. BMG Entertainment*, 42 Cal.Rptr. 3d 268, 274 (Cal. Ct. App. 2006); *Berg v. MTC Electronics Technologies*, 71 Cal.Rptr.2d 523, 529 (Cal. Ct. App. 1998).

³³⁷ See *Intershop*, 127 Cal. Rptr.2d at 850 (“the forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement of the clause would be unreasonable under the circumstances of the case”); *America Online*, 108 Cal. Rptr.2d at 707; *Furda*, 207 Cal.Rptr. at 650 (“the existence of a contractual forum selection clause requires a court to decline jurisdiction under Code of Civil Procedure section 410.30, absent a showing that enforcement would be unfair or unreasonable”); *Berg*, 71 Cal.Rptr.2d at 528 (“the modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable”); *CQL Original Products, Inc. v. National Hockey League Players’ Assn.*, 46 Cal. Rptr.2d 412, 415-416 (Cal. Ct. App. 1995) (burden on party opposing provision). To prove unreasonableness, the opponent must show that the selected forum would be

rejected,” and “[a] court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience.”³³⁸ Moreover, “[t]he fact the forum-selection clause is contained in a contract of adhesion and was not the subject of bargaining does not defeat enforcement as a matter of law, where there is no evidence of unfair use of superior power to impose the contract upon the other party and where the covenant is within the reasonable expectations of the party against whom it is being enforced.”³³⁹

Although, as a general rule, California courts favor enforcement of forum selection clauses, they have also been aggressive in carving out exceptions based on the state’s “more demanding concept of [its] own public policy.”³⁴⁰ Thus, “California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy.”³⁴¹ California’s public policy exception is, however, frequently triggered by disputes that implicate a resident’s non-waivable rights or remedies, or the anti-waiver provisions of a state statute.³⁴² In those circumstances, California courts may refuse to enforce a forum selection provision because enforcement could effectively circumvent the legislature’s intention that California law govern the dispute.³⁴³

unavailable, unable to accomplish substantial justice, or that no rational basis exists for the choice of forum. *Id.* at 416; *America Online*, 108 Cal. Rptr. 2d at 707 (“to be enforceable, the selected jurisdiction must be ‘suitable,’ ‘available,’ and able to ‘accomplish substantial justice’”); *Intershop*, 127 Cal.Rptr.2d at 853 (“The party’s burden on a motion to enforce a mandatory forum selection clause is to demonstrate that the contractually selected forum would be unavailable or unable to accomplish substantial justice or that no rational basis exists for the choice of forum”). California courts will also set aside a forum selection clause that is affected by fraud, undue influence, or overweening bargaining power, or if enforcement will bring about a result contrary to the public policy of the forum in which the action was filed. *Alan v. Super. Ct.*, 3 Cal.Rptr.3d 377, 388 (Cal. Ct. App. 2003). *See also America Online*, 108 Cal. Rptr. 2d at 707 (“Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement”); *CQL Original Products*, 46 Cal.Rptr.2d at 416.

³³⁸ *Berg*, 71 Cal.Rptr.2d at 528-29. “Mere inconvenience or additional expense is not the test of unreasonableness. . . of a mandatory forum selection clause.” *Id.* at 529 (citing *Smith, Valentino & Smith*, 551 P.2d at 1209).

³³⁹ *Cal-State Business Products & Services, Inc. v. Ricoh*, 12 Cal.App.4th 1666, 1679, 16 Cal.Rptr.2d 417 (1993). *See also Furda*, 207 Cal. Rptr. at 651 (“Even if the [forum selection] clause were adhesive, it would be fully enforceable absent a showing that it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable”).

³⁴⁰ Eisenberg & Miller, *The Market for Contracts*, *supra* note 14, at 2089 (collecting cases in notes 98-99).

³⁴¹ *America Online*, 108 Cal. Rptr. 2d at 708.

³⁴² Examples of such statutes include Cal. Corp. Code § 25701 (“Any condition, stipulation or provision purporting to bind any person acquiring any security to waive compliance with any provision of this law or any rule or order hereunder is void”); Cal. Civ. Code § 1717 (a) (“Attorney’s fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney’s fees is void.”); Cal. Civ. Code § 1751 (Any waiver by a consumer of the provisions of this title [Consumer Legal Remedies Act] is contrary to public policy and shall be unenforceable and void”).

³⁴³ *See Eisenberg & Miller, The Market for Contracts, supra* note 14, at 2090 (citing *Am. Online*, 108 Cal. Rptr. 2d at 708-713 (enforcement of the contractual forum selection and choice-of-law clauses in defendant’s service agreements held to be unenforceable because they were the functional equivalent of a contractual waiver of the consumer protections under the California Legal Remedies Act); *Hall*, 197 Cal. Rptr. at 763 (“we hold the choice of Nevada law provision in this agreement violates [the anti-waiver provisions of] section 25701 and the public policy of this state [citation] and for that reason deny enforcement of the forum selection clause as unreasonable”); *GMAC Commer. Fin. LLC v. Super. Ct.*, No. B166070, 2003 WL 21398319, at *4 (Cal. Ct. App. June 18, 2003)

The entire body of California law that articulates public policy rationales against forum selection enforcement based on the existence of non-waivable rights or anti-waiver provisions is, however, irrelevant to the analysis of ICFS provisions because California law creates no non-waivable rights relating to intra-corporate claims against foreign chartered publicly traded entities. ICFS provisions that designate the chartering jurisdiction as the forum for the resolution of intra-corporate disputes also have no impact on California’s public policies because these provisions are, by their very nature, limited to the resolution of disputes that arise within the corporation and that are resolved pursuant to the internal affairs doctrine³⁴⁴ under the business entity laws of the chartering jurisdiction.

Indeed, the very structure of California’s controversial quasi-corporation statute, California Corporation Code Section 2115, supports the conclusion that California has no public interest in the resolution of intra-corporate disputes of foreign chartered publicly traded entities.³⁴⁵ Section 2115 provides that, if certain conditions are satisfied,³⁴⁶ California law, and not the law of the chartering jurisdiction, will govern a range of fundamental corporate governance issues, including the directors’ standard of care.³⁴⁷ “California courts have made clear that the policy behind section 2115 is, in part, motivated by a belief that California has the largest stake in protecting resident shareholders and other stakeholders (e.g., employees) and that this interest is greater than any incorporating state’s right to regulate internal affairs.”³⁴⁸

However, when adopting Section 2115, California’s legislature affirmatively decided that it would not apply to publicly traded corporations.³⁴⁹ California’s legislature thereby expressly

(UNPUBLISHED) (“The combination of the New York forum selection clause and the New York choice of law provision in the factoring agreement effectively constitute a waiver of the statutory and regulatory provisions of the California Finance Lenders Law. Thus, we conclude enforcement of the contractual forum selection clause in the factoring agreement would violate a strong California public policy.”). *See also Perry v. AT&T Mobility LLC*, No. C 11-01488, 2011 WL 4080625, at *4- *7 (N.D. Cal. Sept. 12, 2011) (finding Florida forum selection provision in services agreement to be unenforceable, where “a determination that Florida rather than California law governs plaintiff’s claims could well have the serious practical effect of depriving plaintiff of her unwaivable statutory entitlement to minimum wage and overtime payments”); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083-85 (9th Cir. 2009) (finding Virginia forum selection provision in LLC agreement was unenforceable as to California resident plaintiffs who brought claims under California’s consumer protection laws; class action relief was unavailable in Virginia, and California courts had previously found a California public policy against consumer class action waivers and waivers of consumer rights under California consumer protection laws).

³⁴⁴ For a more detailed discussion of the internal affairs doctrine, see Section II.E., *supra*.

³⁴⁵ Sara Lewis raises the prospect that courts will rely on the quasi-corporation statute to refuse to enforce ICFS provisions. *See Lewis, Transforming the “Anywhere but Chancery” Problem into the “Nowhere but Chancery” Solution, supra* note 39, at 217.

³⁴⁶ A foreign corporation becomes subject to Section 2115 if it transacts more than half of its business in California, and more than half of its voting stock is held by California residents. *See Cal. Corp. Code* § 2115(a). Section 2115 does not, however, apply to foreign corporations which trade their shares on a national stock exchange or whose voting shares are owned entirely, whether directly or indirectly, by a corporation or corporations not subject to this section. *Cal. Corp. Code* § 2115(c).

³⁴⁷ *See Cal. Corp. Code* § 2115(a), (b).

³⁴⁸ Lewis, *Transforming the “Anywhere but Chancery” Problem into the “Nowhere but Chancery” Solution, supra* note 39, at 217 (citing *Wilson v. La.-Pac. Res., Inc.*, 187 Cal. Rptr. 852, 858 (Cal. Ct. App. 1983); *Cal. Corp. Code* § 2115 (West 2006) (Legislative Committee Comments)).

³⁴⁹ *Cal. Corp. Code* § 2115(c) (“This section does not apply to any corporation (1) with outstanding securities listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market. . .”).

disclaimed any such public policy interest in a corporation once it registers to be publicly traded. The logic of this position is apparent: California's interest in protecting resident stockholders declines dramatically at the point that a company's stock becomes publicly traded because the equity interests are then exchanged in a national and international market in which California residents may be minor participants.³⁵⁰

Extending the same logic to the case of ICFS provisions supports the conclusion that California has no legitimate public policy interest that would cause it to deny enforcement of ICFS provisions in publicly traded entities. To be sure, California courts might reach a different conclusion in the case of an ICFS provision incorporated into the organic documents of a privately held entity with a California nexus sufficient to support the application of Section 2115. And, if California courts reached such a decision, a dispute regarding the application of the internal affairs doctrine might arise.³⁵¹ But that situation does not arise when considering ICFS provisions adopted by publicly traded entities.

C. The Fiduciary Duty Test³⁵²

The fact that an intra-corporate forum selection provision is enforceable under the standards governing the enforcement of forum selection provisions does not necessarily end the inquiry.³⁵³ Courts must also consider whether the operation of the provision would, under the particular facts and circumstances of the case, violate the fiduciary duties that the board owes to stockholders and to the corporation.³⁵⁴ Analytically, these fiduciary duty concerns can be

³⁵⁰ One California court suggests the following "rational basis" behind the exemption for corporations listed on certified stock exchanges: "While some of the internal affairs covered by section 2115 are not covered by federal securities regulations [citation omitted], the Legislature may well have reasoned that the disclosure requirements and other forms of regulation imposed upon listed securities, combined with the presumably greater liquidity of such investments, and the higher degree of scrutiny to which they are subjected in the marketplace, provide an adequate substitute, in the case of foreign corporations, for the regulations imposed by section 2115." *Wilson v. Louisiana-Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 862-63 (Cal. Ct. App. 1982).

³⁵¹ See, e.g., *VantagePoint*, 871 A.2d at 1116 (holding Section 2115 unconstitutional and finding that matters relating to the internal affairs of Delaware corporations should "be adjudicated exclusively" in accordance with Delaware law); *Lidow*, Cal. Rptr. 3d at 737 (stating in *dicta* that matters of internal corporate governance fall within a corporation's internal affairs, and that only its state of incorporation's laws should govern such matters).

³⁵² This section addresses the fiduciary duties of corporate officers and directors. For a discussion of fiduciary duties in the context of partnerships and LLCs, see Nicole Sciotto, *Opt-In vs. Opt-Out: Settling the Debate Over Default Fiduciary Duties in Delaware LLCs*, Del. J. Corp. L. (2012) (forthcoming).

³⁵³ In many instances the fact that a provision is reasonable will also suggest that enforcement of the provision complies with the board's fiduciary obligations. However, there may be instances in which plaintiffs assert that a provision itself is reasonable – because it is not the result of fraud or overreaching, enforcement would not violate a public policy of the forum state, and because litigation in the designated forum would not be so seriously inconvenient as to be unreasonable – but nonetheless enforcement of the provision would arguably breach the directors' duty of loyalty because it is done primarily to shield directors or officers from liability. The difficulty with this argument, however, is that it relies on the assumption that Delaware courts will not adequately enforce fiduciary rights. See *infra*.

³⁵⁴ See, e.g., *Kidsco*, 674 A.2d at 492 (analyzing whether board-enacted bylaw amendment constituted a breach of the directors' fiduciary duties); Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 12 (noting that in *Schnell*, "the Delaware Supreme Court articulated a bedrock principle of modern Delaware corporate law, namely that 'inequitable action does not become permissible simply because it is legally possible' – one consequence being that technically valid bylaw amendments may nevertheless be struck down by the court if done for 'inequitable purposes'" (quoting *Schnell v. Chris-Craft Industries Inc.*, 285 A.2d 437, 439 (Del. 1971)). See also cases cited in note 360, *infra*.

evaluated either as a component of the *Bremen/Carnival Cruise, Stewart*, or *forum non conveniens* tests,³⁵⁵ or they can be addressed as an additional independent standard that must be satisfied before a court enforces an ICFS provision. In no event, however, should an ICFS provision be enforced if enforcement would violate a fiduciary obligation.

As Delaware’s Chancery Court has noted, directors are empowered to act in accordance with the powers granted to them in the charter, bylaws and applicable statutory law, “subject only to their obligation to exercise that power in accordance with their fiduciary duties.”³⁵⁶ Courts have articulated two³⁵⁷ duties that effectively govern a corporate director’s requisite conduct: the duty of care and the duty of loyalty.³⁵⁸ If operation of an intra-corporate forum selection provision would, in the context of a pending litigation, constitute a breach of either of these duties, the provision should not be enforced.³⁵⁹ Stated differently, a forum selection provision that is technically valid may be struck down if it is enforced for “inequitable purposes.”³⁶⁰

The proper performance of a director’s fiduciary duties is a question of fact to be determined in each case after a review of all the circumstances.³⁶¹ “Although the fiduciary duty of a Delaware director is unremitting, the exact course of conduct that must be charted to properly discharge that responsibility will change in the specific context of the action the director is taking with regard to either the corporation or its shareholders.”³⁶² A bright-line rule invalidating all intra-corporate forum selection provisions *ab initio* would preclude the type of

³⁵⁵ For example, in evaluating the reasonableness of an ICFS provision, the court could consider whether the board has a fiduciary obligation to proceed with litigation in an alternative jurisdiction.

³⁵⁶ *Kidsco*, 674 A.2d at 493.

³⁵⁷ Although the duty of good faith has at times been treated as a third duty, the Delaware Supreme Court recently pronounced that good faith is not an independent fiduciary duty, and is instead “a subsidiary element[,]’ i.e., a condition, ‘of the fundamental duty of loyalty.’” See *Stone ex rel AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 269-70 (Del. 2006) (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n. 34 (Del.Ch.2003)).

³⁵⁸ See, e.g., 1 FRANKLIN BALOTTI AND JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.14 (2012); MARSH, ET AL., CALIFORNIA CORPORATION LAW § 11.02 (2012-2 Supplement); 18B Am. Jur. 2d Corporations § 1460 (2012).

³⁵⁹ The fact that a charter or bylaw forum selection provision technically permits or even requires litigation in a particular jurisdiction does not automatically insulate from scrutiny the decision of a board of directors to enforce that provision. See *Schnell*, 285 A.2d at 439 (holding that management could not advance the bylaw date of the annual shareholders meeting, even though such action was technically permitted by Delaware corporation law, when it was clearly done to limit the ability of dissident shareholders to wage a proxy fight); *Hollinger*, 844 A.2d at 1080-81 (striking down bylaw amendments that “were clearly adopted for an inequitable purpose and have an inequitable effect”); *Petty v. Penntech Papers, Inc.*, 347 A.2d 140, 143 (Del. Ch. 1975) (noting the “fact that charter or by-law provisions may technically permit the action contemplated does not automatically insulate directors against scrutiny of purpose,” and enjoining proposed stock redemption where it appeared, inter alia, that the planned redemption might be directed toward maintaining management in control); *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769, 776-77 (Del. Ch. 1967) (holding issuance of additional shares to thwart the acquisition of majority stock control by another was “clearly unwarranted”).

³⁶⁰ *Schnell*, 285 A.2d at 439.

³⁶¹ See, e.g., *Brown v. Slenker*, 220 F.3d 411, 424 (5th Cir. 2000) (“The existence of a fiduciary duty, and the breach thereof, are both questions of fact”); *Kirschner Brothers Oil, Inc. v. Natomas Co.*, 229 Cal.Rptr. 899, 902 (Cal. Ct. App. 1986) (“breach of fiduciary duty is a question of fact”); see also Cal. Prac. Guide Prof. Resp. Ch. 6-D § 6:425.2 (same); 37 Am. Jur. 2d Fraud and Deceit § 502 (“The existence of a confidential or fiduciary relationship, and the breach of that relationship, is typically treated as a factual question”).

³⁶² See *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

case-by-case analysis necessary to determine whether operation of a particular provision, under the particular facts of a case, would constitute a violation of the board's fiduciary obligations.³⁶³

A bright-line rule would also fail to respect the fact that the presumption that directors of Delaware corporations will always seek to enforce an ICFS provision is speculative and assumes a fact not in evidence. In every litigation in which a plaintiff is subject to a forum selection provision but elects to file in a foreign forum, the defendant always has the option of consenting to jurisdiction in the foreign forum simply by not opposing the plaintiff's chosen forum.³⁶⁴ Indeed, ICFS provisions often expressly provide for the corporation's option to consent in writing to the selection of an alternative forum.³⁶⁵ And, even where the provision contains no such express authority, the corporation can simply decide not to challenge plaintiff's selection of venue.³⁶⁶

This optionality is significant because it establishes a "fiduciary out" that allows the corporation to consent to proceedings in a foreign forum if the board's fiduciary obligations so require. For example, if Delaware Chancery Court cannot obtain jurisdiction over an indispensable defendant from whom significant recovery is practical, then the directors' fiduciary duties might, depending on the facts and circumstances, require that they consent to proceedings in a foreign forum.

The question then remains as to potential facts and circumstances under which a board's decision seeking enforcement of an ICFS provision designating Delaware courts might violate a fiduciary duty. As demonstrated in Part II of this analysis, directors of Delaware corporations have a substantial good faith basis upon which to conclude that adoption of an ICFS provision is in the best interests of the corporation and of its stockholders. To be sure, directors may, for any number of reasons, also prefer that in any one case their conduct be judged by Delaware courts applying Delaware law, rather than by a foreign court applying Delaware law. But that preference would not constitute a breach of a fiduciary duty unless plaintiffs can demonstrate that Delaware courts will fail to hold directors properly responsible for their actions. Put another way, a forum selection clause that would move litigation among courts that can be equally relied upon to enforce fiduciary obligations cannot create a biased self-interest among directors in favor of one court over any other.

A fiduciary challenge to enforcement of an ICFS provision designating Delaware is thus a very difficult argument to sustain. It requires a direct, frontal assault on the competence of the Delaware judiciary in the application and interpretation of Delaware law, and presumes that the party challenging enforcement of the ICFS provision could present evidence that the Delaware judiciary cannot be relied upon to enforce Delaware's own fiduciary obligations. Moreover, if this argument challenging Delaware's competence succeeds, it cannot be cabined to situations in which directors seek enforcement of Delaware ICFS provisions. It will, instead, have to stand for

³⁶³ See, e.g., *Blasius*, 564 A.2d at 661-62 (rejecting a *per se* rule to strike down any board action that is taken for the primary purpose of interfering with the voting process, because such a rule "may sweep too broadly" and prohibits a case-by-case determination of whether future situations would warrant a board action thwarting a stockholder vote), overruled on other grounds by *City of Westland Police & Fire Retirement System*, 1 A.3d 281.

³⁶⁴ See note 187, *supra*.

³⁶⁵ Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.E. & Table 6.

³⁶⁶ See note 187, *supra*.

the proposition that the Delaware judiciary cannot generally be relied upon properly to enforce a board's fiduciary obligations, even in circumstances that do not involve ICFS provisions. It is doubtful in the extreme that such an argument would prevail in any court given the high regard that the case law and academic literature express for the Delaware courts' expertise in matters of corporate law.³⁶⁷

The possibility that an action seeking enforcement of an ICFS provision might raise a fiduciary concern can, however, be contingent on the stage of litigation at which the ICFS provision is adopted. In the simplest situation, the ICFS provision is adopted prior to the initiation of the litigation at issue, and prior to the events that later give rise to the claim. Under these circumstances, there can be no credible assertion that the board has violated a fiduciary duty simply by deciding to adopt an ICFS provision.

A board can, however, adopt an ICFS bylaw provision after the occurrence of events that later give rise to litigation but prior to the filing of any claim.³⁶⁸ Under these circumstances, even if one assumes that the decision to adopt the ICFS provision was animated in part by the potential that litigation relating to those events would ensue, it does not follow that the decision to adopt or seek enforcement of an ICFS provision would violate a fiduciary duty. Because no claim has been filed, no right to pursue the claim in any forum has vested. It follows that the decision to adopt and enforce the provision cannot divest stockholders of an unvested right. Instead, to support the contention that the adoption of the ICFS provision violates a fiduciary obligation in this circumstance, it would again be necessary to demonstrate that Delaware courts cannot be relied upon properly to apply Delaware's own laws governing fiduciary duties. But, yet again, how is it a breach of a fiduciary duty to seek litigation of a matter in a court that can be relied upon properly to enforce the fiduciary duty?

The situation is, however, potentially different if plaintiffs have already filed a claim in a foreign court at the time the ICFS provision is adopted. At that point, plaintiffs can contend that they have perfected their right to pursue the claim,³⁶⁹ and that directors seeking to enforce the ICFS provision are improperly seeking to divest the complaining stockholders of that vested right. That action could arguably be framed as a violation of a fiduciary duty,³⁷⁰ but again, opponents of the ICFS provision would face the challenge of demonstrating that Delaware's courts would be unable adequately to apply Delaware law to hold directors responsible for violations of their fiduciary obligations. The actual resolution of such a claim would, however, depend on the presence of facts and circumstances that cannot be anticipated in the abstract. A categorical conclusion regarding the enforcement of ICFS provisions under these circumstances - - which are likely to be relatively rare - - is thus impossible, but the basis for a reasoned challenge can certainly be stated.

³⁶⁷ See notes 136-138, *supra*.

³⁶⁸ For an example of this fact pattern, see *Galaviz*, 763 F. Supp. 2d at 1172, and for further discussion of that case, see Part V, *infra*.

³⁶⁹ See Section III.B.2., *supra*.

³⁷⁰ It does not follow that the simple adoption of the ICFS provision, as distinguished from its enforcement, is a breach of a fiduciary duty because the board may choose not to enforce the provision with respect to litigation that was already pending at the time of the adoption.

The more substantial concern regarding the possibility that enforcing an ICFS provision might breach a fiduciary duty arises if enforcing the provision would, for any reason, extinguish claims against directors or cause the corporation not to be able to pursue claims that are available in the foreign forum but not in the forum designated by the ICFS provision. A more nuanced analysis of the directors' fiduciary obligations would then be appropriate, and that analysis would have to consider, in detail, a host of considerations relevant to the board's decision. For example, if a particular defendant cannot for any reason be pursued in a Delaware action, but can be pursued in the foreign forum, then the board might be able to justify its decision to seek enforcement of the ICFS provision by demonstrating that recovery from that defendant is unlikely for any of a number of reasons: the defendant may be judgment proof, or limited in its ability to satisfy a judgment or pay a settlement, or the claim against the defendant may be quite weak. The board might also be able to demonstrate that the claims asserted in the foreign forum are "add on" claims designed for the specific purpose of attempting to defeat the ICFS provision,³⁷¹ and that all the recovery sought in the litigation can, as a practical matter, be obtained in a Delaware action.³⁷²

In many respects, the decision to seek to enforce an ICFS provision that extinguishes entire claims or claims against certain individuals is similar to the board's decision not to pursue derivative claims and can be evaluated under essentially the same body of law that is designed to prevent that form of abuse.³⁷³ It is impossible, however, to anticipate every circumstance that might arise in connection with litigation over such claims, and rather than attempt to catalogue every conceivable permutation of potentially relevant facts, these contingencies should be addressed by the foreign court ruling on a motion to enforce an ICFS provision at the time a case or controversy actually arises.

D. Concluding Observations Regarding the Enforcement of ICFS Provisions

ICFS provisions should, in the large majority of circumstances, be viewed as valid when adopted and should also be susceptible of ready enforcement. In a small number of circumstances, it may be difficult to enforce an ICFS provision without engaging in a more

³⁷¹ For example, federal courts will dismiss a federal claim for want of subject-matter jurisdiction "if it is not colorable, *i.e.*, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)); *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 975 (9th Cir. 2012) (same).

³⁷² See, *e.g.*, Order Granting in Part and Denying in Part Defendants' Motion to Abstain or Stay dated August 9, 2012, at 7-9, *Bushansky v. Armacost, et al.*, Case No. C 12-01597 WHA (N.D. Cal.) (granting motion to stay federal action in favor of substantially similar Delaware action, where Delaware action "will resolve all issues before the federal court" and Delaware court proceedings could adequately protect the interests of the federal litigants).

³⁷³ If stockholders request that a board of directors file litigation on behalf of the corporation and the board refuses, the stockholders can pursue a derivative action only if they can show that the refusal to bring suit was not a valid exercise of the board's business judgment. See, *e.g.*, *McCall v. Scott*, 239 F.3d 808, 816 & n.7 (6th Cir. 2001) (applying Delaware law), amended on denial of reh'g, 250 F.3d 997 (6th Cir. 2001); *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993) ("the right of a stockholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation"). See also 1 BALOTTI AND FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 13.16 (2012); MARSH, ET AL., CALIFORNIA CORPORATION LAW § 15.11[G] (2012-2 Supplement); Cal. Prac. Guide Corps. Ch. 6-G § 6:631.

searching inquiry relating to the factors articulated in the rule of *Bremen* and the possibility that enforcement may breach a board’s fiduciary obligations. Generalizations as to the outcome of such inquiries are not, however, possible in the abstract. In any event, speculation as to the likelihood that any of these circumstances will arise should not influence the validity of the ICFS provision as adopted because the law is clear that the presence of speculative contingencies will not cause the invalidation of charter or bylaw provisions.³⁷⁴

V. *Galaviz v. Berg*

To date, only one court has issued a decision addressing the enforceability or validity of an ICFS provision, and it seems that the provision’s novelty may have contributed to a series of analytic errors. In an opinion that the court itself describes as addressing a “question of first impression, in that no court has previously ruled on the enforceability of a venue provision for derivative actions contained in corporate bylaws,”³⁷⁵ the United States District Court for the Northern District of California denied a motion to dismiss filed by Oracle Corp. seeking enforcement of an ICFS bylaw provision adopted by Oracle’s board without prior stockholder consent and designating Delaware Chancery Court as the exclusive forum for the resolution of derivative claims.³⁷⁶ Two separate plaintiff law firms filed two “nearly identical” competing derivative actions, one in federal court and another in California state court, alleging that Oracle had over-billed the federal government and that its directors were “liable for breach of fiduciary duty and abuse of control”³⁷⁷ because of their failure to prevent the alleged wrongdoing. The ICFS provision at issue had been adopted “after the purported overbilling scheme had allegedly been ongoing for several years,”³⁷⁸ but before litigation over the billing practices was initiated and before the derivative actions had been filed.

The court explained that the Ninth Circuit follows the rule of *Bremen*,³⁷⁹ and observed that “neither plaintiff suggests the bylaw was the product of fraud or undue influence.”³⁸⁰ The plaintiffs also did not “go so far as to suggest that requiring stockholders to pursue claims in Delaware courts would somehow make it ‘so gravely difficult and inconvenient’ as to ‘for all practical purposes’ deprive them of their day in court.”³⁸¹ Similarly, plaintiff had “not persuasively demonstrated that it would violate fundamental California public policy to require resolution of shareholder derivative actions in a corporation’s home state.”³⁸²

³⁷⁴ See Section III, *supra*.

³⁷⁵ *Galaviz*, 763 F. Supp. 2d at 1172. The court’s description of the case’s novelty is too modest: it is the first reported decision analyzing the validity or enforceability of an ICFS provision in a bylaw or charter agreement. The bylaw provision at issue in *Galaviz* was also a rare form that does not follow the dominant template and states, in its entirety, that “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.* See also Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, *supra* note 1, at II.E. & Table 6 (discussing dominant form of forum selection provision).

³⁷⁶ *Id.* at 1171.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 1172.

³⁷⁹ *Id.* at 1173 (quoting *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F. 3d 320, 325 (9th Cir. 1996)).

³⁸⁰ *Id.*

³⁸¹ *Id.* (quoting *Argueta*, 87 F. 3d at 325).

³⁸² *Id.*

Had the analysis stopped at this point, “there would be little basis to decline to enforce the venue provision of Oracle’s bylaws,”³⁸³ and the court could have reached a correct conclusion. The lawsuit would have been dismissed and plaintiffs could have re-filed their claims in Delaware. The court proceeded, however, to commit two clear and distinct analytical errors that led it to deny the motion to dismiss.

First, the court followed the “vested rights” theory that has been resoundingly rejected by Delaware and California under both corporate and contract law principles.³⁸⁴ Stockholders in Delaware corporations are on notice that boards have the authority to amend bylaws without prior stockholder consent, and directors have for decades amended bylaws without stockholder consent, and have done so openly and notoriously with respect to a range of bylaw provisions.³⁸⁵ Further, by acquiring stock in a Delaware corporation, stockholders effectively consent to the grant of authority to the board unilaterally to amend the bylaws.³⁸⁶ Stockholders thus cannot claim reasonable reliance on having the corporation’s bylaws remaining fixed as of the date of the stockholder’s acquisition.³⁸⁷

The *Galaviz* court, however, seemed unaware of this controlling precedent. It bridled at the prospect that a director-adopted bylaw could bind stockholders who had acquired their shares prior to the board’s action, and observed that “[u]nder contract law, a party’s consent to a written agreement may serve as consent to all the terms therein, whether or not all of them were specifically negotiated or even read, but it does not follow that a contracting party may thereafter unilaterally add or modify contractual provisions.”³⁸⁸ The court thereby sought to distinguish the contract of adhesion at issue in *Carnival Cruise* by observing that the *Carnival Cruise* forum selection provision was in place prior to the purchase of the ticket and was not later unilaterally imposed by the cruise line.³⁸⁹

The court’s error is, however, plain on the face of its analysis: In the case of a Delaware corporation, the stockholders do indeed consent to unilateral amendment of the bylaws by the directors, subject, of course, to the protections of judicial review. Further, in the case of a bylaw amendment, the stockholders have the ability to vote to rescind or to amend the bylaw provision. In contrast, once the ticket holders in *Carnival Cruise* had purchased passage, they had no mechanism whatsoever to force a change in their contract.³⁹⁰ The court also failed to cite to any precedent supporting its interpretation of corporate or contract law, and further failed to consider the implications of its ruling for all of corporate law. In particular, if boards cannot unilaterally amend bylaws to adopt ICFS provisions, they also cannot amend bylaws for dozens of other reasons that are standard corporate practice. A material portion of the bylaws of publicly traded corporations that have been amended by unilateral board actions would thus have to be declared invalid. Thus, if the *Galaviz* analysis stands then much of standard corporate law practice regarding the amendment of bylaws must fall, and much larger bodies of corporate law must be

³⁸³ *Id.* at 1174.

³⁸⁴ *See* note 221, *supra*.

³⁸⁵ *See* Section III.B.2., *supra*.

³⁸⁶ *Kidsco*, 674 A.2d at 492. *See also* Section III.B.2., *supra*.

³⁸⁷ *Kidsco*, 674 A.2d at 492. *See also* Section III.B.2., *supra*.

³⁸⁸ *Galaviz*, 763 F. Supp. 2d at 1174.

³⁸⁹ *Id.*

³⁹⁰ 8 Del. C. § 109(a).

re-written. Obviously, this is not the case, and the *Galaviz* logic fails because it also proves too much.

The court's second error arises from its observation that the ICFS provision was adopted "after the majority of the purported wrongdoing is alleged to have occurred."³⁹¹ But the court's opinion cites no evidence that the directors had any knowledge of the alleged wrongdoing as of the date they amended the bylaws. If the directors were unaware of the alleged wrongdoing then they could not possibly have adopted the ICFS provision in anticipation of the litigation at hand, and the occurrence of the alleged wrongdoing could have had no effect on the *bona fides* of their decision.

Further, even if the directors were aware of the alleged wrongdoing, the court fails to describe any legal principle that is violated by the board's decision to adopt the ICFS bylaw. How it is a violation of a fiduciary duty to adopt a bylaw stating that intra-corporate litigation involving a Delaware corporation (even if the potential allegation is known to the board) is to be adjudicated in Delaware under Delaware law? The directors do not avoid any liability by adopting this rule, and are Delaware courts not to be trusted when it comes to enforcing fiduciary duties? The court's reliance on the underlying sequence of events thus rests on critical unproven assumptions of fact and operates through a mysterious, undescribed principle of law.³⁹²

Because *Galaviz* involves a fact pattern that may not be replicated in other ICFS litigation (*i.e.*, the assertion that the provision was adopted after the facts supporting the underlying litigation arose) courts may be able to distinguish *Galaviz* without directly addressing the observation that it is wrongly decided.

VI. Conclusion

The data document a significant increase in the incidence of foreign-forum litigation. A large academic literature attributes this growth to economic incentives that are beneficial for plaintiffs' attorneys but inimical to stockholder interests. These two factors provide a good faith basis in support of directors' decisions to adopt ICFS provisions. The inability of alternative judicial techniques to address various challenges posed by foreign forum litigation, especially when no complaint is filed in the chartering jurisdiction, is a further reason to prefer ICFS provisions to other mechanisms of addressing the problems posed by foreign forum litigation.

Facial challenges to the validity of ICFS provisions are without merit. ICFS provisions are proper subject matter for charters and bylaws. Because stockholders are on notice that boards may amend bylaws without prior stockholder consent, and because the "vested rights" theory has been broadly rejected, the absence of prior stockholder consent prevents neither adoption nor enforcement of ICFS bylaws adopted by boards on their own motion.

ICFS provisions should also be readily enforceable in the large majority of instances. Under the rule of *Bremen*, it is apparent that ICFS provisions are not induced by fraud or over-reaching. They are adopted in accordance with well-established principles of corporate law. Trial in the state of incorporation will not, for all practical purposes, be so difficult or inconvenient as to

³⁹¹ *Galaviz*, 763 F. Supp. 2d at 1174.

³⁹² Because plaintiffs had not filed any complaints as of the date the ICFS provision was adopted, their rights, if any, had not vested.

deprive the plaintiff of a day in court. Plaintiffs are on notice that intra-corporate matters are subject to litigation in the courts of the chartering jurisdiction and, given the Supreme Court's analysis of the inconvenience factor in *Carnival Cruise*,³⁹³ it follows, *a fortiori*, that stockholders are not deprived of their rights if forced to litigate in the state of incorporation. Nor does enforcement of an ICFS provision designating the state of incorporation contravene the strong public policy of the foreign forum, even if that forum is California. California's controversial quasi-corporation statute does not apply to publicly traded corporations. No other California statute or judicial opinion articulates an interest in controlling the internal affairs of a publicly traded corporation. There is also no California statute with an anti-waiver or exclusive jurisdiction provision that would govern the resolution of intra-corporate disputes or argue against the enforcement of ICFS provisions of corporations chartered outside of California. Indeed, a holding that California law or public policy creates a cognizable California interest that precludes enforcing an ICFS provision would set California's courts on a collision course with the internal affairs doctrine. In light of the strong Supreme Court precedent on point,³⁹⁴ California courts might not fare well in this confrontation, should it ever come to pass.

ICFS provisions should also easily survive fiduciary duty analysis in the vast majority of instances. Enforcing an ICFS provision relieves no defendant of any fiduciary obligation. It merely designates the court in which fidelity to those obligations is to be tested. To succeed on a fiduciary duty challenge, plaintiffs will thus have to demonstrate that the courts of the chartering jurisdiction cannot be relied upon properly to apply the fiduciary principles established by the laws of the chartering jurisdiction. We are aware of no precedent that supports this proposition as it might apply to any of the United States.³⁹⁵

The pending challenges to ICFS provisions also rely on an array of hypothetical contingencies that plaintiffs contend should cause those provisions to be invalidated. Charter and bylaw provisions are, however, presumed valid as adopted. They are not to be overturned based on speculation regarding hypothetical future circumstances in which they might be improperly or inequitably applied. Challenges of that sort must await development of a factual record that a court can address in the context of an actual case or controversy in which the decision to enforce an ICFS provision can be tested.

Despite these strong arguments supporting the validity and enforcement of ICFS provisions, the pendency of Delaware litigation challenging the facial validity of these provisions has frozen a significant portion of the trend towards ICFS adoption. To date, 300 publicly traded entities have adopted ICFS provisions.³⁹⁶ Corporations going public continue to adopt ICFS provisions at a healthy rate.³⁹⁷ Boards have, however, stepped back from adopting ICFS

³⁹³ See Section IV.A.1., *supra*.

³⁹⁴ See Section IV.A., *supra*.

³⁹⁵ This is not to deny the possibility that, in a small number of situations, a board's fiduciary obligations might support the conclusion that litigation should proceed outside the state of incorporation. For example, if jurisdiction cannot be obtained in the chartering state over an indispensable party who is not judgment-proof and from whom a material recovery is anticipated, then fiduciary consideration might militate against enforcement of an ICFS provision.

³⁹⁶ See Table 1, *supra*, and accompanying text.

³⁹⁷ See Table 2, *supra*, and accompanying text.

provisions as bylaws without prior stockholder approval. The adoption rate for this category of ICFS provisions has, since the filing of the Delaware complaints, plummeted to close to zero.³⁹⁸

If, however, Delaware courts uphold the validity of ICFS bylaw provisions adopted without prior stockholder consent, it is then reasonable to expect that boards will resume the practice. Further, because boards would then be able to rely on an express judicial finding that bylaw provisions are valid, it would not be surprising to observe a sharp increase in the rate at which boards adopt ICFS bylaws. The effect would not be dissimilar to the increase in adoption rates observed after *Revlon*,³⁹⁹ but could well be more powerful because the resolution of the ICFS litigation would constitute a holding, rather than *dictum*, and would facilitate an action that could be implemented by any board of any company that is already publicly traded. The implications of the pending litigation thus reach far beyond the simple validity of the specific ICFS provisions currently pending before the court. The resolution of those suits will greatly expand or contract the universe of publicly traded entities with ICFS provisions in their bylaws. That expansion or contraction will have significant implications for the evolution of intra-corporate litigation in general.

³⁹⁸ *Id.*

³⁹⁹ See Tables 1 and 2, *supra* (documenting increase in adoption rates in the wake of the *Revlon* decision). See also Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Provisions*, *supra* note 1, at I (discussing *Revlon*).