Shhh . . . Secret Arbitration in Process: The Unconstitutionality of Delaware's Chancery Arbitrations

Matthew R. Koch*

Abstract

During the second half of the twentieth century, arbitration rapidly emerged as a dominant player in the legal industry. Because arbitration is arguably more efficient and less costly, it serves as an attractive alternative to litigation. Accordingly, potential litigants and state courts are increasingly choosing arbitration over traditional litigation to resolve legal disputes.

Consistent with this trend, the Delaware State Legislature in 2009 enacted an arbitral mechanism that authorized the Court of Chancery to conduct secret arbitration proceedings. Following this initiative, however, in *Delaware Coalition for Open Government v. Strine*, the United States District Court for the District of Delaware found that these proceedings constitute the functional equivalent of civil trials. Reasoning that such secrecy inherently conflicts with the guarantee of open access surrounding traditional litigation, the court definitively struck down Delaware's experiment as violative of the First Amendment to the United States Constitution.

This Comment provides an explanation of the arbitral process, explores the First Amendment in relation to the right of public access, and analyzes the opinion set forth in *Strine*. This Comment then proposes a statutory solution, offering a middle ground that would survive First Amendment scrutiny, while permitting Delaware to continue to offer the Chancery alternative.

* J.D. Candidate, The Pennsylvania State University, The Dickinson School of Law, 2014; B.A., University of Delaware, 2011. I would like to thank my family and friends who supported and encouraged me throughout this process, most especially my mother and grandparents, without whom I would not be the person I am today.

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I. INTRODUCTION

In April 2009, the Delaware State Legislature embarked on a creative journey toward more efficient adjudication of cases within the state's judicial chambers.[1] To accomplish this seemingly difficult task, the General Assembly enacted Delaware Code Section 349,[2] a law that authorized sitting chancellors of the Court of Chancery to hear binding, private arbitration proceedings.[3] The statute permitted confidential resolution of commercial and business controversies between two consenting parties in a forum accustomed to resolving such disputes.[4]

The Court of Chancery was the logical forum to serve as the testing grounds for Delaware's new experiment. Among other things, it is nationally recognized as a specialized court that is on the forefront of resolving commercial, intellectual property, and corporate legal battles.[5] The program's launch officially ordained Delaware the trailblazer in the

1. Steven M. Davidoff, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. TIMES DEALBOOK (Aug. 31, 2012, 11:58 AM), http://nyti.ms/NGTVzK.

2. DEL. CODE ANN. tit. 10, § 349 (Supp. 2012).

3. *Id.*

4. *Id.*

5. *See* H.B. 49, 145th Leg. (Del. 2009); Int'l Inst. for Conflict Prevention & Resolution, *Not in Private: Delaware's Chancery Court Arbitration Program Is Struck Down*, 30 ALTERNATIVES TO HIGH COST LITIG. 180, 180 (2012).

field of state court-sponsored arbitration, making it the first state to offer arbitrations presided over by active state judges.[6]

In crafting the process by which secret arbitrations could take place, the Legislature sought "to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes," particularly those involving the matters mentioned above.[7] To participate in such a proceeding, the parties needed a preexisting arbitration agreement designating the Court of Chancery as the arbitral forum, or they could consensually submit the dispute after it arose.[8] The Legislature also required at least one of the participants to be a Delaware business entity that met the State's personal jurisdiction standard.[9] Additionally, if monetary damages comprised the exclusive relief requested, the amount in controversy could not fall short of one million dollars.[10] Notwithstanding those requirements, eligibility to enter into Chancery arbitration was broadly granted to all "business disputes."[11]

In practice, Section 349 of the Delaware Code empowered the Court of Chancery to conduct what could potentially amount to high stakes[12] arbitration hearings.[13] To implement this new arbitral model, Chancery Court Rules 96, 97, and 98 were adopted to provide a clear and functional process for those who intended to utilize the Chancery alternative.[14] The Rules stipulated that to initiate the process, the demanding party must file a petition for arbitration with the court and pay a special filing fee.[15] Further, the Rules required the assistance of Delaware counsel at the petition stage as a preliminary condition of participation.[16]

Unlike the filing of standard claims destined for courtroom litigation, the petitions directly at issue were excluded from the public docketing system.[17] In other words, the public could not discover the initiation of Chancery arbitrations absent a mutual agreement between

6. Peg Brickley, *Secrecy Puts Judges on Defense in Delaware*, WALL ST. J., Feb. 21, 2012, http://on.wsj.com/xxwZ4A.

7. Del. H.B. 49.

8. tit. 10, § 349(a).

9. *Id.* § 347(a)(2), (3). Consumers, defined as individuals who purchased or leased merchandise primarily for personal use, DEL CODE ANN. tit. 6, § 2731(1) (2005), could not take advantage of this recourse. tit. 10, § 347(a)(4).

10. tit. 10, § 347(a)(5).

11. *Id.* § 349(a).

12. *See id.* § 347(a)(5).

13. *See id.* § 349.

14. *See* DEL. CH. CT. R. 96–98.

15. *Id.* R. 97(a)(1).

16. *Id.*

17. *Id.* R. 97(a)(4).

the parties to the contrary.[18] Confidentiality in the petitions and supporting documents would be lost, however, if the proceedings became the subject of appeal.[19] In the case of an appeal, the Court of Chancery would rescind its jurisdiction and the record would be removed to the Delaware Supreme Court.[20]

Unlike conventional arbitration, the chancellor reviewing the petition appointed the arbitrator himself.[21] In effect, non-chancellors, such as masters sitting permanently in the court, could serve as arbitrators.[22] By allowing the chancellor to appoint the arbitrator, the Legislature sought to offer an arbitration alternative that would be held before "widely recognized competent business court judges who are familiar with the law that underlies" the agreement to arbitrate.[23]

After a petition was filed with the court, the chancellor acting as arbitrator would conduct a preliminary hearing to anticipate future scheduling concerns and discuss the particulars of the case.[24] At this point, the parties would attempt to reach some form of agreement regarding the scope of discovery, availability of witnesses, and issuance of subpoenas, among other questions of procedure.[25] As to the proceeding itself, the Rules required arbitration of the claims to commence within 90 days of the court's receipt of the petition.[26] The Rules further required Delaware lawyers to attend the proceedings on behalf of both parties.[27]

Consistent with traditional arbitration norms, Chancery arbitrators possessed authority to issue final and binding awards.[28] Awards could include not only monetary damages but also "any remedy or relief that the Arbitrator deem[ed] just and equitable and within the scope of any

18. *See id.*

19. DEL. CH. CT. R. 97(a)(4).

20. *Id.* No case during the life of the arbitration program was ever appealed to the Delaware Supreme Court.

21. *See id.* R. 97(b). It should be pointed out, however, that Rule 96(c) permits the adoption and/or amendment of the arbitration rules by consent of both parties unless the additional or altered provision is found inconsistent with Rules 96–98. *Id.* R. 96(c).

22. *See id.* R. 96(d)(2).

23. Myron T. Steele, Chief Justice, Del. Supreme Court, Keynote Address at the Journal of Business, Entrepreneurship and the Law Symposium: Delaware's Closed Door Arbitration: What the Future Holds for Large Business Disputes and How It Will Affect M&A Deals (Oct. 30, 2012), *in* 6 J. BUS. ENTREPRENEURSHIP & L. 375, 376 (2013).

24. *See* DEL. CH. CT. R. 97(d).

25. *Id.* R. 97(f). However, the parties may have already come to an agreement on these issues and, as such, these issues would not be the subject for consideration during the preliminary hearing. *See id.*

26. *Id.* R. 97(e).

27. *Id.* R. 98(a).

28. *Id.* R. 98(f)(3).

applicable agreement of the parties."[29] Impliedly, an arbitrator could impose all measures rightfully within the bounds of their judicial powers to the extent not foreclosed by the parties' agreement.[30]

Additionally, at any stage in the proceedings prior to a final disposition, the Rules permitted the parties to mutually opt out of arbitration if they reached a settlement with the assistance of the arbitrator.[31] If the arbitrator rendered an award, it carried with it the same force and effect as any other judgment or decree entered by the Court.[32] Perhaps most significantly, the presiding arbitrator thereafter became ineligible to adjudicate any subsequent litigation stemming from the issues identified in the petition.[33]

In 2012, the Legislature's experiment was cut short when the U.S. District Court for the District of Delaware qualified the hearings as civil trials lacking requisite public access in violation of the First Amendment.[34] Specifically, Judge McLaughlin held that the public right of access to civil trials applied to the Chancery arbitrations, and thus their confidential nature unquestionably violated this liberty interest.[35] As such, the district court struck down portions of the statute pertaining to the privacy of the proceedings, as well as aspects of the Chancery Court Rules implementing the procedural mechanisms for these unique adjudications.[36] Considering the noticeable interest the U.S. Supreme Court has shown toward arbitration generally, and the abundance of arbitration-related case law generated by the Court,[37] the constitutionality of state-run arbitrations is likely to attract further attention in the federal courts.

Part II of this Comment examines arbitration in general, weighing in on both its positive and negative attributes. Part III discusses the First Amendment in the context of public access to judicial trials, and is followed by an explanation of the Federal Arbitration Act ("FAA") in Part IV. Thereafter, Part V analyzes Delaware's arbitration law as applied to the constitutional issue of public access to civil trials. This Comment concludes by offering an intermediate approach that satisfies

29. DEL. CH. CT. R. 98(f)(1).
30. *See id.*
31. *Id.* R. 98(e).
32. *Id.* R. 98(f)(3).
33. *Id.* R. 98(f)(4).
34. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 503–04 (D. Del. 2012).
35. *Id.* at 504.
36. *Id.*
37. *See generally* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012).

both the need for innovative judicial action and public access to the Chancery arbitrations.

II. THE ARBITRATION ALTERNATIVE

Arbitration functions as a consensual, alternative mechanism for dispute resolution that is private in nature, typically informal, and presumably expedient for the disputing parties.[38] All arbitration must commence from some form of mutual agreement between the litigants.[39] The arbitral clause and submission are the primary avenues for initiating the arbitration process.[40]

Prospectively, the arbitral clause is a contract provision under which the parties agree to the final resolution of future disputes through arbitration.[41] Alternatively, submission refers to an arbitration agreement advancing pre-existing controversies to the arbitral forum.[42] The term "arbitral forum" broadly encompasses any private venue or institution the parties choose to administer the arbitration.[43] Arbitration is thus viewed as a forum selection mechanism in that the same substantive rights are available to litigants in both the conventional judicial setting and arbitration.[44]

Accordingly, the freedom of contract doctrine plays a pivotal role in U.S. arbitration.[45] American law permits arbitration to function in the manner in which it is designed, allowing parties to formulate arbitration rules that best serve their individual interests.[46] Litigants may shape their own course, "customizing the process to their needs, eliminating unsuitable rules and techniques, and providing procedural devices that

38. THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 1 (6th ed. 2012).

39. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989). As stated by the U.S. Supreme Court:

> [T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms . . . . Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.

Id. (citations omitted).

40. CARBONNEAU, *supra* note 38, at 26.

41. *Id.*

42. *Id.*

43. *See* Control Screening LLC v. Technological Application & Prod. Co., 687 F.3d 163, 169–71 (3d Cir. 2012).

44. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985); 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 1:1 (West 3d ed. 2003).

45. CARBONNEAU, *supra* note 38, at 24.

46. *Id.*

achieve fairness, finality, and functionality."[47] This flexibility distinguishes arbitration from the traditional adjudicatory setting.[48]

A. The Advantages of Arbitration

As an available alternative to what can easily amount to costly and time-consuming courtroom litigation, arbitration offers the benefits of privacy, party autonomy, and efficiency in rendering final awards.[49] The relative economic advantage of arbitration is paramount to its appeal, especially within the commercial realm.[50] More specifically, reducing litigation-related complications "results in an economy of time and money."[51] Streamlined resolution of business disputes reduces the procedural delay with which courts often struggle and cuts costs for both parties.[52] Arguably, any reduction in time spent and resources consumed is a mutual benefit for the parties weighing in favor of arbitration.[53]

The comparative congeniality of arbitration encourages parties to refrain from clutching onto adversarial weaponry, thereby allowing the parties to resume their ordinary business relations without undue strain from the dispute.[54] Commercial entities often find it beneficial to avoid

47. *Id.*

48. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2 (2d ed. 2007); *see also* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 51 (observing that party "[c]hoice is what sets arbitration apart from litigation").

49. CARBONNEAU, *supra* note 38, at 1. As a disclaimer to the finality of arbitration awards, Section 10 of the FAA permits an aggrieved party to file a motion for vacatur in a federal district court. Federal Arbitration Act, 9 U.S.C. § 10 (2012). Grounds for vacatur are specifically enumerated in this section, but awards are typically enforced. *See* THOMAS J. BREWER & LAWRENCE R. MILLS, VACATUR OF ARBITRATION AWARDS: A REAL-WORLD REVIEW OF THE CASE LAW 3–8 (2006), *available at* http://bit.ly/1bZjU2f. The FAA will be discussed at greater length in Part IV, *infra*.

50. OEHMKE, *supra* note 44, § 16:7.

51. CARBONNEAU, *supra* note 38, at 11.

52. *Id.* ("The reduction of litigious obfuscation results in an economy of time and money."); *see also* Maurice Rosenberg, *The Literature on Court Delay*, 114 U. PA. L. REV. 323, 323 (1965) (noting that court delay "has emerged as a highly visible, concrete, and urgent problem in the administration of civil justice in this country").

53. *See* CARBONNEAU, *supra* note 38, at 11. It is appropriate to recognize that this mutual benefit may not be conferred in all instances. There exists a strong argument that arbitration is ill-suited for certain disputes, given the particular nature of the claim. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."). This view is most clearly associated with consumer and employment arbitration, where positional disparities are central to attacks on the efficacy of the arbitral forum. *See id.* Arbitration in these settings can be manipulated by the stronger party to serve as a mechanism to mitigate damages and thwart proper relief. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57. STAN. L. REV. 1631, 1649–50 (2005).

54. CARBONNEAU, *supra* note 38, at 13.

gladiatorial tactics, such as undue discovery requests, in making their case.[55] Further, the procedural flexibility inherent in arbitration facilitates professionalism.[56] It enables litigants to create less formal adjudicatory settings and set hearings at their convenience, thus minimizing the stress on those litigants' relationships during the disagreement.[57] It is precisely this professional tenor of arbitration that contributes to its "business appeal."[58]

Litigants also value the privacy that underscores the arbitral process.[59] Unlike court proceedings, arbitration hearings and records are confidential.[60] Confidentiality is especially attractive to those parties wishing to maintain a competitive edge in the market by protecting themselves from any negative publicity that may arise from "airing their dirty laundry."[61] Moreover, the freedom to structure individualized dispute resolution confers upon parties the advantage of expert and experienced adjudicators whom the parties can freely select upon the basis of their unique skill sets.[62] As such, the choice to arbitrate facilitates the business-oriented desire to "avoid inexpert judges who may be prone to impose legalistic solutions upon commercial problems."[63]

The ability to designate professional arbitrators would be meaningless absent an enforceable award.[64] Critical to U.S. arbitration law is the general principle that awards are final and binding in nature.[65] Indeed, courts typically construe the statutory grounds for judicial

55. *Id.*

56. Edna Sussman, *Why Arbitrate? The Benefits and Savings*, N.Y. ST. B.J., Oct. 2009, at 20, 20, *available at* http://bit.ly/1bZkVY1.

57. *Id.*

58. CARBONNEAU, *supra* note 38, at 13.

59. WILLIAM H. HANNAY, 2 LAWS OF INTERNATIONAL TRADE § 70:15 (2013), *available at* Westlaw INTLTRADE.

60. *Id.*

61. *Id.* The use of "airing their dirty laundry" is not directly taken from the text of this source, but is quoted for its application as a colloquial phrase.

62. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) ("[P]arties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." (quoting Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (internal quotation marks omitted)). As a caveat to the foregoing statement, parties demanding arbitration are not always afforded meaningful influence over arbitrator designation. *See* Sternlight, *supra* note 53, at 1649–51. The absence of an influential voice in the process is most prominent in the consumer context, where the commercial party largely controls who may serve as arbitrator(s) and structures the selection apparatus. *Id.*

63. CARBONNEAU, *supra* note 38, at 12.

64. *Id.* at 557.

65. *See* 9 U.S.C. § 2 (2012).

supervision of arbitral awards narrowly,[66] and such grounds, in theory, should exclude any review of the merits.[67] Litigants can thus expect full resolution of the contested issue.[68] As such, any arbitral award stands on equal footing with judicial decisions mandating damages.[69] These professed advantages of arbitration help alleviate already overburdened court dockets by funneling legal conflicts into a distinct and functional channel of resolution.[70]

B. The Downside to Arbitration

It must be noted, however, that arbitration is not a universal remedy resolving all of the judicial system's perceived failures.[71] These failures include overloaded court dockets resulting in undue delay, judicial decisions fraught with unique uncertainties, generalist judges unfamiliar with specialized commercial practices, and costs transcending the affordability range for the average citizen.[72] Concededly, arbitration

66. *See, e.g.*, Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) ("Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings.").

67. *See* 9 U.S.C. § 10. The limited statutory grounds for vacating an arbitration award under Section 10(a) include: (1) corruption, fraud, or undue means in the procedure; (2) evident partiality in the arbitrators; (3) denial of due process through an arbitrator's misconduct; and (4) an arbitrator exceeding the scope of his or her authority under the arbitration agreement. *Id.* § 10(a). Notwithstanding these limited grounds, some courts have vacated arbitral awards under non-statutory grounds. *See, e.g.*, Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir. 2009). In *Improv West*, the Ninth Circuit held that "manifest disregard of the law," a non-statutory ground for vacatur, remained valid under § 10(a)(4). *Id.* at 1281. The court explained that an arbitrator manifestly disregards the law when he or she recognizes the applicable law and simply ignores it. *Id.* at 1290. It has been recognized, however, that such a common law ground has the potential to expose arbitration awards to merits review. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994). The U.S. Supreme Court has yet to definitively address the issue of whether manifest disregard as a non-statutory ground for judicial supervision has been subsumed into the enumerated standards in Section 10(a). Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585 (2008).

68. CARBONNEAU, *supra* note 38, at 22.

69. RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982).

70. CARBONNEAU, *supra* note 38, at 22.

71. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 665 (1985) (Stevens, J., dissenting) ("The Court's repeated incantation of the high ideals of 'international arbitration' [improperly] creates the impression that this case involves the fate of an institution designed to implement a formula for world peace.").

72. *See* Jose Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, N.Y. ST. B.J., Apr. 1998, at 22, 23; Andrew Pincus, *The Advantages of Arbitration*, N.Y. TIMES DEALBOOK (May 24, 2012, 1:44 PM), http://nyti.ms/KkVeVv ("In fact, ordinary people cannot access the courts, with their byzantine rules and time-consuming delays . . . ."). Depending on the arbitral process constructed, however, arbitration may actually serve as a more expensive substitute for litigation in some cases. *See* Green Tree Fin.

embodies certain drawbacks that make it vulnerable to criticism.[73] For instance, critics readily emphasize arbitration's ad hoc character, stressing its purported failure to adequately protect parties' rights and interests, including those of non-signatories.[74] Furthermore, the same desired element of privacy critical to commercial entities is detrimental to particular public interests, specifically access to otherwise public information.[75] Public scrutiny, which provides an informal check upon the judicial system, is simply nonexistent.[76] Instead, arbitration embraces self-governance, restrained largely by market forces.[77]

Compounding the privacy dilemma, arbitral awards provide a bare-bones resolution of the case.[78] Rather than disclosing the legal rationale and publicizing a written opinion, arbitrators usually finalize the dispute with a mere one-page statement of the ultimate award.[79] This, in turn, negates any real possibility for precedential value and hampers predictability in the future outcomes of similarly arbitrated controversies.[80] As a consequence, trust in the arbitrator's professionalism and legal competence in applying the relevant law is essential.[81]

Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000). Accordingly, it is incorrect to assert that arbitration is a universal solution to the potential cost deterrents of litigation. *Id.*

73. *See* EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 17–23 (2006).

74. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) (holding that the arbitral forum is inappropriate for the protection of statutory rights created under Title VII of the Civil Rights Act of 1964).

75. Brian JM Quinn, *Skyworks Fireworks*, M&A LAW PROF BLOG (Nov. 4, 2011), http://bit.ly/vTEu6I. A non-signatory is a party that has not signed the arbitration contract. Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995).

76. BRUNET ET AL., *supra* note 73, at 10.

77. CARBONNEAU, *supra* note 38, at 14.

78. BRUNET ET AL., *supra* note 73, at 10.

79. *Id.* There is a qualified exception to this generalized statement if the arbitration rules adopted require publication or the parties' consent to such action. 3 OEHMKE, *supra* note 44, § 117:5.60 (Supp. 2011). Still, there is no supreme mandate dictating that an arbitrator follow a previous award or any supporting rationale provided. *See* Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1255 (7th Cir. 1994).

80. *See, e.g.*, David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 490 (2011) (observing that arbitrators "can flout controlling law" as they are not bound by precedent). Maritime arbitration exemplifies this concept. Arbitrators in that field can consult and use previous awards as persuasive authority, but they are under no obligation to adhere to such precedent and thus are not bound in their decision-making. CARBONNEAU, *supra* note 38, at 388. On the other hand, international arbitral awards, within the context of "a-national arbitration," can function as legal precedent. *See id.* at 39.

81. CARBONNEAU, *supra* note 38, at 14.

C. Subject Matter Inarbitrabililty, or the Lack Thereof

The U.S. Supreme Court's arbitration jurisprudence has noted that certain private disputes implicate the public interest to such a degree that any recourse other than through the court system is against public policy and therefore intolerable.[82] The Court in recent years has shifted gears, however, praising arbitration for its ability to protect substantive rights to the same extent as the judiciary.[83] The need for non-judicial resolution of statutory claims is clearly reflected in the contemporary judicial attitude that "objections centered [solely] on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum."[84] Unless it can be established that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights[,]" the particular subject matter alone is not an absolute barrier to the arbitral forum.[85] The tension between the desire for efficient dispute resolution and society's understandable interest in statutory rights must be analyzed in conjunction with the emphatic federal policy favoring arbitration.[86] Simply put, unless a clear congressional indication to the contrary exists, the presumption remains in favor of arbitration.[87]

D. Court of Chancery: A Quick Profile

The Delaware Court of Chancery is widely recognized as one of the nation's premier business adjudication venues.[88] Its national prominence is largely due to its specialization in corporate law, created by the high volume[89] of corporate litigation that it confronts.[90] Chancellors, as such,

82. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) (finding that an agreement to arbitrate certain labor disputes does not foreclose a litigant's right to vindicate his or her Title VII statutory rights in court); Wilko v. Swan, 346 U.S. 427, 438 (1953) (finding claims arising under the Securities Act of 1933 inarbitrable), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

83. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 268 (2009) (explaining that arbitration is "readily capable of handling" disputes involving statutory rights (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (internal quotation marks omitted))).

84. *Id.* at 269. *But see In re* Am. Express Merchants' Litig., 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

85. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (internal quotation marks omitted)).

86. *Id.*

87. *Id.*

88. *See, e.g.*, William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992).

89. *Id.* An overwhelming number of companies choose to incorporate in Delaware, largely because of its business-friendly corporate stance. *See* Faith Stevelman,

have vast experience with the intricacies that underlie commercial transactions.[91] Decisions are rendered quickly with the advantage of Delaware decisional law that has been progressively refined by the jurisdiction's extensive exposure to business controversies.[92] Simply put, the court's unique competence in, and exposure to, issues of corporate law is unmatched.[93]

The court itself is composed of five chancellors: four vice chancellors and one chancellor.[94] Corporations flock to Delaware precisely because of the value the court's detailed opinions hold, opinions which also eliminate the unpredictability of jury trials.[95] Businesses are therefore guaranteed a "level playing field" and are privileged with an aptly qualified judge.[96] As one commentator stated, "[t]he history and tradition of the Court of Chancery and the human capital of its excellent judges, cannot be magically transplanted to some other jurisdiction."[97] The court's reputation for innovative legal solutions to complex transactional problems only enhances its appeal as an adjudicative forum.[98] It should come as no surprise that the court's expertise in corporate matters offers a powerful reason for Fortune 500 companies to incorporate in Delaware.[99]

III. A BRIEF HISTORY: THE FIRST AMENDMENT & THE QUALIFIED RIGHT TO ATTEND TRIAL

The First Amendment to the U.S. Constitution provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech,

Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law, 34 DEL. J. CORP. L. 57, 59–60 (2009). There is also no residency requirement and its filing fee is relatively cheap compared to other states. *See* CLIFFORD R. ENNICO, 7 WEST'S MCKINNEY'S FORMS BUSINESS CORPORATION LAW § 1:28 (2012). Further, as explained above, Delaware has a separate, specialized court system for corporate law that does not involve juries. *Id.* Accordingly, most corporate litigation finds its way to the Court of Chancery, as both commercial parties are probably incorporated in Delaware. *See id.*

90. Rehnquist, *supra* note 88, at 354.

91. *Id.*

92. *Id.*

93. *Id.*

94. DEL. CODE ANN. tit. 10, § 307 (1999).

95. LEWIS S. BLACK, JR., DEL. DEP'T OF STATE, DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 5 (2007), *available at* http://1.usa.gov/HAgIRP.

96. *Id.* at 7.

97. *Id.*

98. *See* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 587.

99. *See* BLACK, *supra* note 95, at 7; *see also Fortune 500*, CNN MONEY (May 21, 2012), http://cnnmon.ie/KHiSJB. Approximately 61 percent of Fortune 500 companies are chartered in Delaware. Steele, *supra* note 23, at 376.

or of the press."[100] Application of this substantive mandate extends to the states through the Fourteenth Amendment.[101] Not until 1980, when the U.S. Supreme Court decided *Richmond Newspapers, Inc. v. Virginia*,[102] did the Court determine that the First Amendment extends to the public the right to observe and attend *criminal* prosecutions.[103] The following section will discuss and analyze *Richmond Newspapers*, along with precedential case law stemming from the Third Circuit.

A. Richmond Newspapers—*The Forerunner*

In *Richmond Newspapers, Inc. v. Virginia*, John Paul Stevenson,[104] accused of stabbing a hotel manager to death, was indicted for murder.[105] The case was tried a total of four times.[106] The Virginia Supreme Court reversed the initial conviction for improper admission of material evidence—namely, a bloodstained shirt purportedly belonging to Stevenson.[107] The second and third attempts resulted in mistrials.[108] On the fourth try, counsel for the defendant requested that the trial court close the proceedings to the public as a preventive measure against further procedural mishaps.[109] The trial judge ultimately granted the motion, but the decision did not remain unchallenged.[110] Among those against granting closure were reporters for Richmond Newspapers.[111] The reporters challenged the ruling, arguing that the public had a right of access to the proceedings.[112] Nonetheless, appeal to the Virginia Supreme Court was denied.[113] The U.S. Supreme Court granted certiorari to review the constitutionality of the trial court's order.[114]

100. U.S. CONST. amend. I.
101. U.S. CONST. amend. XIV.
102. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
103. *Id.* at 580.
104. DOUGLAS S. CAMPBELL, FREE PRESS V. FAIR TRIAL: SUPREME COURT DECISIONS SINCE 1807, at 160 (1994).
105. *Richmond Newspapers*, 448 U.S. at 559.
106. *Id.*
107. *Id.*
108. *Id.* The second trial ended in a mistrial after a juror requested to be excused in the midst of the proceedings and no replacement was available. *Id.* The third trial also concluded in a mistrial, but on the ground that a prospective juror had read about the previous judicial blunders in the news and thereafter informed the other prospective "jurors about the case before the retrial began." *Id.*
109. *Id.* at 559–60.
110. *Richmond Newspapers*, 448 U.S. at 560–61.
111. *Id.*
112. *Id.* at 562 n.4.
113. *Id.* at 562.
114. *Id.* at 562–63.

The U.S. Supreme Court held that implicit in the First Amendment is the right for the public and press to attend criminal trials.[115] Absent a compelling interest supported by a strong factual basis, criminal cases must remain open to the public.[116] Although no categorical demand exists within the text of the First Amendment itself, the Court reasoned that inaccessible criminal trials would foreclose significant aspects of free speech and press.[117] Moreover, the ability to attend such proceedings provides substance to the explicit guarantee of free communication by facilitating the dissemination of public information.[118]

On this issue of first impression, the U.S. Supreme Court diligently examined the historical background surrounding the openness of criminal trials.[119] The Court's analysis concluded that an "unbroken, uncontradicted history" compelled a presumption of openness inherent "in the very nature of a criminal trial under our system of justice."[120] After citing numerous legal scholars and colonial history,[121] the Court endorsed the view that open judicial forums give the assurance of fair proceedings, discourage perjury in the face of public reaction, and deter secret bias or partiality on behalf of judges.[122]

Deriving its authority from this analysis, a two-pronged test emerged for determining when a First Amendment right of access exists.[123] The two prongs focus exclusively on experience and logic.[124] The experience prong addresses whether the challenged proceedings have historically remained open, whereas the logic prong emphasizes whether the societal benefit of public access outweighs competing concerns.[125]

115. *Richmond Newspapers*, 448 U.S. at 580. However, the U.S. Supreme Court later noted that the right of access is qualified, not absolute. *See* Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 9 (1986).

116. *Richmond Newspapers*, 448 U.S. at 581.

117. *Id.* at 580.

118. *Id.* at 582 (Stevens, J., concurring).

119. *Id.* at 564–73 (majority opinion).

120. *Id.* at 573.

121. *Richmond Newspapers*, 448 U.S. at 566–69 (citing THOMAS SMITH, DE REPUBLICA ANGLORUM 101 (Alston ed. 1972); FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 31–32 (1904); ARTHUR SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 128–29 (1930); 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129 (1971); 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 101, 105 (1904); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343–45 (6th ed. 1820); 3 WILLIAM BLACKSTONE, COMMENTARIES *372–73).

122. *Id.* at 569.

123. The U.S. Supreme Court later clarified this test. *See Press-Enter. II*, 478 U.S. 1, 9 (1986); Press-Enter. Co v. Superior Court (*Press-Enter. I*), 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

124. *Press-Enter. II*, 478 U.S. at 8–9.

125. *Id.*

Significantly, the Court recognized that its opinion was not controlling on the issue of civil trials.[126] It nonetheless stated that "*both* civil and criminal hearings have been presumptively open."[127] The Court also suggested that due process requires public access regardless of the nature of the case.[128] No U.S. Supreme Court case following *Richmond Newspapers*, however, has directly ruled on the right to attend civil trials, although every Court of Appeals to consider the issue, including the Third Circuit,[129] has held that there exists a qualified right of access to such proceedings.[130]

B. Publicker Industries—*Picking Up the Slack*

In *Publicker Industries, Inc. v. Cohen*,[131] the Third Circuit addressed an issue of first impression: whether the First Amendment secures for the public and press a right of access to civil proceedings.[132] After a fairly short opinion, the panel held in the affirmative.[133] Utilizing the rubric laid out in *Richmond Newspapers*, the court found that a right of access to civil trials and records is historically well-established.[134]

Quoting numerous early English and American legal scholars, as the U.S. Supreme Court did in *Richmond Newspapers*, the Third Circuit concluded that experience dictated a presumption of openness in civil as well as criminal hearings.[135] The court found the same logic supporting public criminal trials—namely, maintaining confidence in the judicial system—to be equally applicable in the civil setting.[136] Under Third Circuit precedent, strict scrutiny applies where access to *any* type of judicial trial is denied; that is, absent a compelling governmental interest and no less restrictive means of remedying that concern, courts may not

126. *Richmond Newspapers*, 448 U.S. at 580 n.17.
127. *Id.* (emphasis added).
128. *Id.* at 574 (citing Levine v. United States, 362 U.S. 610 (1960)).
129. *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984). The finding of this qualified right by the Third Circuit carries significant weight given the fact that this circuit includes Delaware. As such, the Delaware District Court is bound by the Third Circuit's conclusion of law.
130. *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); *Publicker*, 733 F.2d at 1061; *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1309 (7th Cir. 1984); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983).
131. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).
132. *Id.* at 1061.
133. *Id. at* 1070.
134. *Id.* at 1066–67.
135. *Id.* at 1068–69; *see also* Gannett Co. v. DePasquale, 443 U.S. 368, 386 (1979) (acknowledging historical evidence indicates that the constitutional right to request a public criminal trial carries over into the civil realm).
136. *Publicker*, 733 F.2d at 1070.

restrict otherwise unconstrained admission to civil trials.[137] This analysis, nonetheless, did not address arbitration, and certainly did not account for the tremendous force behind the Federal Arbitration Act.

IV. THE FEDERAL ARBITRATION ACT

Enacted in 1925, the Federal Arbitration Act[138] ("FAA" or "the Act") served as a congressional mandate to legitimize arbitration in the United States.[139] The FAA's express purpose was to eliminate longstanding judicial hostility toward the arbitral forum and place arbitration clauses on equal footing with other contractual provisions.[140] The U.S. Supreme Court has effectively sponsored arbitration's growth and has provided for its judicial protection, resolving all doubts of the Act's scope in favor thereof.[141] Statutory civil rights,[142] adhesive consumer agreements prohibiting class actions,[143] and even mandatory employment contracts[144] have all been implicitly or explicitly deemed arbitrable by the U.S. Supreme Court under the auspices of the FAA. Over time, the Court crafted a national policy on arbitration and federalized arbitration law as practiced today.[145]

The strategic dynamics underlying the U.S. Supreme Court's decisional law have driven doctrinal change in domestic arbitration that has transformed this dispute mechanism into a "phenomenon that pervades the contemporary economy."[146] The Court's expansive interpretations of the FAA have arguably created a federal right to arbitrate.[147] In *Southland v. Keating*,[148] the Court struck down as

137. *Id.* The Third Circuit goes on to discuss the procedural and substantive requirements that must be met for closure. *Id.* at 1071–75. However, because the Delaware secret arbitrations were deemed "civil trials," the remainder of the opinion is irrelevant for purposes of this comment. *See id.*

138. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

139. *Id.* § 2 (stating agreements to arbitrate "shall be valid, irrevocable, and enforceable").

140. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 & n.6 (1991)).

141. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

142. *Gilmer*, 500 U.S. at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement . . . .").

143. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

144. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118–19 (2001).

145. *Id.* at 131–32 (Stevens, J., dissenting).

146. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008).

147. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that a provision of California law directly conflicted with the FAA and thus violated the Supremacy Clause of the United States Constitution).

148. Southland Corp. v. Keating, 465 U.S. 1 (1984).

unconstitutional statutory enactments and judicial decisions diverging from the FAA's congressional purpose.[149] As the intended solution to protracted litigation, arbitration has unquestionably been nurtured by the Court into something beyond the contractual status the FAA sought to bestow upon it.[150] Notwithstanding a few decisional outliers,[151] the U.S Supreme Court has consistently endorsed all interpretative measures within its constitutional power to foster arbitral recourse, even in the face of adverse public policy considerations.[152]

The U.S. Supreme Court has long read the FAA as a substantive—rather than merely procedural—federal statute that preempts inconsistent state law.[153] As the centerpiece of the statute, Section 2 provides that "an agreement in writing to submit to arbitration . . . shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of *any* contract."[154] This provision has opened the door for a great deal of latitude in interpreting the validity of arbitral contracts.[155]

The U.S. Supreme Court has emphasized the limited circumstances under which the FAA will invalidate an arbitration agreement.[156] Such judicial approval of arbitration underscores the significance of the bargain for that recourse.[157] The freedom to contract overshadows legitimate societal concerns, a problem only magnified when proceedings are resolved in a private setting.[158] However, unless

149. *Id.* at 16.

150. *Circuit City*, 532 U.S. at 131–32 (Stevens, J., dissenting).

151. *See* Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 673–75 (2010); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 583 (2008); Wilko v. Swan, 346 U.S. 427, 438 (1953), *overruled by* Rodriguez de Quijas v. Pearson/Am. Express, Inc., 490 U.S. 477 (1989).

152. *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1755 (2011) (Thomas, J., concurring); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987).

153. *See, e.g.*, *AT&T Mobility*, 131 S. Ct. at 1756 (Thomas, J., concurring).

154. 9 U.S.C. § 2 (2012) (emphasis added).

155. *See* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 183 (3d Cir. 1999) ("[I]nequality in bargaining power, alone, is not a valid basis upon which to invalidate an arbitration agreement." (citing Great W. Mortg. Corp. v. Peacock, 110 F.3d 222, 229 (3d Cir. 1997))).

156. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36–37 (1987) (quoting United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 567–68 (1960)).

157. *Id.* The Court emphasizes that the proper judicial approach is to refuse a merits review, as both parties contractually agreed to submit all legal and factual interpretation to the arbitrator(s). *Id.* at 37–38.

158. *See* Cleveland Bd. of Educ. v. Int'l Bhd. of Firemen & Oilers Local 701, 696 N.E.2d 658, 664 (Ohio Ct. App. 1997) (holding an arbitrator's reinstatement of a school bus mechanic after discharge for cocaine use violated public policy to suppress illegal drug use among transportation employees); *see also* Westvaco Corp. v. United Paperworkers Int'l Union, 171 F.3d 971, 978 (4th Cir. 1999) (reinstating a serial sexual harasser because the parties bargained for the judgment of an arbitrator and not a court).

violative of explicit and well-settled public policy detailed by federal statutory and decisional law, as opposed to generic public policy considerations, arbitration will be upheld.[159] Any other view would create discernible tension with the clear federal policy to defend arbitration against amorphous attacks.[160] In this regard, providing for arbitral autonomy adds substance to Section 2 of the FAA.[161]

Section 5 of the FAA[162] gives the freedom of contract doctrine additional recognition. It expressly delegates to the arbitrating parties the ability to control the selection of arbitrators.[163] This power is essential not only to customize the arbitral process to the parties' individual interests, but also to ensure the award's enforceability—the purpose of entering into arbitration in the first place.[164] Under Section 10(a)(2), the FAA requires only that the selected arbitrators be impartial to the proceeding.[165] This section implies that the parties can designate as arbitrators whomever they wish, contingent only on satisfying procedural due process.[166] If partiality is challenged, the responding party satisfies its burden upon a showing that the arbitrator is not infected with bias.[167] In general, parties often find it expedient to

159. *Misco*, 484 U.S. at 42 (quoting W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983)); *see also* Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 782 (11th Cir. 1993) (noting that the action must *directly* conflict with unequivocal public policy), *abrogated on other grounds as recognized in* Frazier v. CitiFin. Corp., 604 F.3d 1313 (11th Cir. 2010).

160. *See Misco*, 484 U.S. at 36 (quoting United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960)); *see also* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008) ("Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process' . . . ." (alteration in original) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., 341 F.3d 987, 998 (9th Cir. 2003))).

161. Waterbury Bd. of Educ. v. Waterbury Teachers Ass'n, 357 A.2d 466, 471 (Conn. 1975) ("The continued autonomy of that process [arbitration] can be maintained only with a minimum of judicial intrusion.").

162. 9 U.S.C. § 5 (2012).

163. *Id.* ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators . . . such method shall be followed . . . .").

164. Francis O. Spalding, *Selecting the Arbitrator: What Counsel Can Do*, *in* HANDBOOK ON COMMERCIAL ARBITRATION 181, 181 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006).

165. 9 U.S.C. § 10(a)(2); *see also* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008). *But see* Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002).

166. *See* Hayne, Miller & Farni, Inc. v. Flume, 888 F. Supp. 949, 952–53 (E.D. Wis. 1995) ("A fundamentally fair hearing 'requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that *the decision makers are not infected with bias*.'" (emphasis added) (quoting Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1013 (10th Cir. 1994))).

167. *See id.* (quoting *Bowles*, 22 F.3d at 1013).

select retired judges for their perceived prudence, experience, and impartiality.[168]

The U.S. Supreme Court has effectively federalized arbitration law through its interpretation and application of the FAA.[169] Accordingly, the FAA was the applicable substantive law surrounding the Chancery arbitrations.[170] As discussed in the following section, however, such proceedings must first properly constitute "arbitrations" for the Act to control.[171]

V. ANALYSIS OF DELAWARE'S LAW: SHAM TRIALS OR ACTUAL ARBITRATIONS?

The constitutional issue raised in *Delaware Coalition for Open Government v. Strine*[172] appears to represent a clash between two legal titans:[173] the federal right to arbitrate and the constitutional guarantee of free speech.[174] Not surprisingly, the case boiled down to how the district court weighed the various policy considerations surrounding these two titans.[175] The district court ultimately determined that the arbitrations were effectively civil trials that necessitated openness—a requirement in

168. *See* Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*, 7 DEPAUL BUS. & COM. L.J. 499, 511 (2009).

169. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

170. *See* DEL. CODE ANN. tit. 10, § 349(c) (Supp. 2012). "Any application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding" must be filed with the Delaware Supreme Court, "which shall exercise its authority in conformity with the Federal Arbitration Act, and such general principles of law and equity as are not inconsistent with that Act." *Id.*

171. *See* Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 500 (D. Del. 2012).

172. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012).

173. *See id.* at 497–501. The District Court of Delaware decided this case solely on First Amendment considerations while neglecting any discussion of the strong federal policy in favor of arbitration. *Id.* at 501–04. It is in the respectful opinion of this author that such concerns are paramount to the issue at hand.

174. *See Southland*, 465 U.S. at 15 ("We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."); *see also* Dennis v. United States, 341 U.S. 494, 584 (1951) ("Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy.").

175. *See Strine*, 894 F. Supp. 2d at 499. For example, such considerations include the importance of public dissemination of information as well as encouraging innovation within the processes for dispute resolution. *Id.* at 499, 503. *Strine* exemplifies the tension between these two concerns. *See id.* at 502 (noting that "several courts have noted the inherent tension between the role of judge and arbitrator").

direct conflict with Delaware's experiment.[176] This critical determination, however, failed to incorporate the experience and logic test, rendering the district court's analysis flawed.[177]

A. Where the District Court Went Wrong

The vitality of the Chancery arbitration system hinged on whether the district court characterized the proceedings as secret civil trials.[178] In the district court's eyes, the real question was whether these arbitrations "'walk, talk, and squawk' . . . like a judicial proceeding."[179] On appeal, the Third Circuit upheld the lower court's finding that the right of access attached to the Chancery arbitrations, but reprimanded the lower court for bypassing the experience and logic test.[180]

Couched in terms antagonistic toward private arbitration, the district court's opinion emphasized the procedural similarities between arbitration and civil trials.[181] For instance, Judge McLaughlin specifically noted that rather than the parties determining their own discovery rules, many of the same rules governing discovery in Chancery Court litigation applied to Chancery arbitration.[182] Moreover, in finding that the Chancery arbitrations were like civil trials, Judge McLaughlin underscored the fact that a *sitting* judge would preside over the arbitrations "*in the Chancery courthouse with the assistance of Chancery Court staff*."[183] In a similar vein, she noted that the chancellors and staff who would administer the arbitrations were not privately compensated.[184] Instead, they would receive their usual salaries for arbitration work.[185]

176. *See id.* at 502. "Before this Court can consider the experience and logic test, it must address this threshold question. Has Delaware implemented a form of commercial arbitration to which the Court must apply the logic and experience test, or has it created a procedure 'sufficiently like a trial' such that *Publicker Industries* governs?" *Id.* at 500 (citation omitted).

177. Del. Coal. for Open Gov't, Inc. v. Strine, No. 12-3859, 2013 WL 5737309, at *3 (3d Cir. Oct. 23, 2013).

178. *See Strine*, 894 F. Supp. 2d at 502.

179. Detroit Free Press v. Ashcroft, 303 F.3d 681, 702 (6th Cir. 2002).

180. *Strine*, 2013 WL 5737309, at *3. The Third Circuit held that the confidentiality of Delaware's arbitration program violated the First Amendment's right of public access because both the place and process of the proceedings have historically been open to the public and the benefits of public access outweighed its drawbacks. *Id.* at *10. However, it is this author's opinion that the Third Circuit wrongly focused on the physical place of the arbitrations and those who would serve as arbitrators, rather than on the nature of the proceedings before the Chancery Court, when assessing the experience prong.

181. *See Strine*, 894 F. Supp. 2d at 500–03.

182. *Id.* at 502.

183. *Id.* at 503 (emphasis added). The Third Circuit also highlighted this point. *Strine*, 2013 WL 5737309, at *5–7.

184. *Strine*, 894 F. Supp. 2d at 503.

185. *Id.*

While the above-mentioned distinctions are certainly true, both the district and appellate court have not grasped the essence of arbitration and the dominant role it plays in U.S. law.[186] In many ways arbitration hearings resemble civil trials in both function and form, but these parallels do not necessarily create a quid pro quo.[187] In fact, unlike claims typically presented in the Court of Chancery, the arbitration proceedings that follow an initial petition are customizable to the parties' needs.[188] One would be hard-pressed to argue that standard litigation invites such procedural flexibility. To the contrary, a repeated criticism of civil trials is that associated formalities, such as stringent evidentiary rules, tend to funnel litigants into a "one size fits all" avenue for adjudicative relief.[189] This is the type of problem the Delaware State Legislature attempted to combat.[190] Such flexibility, which both courts failed to meaningfully explore, constitutes a significant distinction between the Chancery arbitrations and traditional civil trials.

The district court also analyzed the arbitrator selection process set forth in Chancery Court Rule 97(b).[191] The court took issue with the idea that the chancellor, rather than the parties, would select the Chancery Court judge who would hear the case.[192] The court's analysis, however, failed to describe how the parties initially wound up at the Court of Chancery. Critically, the parties *purposely selected* that specific forum, knowing full well the institutional rules that would subsequently attach.[193] In essence, by selecting the Court of Chancery as the arbitral forum, the parties indirectly selected who would serve as their arbitrator. Regardless, it is not an indispensible feature of arbitration for parties to possess the power to handpick their arbitrator.[194] In fact, the FAA

186. Nowhere in the opinion does the court recognize, or at least allude to, the U.S. Supreme Court's historical support for arbitration or its rhetoric supplying a presumption in favor of arbitral validity.

187. *See* Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 205 ("Arbitration in practice may not be the procedurally or substantively differentiated process that was originally envisioned. For instance, arbitrations now frequently include legal counsel for parties, legal briefs, comprehensive records, and extensive hearings. In these ways, arbitrations mimic the formalities and lawyers' orchestration of litigation.").

188. *See* DEL. CH. CT. R. 96(c).

189. *See* Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1619 (1997) (maintaining that what we have gleaned from the "field of ADR" is that "one size does not fit all" and that "different configurations of disputants, issues, and stakes in disputes may militate in favor of different forms of disputing").

190. *See* H.B. 49, 145th Leg. (Del. 2009).

191. DEL. CH. CT. R. 97(b).

192. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 502 (D. Del. 2012).

193. *See* DEL. CH. CT. R. 96(d)(7).

194. *See* 9 U.S.C. § 5 (2012).

mandates that if the parties cannot agree on an arbitrator, a federal court will appoint one.[195]

Paramount to arbitral efficacy is the parties' mutual agreement to be bound by the arbitrator's award—a bedrock principle of arbitration that is antithetical to traditional judicial recourse.[196] In other words, parties are not compelled to arbitrate; they are willing participants.[197] Conversely, unwilling litigants are compelled to participate in civil trials if they wish to have any say in the matter.[198] It seems logical that such a sharp distinction would qualify the Chancery proceedings as arbitrations, yet this did not persuade the district court.[199] At the most basic level, what separates the Delaware alternative from traditional civil litigation is the requirement of consent.

This strong distinction, however, is somewhat diluted by practical concerns over the use of public resources for the Chancery arbitrations.[200] In the words of Judge McLaughlin, "the actions of those charged with administering justice *through the judiciary* is always a public matter."[201] Admittedly, without the use of government employees and public facilities, the program loses much of its defining temperament and allure. Nonetheless, placing such a high degree of emphasis on procedural nuisances unjustifiably stresses form over function. For instance, corporations in Delaware are already free to choose arbitration over litigation.[202] That these companies can arbitrate otherwise important disputes remains unchanged; the Chancery arbitrations merely rerouted the path to that destination.[203]

Regardless of the benefits of fostering public access, substituting Chancery arbitration with its private counterpart would achieve the same dreaded secrecy rejected in *Strine* yet nurtured under U.S. Supreme Court precedent.[204] By eviscerating Delaware's experiment, the court took arbitral power out of the hands of a select few experts accustomed to public accountability and indirectly placed that same authority in the

195. *Id.*

196. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Univ., 489 U.S. 468, 478 (1989).

197. *Id.*

198. *See* FED. R. CIV. P. 55(a). This statement must be qualified by the assumption that the particular dispute is not decided on the pleadings.

199. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 502–03 (D. Del. 2012).

200. *Id.* at 503.

201. *Id.* at 498 (emphasis added).

202. Brickley, *supra* note 6 ("Corporations already can choose arbitration over litigation, says Lawrence Hamermesh, who represents the Chancery judges.").

203. *See id.*

204. *See supra* note 152 and accompanying text.

hands of private institutions. The irony of the district court and Third Circuit decisions is that less, not more, accountability is safeguarded.

B. Application of the Experience and Logic Test

As the foregoing indicates, classifying these procedures is not the straightforward inquiry it appears at first blush. The fusion of judicial resources with fundamental principles of arbitration created a legal mechanism unprecedented in U.S. arbitration law.[205] From this angle, application of the *Richmond Newspapers* experience and logic test leaves substantial room for interpretive maneuvering.[206] Consistent with the insight into arbitration and Chancery proceedings detailed above, the Delaware alternative does not quite mimic the proverbial quack of ordinary civil trials.[207] Accordingly, the depth of the *Richmond Newspapers* analysis would be shallow without peering into the historical openness of arbitration cases.[208] As such, this Comment will now independently apply the experience and logic test to the Chancery arbitrations.

1. Application of the Experience Prong

Not surprisingly, the history of arbitration is devoid of public participation.[209] Rather, arbitration evinces a historical tradition of confidentiality.[210] This historic experience lends support to the conclusion that arbitration proceedings have never been presumptively open. Thus, application of the *Richmond Newspapers* experience prong

205. *See* Brickley, *supra* note 6.

206. *See* Tom Hals, *Backers of Secret Delaware Arbitrations See Grounds for Appeal*, REUTERS, Sept. 10, 2012, *available at* http://bit.ly/HJIvyK (accessible with Westlaw account).

207. *See* DEL. CH. CT. R. 96–98.

208. *See* Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 564–74 (1980) (exploring in great detail the historical openness of criminal trials).

209. CARBONNEAU, *supra* note 38, at 11 ("Arbitral proceedings are not open to the public and awards generally are not published.").

210. *Id.* The procedural rules of both national and international arbitral institutions reflect the central role confidentiality occupies. *See, e.g.*, UNCITRAL Arbitration Rules, G.A. Res. 65/22, at art. 28(3), U.N. Doc. A/RES/65/465 (Dec. 6, 2010) ("Hearings shall be held in camera unless the parties agree otherwise."); INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 26(3) (2012) ("Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."); AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R-23 (2009) (arbitrators must "maintain the privacy of the hearings unless the law provides to the contrary"); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VI(B) (2004) ("The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.").

weighs heavily in favor of upholding the validity of the Chancery arbitrations.

2. Application of the Logic Prong

Although the argument for open access presumably fails under the first part of the *Richmond Newspapers* test,[211] there are abundant policy reasons for upholding public access to adjudicative hearings involving major corporations.[212] Among the practical policy objectives concerned is the adequate maintenance of Delaware corporate law—a body of law developed primarily by well-reasoned, detailed, and *published* Chancery opinions.[213] Without the benefit of published memoranda, there exists the potential for Delaware corporate law to begin "developing in the dark."[214] Undercutting the predictability and stability within the very law that attracts businesses to incorporate in Delaware might therefore create a long-term effect neither envisioned nor desired by the Legislature.[215] Private development of that body of law, obscured by the arbitral veil, could very well negatively impact Delaware's critical business appeal.

Further consideration of the logic prong fails to placate concerns that Delaware's scheme will inevitably create a two-tiered judicial system.[216] As the Third Circuit previously recognized, promoting public perception of judicial fairness is a benefit of open access.[217] Conversely, critics have pointed out that the Chancery initiative is a step toward a system "'in which the wealthy get secret justice on a fast track, while

211. This result follows only if the proceedings are characterized by the tradition of confidentiality narrowly surrounding *arbitrations*. The Third Circuit took a broader approach and explored the history of the *type* of proceedings under review (i.e., its historical analysis was not limited specifically to arbitration). Del. Coal. for Open Gov't v. Strine, Inc., No. 12-3859, 2013 WL 5737309, at *4 (3d Cir. Oct. 23, 2013). Accordingly, it found that the experience prong mandated public access to Delaware's arbitration program. *Id.* at *7.

212. *See* Brief for The Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Plaintiff-Appellee at 7–20, *Strine*, No. 12-3859, 2013 WL 175552, at *8–20.

213. Brickley, *supra* note 6 (what Delaware has to offer corporations is "a body of business law that has been forged in public view and is refined and certain"); *see* BLACK, *supra* note 95, at 5.

214. Brickley, *supra* note 6.

215. *See id.* Less predictability within the confines of corporate law ultimately creates unwanted problems for transactional planning. Stephen J. Massey, *Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 DEL. J. CORP. L. 683, 688 (1992) (explaining the "necessity that corporate law provide a sufficient level of stability and predictability to allow corporate planners to have a high level of confidence as to the law that courts will apply to their transactions").

216. *See* Joe Palazzolo, *A Judge and an Arbitrator Too?*, WALL ST. J. L. BLOG (Feb. 21, 2012, 11:23 AM), http://on.wsj.com/xq3cSB.

217. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068 (3d Cir. 1984).

others [receive] messy public processes.'"[218] Assuming what these critics view as inevitable, reason mandates adherence to the same openness surrounding civil trials.

Additionally, under a broad application of the logic prong, public access enables shareholders of public corporations to be informed of corporate activities that could affect stock prices and their rights as shareholders.[219] A lack of access therefore further removes shareholders from control of their investments. Keeping in mind the important corporate cases that fill the Chancery Court's docket, in conjunction with the one million dollar eligibility requirement, the secrecy of Chancery arbitrations heightens the risks associated with investment. As one commentator cautioned, "the Delaware arbitration provisions had the potential to lock shareholders out of many claims as companies shifted these claims to arbitration in order to keep them confidential and stop shareholder class action lawsuits."[220] If Delaware's experiment was permitted to continue, the anticipated increase in corporate claims addressed behind closed doors would, at least superficially, satisfy the logic prong of the *Richmond Newspapers* test.[221]

On the other hand, to *correctly* apply the logic prong of the *Richmond Newspapers* test, a court must determine whether public access fosters the proper "'functioning of the particular process in question.'"[222] Emphasis here is rightfully assigned to the specific procedures at hand.[223] Considering that confidentiality is a basic tenet of arbitration, to expose Chancery arbitration to the public and press would extinguish any hope for the program's future success. Corporations would have every incentive to take their chances elsewhere and forego the advantages offered by a chancellor's award.[224] The probative force of the logic prong, when focused narrowly on arbitration, demands

218. Palazzolo, *supra* note 216.

219. For example, arbitrating disputes relating to purposed mergers or asset sales may leave shareholders in the dark until a time when the board of directors decides to relay such information, if it even does. Thus, the legal details of corporate decision-making may never become known if the controversy is remedied through arbitration of the matter.

220. Davidoff, *supra* note 1.

221. Hals, *supra* note 206. "'In five years, we could see substantial growth in the number of these cases,[']' said Gregory Varallo, of Richards, Layton & Finger in Wilmington, 'It could even rival the number of public business cases.'" *Id.*

222. N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 200 (3d Cir. 2002) (quoting *Press-Enter. II*, 478 U.S. 1, 8 (1986)).

223. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) ("[T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information." (citation omitted) (internal quotation marks omitted)).

224. These advantages include, as discussed previously, a ruling that incorporates a chancellor's vast experience and expertise in corporate law.

adherence to the traditional privacy associated with private dispute resolution.

Courts in the past, including the Third Circuit, have been willing to find exception to the presumption of public access.[225] Specifically, courts have applied the experience and logic test to find that deportation cases[226] and judicial disciplinary hearings[227] do not require the watchful eye of the public. This demonstrates that a narrow approach to the test is perhaps more appropriate where the constitutionality of closed proceedings is at least questionable. The unique nature of arbitration and the role it plays in contemporary American law seem to justify exclusion of the public in accordance with the parties' wishes. This opinion may be at odds with the determination made in *Strine*, yet is consistent with the broad aims of the FAA and the amicable sentiment the U.S. Supreme Court has expressed toward arbitration as a means to alleviate an already overburdened court system.

VI. CONCLUSION

It is this author's opinion that the district court and the Third Circuit improperly conluded that the Chancery arbitrations must be open to the public. Accordingly, the Chancery arbitrations do not violate the First Amendment. Nonetheless, protection of public and shareholder interests is still possible under Delaware's current arbitration scheme, even if basic constitutional rights dictate openness.

One possible solution is to amend Delaware's law to provide for privileged awards. Privileged awards contain a formal determination "without reason[ing,] together with a document which does not form part of the award but which gives, on a confidential basis, an outline of the reasons for the tribunal's decision."[228] These awards implicitly recognize the existence of interested third parties by providing some basis from which future litigants can model their conduct.[229] Adopting mandatory privileged awards would help soothe the tension between First Amendment concerns and the need for a functional alternative to litigation.

225. *See, e.g.*, *N. Jersey Media Grp.*, 308 F.3d at 212 (holding that "deportation hearings [do not] boast a tradition of openness sufficient to satisfy *Richmond Newspapers*").

226. *Id.*

227. First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d 467, 472 (3d Cir. 1986) (finding that judicial disciplinary boards "do not have a long history of openness").

228. LONDON MARITIME ARBITRATORS ASSOCIATION TERMS para. 22(c) (2006), *available at* http://bit.ly/190PY2I.

229. *See id.*

Applied here, such awards could be furnished for shareholder review and would add to the legitimacy of the proceedings from the public's perspective. Moreover, confidentiality is maintained while simultaneously permitting beneficial access. This solution encourages transparency in a process that is not antithetical to it. In this sense, Delaware is free to tend to the administrative ailments its courts face, corporations can continue to utilize Chancery arbitrations, and the public remains informed. Amendment of Delaware's law to allow for privileged awards therefore provides a middle ground in the midst of the battle between these two legal titans.