ARTICLES

The Battle over Confidential Arbitration

By Jason J. Rawnsley

The Delaware Court of Chancery's business arbitration program was barely underway when the Delaware Coalition for Open Government, a state affiliate of the National Freedom of Information Coalition, brought suit to nullify one of its central features: confidentiality of proceedings. The coalition alleged that the confidentiality provisions of the arbitration statute and the corresponding Court of Chancery rules violated the presumptive right of public access to judicial proceedings protected by the First Amendment. Complaint, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 11-1015-MAM, 2012 WL 3744718 (D. Del. Aug. 30, 2012).
The U.S. District Court for the District of Delaware agreed, and the case is now on appeal to the U.S. Court of Appeals for the Third Circuit. The case is being closely watched by those who see the program as a significant benefit of incorporation in Delaware, as well as by those concerned about First Amendment rights and public access to government proceedings.

Court of Chancery Arbitration Akin to Civil Trial
"[T]he Delaware proceeding functions essentially as a non-jury trial before a Chancery Court Judge. Because it is a civil trial, there is a qualified right of access and this proceeding must be open to the public." *Id.* at *1. Thus ruled Judge Mary A. McLaughlin in holding the statute that provides for the Court of Chancery's arbitration program, Del. Code tit. 10, § 349, and Court of Chancery Rules 96, 97, and 98 to be in violation of the First Amendment.

The First Amendment protects a qualified right of access to governmental proceedings. Whether a given governmental proceeding should be open to the public depends on the "experience and logic" test: First, has there been a tradition of public access to the proceeding at issue? Second, would public access benefit the functioning of such a proceeding? In *Publicker Industries v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), the Third Circuit had applied this test, first established for criminal trials by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), to hold that the right of access also applies to civil trials.

After noting that Third Circuit precedent called for application of the logic and experience test to determine whether there is a public right of access to a particular proceeding or record, the district court first posed a "threshold question," instead: "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?" 2012 WL 3744718, at *6. Concluding that the Delaware procedure is a civil judicial proceeding, it found it unnecessary to "reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in *Publicker Industries*." *Id.* at *10.

According to the district court, the role of an arbitrator overseeing a private arbitration and the role of a state-appointed judge are fundamentally different: Arbitrators "are empowered by the

parties' consent and limited by the scope of that consent. They serve the parties." *Id.* at *8. Judges, on the other hand, "are empowered by their appointment to a public office. They act according to prescribed rules of law and procedure. They serve the public." *Id.* "Even with the proliferation of alternative dispute resolution in courts," wrote Judge McLaughlin, "judges in this country do not take on the role of arbitrators." *Id.*

After reviewing the details of the Chancery arbitration program, the district court found that the proceeding was akin to a civil trial: The chancellor, not the parties, selects which member of the bench will serve as an arbitrator; many of the Court of Chancery procedural rules govern discovery; a sitting judge, using his or her courtroom and court staff and receiving compensation from the state, presides over the arbitration; and the final arbitration award is an enforceable judgment with the backing of the state, whereas in private arbitration those seeking to convert an arbitration award to a state-enforceable judgment must initiate a new proceeding. The facts of this case thus fell, according to Judge McLaughlin, within the scope of *Publicker Industries*.

The defendants, the sitting chancellor and vice chancellors of the Court of Chancery, highlighted a number of distinctions between civil trials and arbitration: For example, in arbitration, the parties consent to participate, the procedures can be altered to suit the needs of the dispute, and settlement and mediation are encouraged throughout. But the district court responded that consent does not affect the judge's role as a public official, parties in civil litigation can agree to limit discovery, and settlement and mediation are no less encouraged in civil litigation than in private arbitration.

Because of what it regarded as a fundamental difference between a judge and an arbitrator and the close similarities between Chancery arbitration and civil trials, the district court concluded that the Chancery arbitration program was a civil judicial proceeding; for this reason, it saw no need to "reiterate" the experience and logic analysis set forth in *Publicker Industries*. That this ruling could mean the end of the program, which the district court dismissed as speculation, was immaterial to the analysis. "Even if the procedure fell into disuse, the judiciary as a whole is strengthened by the public knowledge that its courthouses are open and judicial officers are not adjudicating in secret." *Id.* at *10. In its present form, the business arbitration program was thus held to be unconstitutional.

Which "Experience" Matters—Civil Trials or Arbitration?

The controversy over the program has now moved to the Third Circuit. On appeal, the parties dispute what the relevant "experience" at issue should be: a civil proceeding that the Chancery arbitration program may be sufficiently like or traditional arbitration? According to the defendants, now appellants, the district court erred by applying a malleable "sufficiently like" standard that has no basis in precedent, instead of the experience and logic test. They further criticize the district court decision for likening the Chancery procedure to an abstracted category of "civil proceedings," instead of examining the experience and tradition of the particular proceeding at issue, which the appellants here argue is commercial arbitration.

The coalition argues that, to the contrary, the district court *did* apply the experience and logic test. Experience and logic have shown that civil trials—the closest analogue to the Chancery program—are rightfully subject to public access and that the only difference between a civil trial and the Chancery arbitration program is the confidentiality of the proceeding. Civil trials, not private arbitrations, are thus the proper kind of proceeding to which to apply the experience and logic test. Furthermore, it is entirely proper to analogize to similar proceedings when faced with novel ones. Quoting extensively from a recent Second Circuit case, the coalition states that "'changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures.'" Brief for Appellee at 19, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. Jan. 7, 2013) (quoting *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 299 (2d Cir. 2012)).

In response, the appellants challenge the bases of the district court's comparison. Even on its own terms, they argue, the "sufficiently like" standard failed to support the district court's conclusion, because Chancery arbitration proceedings fundamentally differ from civil trials: Although the chancellor and vice chancellors may derive their authority from the coercive power of the state, their ability to serve as arbitrators stems from the agreement of the parties—unlike a civil trial, no proceeding could take place without the parties' consent. Furthermore, parties in arbitration have great flexibility to shape the rules of decision and procedure. Although discovery rules in civil trials may be modified to some degree, other procedures and standards—such as the standard for summary judgment—cannot. And appellate review of an arbitration award is considerably limited: Corruption, fraud, partiality, and misconduct by a party or the arbitrator are the primary grounds available to set aside an award, whereas appellate review of a judicial trial involves deferential review of facts and de novo review of law.

The coalition responds that these differences are superficial. Without the arbitration statute, parties could not obtain the services of the chancellor and vice chancellors. And according to the coalition, arbitration does not, in fact, take place by consent—consent takes place only in the earlier agreement to arbitrate, which is "nothing more than a choice of venue provision." *Id.* at 22. Furthermore, judges cannot *compel* someone to litigate any more than an arbitrator can—at best, both can enter a default judgment against a recalcitrant party for its failure to participate. In litigation, the parties can make a variety of procedural and discovery modifications, and parties need not be in arbitration to limit the scope of appellate review.

But more fundamentally, argues the coalition, arbitration and litigation share the same purpose: "[T]he judicial arbitrator interprets the law, decides the facts, applies the law to those facts, and renders a binding decision affecting the substantive legal rights of the parties—in other words, performs the supreme judicial function." *Id.* at 26–27. The chancellor and vice chancellors, by serving as arbitrators at government expense and using government resources, function no differently than they would in any of the civil proceedings before them. To allow them to perform these functions in private runs contrary to the reasons for which the public right of access exists.

In reply, the appellants argue that what the coalition sees as a fundamental incompatibility between judges' service in civil proceedings and their service as arbitrators is a policy preference with no basis in First Amendment jurisprudence. According to the appellants, the public access right developed as a check on coercive government power, a concern that does not arise when parties agree to submit their disputes to an arbitrator.

The parties also dispute the extent to which precedents exist for judges to serve as arbitrators. The appellants cite a number of statutes and rules permitting judges to conduct arbitrations and note that even Supreme Court justices have served as arbitrators. States, not being bound by federal principles of separation of powers, can and have assigned nonjudicial functions to judicial officers, such as rate making, election supervision, and providing advisory opinions. Even Article III judges have performed nonjudicial functions, the Warren Commission and Justice Jackson's role as a prosecutor at Nuremberg being the most prominent but by no means the only such examples.

In response, the coalition argues that not one of the statutes cited by the appellants reveals an instance of the fact pattern before the court: a sitting judge arbitrating a confidential proceeding under the auspices of the state. The statutes either permit retired judges, administrative judges, commissioners, or others—not sitting judges—to arbitrate disputes, or provide for nonbinding arbitration, or do not indicate either way whether the proceedings are confidential. Furthermore, the experience of Supreme Court justices serving as arbitrators in international tribunals, argues the coalition, has no bearing on the First Amendment question at issue.

Applying the Experience and Logic Test

The appellants argue that a proper application of the experience and logic test shows that the Chancery procedure should be upheld. Tracing the roots of private arbitration in English law, the appellants insist that confidentiality has been one, if not the most, central feature of arbitration for centuries. All the leading bodies of arbitration provide for confidentiality as a matter of course. That no tradition of public access to arbitration exists should, according to the appellants, in itself be sufficient to uphold the arbitration statute.

Again, the coalition argues that this is the wrong comparison. It does not matter whether a tradition of public access to *private* arbitration exists—that those proceedings may be confidential is immaterial. Civil trials are the proper analogy.

The parties' arguments on the logic prong follow directly from the positions they take on the experience prong. According to the appellants, logic also supports historical practice: Businesses choose arbitration precisely because of the ability to resolve disputes discreetly and away from the public eye. Quoting Third Circuit precedent, the appellants state that the logic inquiry must look to whether "'public access to a particular proceeding would enhance *the functioning of that proceeding*.'" Brief for Appellants at 62, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. Dec. 11, 2012) (quoting *United States v. Simone*, 14 F.3d 833, 838–39 (3d Cir. 1994)

(emphasis added in the brief)). Removing confidentiality would remove the main advantage arbitration has as an alternative to litigation and would thus not only undermine the Chancery arbitration program but likely mean the end of it.

The coalition, looking instead to civil trials, argues that logic supports opening the proceedings for all the reasons that courts have previously explained, in *Publicker* and elsewhere: to promote public discussion, ensure fairness, and deter corruption. Furthering these values would strengthen the proceeding; if businesses want confidentiality, private arbitration remains available.

Amici Support for Both Sides

The case has attracted a number of amicus briefs on appeal. The Corporation Law Section of the Delaware State Bar Association and the Chamber of Commerce of the United States of America, jointly with the Business Roundtable, have filed briefs in support of the arbitration program. *See* Brief of Amicus Curiae the Corporation Law Section of the Delaware State Bar Association in Support of Defendants-Appellants, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. Dec. 18, 2012); Brief of Amici Curiae the Chamber of Commerce of the United States of America and the Business Roundtable in Support of Defendants-Appellants and Reversal of the Judgment Below, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. Dec. 18, 2012). The Reporters Committee for Freedom of the Press and Twelve News Organizations (including National Public Radio, the *New York Times*, and News Corporation) and Public Citizen, Inc., have filed briefs asking the Third Circuit to affirm the district court's ruling. *See* Brief of Amici Curiae the Reporters Committee for Freedom of the Press and Twelve News Organizations in Support of Plaintiff-Appellee, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. Jan. 14, 2013); Brief of Amicus Curiae Public Citizen, Inc. in Support of Plaintiff-Appellee Delaware Coalition for Open Government, Inc. Urging Affirmance, *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. Jan. 14, 2013). The Reporters Committee notes that, unlike in other arbitration programs, the parties most likely to take advantage of the Chancery arbitration program are precisely those that would be of significant interest to the public generally and to stockholders in particular. The Chamber of Commerce and the Business Roundtable emphasize the speed and efficiency of arbitration and warn that without confidentiality, businesses are more likely to arbitrate disputes before sophisticated arbitral bodies abroad, where confidentiality is assured.

Meanwhile, the program remains unavailable while the parties, the press, the business community, and other stakeholders await a ruling from the Third Circuit. Whether the State of Delaware can provide access to the Court of Chancery's chancellor and vice chancellors in confidential arbitration has yet to be seen.

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