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Secret Arbitration or Civil Litigation?: An Analysis of the Delaware Arbitration Program

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SECRET ARBITRATION OR CIVIL LITIGATION?: AN ANALYSIS OF THE DELAWARE ARBITRATION PROGRAM

BY: JORES KHARATIAN*

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I. INTRODUCTION

The State of Delaware has long been known to be the home to many large corporations both private and public. Justice Steele, Chief Justice of the Delaware Supreme Court, has reiterated the prominent reason why many corporations choose Delaware as the state of their incorporation is the presence of highly knowledgeable judges within the business law realm, as well as the predictability of its judicial system.¹ Therefore, it is no surprise that 51% of all public companies and 61% of Fortune 500 companies are incorporated in Delaware.² Nonetheless, the predictability of Delaware's judicial system may slowly be on the path to its demise.

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¹ 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, 376.

² Steele, *supra* note 1.

In April of 2009, the Delaware State Legislature amended the rules governing the resolution of disputes in the Court of Chancery.³ This law gives the Court of Chancery “the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute.”⁴ The arbitration procedure is “intended to preserve Delaware’s pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.”⁵

In order to have access to the arbitration procedure both parties must consent.⁶ Although an agreement does not need to be in place prior to the dispute arising, both parties must consent at the time they submit the dispute to the court.⁷ In addition to mutual consent, both parties must also meet certain criteria.⁸ Of the parties involved, at least one party must be a “business entity”⁹ and one party must be a citizen of the state of Delaware, although the same party can meet both criteria.¹⁰ If the parties are only seeking monetary damages, then the relief the parties seek must exceed one million dollars.¹¹

In essence, the newly enacted bill allows Delaware corporations, and in some cases non-business entities,¹² to elect arbitration as the means of resolving disputes, with a Delaware Chancery Court presiding judge serving as the arbitrator.¹³ On its face, the arbitration program seems like a great cost effective option for many corporations and non-business entities alike.¹⁴ The program comes at a much lower cost than the traditional option of litigation,¹⁵ all the while having a highly acclaimed and business savvy Delaware Chancery Court judge presiding over the case as an arbitrator.¹⁶ But much to Delaware’s surprise, the newly enacted Bill was not received with open arms.¹⁷ Instead, litigation has

³ DEL. CODE ANN. tit. 10, § 349 (West 2013).

⁴ *Id.* § 349(a).

⁵ Delaware Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493, 494 (D. Del. 2012).

⁶ DEL. CODE ANN. tit. 10, § 347(a)(1) (West 2013).

⁷ *Id.* § 349(a).

⁸ *Id.* §§ 349(a), 347(a), (b).

⁹ *Id.* § 346(b) (“A ‘business entity’ means a corporation, statutory trust, business trust or association, a real estate investment trust, a common-law trust, or any other unincorporated business, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or a limited liability company.”).

¹⁰ *Id.* §§ 349(a), 347(a)(2)–(3).

¹¹ *Id.* §§ 349(a), 347(a)(5).

¹² Compare DEL. CODE ANN. tit. 10, §§ 349(a), 347(a)(4) and DEL. CODE ANN. tit. 6, § 2731(1) (West) (Although one party may be a non-business entity the non-business entity may not be a consumer. See § 347(a)(4). A consumer is defined as “an individual who purchases or leases merchandise primarily for personal, family or household purposes.” § 2731(1)).

¹³ DEL. CODE ANN. tit. 10, § 349(a) (West 2013).

¹⁴ Steele, *supra* note 1, at 379.

¹⁵ John Q. Lewis, Louis A. Chalten & Nicholas B. Wille, *United States: The Delaware Court Of Chancery Offers New Arbitration Procedures For Confidential, Efficient Resolution Of Significant Business Disputes*, JONES DAY (Feb. 2010), http://www.jonesday.com/delaware_court_of_chancery (“The fees associated with the arbitration program include \$12,000 for filing the petition and \$6,000 for each day of the arbitration hearing. The fees are divided equally between the parties.”).

¹⁶ Steele, *supra* note 1, at 381.

¹⁷ Delaware Coal. for Open Gov’t. 894 F. Supp. 2d 493, 494 (D. Del. 2012).

ensued and public interest institutions have challenged the confidentiality of Delaware's arbitration proceeding on claims of unconstitutionality;¹⁸ more specifically, there have been claims of First Amendment violations.¹⁹ The plaintiff, Delaware Coalition for Open Government, Inc. ("DelCOG"), argues that the cases the Delaware Chancery Court hears under this program are, in actuality, civil litigation cases, simply masked as arbitration proceedings in order to claim the luxury of confidentiality.²⁰ DelCOG pleads that the First Amendment establishes a right of public access to civil judicial proceedings,²¹ and the procedures at issue are effectively civil judicial proceedings.²²

Part II of this article will discuss the constitutional analysis the courts, including the United States Supreme Court, have made in the past regarding litigation and the test they have employed in their analysis. Part III will analyze Delaware's arbitration program and whether it fits within the purview of what courts in the past have defined as "litigation." Part IV will discuss the impact, or lack thereof, of the District Courts holding in *Strine*. Finally, Part V will end with a short conclusion.

II. TRADITIONAL LITIGATION VERSUS ARBITRATION AND THE CONSTITUTION

A. Criminal Case History

The United States Supreme Court first recognized that the First Amendment grants the public access to attend and observe court proceedings in *Richmond Newspapers, Inc. v. Virginia*.²³ In the opinion, seven of the eight participating judges recognized that, at least in criminal proceedings, there was a long history of public access to judicial proceedings, and that public access promotes public confidence in the Judicial Branch of Government and an understanding of how the system works.²⁴ The Supreme Court reaffirmed the First Amendment right of public access to judicial proceedings established in *Richmond Newspapers* by a clear majority in *Globe Newspaper Co. v. Superior Court for the County of*

¹⁸ *Id.* at 498. "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'" *Id.* The Fourteenth Amendment extends these prohibitions to the states. *Id.*

¹⁹ *Id.*

²⁰ Complaint at 4, Delaware Coalition for Open Government, Inc. v. The Hon. Leo E. Strine, Jr., The Hon. John W. Noble, The Hon. Donald F. Parsons, Jr., The Hon. J. Travis Laster, The Hon. Sam Glasscock, III, The Delaware Court of Chancery, and the State of Delaware, No. CIV.A. 1:11-1015, 2012 WL 3744718 (D. Del. Aug. 30, 2012) (No. 11:11CV01015), 2011 WL 5042086.

²¹ *Id.*

²² *Id.*

²³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

²⁴ *Id.* at 577; Further stating:

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen.

Id.

*Norwalk*²⁵ and once more two years later in *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*.²⁶

B. Civil Case History

Although the aforementioned cases were regarding criminal proceedings, in *Richmond Newspaper*, the Supreme Court did address whether public access applies to civil proceedings, stating in a footnote: “[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”²⁷ Consequently, many lower courts have found that this right does in fact apply to civil proceedings as well, most notably in *Publicker Industries, Inc. v. Cohen*, which involved a corporate governance dispute.²⁸ In its ruling, the Third Circuit held that the “First Amendment guarantee of the public’s . . . right of access to criminal trials is applicable to civil cases.”²⁹ In finding a history of public access to civil proceedings, the Third Circuit concluded, “[t]he explanation for and the importance of this public right of access to civil trials is that it is inherent in the nature of our democratic form of government.”³⁰ The court in *Publicker Industries* further concluded that “to limit the public’s access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.”³¹ Since *Publicker Industries*, the Third Circuit has re-affirmed time and time again that the First Amendment right of public access does apply to civil judicial proceedings and records.³²

C. Experience and Logic Test

Accordingly, in order for courts to determine if there is a public right of access to a particular proceeding or record when faced with such an issue, the rule in the Third Circuit is to apply the “Experience and Logic” Test.³³ In applying the Experience and Logic Test, the court must consider (1) “whether a given government proceeding or an analogous proceeding has historically been open to the public,”³⁴ and (2) “whether openness serves a significant societal function.”³⁵

²⁵ *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982).

²⁶ *Press-Enter. Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1 (1986).

²⁷ *Richmond Newspapers*, 448 U.S. at 580 n.17 (1980).

²⁸ *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1061 (3rd Cir. 1984).

²⁹ *Id.* at 1067–68.

³⁰ *Id.* at 1069 (internal citations omitted).

³¹ *Id.* at 1070.

³² *Delaware Coal. for Open Gov't*, 894 F. Supp. 2d 493, 499 (D. Del. 2012); *see also* *In re Cendant Corp.*, 260 F.3d 183, 198 (3rd Cir. 2001); *U.S. v. A.D.*, 28 F.3d 1353, 1356 (3rd Cir. 1994); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157,161 (3rd Cir. 1993); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3rd Cir. 1991).

³³ *Delaware Coal. for Open Gov't*, 894 F. Supp. 2d 493, 499 (D. Del. 2012).

³⁴ Plaintiff's Brief in Opposition to Defendants' Motion for Judgment on the Pleadings and in Support of Plaintiff's Cross-Motion for Judgment on the Pleadings at 11, *Del Coal. for Open Gov't, Inc. v. Strine*, CIV.A. No. 1:11–1015, 2012 WL 3744718 (D. Del. Aug. 30, 2012) (No. 11–01015), 2012 WL 137000 at *11.

Once both tests are met, the right to public access attaches.³⁶ Courts look at both elements and there is no particular standard on which element has more weight in comparison to the other.³⁷ For example, a significant public benefit to openness may compensate for the absence of a history of openness.³⁸

III. COURTS' ANALYSIS OF DELAWARE'S ARBITRATION PROCEEDING: *DELCOG V. STRINE*

In analyzing Delaware's arbitration program, prior to the application of the Logic and Experience Test, the presiding judge in *Strine* first addressed a threshold question of whether Delaware "implemented a form of commercial arbitration to which the Court must apply the logic and experience test," or whether Delaware "created a procedure 'sufficiently like a trial' such that *Publicker Industries* governs?"³⁹ In answering this question, the Court alluded to the fact that simply labeling something a particular name does not necessarily mean that the event fits within the description or purview of its label.⁴⁰ In turn, simply labeling a proceeding "arbitration" does not automatically equate that proceeding to an actual arbitration when for all intents and purposes the proceeding is civil litigation.⁴¹ In analyzing whether Delaware's arbitration proceeding is in actuality civil litigation masked as arbitration, the court (1) compared and contrasted the similarities and differences among Delaware's arbitration proceeding, arbitration proceedings in general, and civil litigation; and the court (2) compared and contrasted the role of an arbitrator to the role of a judge.⁴²

A. *Arbitration Versus Litigation*

i. *Traditional Arbitration Versus Traditional Litigation*

Although arbitration and civil litigation are alike in many ways, they still maintain distinct differences.⁴³ In both proceedings, parties select a neutral decision maker to resolve their dispute.⁴⁴ The parties must both consent to

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See, e.g.,* *Simone v. Rubin*, 733 F.2d 837, 840; *see also* *U.S. v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) ("[T]he lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings.").

³⁹ *Delaware Coal. for Open Gov't*, 894 F. Supp. 2d 493, 500 (D. Del. 2012).

⁴⁰ *Id.* at 500. ("The label Delaware gives the proceeding offers little guidance. '[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the [proceeding at issue] functions much like a full-scale trial.'" (internal citations omitted).

⁴¹ *Id.* ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the [proceeding at issue] functions much like a full-scale trial.'" (internal citations omitted).

⁴² *Id.* at 501–504.

⁴³ *Id.* at 500.

⁴⁴ *Id.*

arbitration in order for the final decision to be binding.⁴⁵ The defining aspect of arbitration, and arguably a key distinction between arbitration and civil litigation, is the consent aspect of arbitration.⁴⁶ Furthermore, unlike litigation, traditional arbitration takes place outside the judicial process and the arbitrator is not a judicial officer.⁴⁷ In traditional litigation, the court has the ability to compel an unwilling party, whereas in arbitration, the parties have already willingly agreed to participate in the specified forum.⁴⁸ Moreover, in arbitration, parties have the ability to “craft arbitrations to their specific needs.”⁴⁹ The parties have the luxury of specifying the scope of the arbitrator’s authority as well as the procedural rules that will apply to the proceedings.⁵⁰ Alternatively, parties in litigation are subject to predetermined guidelines and procedural rules.⁵¹ Additionally, the presiding arbitrator’s decisions have no precedent for they are ad hoc decisions.⁵² Litigation, once again, has strict precedent guidelines that apply to cases.⁵³

ii. Delaware’s Arbitration Proceeding Versus Civil Litigation

Although labeled “arbitration,” the Delaware arbitration proceeding is in reality a civil trial.⁵⁴ When parties file their “petition for an arbitration proceeding, the Chancellor” selects the arbitrator who will hear the case, not the parties themselves.⁵⁵ Furthermore, the selected arbitrator is a presiding Delaware Chancery Court judge, whereas in traditional arbitration, the selected arbitrator is a third party. In addition, “many of the same rules” that govern discovery within “the Chancery Court apply to the arbitration” proceeding.⁵⁶

iii. Traditional Arbitrators Versus Traditional Judges

Where arbitration is very similar to traditional litigation, in the sense that both proceedings offer a set of remedies, a judge has many similar attributes to that of an arbitrator.⁵⁷ Much like a judge, an arbitrator, usually a neutral third party the parties select, hears the evidence and renders a decision.⁵⁸ And for this reason, an arbitrator presiding over arbitration “may look and act much like a judge.”⁵⁹

⁴⁵ *Id.*

⁴⁶ *Id.* (“The parties’ voluntary agreement to resolve their dispute through a decision maker of their choosing is the “essence of arbitration.”) (quoting *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir.2003)).

⁴⁷ *Id.* at 501.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 501–502

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 503.

⁵⁹ *Id.*

Yet aside from the large similarities, an arbitrator and a judge perform very distinctive functions.⁶⁰ As the court points out in its analysis, “[a]rbitrators act as a ‘private extraordinary Judge[], chosen by the Parties to give Judgments between them.’⁶¹ They are empowered by the parties’ consent and limited by the scope of that consent.⁶² They serve the parties.”⁶³ In comparing the attributes of an arbitrator to that of a judge the court further stated, “Judges, on the other hand, are empowered by their appointment to a public office.⁶⁴ They act according to prescribed rules of law and procedure.⁶⁵ They serve the public.”⁶⁶

iv. Delaware Arbitration Proceeding Arbitrators Versus Traditional Judges

As this article notes above, an arbitrator is usually a neutral third party that both parties to a dispute select.⁶⁷ But in the case of Delaware’s arbitration proceedings, this is not the case.⁶⁸ Instead, a Delaware sitting judge presides over the proceeding.⁶⁹ The court finds that “it is this fact which distinguishes the Delaware proceeding[s] from court-annexed arbitrations.”⁷⁰ And much like traditional civil proceedings, in Delaware’s Chancery Court “the judge conducts the proceedings in the Chancery courthouse with the assistance of Chancery Court staff.”⁷¹ And, unlike a neutral third party arbitrator the parties pay, the Chancery Court judge and staff are not compensated by the parties, but rather “are paid their usual salaries for [their] arbitration work.”⁷²

Moreover, in traditional arbitration proceedings, if one party refuses to comply, the other party may enforce the party’s obligation to comply through the court system.⁷³ Alternatively, in Delaware, the judge and the arbitrator are essentially the same people; therefore, the judge’s award results in a final judgment that state power enforces.⁷⁴ Beyond final awards, the judge acting as an arbitrator has “interim, interlocutory, or partial orders and awards” at his disposal.⁷⁵ These

⁶⁰ *Id.*

⁶¹ *Id.* (quoting A DICTIONARY OF ARBITRATION AND ITS TERMS 27, at 27–28 (Katharine Seide ed., Oceana Publications, Inc.) (1970).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 502. (“A sitting judge presides over the proceeding. It is this fact which distinguishes the Delaware proceeding from court-annexed arbitrations where third parties sit as arbitrators. Just as in any other civil case, the judge conducts the proceedings in the Chancery courthouse with the assistance of Chancery Court staff.”).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (citing Del. Ch. Ct. R. 98).

⁷⁵ *Id.* (citing Del. Ch. Ct. R. 98).

awards, along with final arbitration awards, are binding amongst the parties to the same extent as any court orders would be.⁷⁶ As such, these arbitration awards are essentially identical to a judge's orders in a traditional civil trial, with one major difference—since arbitration proceedings are confidential, the ruling or reasoning behind the ruling is not published.⁷⁷ This effectively serves to conceal the arbitrator's factual findings and the legal rules the arbitrator applied or, quite possibly, the judge should have applied.⁷⁸ Therefore, to conclude the comparison of Delaware's arbitration proceeding with that of a traditional arbitration proceeding and traditional civil litigation the court justly states:

In the Delaware proceeding, the parties submit their dispute to a sitting judge acting pursuant to state authority, paid by the state, and using state personnel and facilities; the judge finds facts, applies the relevant law, determines the obligations of the parties; and the judge then issues an enforceable order.⁷⁹ This procedure is sufficiently like a civil trial that *Publiker Industries* governs.

And the court ultimately concludes, “that the right of access applies to the Delaware proceeding created by section 349 of the Delaware Code. The portions of that law and Chancery Court Rules 96, 97, and 98, which make the proceeding confidential, violate that right.”⁸⁰

V. LOGIC AND EXPERIENCE TEST APPLIED TO DELAWARE'S ARBITRATION PROCEEDING

Based on the aforementioned analysis of the noticeable similarities between Delaware's arbitration proceeding and traditional civil litigation, the Court ultimately found “that the Delaware procedure is a civil judicial proceeding, [and] it is not necessary to reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in *Publiker Industries*.”⁸¹ However, had the court applied both tests, the results would ultimately be the same.⁸² In its short analysis the court states:

These benefits accrue to civil disputes among corporate citizens as well as to those between individuals, both of whom can participate in the Delaware procedure. Diverse business disputes may be submitted to the Chancery Court, and open proceedings can serve to educate the public about important legal and social issues. Public scrutiny discourages witness perjury and promotes confidence in the integrity of the courts. Public confidence that court proceedings are fair is protected when the public can access those proceedings and understand the reasoning supporting judicial findings and rulings.⁸³

Regarding the logic aspect of the test, the court goes on to state:

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 504.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

The public benefits of openness are not outweighed by the defendants' speculation that such openness will drive parties to use alternative non-public fora to resolve their disputes. 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.⁸⁴

IV. IMPACT

The court's ruling in *Strine* may not be as big a blow as many may set it out to be for the state of Delaware, which is constantly yearning to be on the leading edge of corporate governance, and for the most part, it accomplishes this goal. Arbitration for dispute resolution is still a relatively new option for legal conflicts, especially in Delaware.⁸⁵ Since arbitration is largely confidential, many business entities remain skeptical of this procedure and feel more at ease with traditional litigation.⁸⁶ As this article mentioned earlier, predictability is one of the enticing qualities of Delaware's judicial system.⁸⁷ Based on case precedent, with largely majority opinions, corporations incorporated in Delaware feel a sense of uniformity within the judicial system.⁸⁸ Putting this system behind closed doors may ultimately strip this enticing feature away.⁸⁹ Furthermore, many large corporations continuously prefer the traditional litigation route.⁹⁰ Corporations rarely negotiate choice of law and forum clauses when drafting agreements, opting to utilize standard boilerplate languages instead.⁹¹ So, on its face, the *Strine* decision may seem like a blow to the state of Delaware and its ability to continue to entice many large corporations to incorporate within their state, but in actuality it may just be the opposite.⁹² Many corporations may possibly have no concern

⁸⁴ *Id.*

⁸⁵ 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 (stating "It is fairly new in the legal community so it's not used as much, but it has been used in agreements and I know that parties have discussed putting it in there.")

⁸⁶ Monica Shilling, Partner, Proskauer Rose, LLP, 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, 384. Shilling commented that her clients tend to always prefer litigation:

So in Delaware, especially on the corporate side, you have predictability, ease of use, and flexibility, and so we all use Delaware. Twenty years ago, you didn't see people all that comfortable with LLC's because they weren't and now you see LLC's all over the place. So when I think about that, and I think about what this sort of arbitration system could do, on the litigation side, it's really disappointing that we're stuck right now. In my deals, I tend to work with financial service clients. They tend to have a confidence about their ability to win anything; so you almost never see arbitration provisions in those documents.

Id.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Robert Anderson, Professor, Pepperdine Univ. Sch. of Law, Keynote Address at the Journal of Business, Entrepreneurship, & the Law Symposium: Delaware's Closed Door Arbitration: What the

with such a decision.

V. CONCLUSION

In conclusion, the Delaware arbitration proceeding is in actuality a civil litigation proceeding that the Delaware courts have simply labeled as “arbitration.” The process of traditional arbitration differs greatly from that of Delaware’s “arbitration” proceedings. Furthermore, the process of Delaware’s arbitration proceeding has many noticeable similarities to that of civil litigation. And, such similarities are not minute, but rather are the attributes that define civil litigation and break it way from arbitration. Therefore, the district court was correct in finding that Delaware’s arbitration proceeding was a clear violation of the First Amendment. Indeed, such a decision has not stripped away Delaware’s competitive edge or arguably affected it at all, evidenced by the panel first hand experiences with their clients’ lack of desire to opt into arbitration versus traditional litigation. Henceforth, the decision in the *Strine* case has not eliminated the appeal of incorporating in Delaware for large public companies, for such companies would not have consented to arbitration even if it were an option.

Future Holds For Large Business Disputes and How It Will Affect M&A Deals (Oct. 30, 2012), in 6 J. BUS. ENTREPRENEURSHIP & L. 375, 385. When Professor Anderson asked the speakers, “And I think a big question about this so...why hadn’t more companies arbitrated under this procedure?” the general response from panelists was, “It’s the last on the list, if anything. It’s a throw-in.” This exemplifies the desire for many large corporations to choose traditional litigation over arbitration.