



## Episode 5 Transcript: “SEC Changes Course on Mandatory Arbitration”

**Scott:** Welcome to the Akin Podcast Series, The Business Court Benches: Delaware and Texas Compared. I'm your host, Scott Barnard, a litigation partner in the Dallas office of Akin.

**Stephanie:** And I'm your host, Stephanie Lindemuth, a litigation partner in New York. This is episode five: SEC Changes Course on Mandatory Arbitration.

**Scott:** Today we're diving into important news for public companies and investors, the SEC's recent policy shift on mandatory arbitration agreements and how state laws are complicating the picture.

**Stephanie:** That's right. On September 17th, 2025, the SEC published a policy statement announcing it will no longer oppose mandatory arbitration provisions in organizational documents for public companies. That's a big change from the SEC's previous position where they wouldn't accelerate registration statements if a company tried to include mandatory arbitration clauses, citing investor protection concerns. Now, the SEC says its focus will be on making sure these provisions are consistent with federal securities laws and are adequately disclosed.

**Scott:** But Stephanie, the SEC policy doesn't override state law. Companies still have to comply with the statutes of the state where they're incorporated, right?

**Stephanie:** Yes, absolutely.

**Scott:** So let's break down what that means in practice. Delaware, for example, has taken a relatively clear stance. Delaware law prohibits mandatory arbitration provisions for shareholder claims in corporate charters or bylaws. The legislature recently amended a provision of the Delaware General Corporate law to allow companies to prescribe a venue or forum for shareholder claims, but only if the clause lets a shareholder bring claims in at least one court in Delaware that has jurisdiction.

**Stephanie:** Yes. So putting this all together, this means that even if the SEC is okay with it, Delaware incorporated companies cannot force shareholders into arbitration through their charters. So there's a couple of open questions, including that no court has addressed the new amendment's language yet, and whether the Federal Arbitration Act will preempt the Delaware amendments.

**Scott:** On the other hand, we have Texas, which seems to be more friendly to arbitration. It has no explicit statutory ban on mandatory arbitration for shareholder claims. Texas law says governing documents can require internal entity claims to be brought only in a Texas court. But it doesn't say whether alternative forms like arbitration are specifically banned or allowed.



**Stephanie:** That's right, and Nevada is similar to Texas. Under Nevada law, it does not prohibit mandatory arbitration provisions for shareholder claims. The relevant statute is silent on the validity of such provisions, and Nevada is generally seen as protective of boards and management.

**Scott:** So Stephanie, we know that even if state law is decisive on whether mandatory arbitration provisions are allowed, the SEC's new policy statement may encourage states like Nevada or Texas to adopt a more friendly approach towards arbitration. Is that right? Is that a good thing for companies trying to avoid costly shareholder litigation?

**Stephanie:** That's a really good question, Scott. And here's a twist. Allowing these arbitration provisions could lead to securities litigation being pushed into mass arbitrations. And mass arbitrations can be even more unwieldy than class actions under federal court rules, right?

**Scott:** That's right. I've seen some examples of that under FINRA and it can be a mess.

**Stephanie:** Yes. In a mass arbitration situation, the plaintiff's firms can file thousands of individual arbitration demands. There's currently no centralized arbitration venue to take these arbitrations on, and thus there's no one set of rules to govern like you have in the federal courts under the federal rules of civil procedure. Arbitrations are also private unlike the current public securities class action framework we see now in the courts.

**Scott:** That's right.

**Stephanie:** And having the litigation open to the public eye may actually be beneficial in policing the issues and also, in developing precedent and clear boundaries and rules for the boards of directors and corporations that are subject to these suits. Finally, I think I'd add that pushing these lawsuits into arbitration doesn't really solve for the third party claims.

**Scott:** That's a really good point.

**Stephanie:** Several securities class actions involve claims against company advisors like accountants and financial advisors who play key roles in the relevant board decisions and transactions at issue. The arbitration provision in a charter would not extend to, and thus wouldn't mandate or permit claims against these third parties from being litigated simultaneously with the claims against the company and its fiduciaries. That, in my view, could lead to inefficiencies and inconsistent results. That's all to say that companies need to think carefully about the practical risks of potentially being a first mover in adopting an arbitration mandate that the SEC seems to have blessed.

**Scott:** Those are all great points, Stephanie, and I think it's also worth looking abroad for lessons as well. For example, Brazil has a securities arbitration framework that is often cited as a model. And unlike in the U.S., Brazil does have a centralized form for corporate arbitration disputes.



**Stephanie:** Yes, you're absolutely right, Scott. The Brazilian system is cohesive with centralized administration and standardized procedures. It's mandatory for companies listed as premium on the Brazilian Stock Exchange to participate by including arbitration clauses. In their bylaws. They bind shareholders, management and the company. And although the companies have to disclose material facts related to arbitration, the arbitration proceedings are confidential. Okay, Scott, what do you think the benefits would be of this type of Brazilian model, implemented in the U.S.?

**Scott:** Yeah, that's a good question. I mean, I think one benefit is regulatory certainty, and I guess I would also say market confidence. Because the Brazilian system is standardized, permanent and apparently specialized, it carries legitimacy for both corporations and for shareholders.

**Stephanie:** Right.

**Scott:** The predictability of that process could potentially even lower costs.

**Stephanie:** I agree. And also a system with neutral arbitrators and fair procedures would make arbitration and investor protection more compatible with each other.

**Scott:** Yeah. But at the same time, there's commentators out there that are gonna criticize jumping into such a new regime. They're gonna point to the criticisms with the FINA arbitrations, like I was mentioning earlier. Just arguing that these arbitrations for these types of securities claims might actually be much, much worse in a mass arbitration or arbitration. So what's the takeaway for US companies and investors? The SEC's new policy opens the door for mandatory arbitration in company charters. But certain state law, especially Delaware, can slam it shut. Texas and maybe Nevada may offer more flexibility, but companies need to weigh the risks, including the potential for the mass arbitrations we were talking about.

**Stephanie:** And as always, the legal landscape here is evolving. Companies should stay tuned for further developments, especially as the courts and legislatures grapple with these issues. Who knows, we may see arbitration forms for these disputes being contemplated and developed in the future.

**Scott:** Until then, it may not make sense for companies to take advantage of the SEC's new policy statement regarding these arbitration provisions. We're keeping an eye on this issue and we'll keep everyone apprised of important developments. Thanks again for joining us on The Business Court Benches: Delaware and Texas compared. I'm Scott Barnard, a litigation partner in the Dallas office of Akin.

**Stephanie:** And I'm Stephanie Lindemuth, a litigation partner in Akin's New York office. That wraps up episode five: SEC changes course on mandatory arbitration. Thank you for listening and catch you next time.