

4-26-2013

## In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program

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### Recommended Citation

Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. Bus. Entrepreneurship & L. Iss. 2 (2013)  
Available at: <https://digitalcommons.pepperdine.edu/jbel/vol6/iss2/7>

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**IN QUEST OF THE ARBITRATION  
TRIFECTA, OR CLOSED DOOR  
LITIGATION?:  
THE DELAWARE ARBITRATION  
PROGRAM**

BY: THOMAS J. STIPANOWICH \*

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I. INTRODUCTION

Recently, a minor tempest has been raging over the Delaware Arbitration Program, which attempts to marry one of America’s premier business courts to the

fundamentally more private consensual adjudicative alternative, binding arbitration.<sup>1</sup> At a time when commercial parties face potentially long delays in underfunded courts, but harbor mixed views about arbitration, Delaware's unique concoction ostensibly offers a veritable trifecta of procedural advantages. These include: (1) a first-rate adjudicator practiced at applying the law to complex factual scenarios, (2) efficient case management and short cycle time and, above all, (3) a proceeding cloaked in secrecy. For the State of Delaware, the Program represents yet another enticement to businesses to select Delaware as the forum of choice, and even suggests the jurisdiction's pretensions as a potential competitor in the global arbitration sweepstakes. For judges sitting in Delaware's Court of Chancery, moreover, it is a sterling entrée into a post-judicial career as an arbitrator and mediator—the retirement plan *du jour* for American judges.<sup>2</sup>

On the other hand, the Delaware Arbitration Program's ambitious intermingling of public and private forums brings into play the longstanding tug-of-war between “the traditional party-centered view of civil litigation as a public service for private dispute resolution and the often conflicting perception of courts as ‘institutions expressive of and accountable to the public.’”<sup>3</sup> The Program triggered a constitutional challenge based on third parties' right of access to court proceedings. The case was heard by a judge of the U.S. District Court for the Eastern District of Pennsylvania, sitting by designation, who ruled that arbitration proceedings heard before sitting judges of the Delaware Chancery Court were “essentially” non-jury civil trials and thus were subject to public access.<sup>4</sup>

The decision has been appealed to the Third Circuit. The case raises legitimate questions about the appropriateness of structuring a program in which sitting judges serve as arbitrators and preside over a procedure that is effectively shielded from public view. It also implicates issues regarding the use of public resources in ostensibly private disputes, and even the way our justice system is

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<sup>1</sup> The program was “intended to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.” *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 494 (D. Del. 2012) (quoting H.R. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009)).

<sup>2</sup> See Stephanie Francis Cahill, *Judge-to-Arbitrator Route Is Targeted: California Bill Would Limit Jumping From Bench to Private Dispute Firms*, 1 NO. 12 A.B.A. J. E-REPORT 4 (2002).

<sup>3</sup> Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 287 (1999) (quoting Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994)).

<sup>4</sup> *Del. Coal. for Open Gov't*, 894 F. Supp. 2d at 494. The decision was appealed to the Third Circuit Court of Appeals.

funded.

Part II of this article explores the factors that provided the impetus for the Delaware Arbitration Program and describes its features. Part III describes the constitutional challenge, the arguments by opponents and proponents of the Program, and the district court ruling striking down the Program. Part IV analyzes the arguments for and against upholding the district court's determination, along with underlying evidence and other considerations, leading to the conclusion that the district court's decision was well-founded.

## II. IMPETUS FOR, FEATURES OF THE DELAWARE PROGRAM

### A. Courts in Crisis 2.0

Litigation entails big costs and risks to businesses. Although almost ninety-nine percent of cases settle before trial,<sup>5</sup> litigation represents a substantial portion of corporate legal budgets.<sup>6</sup> More than \$21 billion is spent annually on litigation here in the United States, and, judging by recent responses to Fulbright & Jaworski's annual surveys of corporate counsel, the number of U.S.-based companies spending more than a million dollars per year on litigation is above fifty percent, and growing.<sup>7</sup>

The costs and risks of litigation are exacerbated by the current crisis in our court system, as most states have made substantial cuts in judicial funding.<sup>8</sup> The State of California has delayed appointing judges,<sup>9</sup> and there have been massive layoffs in other court systems.<sup>10</sup> For a variety of reasons, federal judicial

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<sup>5</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

<sup>6</sup> The median is approximately 29%. *Second Annual Fulbright's Litigation Trends Survey: Findings*, FULBRIGHT & JAWORSKI L.L.P. (2005), at 13, <http://www.fulbright.com/mediaroom/files/FJ0536-US-V13.pdf>.

<sup>7</sup> *Fulbright's Litigation Trends Survey: A Little Less Litigation; More Regulation*, FULBRIGHT & JAWORSKI L.L.P. (2011), [http://www.fulbright.com/index.cfm?fuseaction=news.detail&article\\_id=9902&site\\_id=286](http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=9902&site_id=286) ("U.S. companies report a median spend of \$1.4 million compared to \$1 million last year.").

<sup>8</sup> See John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES (Nov. 26, 2011), <http://www.nytimes.com/2011/11/27/us/budget-cuts-for-state-courts-risk-rights-critics-say.html?pagewanted=all> ("42 states have reduced their judicial budgets in the previous three fiscal years, with cuts in some jurisdictions totaling more than 12 percent."); Maura Dolan and Victoria Kim, *Budget Cuts to Worsen California Court Delays, Officials Say*, L.A. TIMES (Jul. 20, 2011), available at <http://articles.latimes.com/2011/jul/20/local/la-me-0720-court-cuts-20110720> (California has had a thirty percent reduction in the past three years).

<sup>9</sup> See *Analysis of the 2008-09 Budget Bill: Criminal Justice, Judicial Branch (0250)*, LEGISLATIVE ANALYST'S OFFICE (2008), [http://www.lao.ca.gov/analysis\\_2008/crim\\_justice/cj\\_anl08003.aspx#zxee\\_link\\_1\\_1202846137](http://www.lao.ca.gov/analysis_2008/crim_justice/cj_anl08003.aspx#zxee_link_1_1202846137) ("Delays by the Governor in appointing the first 50 judges established in 2006-07 resulted in savings of nearly \$3 million—ten positions, as of the time this analysis was prepared, still were not filled.").

<sup>10</sup> E.g., Robert Gavin, *State Court Layoffs Hits 17 in Capital Region as CSEA President Decries Cuts*, TIMES UNION (May 18, 2011), <http://www.timesunion.com/local/article/State-court-layoffs-hit-17-in-Capital-Region-as-1385047.php> (367 employees laid off from New York state court system in 2011); *Our View: Court System's Troubles*, GADSDEN TIMES (Feb. 19, 2013), <http://www.gadsdentimes.com/article/20130219/NEWS/130219798?p=1&tc=pg> (Chief Justice Roy Moore of the Supreme Court of Alabama predicts a twenty-five percent increase in layoffs in addition to the twelve percent that has already been cut in recent years).

appointments have also been held up,<sup>11</sup> and the deluge of criminal cases on the federal docket, coupled with the Speedy Trial Act, has meant even mega-cases like the Google/Oracle dispute have taken a back seat when it comes to scheduling.<sup>12</sup>

Not long ago, the American College of Trial Lawyers co-sponsored a study of U.S. litigation that expressed significant concerns regarding high costs and delays in obtaining discovery and getting to trial.<sup>13</sup> The ACTL study encouraged efforts to move beyond the present “one-size-fits-all” procedural framework and promote a variety of process choices tailored to different kinds of cases.<sup>14</sup> The authors, of course, had in mind the development of options within the litigation system. For many corporate counsel, however, binding arbitration holds the greatest potential as a vehicle for accommodating choice-based processes.<sup>15</sup>

### *B. Going for the Arbitration Trifecta?*

Some decades ago, binding arbitration was the most popular alternative for resolution of business disputes that could not be settled.<sup>16</sup> Arbitrating parties availed themselves of a wide variety of procedural options, including non-lawyered procedures,<sup>17</sup> tailored to many different kinds of commercial disputes. Among other things, studies showed that most users believed arbitration promoted faster resolution and cost-savings.<sup>18</sup>

Even after leading businesses and corporate counsel began experimenting with mediation and a variety of other approaches aimed at managing and resolving conflict, arbitration remained a widely-used process choice,<sup>19</sup> encouraged by a series of Supreme Court decisions paving the way for the expansion of arbitration across virtually the entire spectrum of civil actions, including statute-based

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<sup>11</sup> See Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1448 n.157 (2008) (growing partisanship has worsened the appointment process); Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, N.Y. TIMES (Aug. 17, 2012), [http://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html?pagewanted=all&_r=0) (escalating partisan warfare has delayed “even uncontroversial picks who would have been quickly approved in the past.”).

<sup>12</sup> Karen Gullo and Pamela MacLean, *Oracle Trial with Google Over Java Patents is Postponed*, BLOOMBERG (Oct. 19, 2011), available at <http://www.bloomberg.com/news/2011-10-19/oracle-trial-with-google-over-java-patents-may-be-delayed-u-s-judge-says.html>.

<sup>13</sup> FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* 45, HARV. NEGOT. L. REV. (forthcoming), available at <http://ssrn.com/abstract=2221471>.

<sup>16</sup> *Id.* at 4–5.

<sup>17</sup> Some forms of arbitration were pure business tribunals, with no advocacy or adjudicative role for legal counsel. See generally Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 859 (1961) (discussing problem of attorney participation in arbitration process which causes inadequacy and delay). See, e.g., Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L. REV. 425, 434 n.42 (1987), available at <http://ssrn.com/abstract=2061822> (some trade associations forbade attorney involvement in arbitration process).

<sup>18</sup> Stipanowich & Lamare, *supra* note 15, at 4.

<sup>19</sup> *Id.* at 27 (Chart E shows that 83% of Fortune 1,000 companies have used arbitration in the prior three years to 2011).

causes.<sup>20</sup> Many companies see arbitration as a way of saving time and money, ensuring a more satisfactory process, and limiting the extent of discovery.<sup>21</sup> It is also a mechanism for preserving privacy and confidentiality.<sup>22</sup> Because companies' core assets are largely represented by intellectual property and other proprietary information, they often take great pains to render information safe from third parties.<sup>23</sup> Cloaking proceedings in privacy may also be a way of keeping the lid on other facts that might prove embarrassing—or worse.

Some legal advocates, however, feel a lingering discomfort with arbitration as they know (or perceive) it. In a recent survey of Fortune 1,000 corporate counsel, fully half of those responding said that their company was disinclined to use arbitration in the future.<sup>24</sup> Although there are always going to be situations where litigation is generally preferable,<sup>25</sup> a few abiding concerns are cited as barriers to choosing arbitration. Heading the list were limitations on judicial review of arbitration awards, the concern that arbitrators may not follow the law, the perception that arbitrators tend to compromise, and lack of confidence in neutrals.<sup>26</sup> Moreover, a growing number of corporate counsel viewed high cost as a barrier to the use of arbitration;<sup>27</sup> this result is resonant with recent broadly expressed concerns about growing costs and inefficiencies in commercial arbitration.<sup>28</sup>

In light of all of the foregoing, a form of arbitration that ensures parties a high degree of confidentiality coupled with a fair measure of predictability (in terms of a result that is rational and conforms to the law) and an assurance of economy and efficiency would provide a highly desirable process—a veritable arbitration trifecta.

Enter the Delaware Arbitration Program, established by a 2009 statute<sup>29</sup> and implemented by Chancery Court Rules.<sup>30</sup> The legislation provides that “[t]he Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be

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<sup>20</sup> *Id.* at 47; JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 612 (2d ed. 2010).

<sup>21</sup> Stipanowich & Lamare, *supra* note 15, at 43.

<sup>22</sup> *Id.* at 43.

<sup>23</sup> See THOMAS J. STIPANOWICH & PETER H. KASKELL, *COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS*, Ch. 6 (2001) (discussing confidentiality in arbitration and measures for protecting trade secrets and other sensitive information).

<sup>24</sup> Stipanowich & Lamare, *supra* note 15, at 36 (Table N shows that 49.9% of respondents would be unlikely or very unlikely to use arbitration for corporate/commercial disputes).

<sup>25</sup> One example would probably be the acquisition of a public company by a strategic buyer. See James Griffin, Address at the Pepperdine University 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).

<sup>26</sup> Stipanowich & Lamare, *supra* note 15, at 37. Compare similar results from a recent RAND study. See DOUGLAS SHONTZ ET AL., *BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL* (Rand Institute for Civil Justice Report 2011).

<sup>27</sup> Stipanowich & Lamare, *supra* note 15, at 37 (discussing Rand Report and earlier Fortune 1,000 survey).

<sup>28</sup> THE COLLEGE OF COMMERCIAL ARBITRATORS: *PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION* 1–3 (Thomas J. Stipanowich et al., eds. 2010).

<sup>29</sup> DEL. CODE ANN. tit. 10, § 349(a) (West 2013).

<sup>30</sup> DEL. CH. CT. R. 96–98.

authorized under rules of the Court, to arbitrate a dispute.”<sup>31</sup> In order to avail themselves of this provision, parties must consent to the process, at least one party must be a “business entity” formed or organized under the laws of Delaware or have its principal place of business in Delaware, no party can be a “consumer,”<sup>32</sup> and claims for monetary damages must be at least \$1,000,000.<sup>33</sup>

The most notable feature of the Delaware Arbitration Program is confidentiality, for which the program affords special protections. The legislation provides that “[a]rbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal.”<sup>34</sup> Such appeal would be to the Delaware Supreme Court in the form of an “application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding.”<sup>35</sup> The Supreme Court is to “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.”<sup>36</sup> In line with Supreme Court interpretations, application of FAA standards would make review of awards for errors of fact or law extremely unlikely.<sup>37</sup>

The implementing Chancery Court Rules strongly reinforce the element of confidentiality in several ways, cloaking all aspects of the entire arbitration procedure in secrecy. First of all, “[P]etition[s] [for arbitration] and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal,” and are therefore not to be included in the Chancery Court’s public docketing system.<sup>38</sup> Furthermore, state the rules,

[a]rbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. . . . Any communication made in or in connection with the arbitration that relates to any

<sup>31</sup> DEL. CODE ANN. tit. 10, § 349(a).

<sup>32</sup> This is a significant, well-considered and laudable limitation on the Program. While confidentiality is often a prized element of business-to-business arbitration, its use in arbitration in the context of adhesion contracts, notably those involving individual employees and consumers of goods and services, may give rise to tangible concerns about fairness because confidentiality requirements often operate to the relative detriment of individuals. See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1121, 1228-1253 (2006); Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 1047, 1056 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2004543](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004543). A number of courts have found broad confidentiality clauses in adhesion contracts to be unconscionable and therefore unenforceable. See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1001–02 (9th Cir. 2010); *Ting v. Ting*, 319 F.3d 1126, 1151–52 (9th Cir. 2003); *Sprague v. Household Int’l*, 473 F. Supp. 2d 966, 974–75 (W.D. Mo. 2005); *McKee v. AT&T Corp.*, 191 P.3d 845, 858–59 (Wash. 2008); *Schnuerle v. Insight Commc’ns Co., L.P.*, 376 S.W.3d 561, 577–78 (Ky. 2012). But see *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 175–76 (5th Cir. 2004) (confidentiality provision did not render clause unconscionable); *Parilla v. IAP Worldwide Servs., IV, Inc.*, 368 F.3d 269, 279–80 (3d Cir. 2004) (same).

<sup>33</sup> DEL. CODE ANN. tit. 10, § 349(b).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* § 349(c).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 349(b).

<sup>38</sup> DEL. CH. CT. R. 97(a)(4); *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 496 (D. Del. 2012).

controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential.<sup>39</sup>

This expansive language of confidentiality applying to all participants and all communications appears to go well beyond standard arbitration procedures, which typically give general direction to arbitrators and administrative organizations to “maintain” the privacy of the proceedings.<sup>40</sup> Under the circumstances, one wonders if the provisions were modeled in part on procedures for mediation or other settlement-oriented ADR processes!<sup>41</sup>

The arbitrator’s final award is automatically transformed into a judgment of the Court of Chancery<sup>42</sup>—a decree which is not of public record unless and until it is the subject of a motion to the Supreme Court of Delaware.<sup>43</sup> Although awards-*cum*-judgments are available on the LexisNexis File & Serve system under the heading of “arbitration judgments,” no case or party information is included.<sup>44</sup> In this way, it appears, the authors of the Delaware program sought to create a judicially administered version of arbitration which would effectively function *sub rosa* save in those situations where appeal is taken to the Supreme Court.

Delaware’s arbitration model also aims to address businesses’ concern that arbitrators, whose decisions (awards) are not typically reviewable on the merits,

<sup>39</sup> DEL. CH. CT. R. 98(b).

<sup>40</sup> R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

*Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)*, AMERICAN ARBITRATION ASSOCIATION, (Jun. 1, 2009), available at [http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG\\_004130&\\_afLoop=719143701526582&\\_afWindowMode=0&\\_afWindowId=q935mgajk\\_44#%40%3F\\_afWindowId%3Dq935mgajk\\_44%26\\_afLoop%3D719143701526582%26doc%3DADRSTG\\_004130%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dq935mgajk\\_96](http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afLoop=719143701526582&_afWindowMode=0&_afWindowId=q935mgajk_44#%40%3F_afWindowId%3Dq935mgajk_44%26_afLoop%3D719143701526582%26doc%3DADRSTG_004130%26_afWindowMode%3D0%26_adf.ctrl-state%3Dq935mgajk_96).

Rule 26. Confidentiality and Privacy

- (a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.
- (b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.
- (c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

*JAMS Comprehensive Arbitration Rules & Procedures*, JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC., (Oct. 1, 2010), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_comprehensive\\_arbitration\\_rules-2010.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf).

<sup>41</sup> Perhaps not coincidentally, the rules provide for the judge/arbitrator to act as mediator upon request of the parties. DEL. CH. CT. R. 98(d). Although by no means unprecedented, provisions for “med/arb” are unusual in U.S. practice. See STIPANOWICH & KASKELL, *supra* note 23, at 20–21.

<sup>42</sup> “Upon the granting of a final award, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree.” DEL. CH. CT. R. 98(f)(3).

<sup>43</sup> DEL. CODE ANN. tit. 10, § 349(c).

<sup>44</sup> See *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 497 (D. Del. 2012).

might not make decisions in accordance with legal principles and might engage in unsuitable compromise.<sup>45</sup> Here, of course, a sitting judge would be making the decision. In the words of Chief Justice Myron Steele of the Delaware Supreme Court,

[Business parties] want a competent resolution within an expeditious period of time. And they want some predictability of outcome from the process. [In the Delaware Program y]ou get an arbitrator who's knowledgeable about the current state of the law and who's accustomed to apply the law. It's not 'catch as catch can' from a list that the parties pare down, hoping to get one or three to sit as arbitrators in the case.<sup>46</sup>

For cautious, control-minded counsel, the ability to consult a would-be decision-maker's recent published opinions is likely to be perceived as a significant benefit;<sup>47</sup> pertinent knowledge and experience is also critical.<sup>48</sup>

A third and growing concern of businesses has to do with the cost and time associated with adjudication—the fear that arbitration, like litigation, will turn into costly and lengthy procedural quagmire.<sup>49</sup> Here again, proponents assert that the Delaware Program offers unique advantages, since Delaware Chancery judges are noted for their ability to handle cases quickly and efficiently. Justice Steele strongly suggests that, contrary to the broad run of journeyman arbitrators, Chancery judges are incentivized to get the hearing done quickly: “You get an arbitrator with no personal, financial interest in [prolonging the arbitration] . . . members of the Court of Chancery get paid the same, whether they resolve this case in 3 days or 90 days.”<sup>50</sup> Among Chancery judges, he points out, efficient habits of mind are reinforced by a Chancery Court Rule to the effect that the arbitration hearing “generally will occur no later than 90 days following receipt of the petition [for arbitration].”<sup>51</sup>

For Delaware, the Arbitration Program is an opportunity to enhance its reputation as the friendliest forum for business in the United States, and to derive at least some additional recompense from parties for the services of public judges.<sup>52</sup> A more lucrative result may proceed from an increase in charter fees

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<sup>45</sup> Myron T. Steele, Chief Justice, Del. Supreme Court, Keynote Address at the Journal of Business, Entrepreneurship, & 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.

<sup>46</sup> *Id.*

<sup>47</sup> “[I]t really is a draw where you actually have folks who have published opinions that you can look at and have a sense of predictability.” Katherine Blair, Partner, K & L Gates, Keynote Address at the Journal of Business, Entrepreneurship, & 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, 382.

<sup>48</sup> See Distinguished Visiting Practitioner James Griffin, Address at the Journal of Business, Entrepreneurship, and 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, 383 (expressing confidence in knowledge of Court of Chancery judges regarding how M&A deals are done).

<sup>49</sup> See Stipanowich & Lamare, *supra* note 15, at 38, 46–47.

<sup>50</sup> Steele, *supra* note 45, at 381.

<sup>51</sup> See DEL. CH. CT. R. 97(e).

<sup>52</sup> Use of the Program entails a \$12,000 filing fee and \$6,000 per day for the service. Brian Farkas,

from businesses seeking to avail themselves of the new Program by incorporating in Delaware.<sup>53</sup> And for Court of Chancery judges, there is the ability to augment their resumes with expertise in another form of adjudication and enhance their credentials for a post-judicial future as private dispute resolvers.<sup>54</sup>

But when all is said and done, the success of the Program depends on the buy-in of corporations, and dispute resolution tends to be very low on the list of priorities in corporate deal-making.<sup>55</sup> In the words of a Los Angeles M&A attorney, “It’s last on the list, if anything. It’s a throw-in.”<sup>56</sup> Moreover, corporations are notoriously cautious about innovating when it comes to experimenting with new and untried methods of resolving business disputes. As the M&A lawyer puts it, her clients “like to cross the street with a bunch of folks.”<sup>57</sup>

Given the native caution of corporations and counsel respecting new concepts and new options, the last thing the Delaware Arbitration Program needed was a well-publicized challenge to its constitutionality. Enter an organization styling itself the Delaware Coalition for Open Government, Inc.

### III. A CONSTITUTIONAL CHALLENGE

In 2010, the Delaware Coalition for Open Government, a nonprofit organization, challenged the Delaware Arbitration Program by means of a suit against the five judges of the Delaware Court of Chancery.<sup>58</sup> The Coalition contended that the defendants, “under color of State law, constitute[d] an unlawful deprivation of the public’s right of access to trials in violation of the First Amendment as applied to the states by the Fourteenth Amendment to the United States Constitution.”<sup>59</sup> “Although the statute and rules call the procedure arbitration,” the Coalition argued, “it is really litigation under another name,”<sup>60</sup> except for the fact that it was conducted “behind closed doors instead of in open court.”<sup>61</sup> Citing Supreme Court decisions and other precedents recognizing the right of the public and press to attend judicial proceedings, both civil and criminal, and to review documents filed in court,<sup>62</sup> the complaint sought to have the relevant

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*Sitting Judges as Arbitrators: The Delaware Experiment*, LAW STUDENT CONNECTION, (May 16, 2012, 1:54pm), available at [http://nysbar.com/blogs/lawstudentconnection/2012/05/sitting\\_judges\\_as\\_arbitrators\\_.html](http://nysbar.com/blogs/lawstudentconnection/2012/05/sitting_judges_as_arbitrators_.html).

<sup>53</sup> See Steele, *supra* note 45, at 392.

<sup>54</sup> See Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation”*, 7 DEPAUL BUS. & COM. L.J. 383, 405 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1372291](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291) [hereinafter *Arbitration and Choice*].

<sup>55</sup> *Id.* at 408.

<sup>56</sup> Katherine Blair, *supra* note 47, at 386.

<sup>57</sup> *Id.*

<sup>58</sup> Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493, 493 (D. Del. 2012).

<sup>59</sup> Complaint at 5, *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d 493 (No. 11:11CV01015), 2011 WL 5042086.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.*

<sup>62</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding the public and press have a right to attend criminal trials); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (holding the public and press have the right to attend civil trials); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (same).

legislation and implementing Chancery Rules declared unconstitutional and to enjoin the defendant judges from conducting non-public arbitration proceedings under the program.<sup>63</sup>

An *amicus curiae* brief filed by various media outlets in support of the complaint emphasized the press' "strong interest in upholding the public's right to access, monitor and report on the proceedings of this nation's court system."<sup>64</sup> The brief elucidated the various benefits of open access to court proceedings, including the disclosure of information to the public, sufficient to "alert consumers to potential dangers posed by products . . ." and the ability of the public to monitor courts' conduct.<sup>65</sup> It raised concerns about the impact of closed proceedings on the rights of concerned third party parties, including shareholders of arbitrating corporations.<sup>66</sup> The brief asserted that

[p]arties concerned about the confidentiality of information . . . related to private arbitration do not have to consent to the jurisdiction of the Chancery Court. But when they do invoke the authority of a publicly funded court, the rules governing confidentiality change, and a presumption in favor of openness attaches to the records at issue.<sup>67</sup>

By way of example, the brief cited *Zurich American Insurance Co. v. Rite Aid Corp.*,<sup>68</sup> in which a court considering competing motions to vacate or to confirm an arbitration award declined to maintain the entire record of arbitration proceedings under seal in light of, among other things, "the common law presumption of public access" to court proceedings.<sup>69</sup>

In support of their motion for judgment on the pleadings, the defendants filed a joint brief founded on the premise that in order to establish a right of access to governmental proceedings, the plaintiff was required to plead and prove that the type of proceeding involved has historically been accessible to the press and public, and that "public access plays a significant positive role in the functioning of the proceeding, including consideration of whether public access impairs the public good."<sup>70</sup> The brief was replete with citations supporting the longstanding recognition of the inherent privacy of arbitration proceedings.<sup>71</sup> It alluded to the

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<sup>63</sup> Complaint, *supra* note 59, at 5.

<sup>64</sup> Brief Amici Curiae of the Reporter's Committee for Freedom of the Press and Five News Organizations in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment on the Pleadings and Plaintiff's Cross-Motion for Judgment on the Pleadings at 6, *Del. Coal. for Open Gov't*, 894 F. Supp. 2d 493 (No. 11:11CV01015), 2012 WL 487833 [hereinafter Media Amicus Curiae Brief].

<sup>65</sup> Media Amicus Curiae Brief, *supra* note 64, at 9.

<sup>66</sup> Tim Shaffer, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. TIMES, (Aug. 31, 2012, 11:58 AM), available at <http://dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment>.

<sup>67</sup> Media Amicus Curiae Brief, *supra* note 64, at 6.

<sup>68</sup> *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497 (E.D. Pa. 2004).

<sup>69</sup> *Id.* at 504.

<sup>70</sup> Defendants' Opening Brief in Support of their Motion for Judgment on the Pleadings at 5, *Del. Coal. for Open Gov't*, 894 F. Supp. 2d 493 (No. 1:11-1015), 2011 WL 6401166 [hereinafter Defendants' Opening Brief].

<sup>71</sup> *Id.* at 12-13.

ABA Model Code of Judicial Conduct,<sup>72</sup> which acknowledges that judges may “act as an arbitrator . . .” when “expressly authorized by law.”<sup>73</sup> It also drew attention to the employment of court-annexed arbitration in federal district court ADR programs<sup>74</sup> and provisions of the Alternative Dispute Resolution Act of 1998<sup>75</sup> that list voluntary arbitration (subject to a right of trial *de novo*) among ADR options available to Federal courts, and related provisions for confidentiality of ADR proceedings.<sup>76</sup> The defendants asserted that allowing public access to arbitration proceedings under the Delaware Program would prompt businesses to seek other arbitration forums and thereby harm the public due to the “stifling effect on Delaware’s efforts to ‘remain at the cutting-edge in dispute resolution,’”<sup>77</sup> and Delaware’s consequent inability to compete in the international market for arbitration forums.<sup>78</sup> The defendants’ brief also pointed out that there would be public access to any proceedings brought to challenge or confirm arbitration awards in the Delaware Supreme Court.<sup>79</sup> Finally, it sought to distinguish the prescribed arbitration procedure from litigation.<sup>80</sup>

Sitting by designation, Federal District Court Judge Mary McLaughlin held that the proceedings before the Delaware Court of Chancery were in essence civil trials, and therefore subject to the requirements of the First Amendment respecting right of access by members of the public and press.<sup>81</sup> Judge McLaughlin’s opinion stressed the inherent distinctions between arbitration as a consensual “private system of justice” and judicial process.<sup>82</sup> She observed that “arbitration decisions are ad hoc, lacking any precedential value.”<sup>83</sup> Although arbitrators and judges share many characteristics, arbitrators are empowered by private agreement while judges are beholden to the public, and supervise “proceedings [of] a public character in which remedies are devised to vindicate the policies of the [law], not merely to afford private relief.”<sup>84</sup> She found it significant that the defendants were unable to point to specific examples of judges serving as arbitrators in the ABA Code of Judicial Conduct.<sup>85</sup> She also observed that sitting judges do not serve as arbitrators in court-connected proceedings and, indeed, are specifically prohibited

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<sup>72</sup> *Id.* at 13 n.4.

<sup>73</sup> *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 502. The ABA Model Code of Judicial Conduct is cited as permitting arbitration by judges. *Id.* However, as observed by Judge McLaughlin, no examples of such appointments were cited. *Id.* Similarly, the defendants cited the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(d), as authorizing (among other things) arbitration by a Magistrate Judge. Defendants’ Opening Brief, *supra* note 70, at 14. Again, as noted by Judge McLaughlin, no actual examples of binding arbitration were offered. *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 502.

<sup>74</sup> Defendants’ Opening Brief, *supra* note 70, at 14–16.

<sup>75</sup> *Id.* at 14–15.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 17 (quoting H.R. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 6–7.

<sup>80</sup> *Id.* at 19–20.

<sup>81</sup> *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 494.

<sup>82</sup> *Id.* at 500–01.

<sup>83</sup> *Id.* at 501.

<sup>84</sup> *Id.* at 501–02 (quoting *Hutchings v. U.S. Indus. Inc.*, 428 F.2d 303, 311–12 (5th Cir.1970)).

<sup>85</sup> *Id.* at 502.

from doing so by case precedents in some jurisdictions.<sup>86</sup> She then enumerated certain elements of proceedings under the Delaware Arbitration Program that were sufficiently like trial to bring into play policies of open access, including (1) selection of judges as arbitrators by the Chancellor; (2) a sitting judge, paid by the state, presiding over a proceeding with the assistance of state personnel in public facilities; (3) the wielding of arbitral as well as judicial authority by the judge; and (4) the rendition of a final enforceable order by the judge.<sup>87</sup>

The Chancery Court judges appealed the district court's decision to the Third Circuit on October 11, 2012,<sup>88</sup> presaging a battle that some say may continue all the way to the United States Supreme Court.<sup>89</sup> Briefs filed by the parties and a number of *amici curiae* reiterated and expanded upon the arguments raised in the district court.<sup>90</sup> Given the interest generated by the case and the policies involved, it is appropriate to look more closely at the Delaware Arbitration Program and the rationale of the district court.

#### IV. REFLECTIONS ON THE DELAWARE ARBITRATION PROGRAM AND ITS CONSTITUTIONALITY

Was Federal District Court Judge Mary McLaughlin on solid ground in holding that the proceedings before the Delaware Court of Chancery under the Delaware Arbitration Program were in essence civil trials, and therefore subject to the requirements of the First Amendment respecting right of access by members of the public and the press?<sup>91</sup> On appeal, counsel for the Delaware Chancery Court judges argued that the district court improperly used that conclusion to avoid applying the “logic and experience test” to determine “if there is a public right of access to a particular proceeding or record.”<sup>92</sup> They argued that the Program established a framework for proceedings that included “key distinctions between arbitration and litigation”: a consent-based process, with decisions made “outside the judicial system” and “ad hoc, lacking any precedential value;” permitting parties to “specify the scope of the arbitrator’s authority and design the applicable

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 502–03.

<sup>88</sup> Brief for Appellants, *Del. Coal. for Open Gov't*, 894 F. Supp. 2d 493 (No. 12-3859), 2012 WL 6639543 [hereinafter Brief for Appellants].

<sup>89</sup> Thomson Reuters, *Constitution Bars ‘Secret’ Delaware Trials, Open-Government Group Says*, 27 NO. 14 WESTLAW J. DEL. CORP. 2 (2013).

<sup>90</sup> See 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*, 894 F. Supp. 2d 493 (No. 12-3859), 2012 WL 6837826 [hereinafter Brief of Amici Curiae the Chamber of Commerce]; 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*, 894 F. Supp. 2d 493 (No. 12-3859), 2012 WL 6837827 [hereinafter Brief of Amicus Curiae the Corporation Law Section]; 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*, 894 F. Supp. 2d 493 (No. 12-3859), 2013 WL 175551; 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*, 894 F. Supp. 2d 493 (No. 12-3859), 2013 WL 175552.

<sup>91</sup> See *supra* text accompanying note 62.

<sup>92</sup> Brief for Appellants, *supra* note 88, at 15, 20. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993).

procedural rules;” allowing parties to “resolve disputes without aspects often associated with the legal system: procedural delay and cost of discovery, the adversarial relationship of the parties, and publicity of the dispute.”<sup>93</sup> Because it established a form of arbitration, there was no public access requirement for the reason that “[p]roceedings before [] arbitrator[s] traditionally have been confidential [and] there is no history of public access.”<sup>94</sup> They stated that to authorize judges to sit as arbitrators “does not transform the commercial arbitration proceeding into a judicial trial” because of the “settled principle that States may endow judges with non-judicial responsibilities.”<sup>95</sup> The district court’s contrary conclusion would result in detriment not only to the State of Delaware and to businesses seeking effective alternatives to litigation, but to the policies supporting court-connected ADR programs throughout the country.<sup>96</sup> Therefore, they concluded, the district court committed reversible error.

In response, counsel for the appellee, the Delaware Coalition for Open Government, Inc., argued that the district court “properly ignored labels and looked to see whether there was a sufficiently analogous government proceeding to which the right of public access attaches (as opposed to practices in the private sector).”<sup>97</sup> The district court properly recognized that where “a State-empowered judge engages in a core judicial function—hearing evidence, applying the facts to the law, and making binding determinations affecting the substantive legal rights of the parties, which determinations are immediately enforceable by the State[,] the . . . process is effectively a civil bench trial of commercial disputes.”<sup>98</sup> Therefore, the proceeding “was [properly] subject to the right of public access to judicial proceedings . . . .”<sup>99</sup> Because the Delaware Arbitration Program was different from court-connected ADR practices in other jurisdictions, they would not be affected by upholding the district court’s decision.<sup>100</sup> Neither would the decision cause businesses to eschew private arbitration in the U.S for foreign forums whose arbitrators lack the pertinent expertise in U.S. law.<sup>101</sup> Finally, “[n]either Delaware’s desire to facilitate new revenue streams nor the business community’s desire to hide its conduct from public scrutiny justify[ed] subverting the First Amendment.”<sup>102</sup>

A careful assessment of the arguments and underlying evidence, along with other considerations, leads to the conclusion that the district court’s decision is well-founded and should be upheld.

*A. The District Court’s Conclusion That the Delaware Arbitration Program*

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<sup>93</sup> Brief for Appellants, *supra* note 88, at 16–17.

<sup>94</sup> *Id.* at 21–22.

<sup>95</sup> *Id.* at 21.

<sup>96</sup> *Id.* at 66–68.

<sup>97</sup> Brief for Appellee at 10, Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 12-3859), 2013 WL 100597 [hereinafter Brief for Appellee].

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 11.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 12.

*Establishes a Privatized Version of Court Trial Appears to Be Well-Founded*

Was the district court correct in concluding that the Delaware Arbitration Program was essentially a privatized court trial, and therefore subject to the public access requirements of the First Amendment? Or, did the court err in subjecting a system of private arbitration to public access requirements merely because a sitting judge could be the arbitrator?

By establishing sitting judges as the keystone of an adjudicative system that is effectively wholly shielded from public view through the rendition of a legally binding judgment, the Delaware Arbitration Program represents an unprecedented juxtaposition of public trial and private adjudication with no historical or current counterparts. Furthermore, the only significant practical effect of the procedure—that is, the only aspect of the procedure that is not already available to litigants in public trial or, alternatively, in arbitration—is to place proceedings before a sitting judge behind closed doors. For these reasons, the court’s conclusion appears well-founded.

*i. The Delaware Arbitration Program represents an unprecedented juxtaposition of public and private adjudicative spheres*

The body of legislation and judicial decisions respecting the requirements of public access to judicial proceedings and “judicial documents” has played out against the backdrop of a struggle between those who see judicial system as a mechanism for problem solving and the promotion of settlement, and those who see it as vindicating public rights, and see litigation is a kind of public property.<sup>103</sup> The Delaware Arbitration Program, under which sitting publicly appointed judges are authorized to preside over privatized and wholly confidential proceedings, must be viewed against the backdrop of this body of law and the underlying policy dynamics.

Although the law of public access that developed in various ways in different jurisdictions,<sup>104</sup> that body of law generally reflects a kind of balancing between the “problem-solving” and “public rights” approaches<sup>105</sup> in that it recognizes that different forms of litigation and different elements of the litigation process present stronger or weaker bases for public access depending on historical and functional factors.<sup>106</sup> Among functional factors affecting public access to elements of civil litigation, a key factor appears to be the proximity of the element to the core judicial function.<sup>107</sup> The argument for public access to a court-related proceeding

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<sup>103</sup> Kratky Doré, *supra* note 3, at 289, 295–96; *see also* Amie Sloane, *Secret Settlements and Protecting Health and Safety: How Can We Disclose With Our Mouths Shut?*, 3 APPALACHIAN J.L. 61, 61 (2004); James E. Rooks, Jr., *Let the Sun Shine In*, 39-JUN TRIAL 18, 19 (2003).

<sup>104</sup> Kratky Doré, *supra* note 3, at 311–16; *see also* Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI-KENT L. REV. 375, 391–400 (2006); George F. Carpinello, *Public Access to Court Records In New York: Experience Under Uniform Rule 216.1 and the Rule’s Future In a World of Electronic Filing*, 66 ALB. L. REV. 1089 (2003).

<sup>105</sup> Kratky Doré, *supra* note 3, at 311–16.

<sup>106</sup> *Id.* at 321–22.

<sup>107</sup> *Id.* at 318, 402.

or to documents is least powerful when the latter are furthest removed from core judicial functions,<sup>108</sup> as in discovery<sup>109</sup> and settlement-oriented activities.<sup>110</sup> Conversely, it is most powerful within the purview of core judicial functions such as adjudication of a case on the merits;<sup>111</sup> here, proponents of the “public rights” approach say there must be public access.<sup>112</sup> To the extent that confidentiality serves to promote collaborative activities that facilitate the settlement of litigated disputes, then, some argue that it serves to conserve judicial resources.<sup>113</sup> Such arguments are naturally weakest when public access is sought to court trial.

Private binding arbitration is a wholly different realm. It is a thing apart, founded on private agreement, and fundamentally depended on the choices made by the private parties.<sup>114</sup> The Federal Arbitration Act and state arbitration statutes tend to carefully demarcate the interface between arbitration and the courts which are sometimes called upon to facilitate arbitration processes by enforcing arbitration agreements, appointing arbitrators, enforcing subpoenas, and confirming, modifying or vacating awards.<sup>115</sup> As a thing apart, arbitration is not touched by the law of public access as it affects public judicial proceedings.<sup>116</sup> Arbitration proceedings are generally conducted in private,<sup>117</sup> and arbitrating parties sometimes enhance the protections surrounding arbitration by entering into agreements for confidentiality.<sup>118</sup>

When arbitrating parties seek to avail themselves of the assistance of a judge, however, they potentially fall within the ambit of public access law. As observed in a recent federal court decision, “while parties to an arbitration are generally ‘permitted to keep their private undertakings from the prying eyes of others,’ the ‘circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitration, *i.e.* the arbitration award.’”<sup>119</sup> Thus, when arbitrating parties seek the sanction of courts for arbitration awards, those awards and related pleadings may be considered “judicial documents” because of their relevance to the decision of a court to confirm or vacate an arbitration award.<sup>120</sup>

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<sup>108</sup> *Id.* at 375–77, 379.

<sup>109</sup> *Id.* at 370–71.

<sup>110</sup> *Id.* at 395.

<sup>111</sup> *Id.* at 382.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 293.

<sup>114</sup> Stipanowich, *Arbitration and Choice*, *supra* note 54, at 387.

<sup>115</sup> Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 430–31 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1007490](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007490).

<sup>116</sup> Peter W. Billings, Sr., *ADR and Access to the Courts*, 8 UTAH B.J. 12, 13 (1995); Schmitz, *supra* note 32, at 1214.

<sup>117</sup> Schmitz, *supra* note 32, at 1211.

<sup>118</sup> *Id.* at 1214.

<sup>119</sup> *Century Indem. Co. v. AXA Belgium*, No. 11 Civ. 7263(JMF), 2012 WL 4354816, at \*14 (S.D.N.Y. Sept. 24, 2012) (quoting *Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co.*, No. 07 Civ. 8196(PKC), 2008 WL 126976, at \*1 (S.D.N.Y. Jan. 7, 2008), amended by *Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co.*, No. 07 Civ. 8350(PKC), 2008 WL 1805459 (S.D.N.Y. Apr. 21, 2008)).

<sup>120</sup> *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 109 (2d Cir. 2006); *Century Indem. Co. v. Certain Underwriters at Lloyd’s London*, 592 F. Supp. 2d 825, 827 (E.D. Pa. 2009); *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497, 503–05 (E.D. Pa. 2004); *Alexandria Real Estate Equities, Inc. v. Fair*, No. 11 Civ. 3694(LTS), 2011 WL 6015646, at \*2 (S.D.N.Y. Nov. 30, 2011); *Global*

In recent years, the bright line between arbitration and litigation has in some respects blurred as arbitration has taken on many more of the vestiges of litigation in a public forum.<sup>121</sup> Today, arbitrators handle virtually any kind of civil claim or controversy, including even antitrust<sup>122</sup> and discrimination<sup>123</sup> claims and other statutory causes of action. Arbitration proceedings frequently bear close resemblance to civil litigation,<sup>124</sup> and may even result in the imposition of socially exemplary remedies such as punitive damages or statutory damages.<sup>125</sup> There are arbitration agreements that call for arbitrator appointments to be made by courts;<sup>126</sup> this is, in fact, the default resolution under federal and state statutes when the appointment mechanism established by the parties, if any, fails of its intended purpose.<sup>127</sup> And although the Supreme Court has indicated that parties may not contractually expand the limited statutory bases for judicial vacatur of arbitration awards under the Federal Arbitration Act,<sup>128</sup> it is now possible in a few jurisdictions to create a kind of public/private hybrid procedure by means of a contractual provision for judicial review of arbitration awards for errors of law or fact.<sup>129</sup>

There is also no question that, practically speaking, public access to the elements of civil trial is not unlimited, and judges engage in activities that are not strictly adjudicative and which may occur beyond the public purview. Trial judges sometimes conduct private settlement conferences in which they encourage, cajole and browbeat parties into a negotiated resolution.<sup>130</sup> Moreover, they may employ and occasionally even participate in relatively confidential court-connected ADR processes aimed at encouraging pre-trial settlement of disputes.<sup>131</sup> They may also have occasion to seal court records to assure protection from the prying eyes of competitors and other third parties.<sup>132</sup>

There remains, however, an essential, meaningful dividing line between public courts and private binding arbitration. Again, when arbitrating parties avail themselves of the court system before, during or after the process, as stated above,

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*Reinsurance*, 2008 WL 1805459, at \*2.

<sup>121</sup> See generally Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1297526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297526) [hereinafter *The New Litigation*].

<sup>122</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>123</sup> See *Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

<sup>124</sup> See generally Stipanowich, *The New Litigation*, *supra* note 121.

<sup>125</sup> FOLDBERG ET AL., *supra* note 20, at 597.

<sup>126</sup> See, e.g., *Davis v. Melnicke*, 25 A.D.3d 503 (N.Y. 2006); *Pisciotta v. Newspaper Enter., Inc.*, 5 A.D.2d 1014 (N.Y. 1958).

<sup>127</sup> IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 27.3.1.1 (1996).

<sup>128</sup> *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

<sup>129</sup> See, e.g., *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008); *NAFTA Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

<sup>130</sup> Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 157 (2009).

<sup>131</sup> ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS* 60–67 (1996).

<sup>132</sup> See *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 494 (D. Del. 2012).

they open themselves to greater scrutiny. A motion to confirm or vacate an arbitration award creates the possibility that the rights of access of third parties to court proceedings and related documents may entail a loss or diminishing of the confidentiality experienced by the parties in arbitration.<sup>133</sup> To establish a class of arbitration that is subject to a general requirement of confidentiality and is presided over by a sitting judge appears to represent a dramatic departure from this reality.

This brings us to the argument made by proponents of the Delaware Arbitration that arbitration has been regularly employed as one of the ADR options in court-connected programs.<sup>134</sup> They assert that such proceedings are sometimes treated as confidential,<sup>135</sup> and, furthermore, may be presided over by sitting judges.<sup>136</sup>

On close examination, however, the precedents cited are not equivalent to traditional binding arbitration.<sup>137</sup> The practical reality is that court-connected arbitration proceedings do not automatically produce a binding arbitration award, since any party has the right to request trial *de novo* for a period after the rendition of an award.<sup>138</sup> Nonbinding court-connected arbitration proceedings are usually abbreviated processes aimed at promoting a negotiated resolution short of trial, and may be limited in application to cases below a certain dollar value.<sup>139</sup> Aside from distant historical examples, the defendants' brief at trial offered no specific examples of actual proceedings in which sitting judges were appointed as arbitrators in private, binding arbitration proceedings resulting in an enforceable judgment, as here.<sup>140</sup> And although, as stated above, their appellate brief purported to offer such examples, the appellee's brief demonstrated that all of these programs appear to be of the standard court-connected nonbinding variety described above.<sup>141</sup>

Thus, the Delaware Arbitration Program represents a significant leap beyond any other venture along the borderline between public and private adjudicative forums. Research has thus far failed to uncover any other scheme remotely like it.

Moreover, as Judge McLaughlin observed, some courts have ruled that because of inherent conflicts between the two roles sitting judges should not serve as arbitrators.<sup>142</sup> Relatively few published decisions have addressed situations where sitting judges have allowed themselves to be fashioned as arbitrators.<sup>143</sup> In

<sup>133</sup> *E.g.*, *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497, 503–04 (E.D. Pa. 2004).

<sup>134</sup> Brief for Appellants, *supra* note 88, at 44–47.

<sup>135</sup> *Id.* at 47.

<sup>136</sup> *Id.*

<sup>137</sup> Brief for Appellee, *supra* note 97, at 32–38, 49–54.

<sup>138</sup> 28 U.S.C. § 657(c)(1) (2012).

<sup>139</sup> PLAPINGER, *supra* note 131, at 60–67.

<sup>140</sup> *See supra* text accompanying note 87.

<sup>141</sup> Brief for Appellee, *supra* note 97, at 32–38.

<sup>142</sup> *Del. Coal. for Open Gov't*, 894 F. Supp. 2d at 502.

<sup>143</sup> *See* *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163 (7th Cir. 1994); *Brandt v. MIT Development Corp.*, 552 F. Supp. 2d 304 (D. Conn. 2008); *Hameli v. Nazario*, 930 F. Supp. 171 (D. Del. 1996); *Ovadia v. New York Ass'n for New Americans*, Nos. 95 Civ. 10523 (SS), 96 Civ. 330 (SS), 1997 WL 342411 (S.D.N.Y. 1997); *Heenan v. Sobati*, 96 Cal. App. 4th 995 (2002); *Elliot v. Ten Eyck P'ship v. City of Long Beach*, 57 Cal. App. 4th 495 (1997); *see also* Charles H. Smith, *When Is An Arbitrator Not An Arbitrator? When A Sitting Judge Serves As A Private Arbitrator*, 60-OCT DISP. RESOL. J. 29, 33 n.23 (2005).

such cases, the usual result is expressions of doubt or incredulity by appellate courts who find themselves in the position of trying to salvage the situation by recasting the “arbitration award” as a court judgment.<sup>144</sup> The most prominent of these decisions is *DDI Seamless Cylinder International, Inc. v. General Fire Extinguisher Corp.*,<sup>145</sup> in which Judge Richard Posner concluded that an agreement purporting to arbitrate a contract action before a federal magistrate would be treated as “an abbreviated, informal procedure for [the magistrate’s] deciding the case in his judicial capacity.”<sup>146</sup> This was necessary in order to prevent the magistrate’s decision from being deemed *ultra vires*, since “arbitration is not in the job description of a federal judge, including . . . a magistrate judge . . . . Federal statutes authorizing arbitration . . . do not appear to authorize or envisage the appointment of judges or magistrate judges as arbitrators.”<sup>147</sup>

Posner’s decision was approvingly cited at length in a decision of the District of Delaware, *Hameli v. Nazario*,<sup>148</sup> in which the court was also confronted with the question of the legal effect of a decision by a federal magistrate under a purported agreement to arbitrate. In *Hameli*, the court avoided having to directly address the efficacy of the purported agreement on the basis that the magistrate lacked subject matter jurisdiction over the issues in dispute. In a footnote, however, the court observed that under the Civil Justice Reform Act,<sup>149</sup> which laid the groundwork for court-connected ADR programs throughout the federal system, “the magistrate judge has played an ever increasing part in settlement negotiations . . . .”<sup>150</sup> The court noted that its own local rule, moreover, authorized magistrates “to [c]onduct various alternative dispute resolution processes, including but not limited to judge-hosted settlement conferences, mediation, arbitration, early neutral evaluation, and summary trials (jury and nonjury).”<sup>151</sup> It was evident, therefore, that magistrate judges “assume a variety of roles in the course of aiding the district court . . . including those of mediator and adjudicator.”<sup>152</sup> Importantly, however, the court did not go so far as to state that magistrates could not only adjudicate, but could serve as arbitrators under private contracts calling for binding arbitration. To do so would have been inconsistent with practices in federal courts around the country<sup>153</sup> and, most likely, contrary to practices under the cited local court ADR rule quoted above.<sup>154</sup> The latter lists the term “arbitration” in the context of a range of

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<sup>144</sup> See *DDI Seamless Cylinder Int’l, Inc.*, 14 F.3d at 1167; *Brandt*, 552 F. Supp. 2d at 316; *Hameli*, 930 F. Supp. at 182–83; *Ovadia*, 1997 WL 342411, at \*10–11; *Heenan*, 96 Cal. App. 4th at 1003–04.

<sup>145</sup> 14 F.3d 1163 (7th Cir. 1994).

<sup>146</sup> *Id.* at 1166.

<sup>147</sup> *Id.* at 1165. Judge Posner observed that the stipulated procedure “is so remote from the procedures that federal judicial officers are authorized to use that the final order emanating from it might well be void—as if a judge issued an order directing President Clinton to go on a pilgrimage to Mecca.” *Id.* at 1166. He acknowledged, however, that “the day may not be distant when federal judges will be recommissioned (or issued supplementary commissions) as arbitrators. But it has not arrived.” *Id.* at 1165.

<sup>148</sup> 930 F. Supp. 171 (D. Del. 1996).

<sup>149</sup> *Id.* at 181 n.16.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (quoting D. Del. LR 72.1(a)(1)).

<sup>152</sup> *Id.* at 182.

<sup>153</sup> See *supra* text accompanying note 138.

<sup>154</sup> See *supra* text accompanying note 151.

processes (settlement conferences, mediation, early neutral evaluation, and summary trials) employed in federal court ADR programs in order to foster settlement among litigating parties, but not imposing final and binding third-party decisions.<sup>155</sup> As an element in the array of procedural tools employed by courts to settle cases short of trial, participation in nonbinding arbitration may be required by courts even in the absence of party consent.<sup>156</sup> This imposition on the right to trial is deemed acceptable because, as discussed above, such arbitrations are typically abbreviated proceedings which are nonbinding in the absence of a post-hearing agreement, and give parties the option of pursuing a trial *de novo*.<sup>157</sup> This kind of “arbitration” is, again, a very different species from the contractual, legally binding variety furthered by the Federal Arbitration Act and parallel state statutes, and knowledgeable courts, practitioners and scholars are careful to distinguish the two.<sup>158</sup>

This fundamental dichotomy between court-connected nonbinding arbitration and contract-based binding arbitration was noted by a California appellate court in *Heenan v. Sobati*, which found “judicial binding arbitration by a sitting judge” to be an oxymoron under California law.<sup>159</sup> The court observed that California law establishes two “mutually exclusive and independent” statutory schemes: “judicial arbitration,” which involves nonbinding decisions and the right to a trial *de novo*,<sup>160</sup> and “contractual arbitration,” which “takes place outside the legal system without any expectation of further contact with the courts,”<sup>161</sup> “a private proceeding, arranged by contract, without legal compulsion.”<sup>162</sup> The *Heenan* court then proceeded to offer a rationale why sitting judges have no business presiding over binding contractual arbitration; significantly, it hinged on the fundamentally divergent policies respecting the privacy and confidentiality of court trial and arbitration:

Public judging operates in the public eye, with reported proceedings and under appellate review, to both dispense justice *and* “satisfy the appearance of justice.” . . . These distinctions blur if sitting judges, their salaries paid by the state, conduct private, binding arbitrations in the public’s courthouses – shielded from the need to follow established rules of law or to justify their decisions by reason, evidence and precedent.<sup>163</sup>

The Delaware Arbitration Program is an unprecedented experiment that intermingles, among other things, what is indisputably the core judicial function—adjudication of the merits of a dispute—and traditional binding arbitration. It thus

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<sup>155</sup> See generally Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical?: Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587 (2009).

<sup>156</sup> *Id.* See also *Firelock Inc. v. District Court*, 776 P.2d 1090 (Colo. 1989) (holding that a local rule requiring parties to attend nonbinding arbitration did not violate their right to a jury trial because the parties had the option to pursue a trial *de novo*); *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (same); *In re Smith*, 112 A.2d 625 (Pa. 1955) (same).

<sup>157</sup> See *supra* text accompanying notes 138–39.

<sup>158</sup> See Schmitz, *supra* note 155, at 587.

<sup>159</sup> *Heenan v. Sobati*, 96 Cal. App. 4th 995, 1000 (2002).

<sup>160</sup> *Id.* at 1000–01.

<sup>161</sup> *Id.* at 1001.

<sup>162</sup> *Id.* at 1002.

<sup>163</sup> *Id.* (quoting *TJX Companies, Inc. v. Superior Court*, 81 Cal. App. 4th 564, 572 (2000)).

takes the central activity of public judges, that which presents the most compelling of claims for public access, and cloaks it in an enveloping mantle of confidentiality under the rubric of “arbitration.” This is in contrast to settlement-oriented activities which offer less compelling arguments for public access, including the range of court-connected ADR programs including nonbinding arbitration. As we will see, however, despite the difference in labels, the only fundamental element of this program that is not already available to parties is the confidentiality pervading the scheme.

*ii. The key distinguishing element of the Delaware Arbitration*

*Program is the placement of proceedings before a sitting judge behind closed doors*

While it is not unheard of for judges to make arbitral appointments pursuant to a contract,<sup>164</sup> this appears to be the first reported scheme where all appointments are made by the Chancellor, the appointees are sitting judges, and the judges are empowered to render final and binding arbitration awards in private proceedings. Normal arbitrators lack certain powers of courts, including the contempt power, and therefore parties are required to seek the assistance of courts in enforcing arbitral orders.<sup>165</sup> Here, because the arbitrators are also judges, they are at least arguably in a position not only to offer preliminary and final relief in the manner of normal arbitrators, but also to wield coercive power for the purpose of enforcing the orders they frame.<sup>166</sup> That said, however, there is language in the implementing Chancery Court Rules that seems to indicate that many of the enforcement-related activities that would ordinarily be within the authority of Chancery judges are instead delegated to the Delaware Supreme Court in a manner analogous to ordinary arbitration.<sup>167</sup>

Nevertheless, in one respect the Delaware Arbitration Program seemingly makes a significant departure from the model of an analogue to traditional private binding arbitration. This occurs at the end of the proceeding, when under the procedures of the Program the conversion of an arbitration award to a court judgment is apparently automatic.<sup>168</sup> This is a highly distinctive and critically important aspect of the procedure, because it apparently obviates the need for parties to act affirmatively to obtain the benefits associated with converting an arbitration award to a court judgment, such as being able to make use of public enforcement mechanisms against a losing party as debtor. In traditional arbitration, as discussed above, the act of seeking judicial confirmation is a public act, and may open some elements of the proceeding to third party access.<sup>169</sup> Not so with the Delaware procedure. From the inception of the proceeding until the docketing of a court judgment, the public record is non-existent or *de minimus*.

What, after all, does the Delaware Arbitration Program offer businesses that

<sup>164</sup> MACNEIL, ET AL., *supra* note 127, at § 27.3.1.1.

<sup>165</sup> Richard Chernick, *May Arbitrators Award Sanctions?*, SB 41 ALI-ABA 233, 237 (1996).

<sup>166</sup> DEL. CH. CT. R. 98.

<sup>167</sup> See DEL. CODE ANN. tit. 10, § 349(c).

<sup>168</sup> DEL. CH. CT. R. 98(f)(3) (“Upon the granting of a final award, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree.”).

<sup>169</sup> See Schmitz, *supra* note 32, at 1214–22.

they did not have before, since they could already count on highly knowledgeable adjudicators and the promise of a relatively quick and efficient process in regular court proceedings, and since proceedings (including discovery, motion practice and conduct of hearings) will probably be substantially similar in either forum? (Again, it is well understood that today, commercial arbitration often replicates many of the features of court litigation; one would expect this to be especially so where the parties have opted for a proceeding conducted by a sitting judge.) True, the Program affords parties the opportunity to have Chancery judge/arbitrators address bare claims for damages (as opposed to equitable relief) and to have the judge/arbitrators act as mediators, but neither of these alone, arguably, would be a significant draw. In the category of novel, heretofore unrealized benefits there appears to be only one key element—the opportunity to conduct hearings before a sitting judge behind closed doors, and to cloak the proceeding—including its very existence—in secrecy from filing to the automatic docketing of a court judgment. This, more than any other fact, supports the district court’s conclusion that this is really court trial by another name.

*B. As a Matter of Practice and Policy, Denying Enforcement to the Program is Unlikely to Have Negative Consequences, While Enforcement May Produce Negative Consequences*

Does it make a difference as a matter of policy and practice whether or not Delaware is permitted to sponsor a private arbitration program in which the arbitrators are sitting Chancery Court judges? The proponents of the Delaware Arbitration Program argue that striking down the program will work to the detriment of the State of Delaware, harm businesses and undermine court-connected ADR programs.<sup>170</sup> The challengers respond that no harm will be done to the broad run of court-connected ADR, since other programs are fundamentally different from the Delaware scheme; furthermore, harm to Delaware’s coffers or business interests should be given no weight in contravention of First Amendment concerns.<sup>171</sup>

Denying enforcement to this particular scheme is unlikely to deal a body blow to the aspirations of Delaware to enhance its image as the go-to forum for businesses or to greatly impair the ability of businesses to find favorable adjudicative forums. Neither would it in any way hamper the ability of courts around the country to develop and maintain highly effective ADR programs.

On the other hand, upholding the Delaware Arbitration Program could have negative consequences. A precedent for privatizing court-based, judge-supervised arbitrations would be a major step in the direction of undermining the role of courts as public institutions and systems of precedent. It may also blur the boundary between private binding arbitration and public adjudication.

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<sup>170</sup> Brief for Appellants, *supra* note 88, at 66; Brief of Amici Curiae the Chamber of Commerce, *supra* note 90, at 23–24.

<sup>171</sup> Brief for Appellee, *supra* note 97, at 48.

*i. Striking down the Delaware Arbitration Program is unlikely to produce significant negative consequences*

a. Impact on Delaware

It is doubtful that the loss of the Delaware Arbitration Program, which has thus far achieved marginal uptake, will imperil Delaware's position as a favorable business forum. While Delaware may not find itself among leading international "arbitration destinations" (if that was ever a likely outcome of this experiment), its courts can still craft law favorable to private arbitration. Meanwhile, instead of moving a portion of their activities to the sphere of purely private adjudication, the judges of Chancery will continue to perform their judicial duties in the traditional fashion, rendering decisions that continue to build on body of public precedents that have characterized and distinguished Delaware jurisprudence.

The greatest loss to Delaware may be the revenue that might otherwise have entered its coffers had more businesses purchased Delaware charters to avail themselves of the Arbitration Program. One is tempted to suggest that if revenues are an issue, as they so often are for courts today, perhaps consideration should be given to making frequent users pay a heavier share of the burden of providing a public justice system, a burden now borne overwhelmingly by taxpayers.<sup>172</sup> However, the Program's proponents might argue that without the carrot represented by the ultra-private arbitration system, charging business parties a premium for using the Chancery Court might actually put Delaware at a competitive disadvantage until jurisdictions around the country start charging frequent users more of the real cost of litigation.

b. Impact on businesses

As discussed in Part II above, from the standpoint of businesses the Delaware Arbitration Program offers a particularly advantageous procedural framework for the resolution of disputes. It is, however, by no means the only way of accomplishing important business goals and addressing key business concerns in arbitration. While arbitration before a sitting judge may be problematic, similar benefits may be obtained in purely private arbitration proceedings with some degree of planning. Businesses already have the ability to elect to use arbitration procedures that afford a high degree of privacy and confidentiality, including procedures specifically tailored for protection of intellectual property.<sup>173</sup>

There are also other ways of dealing with concerns about arbitrator decision-making and application of legal principles.<sup>174</sup> Among other things, parties could

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<sup>172</sup> See generally Stephen Ware, *Is Adjudication a Public Good?: 'Overcrowded Courts' and the Private-Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2178166](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178166).

<sup>173</sup> See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 23; remarks of Katherine Blair, *supra* note 47, at 19. See generally CPR INSTITUTE FOR CONFLICT RESOLUTION, CPR RULES FOR NON-ADMINISTERED ARBITRATION OF PATENT & TRADE SECRETS (2005), available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/615/CPR-Rules-for-Non-Administered-Arbitration-of-Patent-Trade-Secret-Disputes.aspx>.

<sup>174</sup> See FOLBERG ET AL., *supra* note 20, at 596–97 (discussing ways of addressing concerns about

choose a retired Chancery court judge as their arbitrator. The same may be said of concerns about promoting efficiency and economy in arbitration. Options exist for the taking, and much time and effort has been devoted in recent years to providing parties with the opportunity to make choices aimed at these goals.<sup>175</sup> As long as the determination reached by the Third Circuit is limited to the unique set of circumstances inhering in the Delaware program, a decision denying enforcement to the Delaware Arbitration Program should not seriously affect the ability of businesses to achieve their legitimate ends through private arbitration.

c. Impact on court-connected ADR programs

Finally, for the reasons discussed above, declining to enforce the Delaware Arbitration Program will have absolutely no effect on the wide range of ADR programs around the country.<sup>176</sup> Because the Delaware Program is anomalous, its non-enforcement is no precedent for judicial enforcement of the broad run of nonbinding arbitration programs and other procedures, all of which are aimed at facilitating the achievement of settlements short of court trial.

*ii. Upholding the Delaware Arbitration Program may have negative consequences*

On the other hand, should the Delaware Arbitration Program ultimately be upheld, one could envision potentially significant consequences for courts and for the general public. Once court-sponsored private arbitration receives judicial imprimatur, it is reasonable to expect courts around the country to begin offering such services, and to expect businesses to embrace these options and pay a premium (if the forum and the tribunal are otherwise acceptable) as a convenient way of avoiding the public glare of trial and wrapping the entire proceeding in a cloak of confidentiality.

Besides severely limiting public access to proceedings in the courthouse, moreover, this activity could bring us measurably closer to the kind of scenario long envisioned by those who have argued that the rise of private dispute resolution (especially binding arbitration) will undermine the public justice system by curtailing the publication of decisional precedents.<sup>177</sup> The Delaware Arbitration Program affords parties the opportunity to move court-supervised proceedings from the public docket (and the system of public precedents) directly into a private and precedent-less netherworld. The potential impact on the public justice system is surely as direct and significant as any form of private or public ADR devised to date, or more so.

Moreover, business interests, some of whom have filed briefs in support of

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bad arbitration awards).

<sup>175</sup> See PROTOCOLS, *supra* note 28, at 13–21; Stipanowich, *Arbitration and Choice*, *supra* note 54, at 400–34.

<sup>176</sup> See *supra* text accompanying note 171.

<sup>177</sup> See Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 594 (2001).

the Delaware Arbitration Program,<sup>178</sup> should seriously reflect on the advisability of further intermingling private arbitration with the public forum. Today, consensual binding arbitration affords parties considerable room to structure private and confidential dispute resolution proceedings, in contrast to the presumptively public forum of litigation. If the boundaries between these spheres become increasingly fuzzy, even traditional binding arbitration may become less private. As a California appellate court observed in the course of expressing concerns about litigants refining arbitration to produce “incoherent hybrids”: “[those] who fashion such variants should be forewarned that the primary governing law may be the law of unintended consequences.”<sup>179</sup>

#### V. CONCLUSION

The Delaware Arbitration Program may have been designed as a way of achieving a veritable arbitration trifecta: (1) a first-rate adjudicator practiced at applying the law to complex factual scenarios, (2) efficient case management and short cycle time and (3) a proceeding cloaked in secrecy. On closer analysis, however, the Program appears to establish a proceeding that is in essence litigation behind closed doors.

By establishing sitting judges as the keystone of an adjudicative system that is privatized and presumptively confidential through the rendition of a legally binding judgment, the Delaware Arbitration Program creates an unprecedented juxtaposition of public trial and private adjudication, an anomaly that has no counterparts. The only significant element of the procedure that is not already available to litigants in public trial or, alternatively, in arbitration—is the placement of proceedings before a sitting judge behind closed doors. For these reasons, the court’s conclusion appears well-founded.

It is highly doubtful that the loss of the Delaware Arbitration Program will imperil Delaware’s position as a favorable business forum. Moreover, it will not prevent businesses from structuring effective, appropriate, and confidential arbitration procedures, nor will it undermine the ability of courts to develop and maintain a wide variety of court-connected ADR programs. If the Delaware Arbitration Program were upheld, however, the precedent might work tangibly to the detriment of the public justice system by encouraging businesses to opt out of public adjudication, with public judges rendering private decisions that are off the public roles, thereby negatively impacting our system of public precedents. It might also blur the boundaries between private binding arbitration and public trial, producing other unintended consequences.

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<sup>178</sup> See Brief of Amici Curiae the Chamber of Commerce, *supra* note 90; Brief of Amicus Curiae the Corporation Law Section, *supra* note 90.

<sup>179</sup> Heenan v. Sobati, 96 Cal. App. 4th 995, 1000 (2002) (quoting Sy First Family Ltd. P’ship v. Cheung, 70 Cal. App 4th 1334, 1338 (1999)).