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What Would the American Colonists Do? *Delaware Coalition for Open Government v Strine* Examines Confidentiality Provisions of Government-Sponsored Arbitrations

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1. Delaware Courts Not Authorised to Conduct "Closed-Door" Arbitrations

It may be the age of the internet, but to guide its analysis of a new method of arbitrating disputes adopted by the state of Delaware, a US appellate court looked back to the arbitral procedures used in medieval England and the American colonies. The case arose because Delaware, anxious to maintain its pre-eminent role in corporate governance, authorised its sitting Chancery Court judges to conduct closed-door arbitrations of certain commercial disputes. This procedure prompted a constitutional challenge, which contended that the confidentiality provisions of Delaware's government-sponsored arbitrations violated the First Amendment. To decide this question, the parties and the court searched ancient records to determine whether "experience and logic" supported opening such proceedings to the public. In a split decision, the appellate court invalidated the provisions of the law that authorised closed-door hearings, but otherwise did not prohibit sitting judges of the Delaware courts from conducting fee-based arbitrations.

2. Delaware Legislature Enables Chancery Courts to Arbitrate Commercial Disputes

From its very beginning, the tiny state of Delaware has distinguished itself by acting first. On December 7, 1787, delegates of this former English colony meeting at Battell's Tavern voted to make Delaware the first state to ratify the United States Constitution.[1] In more recent times, Delaware crucially positioned itself as the leading state for US business incorporation. To fortify this position, it developed a Chancery Court with judges experienced in corporate and business law. But increasingly, Delaware has faced stiff competition from other states and jurisdictions that have enacted arbitration laws designed to enhance their position in global commerce.[2]

Sobered by this potential slip in market share of the dispute resolution market, Delaware's legislature—albeit not in a tavern—once again took action to maintain the state's front-runner status. To preserve Delaware's pre-eminence in "resolving disputes",[3] Delaware enacted legislation in 2009 authorising its Chancery Court to conduct private arbitrations.[4] Under this new system, the parties need not have an agreement in place to arbitrate their disputes prior to the dispute arising, so long as they consent to participate at the time the dispute is submitted to the court.[5] To be eligible to participate, the parties must satisfy certain eligibility criteria: (i) at least one party must be a "business entity" and one party must be a citizen of

[1] In acknowledgment of this action, Delaware is accorded the first position in national events such as presidential inaugurations. The state flag displays the colour colonial blue, the date "December 7, 1787" and images symbolising commerce.

[2] See New York State Bar Association, *Task Force on New York Law in International Matters*, Final Report 4 (June 25, 2011) ("[J]urisdictions around the world, many with government support, are taking steps to increase their arbitration case load").

[3] H.B. 49, 145th Gen. Assem. (Del. 2009).

[4] Del. Code Ann. tit. 10 § 349 (West 2012).

[5] Del. Code Ann. tit. 10 § 349(a).

the state of Delaware, although the same party can satisfy both criteria; (ii) neither party can be a consumer; and (iii) if the remedy includes just monetary damages, the amount in controversy must exceed $1 million; but if any equitable remedy is sought, even in conjunction with monetary relief, there is no amount-in-controversy requirement.[6] The arbitration itself is considered confidential; it becomes a matter of public record only if the matter becomes the subject of an appeal.[7] Such appeals are adjudicated in conformity with the Federal Arbitration Act.[8]

On January 5, 2010, the Chancery Court adopted rules to administer the arbitration proceedings authorised by the Legislature. The rules, which flesh out the statutory framework, provide that upon receipt of a petition, the court's Chancellor selects the judge that will serve as the arbitrator.[9] Unless modified by the arbitrator or the parties, the civil rules for discovery apply.[10] Prior to appeal, pleadings are not included in the public docketing system and the arbitration hearing is conducted in the courthouse as a private proceeding.[11] The rules also establish a fee schedule.[12] Under the current fee schedule, the parties share the initial $12,000 filing fee, which includes the first day of the arbitration.[13] Thereafter, the parties split the $6,000 daily fee.[14]

3. First Amendment Analysis of Government-Sponsored Arbitrations

In August 2012, the Delaware Coalition for Open Government (Open Government)[15]—relying on constitutional rights that trace their origin to that fateful ratification meeting in Battell's Tavern—filed an action in the federal district court challenging the confidentiality provisions of the new arbitration procedure.[16] Open Government argued that government-sponsored, closed-door arbitrations violated the First Amendment of the United States Constitution. The First Amendment,[17] which prohibits the government from "abridging the freedom of speech, or of the press", has been interpreted to include a right of public access to trials.[18] To determine whether a proceeding qualifies for the First Amendment right of public access, courts examine whether: (i) "there has been a tradition of accessibility" to that kind of proceeding; and (ii) "access plays a significant positive role in the functioning of the particular process in question".[19] Under this so-called "experience and logic test", both experience and logic must counsel in favour of opening the proceedings to the public.[20] Once established, the presumption of public access may only be overridden by a compelling government interest.[21]

In proceedings before the trial court—a federal district court sitting in Delaware—both parties cross-moved for judgment on the pleadings. The federal district court ruled as a matter of law that the confidentiality provisions violated the First Amendment because the Delaware arbitration proceeding "functioned essentially as a non-jury trial before a Chancery Court judge".[22] The decision issued by the federal district court makes reference to the experience and logic test, but devotes most of its decision to an exception that applies when

[6] Del. Code Ann. tit. 10 § 349(a); § 347(a).
[7] Del. Code Ann. tit. 10 § 349(b).
[8] Del. Code Ann. tit. 10 § 349(c).
[9] Rule 97(b).
[10] Rule 96(c).
[11] Rules 97(a)(4), 98(b).
[12] Rule 98(g).
[13] See *http://www.delawarecourtsonline.com/#!__master-page-chancery/arbitration* [Accessed June 19, 2014].
[14] See *http://www.delawarecourtsonline.com/#!__master-page-chancery/arbitration* [Accessed June 19, 2014].
[15] This entity is the Delaware affiliate of a national organisation focused on open government.
[16] *Delaware Coalition for Open Government v Strine* 2012 WL 3744718 (D. Del. Aug. 30, 2012).
[17] US Const. amend. I.
[18] *Richmond Newspapers Inc v Virginia* 448 US 555, 575 (1980).
[19] *Press-Enter Co v Superior Court* 478 US 1, 9–10 (1986).
[20] *New Jersey Media Group Inc v Ashcroft* 308 F.3d 198, 213–14 (3d Cir. 2002).
[21] *Press-Enter Co v Superior Court* 478 US at 9 (1986).
[22] *Delaware Coalition for Open Government v Strine*, 894 F. Supp. 2d 493, 494 (D.Del. 2012).

the procedure is "sufficiently like a trial".[23] The Delaware Chancery Court judges appealed the decision of the trial court to the Third Circuit, where it was heard de novo by a three-judge panel.[24] The panel issued three opinions. The majority decision by Judge Sloviter affirmed the order of the district court under the experience and logic test. The concurrence, written separately by Judge Fuentes, emphasised that the First Amendment invalidated only three specific confidentiality provisions in the arbitration scheme. Finally, Judge Roth issued a dissent arguing that Delaware's government-sponsored arbitration mechanism should be upheld in its entirety. Read together, the majority and concurring opinions invalidated the confidentiality provisions. In March 2014, the US Supreme Court declined further review.[25] Therefore, the majority's opinion stands, holding that Delaware's confidential judicial-arbitration procedures violate the First Amendment's right of access.

Experience prong

The experience prong examines whether the "place and process have historically been open to the press and general public" because such a "tradition of accessibility implies the favorable judgment of experience".[26] However, in applying the experience prong, the parties and the judges could not agree whether to examine the history of civil trials or the history of arbitrations. The majority expressed concern that selecting which history applies at the outset of the analysis "would beg the question at issue" rather than "consider the judgment of experience".[27] To avoid such infirm reasoning, the majority embarked on an unusual historical tour of public access to civil trials and arbitration.

The majority began this historical examination with a discussion of the 1267 Statute of Marlborough, which required that all causes be heard "openly in the King's Courts".[28] After the American Revolution, the American colonies adopted and preserved this tradition of access to trials and the courthouse.[29]

Unexpectedly, arbitrations have a more mixed history with respect to public access. Records from England record arbitration-like proceedings dating back to the twelfth century. Early English arbitrations were conducted in public venues with community participation.[30] By contrast, many American colonists held a "suspicion of law and lawyers" and favoured arbitrations as a "less public and less adversarial" way to resolve disputes.[31] But in the eighteenth century, American arbitrations became more formal and some seemed to have been conducted in public.[32]

Threading these historical strands, the majority observed that proceedings in "front of judges in courthouses have been presumptively open to the public for centuries" and that not "all arbitrations must be closed, but that arbitrations with non-state action in private

[23] See *Delaware Coalition for Open Government v Strine* 894 F. Supp. 2d at 500 (quoting *El Vocero de Puerto Rico v Puerto Rico* 508 US 147, 149–50 (1993)).

[24] *Delaware Coalition for Open Government v Strine* 733 F.3d 510 (3d Cir. 2013).

[25] *Strine v Delaware Coalition for Open Government* 2014 WL 271920 (S. Ct. Mar. 24, 2014).

[26] *Press Enter Co v Superior Court* 478 US at 8 citing *Globe Newspaper v Superior Court*, 457 US 596, 605 (1982) (quoting *Richmond Newspapers Inc v Virginia*, 448 US 555, 589 (1980) (Brennan J. concurring in judgment)).

[27] *Delaware Coalition for Open Government v Strine* 733 F.3d at 515–16 citing *Press-Enter Co v Superior Court* 478 US at 11.

[28] *Delaware Coalition for Open Government v Strine* 733 F.3d at 515–16 citing Edward Coke, *Institutes of the Law of England*, Pt 2, 6th edn (1681), p.103.

[29] *Delaware Coalition for Open Government v Strine* 733 F.3d at 515–16 citing Edward Jenks, *The Book of English Law*, 6th edn (Athens, Ohio: Ohio University Press, 1967), pp.73–74.

[30] *Delaware Coalition for Open Government v Strine* 733 F.3d at 517 citing Edward Powell, "Settlement of Disputes by Arbitration in Fifteenth-Century England" (1984) 2 Law & Hist. Rev. 21, 29, 33–34.

[31] *Delaware Coalition for Open Government v Strine* 733 F.3d at 517 citing Jerold S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (New York: Oxford University Press, 1983), p.4. The dissent calls attention to additional authority discussing the arbitration of disputes between American and British merchants in the period of the Revolutionary War: *Delaware Coalition for Open Government v Strine* 733 F.3d at 516–17.

[32] *Delaware Coalition for Open Government v Strine* 733 F.3d at 517 citing Bruce H. Mann, "The Formalization of Informal Law: Arbitration Before the American Revolution" (1984) 59 N.Y.U.L. Rev. 443, 454.

venues tend to be closed".[33] Although acknowledging that Delaware's government-sponsored arbitrations share characteristics of private arbitrations, the majority emphasised that they differ because they are conducted before active judges, in a courthouse, and result in a binding order of the Chancery Court.

Logic prong

The logic prong of the test evaluates whether public "access plays a significant positive role in the functioning of the particular process in question".[34] The majority, after examining four arguments raised by the defendant Chancery Court judges, determined the potential drawbacks of openness were slight. The majority concluded that: (i) trade secrets and other confidential information were already protected by court rules that authorised filing confidential and proprietary information under seal; (ii) the "loss of prestige and goodwill" the disputants would suffer in open proceedings was "unpleasant for the parties involved", but would not hinder the functioning of the proceeding; (iii) informality rather than privacy accounts for any reduction in contentiousness during arbitrations; and (iv) opening arbitrations to the public would not effectively end Delaware's arbitration programme because, if confidentiality was its sole attribute, then the programme would be tantamount to a "secret civil trial" in contravention of the First Amendment right to access.[35]

4. May Sitting Judges Conduct Private Arbitrations?

Although this issue was not squarely before the court, the various judges expressed a range of views on the propriety of sitting judges conducting courtroom arbitrations for fee-paying parties. Judge Sloviter, writing for the majority, signalled her ambivalence when she wrote:

> "[o]ne wonders why the numerous advantages … (which apparently motivated the Delaware legislature) should not also be available to business persons with less than a million dollars in dispute".[36]

This statement appeared to provoke Judge Fuentes to issue a concurrence to "reiterate that we do not express any view regarding the constitutionality of a law that may allow sitting judges to conduct private arbitrations".[37] Judge Roth's dissent noted his agreement with Judge Fuentes' concurrence on this point.[38] As result of this fractured decision, Delaware's government-sponsored arbitration programme is now out in the open, but it remains to be seen whether it is out of the constitutional woods.

[33] *Delaware Coalition for Open Government v Strine* 733 F.3d at 518.
[34] *Press Enter Co v Superior Court* 478 US at 8.
[35] *Delaware Coalition for Open Government v Strine* 733 F.3d at 519.
[36] *Delaware Coalition for Open Government v Strine* 733 F.3d at 520.
[37] *Delaware Coalition for Open Government v Strine* 733 F.3d at 520.
[38] *Delaware Coalition for Open Government v Strine* 733 F.3d at 523.