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The Delaware Arbitration Experiment: Not Just a “Secret Court”

Jessica Tyndall

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THE DELAWARE ARBITRATION EXPERIMENT: NOT JUST A “SECRET COURT”

BY: JESSICA TYNDALL*

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I. INTRODUCTION

Delaware has long been at the “cutting-edge” in resolving commercial disputes and providing contemporary statutory corporate governance principles.¹ The Corporate Council, an arm of the Delaware State Bar Association, meets annually to update the Delaware corporation law as needed, in order to provide its chartered corporations with significant advantages over corporations chartered elsewhere.² Accordingly, 51% of the publicly traded companies in the United States, and 61% of the Fortune 500 companies are chartered in Delaware.³

In April 2009, in order to preserve Delaware’s pre-eminence in offering cost-effective dispute resolution, the Corporate Council set forth an initiative, which the Delaware State Legislature adopted into statute, that amended the rules governing the Court of Chancery to permit the court to arbitrate disputes upon consent of the

* Pepperdine University School of Law J.D. Candidate 2014

¹ H.R. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009); 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.

³ *Id.*

parties.⁴ The genesis of the initiative was the presumption that the arbitration program was one that was “needed and desired by the business community” as an alternative to otherwise expensive litigation.⁵ The arbitration program, in addition, was believed to provide a suitable forum for international disputants because it would guarantee participants that disputes would be arbitrated by widely recognized and competent business court judges, who are familiar with the laws that govern business agreements and, additionally, it would provide an award enforceable in other nations.⁶

The arbitration program has not, however, been without critics. The cornerstone of the arbitration program, as with all arbitration, is confidentiality.⁷ Because the arbitration program is confidential, critics have argued that it creates a “secret court” and violates the First Amendment right of access to court proceedings.⁸

II. HISTORICAL BACKGROUND

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press”⁹ The Fourteenth Amendment extends these prohibitions to the states and bars government interference with either the speaker or the listener.¹⁰

A. Litigation

In 1980, through the splintered opinions comprising *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court ruled that the First Amendment entitles the public and press the right to attend criminal trials.¹¹ In *Richmond Newspapers*, the Supreme Court reviewed a Virginia trial court’s decision to exclude the public and press from a murder trial.¹² In his plurality opinion, Chief Justice Burger traced the historic practice of open criminal trials from the earliest recorded proceedings in Anglo-American history,¹³ and concluded that such practice was “unbroken”, and “uncontradicted.”¹⁴ Further, the Chief Justice described several public benefits that were derived from the practice of openness, including honesty from witnesses and reasoned decision making from jurists.¹⁵ Because the Court found

⁴ DEL. CODE ANN. tit. 10, § 349(a) (2009).

⁵ Steele, *supra* note 1, at 376-377.

⁶ *Id.*

⁷ ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 93–94 (2001) (“Confidentiality is generally considered a bedrock principle for most ADR procedures. Thus, participants in court-based ADR are usually assured at the outset of the process that their communications will be kept confidential.”), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/\\$file/ADRGuide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/$file/ADRGuide.pdf).

⁸ Steele, *supra* note 1, at 378, 382.

⁹ U.S. CONST. amend. I.

¹⁰ See U.S. CONST. amend. XIV.

¹¹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

¹² *Id.* at 555.

¹³ *Id.* at 556.

¹⁴ *Id.* at 573.

¹⁵ *Id.* at 556.

that criminal trials were historically open to the public and that such openness promoted public benefits, it found that the First Amendment protects the public's right of access to such historically open proceedings.¹⁶

Through Circuit Court opinions, the holding of *Richmond Newspapers* has been extended to grant the public the right of access to civil litigation, granted that there is no important countervailing interest.¹⁷ In *Publicker Industries, Inc. v. Cohen*, the Third Circuit explained that, similar to criminal trials, civil trials have historically been presumed to be open to the public in the Anglo-American legal system.¹⁸ The Third Circuit subsequently opined that many of the same rationales supporting the openness of criminal trials applied equally to civil trials.¹⁹

B. Experience and Logic Test

The Third Circuit has adopted the experience and logic test to determine if there is a public right of access to a particular proceeding or record, if there is no prior precedent.²⁰ Under this test, when a court assesses a claimed First Amendment right of access, it must consider “[1] whether the place and process have historically been open to the press and general public . . . [and] [2] whether public access plays a significant positive role in the functioning of the particular process in question.”²¹ The two prongs, known as the “experience test” and the “logic test” respectively, must both be satisfied to sustain a constitutional challenge under the First Amendment.²²

III. ANALYSIS

A. Facts

On October 25, 2011, the Delaware Coalition for Open Government (“DelCOG”) filed a complaint in the United States District Court for the District of Delaware, alleging that the Delaware arbitration proceeding violated the First Amendment right of access.²³

The Delaware arbitration procedure is ultimately adjudicatory, however, settlement alternatives and non-adversarial options for resolution are embedded in the program and are encouraged at “nearly every stage.”²⁴ In order to utilize the

¹⁶ *Id.* at 580.

¹⁷ *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

¹⁸ *Id.* at 1068–69.

¹⁹ *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002).

²⁰ *Id.* at 208–09.

²¹ *Press-Enter. v. Superior Court*, 478 U.S. 1, 8 (1986).

²² *See id.* at 201–02.

²³ Complaint at 1, *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 11–01015), 2011 WL 5042086.

²⁴ *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 503 (D. Del. 2012); *see* DEL. CH. CT. R. 96(d)(3) (requiring that during the telephonic preliminary conference, and at the telephonic preliminary hearing, the parties must discuss “whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.”); DEL. CH. CT. R. 98(d) (The parties “may agree at any stage of the arbitration process to submit the dispute to the Court for mediation.”); DEL. CH. CT. R. 98(e) (“The parties may agree, at any stage of the arbitration process, to seek the assistance of the Arbitrator in

arbitration, a party must meet several requirements. First, the parties must consent to participate in arbitration at the time the dispute is submitted to the court.²⁵ Second, at least one party to the dispute must be a business entity and one party must be a citizen of the state of Delaware, although the same party can satisfy both requirements.²⁶ Third, if a plaintiff solely pursues monetary damages, the amount in controversy must exceed one million dollars.²⁷ Because the Court of Chancery has traditionally limited equitable jurisdiction, Chancery arbitration allows some parties to access Chancery Court Judges when they would otherwise be unable to do so.²⁸

The Court of Chancery adopted Rules 96, 97, and 98 on January 5, 2010 in order to administer the arbitration proceedings.²⁹ In accordance with these rules, parties seeking to arbitrate their dispute must file a petition with the Register in Chancery.³⁰ Subsequently, the Chancellor appoints a Chancery Court judge to preside over the case as an arbitrator.³¹ The arbitrator holds a preliminary conference within ten days of the petition's filing,³² a preliminary hearing as soon as practicable,³³ and a hearing approximately ninety days after the petition's filing.³⁴

Both parties, including at least one representative on each side with the authority to resolve the matter, are required to participate in the arbitration.³⁵ Prior to the hearing, the parties and arbitrator together can agree to modify and adopt additional rules for the arbitration.³⁶ If no agreement is reached, Chancery Court Rules 2637 apply by default.³⁷

While the arbitrator does have the power to issue interim, interlocutory, or partial rulings, orders, and awards, they are not enforced by the power of the state

reaching settlement with regard to the issues identified in the petition prior to a final decision from the Arbitrator.”).

²⁵ DEL. CODE ANN. tit. 10, § 347 (2009). There is no requirement that the parties have an agreement to arbitrate their disputes prior to the dispute arising. *Id.*

²⁶ *Id.* § 347(a)(2)–(3). Neither party, however, may be a consumer. *Id.* § 347(a)(4). A consumer is defined as an individual who purchases or leases merchandise for personal use. DEL. CODE ANN. tit 6 § 2731(1).

²⁷ DEL. CODE ANN. tit 10, § 347(a)(5). If a plaintiff pursues an equitable remedy, even if in conjunction with monetary damages, there is no amount in controversy criteria. *Id.*

²⁸ *Del. Coal. for Open Gov't*, 894 F. Supp. 2d at 495 (citing Kevin F. Brady & Francis G.X. Pileggi, *Recent Key Delaware Corporate and Commercial Decisions*, 6 N.Y.U. J.L. & BUS. 421, 456 (2010)).

²⁹ DEL. CH. CT. RS. 96–98.

³⁰ *Id.* 97(a). The petition certifies that the jurisdictional requirements are met and states the nature of the dispute, the claims contended, and the remedies sought. *Del. Coal. for Open Gov't*, 894 F. Supp. 2d at 495.

³¹ DEL. CH. CT. R. 96(d)(2).

³² *Id.* 97(c).

³³ *Id.* 97(d). At the preliminary hearing, the parties and the arbitrator discuss the claims of the dispute, the remedies sought, the defenses asserted, the legal authorities to be relied on, the scope of discovery, the evidence to be presented at the arbitration hearing, and “the possibility of mediation or other non-adjudicative methods of dispute resolution.” *Id.* 96(d)(4).

³⁴ *Id.* 97(e).

³⁵ *Id.* 98(a).

³⁶ *Id.* 96(c).

³⁷ *Id.*

in the same way that a court award would be.³⁸ The arbitrator may issue a final award after the hearing, granting “any remedy or relief that the arbitrator deems just and equitable and *within the scope* of any applicable agreement of the parties.”³⁹ While it is not made public,⁴⁰ a final judgment or decree is entered in accordance with the award, and is enforced as any other judgment.⁴¹ The award may be appealed, but only on the limited grounds available under the Federal Arbitration Act.⁴² At this point, a record of the proceedings may be made public.⁴³

Following disclosure by Advanced Analogic Technologies, Inc. that it had initiated an arbitration proceeding in the Court of Chancery, DelCOG filed its complaint against the Delaware Court of Chancery judges.⁴⁴ Both parties moved for judgment on the pleadings.⁴⁵

B. Analysis

In her opinion, Judge McLaughlin, a Pennsylvania judge sitting by designation in the United States District Court for the District of Delaware, assessed whether Chancery arbitration offended the First Amendment right of access. Following a statement of facts and procedural history, Judge McLaughlin established that before the court could consider the experience and logic test, it had to address a threshold question: whether Delaware implemented a form of commercial arbitration sufficiently distinguishable from a trial that the court must apply the experience and logic test, or whether it created a procedure sufficiently similar to a trial, such that the court must apply the precedent established *Publicker Industries*.⁴⁶ By comparing the tenets of arbitration with those of civil litigation, the court reached the conclusion that the procedure was comparable to civil

³⁸ See *id.* 98(f)(2). While the holding in *Delaware Coalition for Open Government* suggests that these orders “bind the parties much as any court orders would,” *Del. Coal. For Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 503 (D. Del. 2012), a reading of the Rules indicates otherwise. Compare DEL. CH. CT. R. 98(f)(2) (“In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards.”), with 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.”). If all awards under Rule 98(f) were intended to be enforced as any other judgment, the clause would not have only appeared in subsection (3). This is consistent with section 349(c) of the Delaware Code, which provides that either party may apply to the Supreme Court of Delaware to “enforce an order of the Court of Chancery,” which would be an irrelevant provision if all orders were already enforceable by state power. DEL. CODE ANN. tit. 10, § 349(c) (2009) (emphasis added).

³⁹ DEL. CH. CT. R. 98(f)(1) (emphasis added).

⁴⁰ DEL. CODE ANN. tit. 10, § 349(b) (“Arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal.”).

⁴¹ DEL. CH. CT. R. 98(f)(3).

⁴² DEL. CODE ANN. tit. 10, § 349(c). An arbitration judgment can only be vacated if there is a showing of fraud, corruption, undue means in procuring the award, partiality, corruption, certain misconduct on the part of the arbitrator, or the arbitrator exceeded his powers or failed to make a final award. 9 U.S.C. § 10(a). An arbitration award cannot be vacated on the showing of legal error. *Id.*

⁴³ DEL. CODE ANN. tit. 10, § 349(b).

⁴⁴ *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 494 (D. Del. 2012); Defendants’ Opening Brief in Support of their Motion For Judgment on the Pleadings at 9, *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d 493 (No. 11–01015), 2011 WL 6401166 [hereinafter Defendants’ Opening Brief].

⁴⁵ *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 494.

⁴⁶ *Id.* at 500.

litigation and, as such, it was “not necessary to reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in *Publicker Industries*.”⁴⁷ Rather, the court concluded that the right of access applies to the Delaware proceeding.⁴⁸

i. Chancery Arbitration is Analogous to Civil Litigation

The court first turned to the threshold question of whether Chancery arbitration is sufficiently distinguishable from civil litigation, such that the court would be required to apply the experience and logic test.⁴⁹ Upon a comparison of arbitration and litigation, the court found that the Delaware proceeding, while labeled arbitration, is essentially a civil trial.⁵⁰ The court proffered four primary arguments for this conclusion.⁵¹

First, the court found that the Delaware proceeding is analogous to a civil trial because the Chancellor, and not the parties, has the duty to designate the specific judge to arbitrate the dispute.⁵² As such, the court found that the proceeding is readily distinguishable from arbitration, given that the “essence of arbitration” is that the parties voluntarily agree “to resolve their dispute through a decision maker of their choosing.”⁵³

Second, the court concluded that the Delaware proceeding is similar to litigation because “many of the same rules governing discovery in the Chancery Court apply to the arbitration.”⁵⁴ The court noted that because parties to an arbitration may craft their own procedures, while parties to civil litigation must “follow[] the court’s procedures and guidelines,” the Delaware proceedings are distinguishable from arbitration and similar to civil litigation.⁵⁵

Third, the court posited that the Delaware proceeding modeled a civil trial because a sitting judge, in his duties as a public officer,⁵⁶ presides over the

⁴⁷ *Id.* at 504.

⁴⁸ *Id.*

⁴⁹ *Id.* at 500.

⁵⁰ *Id.* at 502.

⁵¹ *Id.* at 502–03.

⁵² *Id.* at 502.

⁵³ *Id.* at 500 (quoting *Dluhos v. Strasber*, 321 F.3d 365, 369 (3d Cir. 2003)). It is recognized, however, that if the parties to the dispute agree to have a third party designate the arbitrators, the parties are still choosing their arbitrator. *Davis v. Forshee*, 34 Ala. 107, 109 (1859), *disapproved of on other grounds*, *Vines v. Crescent Transit, Inc.*, 267 Ala. 232, 234 (1958).

The fact that in this case the arbitrators were named and chosen by the clerk of the court, cannot alter the principle. This power was expressly conferred on him by the terms of the submission; he acted as the agreed agent of both of the parties; and we must presume, in the absence of evidence to the contrary, that the persons selected were satisfactory to the parties litigant. The maxim applies, *qui facit per alium, facit per se*.

Davis, 34 Ala. at 109.

⁵⁴ *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 502.

⁵⁵ *Id.* at 500. Conversely, arbitrations are characterized by the parties’ ability to “craft arbitrations to their specific needs,” and “design the applicable procedural rules.” *Id.* (citing Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 106 (1997)).

⁵⁶ *Id.* at 501. Specifically, the sitting judge “conducts the proceedings in the Chancery courthouse, with the assistance of Chancery Court staff,” and is not compensated privately. *Id.* at 503.

arbitration. The court observed that “[e]ven with the proliferation of alternative dispute resolution in courts, judges in this county do not take on the role of arbitrators,”⁵⁷ and further indicated that “the judge’s public role and obligations prevent a sitting judge from acting as an arbitrator for even consenting parties.”⁵⁸ The court distinguished the Delaware proceeding from court-annexed arbitrations because in such arbitrations, third parties, often lawyers, sit as arbitrators.⁵⁹ While the court admitted that magistrate judges are permitted by statute to oversee court-annexed arbitrations, it also noted that there are no records of such an instance.⁶⁰ Noting that “[a] judge bears a special responsibility to serve the public interest,” and that that obligation in addition to the public role of that job, “is undermined when a judge acts as an arbitrator bound only by the parties’ agreement,” the court concluded that a sitting judge is fundamentally different than an arbitrator. As such, the court found that the Delaware proceeding mirrors litigation.⁶¹

Fourth, the court determined that because the judge’s final arbitration award results in an enforceable judgment, the Delaware proceeding is dissimilar to arbitration, where parties cannot enforce compliance except by pursuing enforcement through a court.⁶²

Determining that the Delaware proceeding is a civil judicial proceeding, rather than an arbitration, the court did not find it necessary to reiterate the analysis of the experience and logic test performed by the Court of Appeals in *Publicker Industries*.⁶³ Rather, it concluded that the public benefits of openness⁶⁴ were not outweighed by the speculation that parties would arbitrate their disputes in other available private fora.⁶⁵ Accordingly, the court concluded that the First Amendment right of access applies to the Delaware proceeding and that the portions of law that make the proceeding confidential violate that right.⁶⁶

IV. CRITIQUE

While the court addressed several similarities between Chancery arbitration and civil litigation, it did not address the fundamental differences.⁶⁷ First, Chancery arbitration is fundamentally different than civil litigation because it requires consent.⁶⁸ Unlike litigation, in which a plaintiff may bring a suit against

⁵⁷ *Id.* at 502 (citing ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 29–34 (1996)).

⁵⁸ *Id.* (citing *Elliott & Ten Eyck P’ship. v. Long Beach*, 67 Cal. Rptr. 2d 140 (Ct. App. 1997); *Heenan v. Sobati*, 117 Cal. Rptr. 2d 532 (Ct. App. 2002)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 503.

⁶² *Id.*

⁶³ *Id.* at 503–04.

⁶⁴ *Id.* at 504. Such benefits include public education about important legal and social issues, public scrutiny that discourages perjury and promotes confidence in the integrity of the courts, and public confidence that court proceedings are fair. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See generally id.*

⁶⁸ *See* DEL. CH. CT. R. 97(a)(3) (providing that the arbitration process is commenced by a petition, which “must also contain a statement that all parties have consented to arbitration by agreement or

an unwilling defendant and may have judgment entered in his favor by default if the defendant fails to appear, both parties to Chancery arbitration must consent to the procedure at the time of filing.⁶⁹ Accordingly, in Chancery arbitration, no party may be compelled to attend against its wishes, nor may either be subject to a judgment without a fair opportunity to be heard.⁷⁰ Because jurisdiction for Chancery arbitration does not extend to non-consenting parties, the legal rights and obligations of those parties cannot be affected in the same way as in litigation.⁷¹ This distinction so substantially limits the power and jurisdiction of the Court of Chancery that it would be improper to characterize Chancery arbitration as a “non-jury trial.”⁷²

Second, as a natural extension of consent, Chancery arbitration is fundamentally different than civil litigation because the authority of the decision maker is derived from a private agreement and not from the public.⁷³ Consequently, while a judge overseeing a civil trial is limited by precedent, a judge to Chancery arbitration is limited by the scope of the parties’ agreement.⁷⁴ The court deciding *Delaware Coalition for Open Government* contends that “[t]he parties’ consent cannot alter the judge’s obligation in his public role as a judicial officer.”⁷⁵ At its heart, this argument addresses a public policy concern that a sitting judge, acting in his capacity as a judicial officer, may issue a private ruling that, in effect, limits his accountability to the public.⁷⁶ There is, however, nothing revolutionary about a sitting judge serving as an arbitrator. Historically, sitting

stipulation . . .”).

⁶⁹ *Id.*

In court, a failure to appear or file a written response to pleadings can result in a default judgment. The concept of a default judgment is not recognized in arbitration. In arbitration, if the respondent does not appear, the claimant must still sustain its burden of proof and submit evidence sufficient to sustain the award.

John Arrastia, Jr. & Christi L. Underwood, *Arbitration v. Litigation: You Control The Process v. The Process Controls You*, 64 DISP. RESOL. J. 31, 34 (2009–2010).

⁷⁰ DEL. CH. CT. R. 98(a) (“At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter *must* participate in the arbitration hearing.”) (emphasis added).

⁷¹ *Compare* DEL. CH. CT. R. 97(a)(3) (providing that the arbitration process is commenced by a petition, which “must [] contain a statement that all parties have consented to arbitration by agreement or stipulation. . . .”), *and* DEL. CH. CT. R. 98(a) (“At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the arbitration hearing.”), *with* Fed. R. Civ. P. 55(a) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, . . . the clerk must enter the party’s default.”), *and* Fed. R. Civ. P. 55(b)(1) (“[T]he clerk . . . must enter judgment . . . against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.”).

⁷² *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 494 (D. Del. 2012); *See* FED. R. CIV. P. 55(b)(1) (The clerk “must enter judgment . . . against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.”); *Phoceene Sous-Marin, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982) (“It is firmly established that the courts have inherent power to . . . enter a default judgment to ensure the orderly administration of justice and the integrity of their orders.”); Arrastia & Underwood, *supra* note 69.

⁷³ Steele, *supra* note 1, at 379.

⁷⁴ *See* DEL. CH. CT. R. 98(f)(1) (“The Arbitrator may grant any remedy . . . within the scope of any applicable agreement of the parties.”); Arrastia & Underwood, *supra* note 68.

⁷⁵ *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 503.

⁷⁶ *See id.* at 503 (“The public does not know the factual findings the judge has made or what legal rules the judge is, or should be, applying to these arbitrations.”).

judges have rendered binding decisions outside of open court by party agreement.⁷⁷ Further, “[t]he American Bar Association Model Code of Judicial Conduct allows arbitration by judges as part of their official duties.”⁷⁸ Finally, the Alternative Dispute Resolution Act of 1998 permits sitting magistrate judges to serve as arbitrators in court-sponsored arbitrations, which may result in binding judgments.⁷⁹ This notion that a judge may serve as an arbitrator is consistent with the fact that many judicial activities aimed at resolving the dispute prior to litigation are conducted outside of the public’s purview.⁸⁰ Given that it is not in violation of public policy for a sitting judge to serve as an arbitrator, the court deciding *Delaware Coalition for Open Government* was wrong to rely so heavily on the proposition that a sitting judge, by public interest, must necessarily act differently than an arbitrator. Because the judges in Chancery arbitration do serve the function of arbitrators, as they are limited in their decision by the scope of the parties’ agreement, Chancery arbitration cannot be likened to civil litigation.

Third, Chancery arbitration is fundamentally different than civil litigation because the rules may be modified by the participants.⁸¹ While Chancery Court Rules 26–37 apply to the arbitration by default, prior to the hearing, the parties and arbitrator together can agree to modify and adopt additional rules for the arbitration.⁸² Because Chancery Court Rule 45 does not govern the arbitration, the parties are *required* to create their own rules for discovery matters such as the procedure for issuing subpoenas.⁸³ This flexibility and choice is often recognized

⁷⁷ JOHN T. MORSE, JR., *THE LAW OF ARBITRATION AND AWARD* 105–06 (1872). Historically, it was common for parties to stipulate that a trial be held before the judge at chambers, functioning much like a settlement conference in which the judge would evaluate the merits of the case. See *Beach v. Beckwith*, 13 Wis. 21, 21 (1860) (holding that “[w]here the parties to an action . . . stipulate that it may be tried before the judge at chambers, and the finding be filed and judgment entered with the same effect as though the trial were had before the court without a jury, a judgment entered in pursuance of such stipulation must be regarded as though actually entered upon a trial before the court”). In addition, at one point, American judges were permitted to be compensated for privately refereeing cases that were scheduled on their dockets. See *Dinsmore v. Smith*, 17 Wis. 20, 23–24 (1863) (upholding an award granted by a judge serving as a paid referee to a dispute that appeared on his docket on the grounds that it was analogous to having a case tried before the judge at chambers), *overruled in part by Hills v. Passage*, 21 Wis. 294, 295–97. While *Dinsmore* was overruled, it was overruled on the grounds that a judge serving as a referee cannot enter a judgment against a party unless the agreement expressly provides for it. *Hills*, 21 Wis. at 296. The court in *Hills* further provided that a judge serving as a private referee is primarily problematic only if he is compensated for the services:

We know of no law authorizing a judge, even by consent of parties, to refer a cause to himself as referee, with a stipulation for and followed by an actual payment of fees to him under color of services as referee. We think such practice is against the policy of the law. If the services are to be regarded as rendered by him as a judge at chambers, as intimated in *Dinsmore v. Smith*, the constitution *prohibits his receiving fees* for such services.

Id. at 297 (emphasis added).

⁷⁸ Steele, *supra* note 1, at 378.

⁷⁹ 28 U.S.C. § 653(a), (b) (2012).

⁸⁰ Steele, *supra* note 1, at 380. For example, there is no public right of access to judicial mediations or settlement conferences. *Id.*

⁸¹ See Tom Hals, *Ruling Bars Private Arbitrations in Delaware Chancery Court: Del. Coalition for Open Government v. Honorable Leo Strine*, 27 No. 5 WESTLAW J. DEL. CORP. 9, at *2 (2012) (“Attorneys . . . praised [Chancery arbitration] for the . . . ability of the parties to craft their own procedures.”).

⁸² DEL. CH. CT. R. 96(c).

⁸³ See *id.* 96(d)(4).

as the most axiomatic difference between arbitration and litigation.⁸⁴ Because Chancery arbitration contains the flexibility of private arbitration, it cannot properly be analogized to litigation.

Fourth, Chancery arbitration is fundamentally different than civil litigation because an award granted in the arbitration is readily distinguishable from a judgment granted in litigation.⁸⁵ Unlike the interim and partial awards granted by judges in civil trials, such awards granted in Chancery arbitration are not enforceable by state power.⁸⁶ As such, a party seeking to enforce the award must petition the Supreme Court of Delaware.⁸⁷ While final awards are binding by state power, they vary from judgments awarded in litigation in a more fundamental way. Unlike trial court judgments, arbitration awards and orders may only be appealed on the grounds recognized under the Federal Arbitration Act.⁸⁸ This precludes an appeal on the merits.⁸⁹ As such, an award granted in Chancery arbitration is much more ironclad than a trial court judgment.⁹⁰ This difference prevents Chancery arbitration from being characterized as a private civil trial.

DelCOG asserts that these are “minor differences in procedure [and] are not a relevant consideration[s].” It is well recognized, however, that the most axiomatic difference between arbitration and litigation is flexibility and choice, which is applied to nearly all aspects of Chancery arbitration.⁹¹ The fact that a sitting judge serves as an arbitrator is not a sufficient distinction to cause Chancery arbitration to mirror anything other than arbitration.⁹² Accordingly, the court had a duty to apply the experience and logic test.

⁸⁴ See Arrastia, *supra* note 69, at 32 (“The core concept of arbitration is flexibility.”); Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 1 (2010) (“The most important difference between arbitration and litigation—and the fundamental value of arbitration—is the ability of users to tailor processes to serve particular needs.”).

⁸⁵ See DEL. CODE ANN. tit. 10, § 349(c).

⁸⁶ See *supra* note 38 and accompanying text.

⁸⁷ See *supra* note 38 and accompanying text.

⁸⁸ DEL. CODE ANN. tit. 10, § 349(c).

⁸⁹ See 9 U.S.C. § 9, 10(a) (2012). An award may only be appealed on the following grounds:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

9 U.S.C. § 10(a) (2012).

⁹⁰ Kathleen M. Scanlon, *Guidance on Arbitration Awards: ‘Finality vs. Reviewability’*, 19 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (2001) (“The almost ironclad finality of an arbitration award has been a hallmark of arbitration.”). This feature has long been considered a chief advantage over litigation, as it promotes faster resolution and cost savings. *Id.*

⁹¹ See *supra* note 82 and accompanying text.

⁹² See 28 U.S.C. § 653(b) (2012). Court-annexed arbitration is still arbitration, even if a magistrate judge serves as the arbitrator. See *id.*; Morse, *supra* note 75, at 105–06 (“If no proceedings are pending or contemplated in court, there is of course no objection to selecting a judge to act as an arbitrator [and] [o]n the contrary, it is very common so to do. . . .”).

A. The Delaware Coalition for Open Government Did Not Satisfy the Experience Test

Given that Chancery arbitration is not analogous to litigation, the court should have analyzed whether arbitration has historically been open to the public. For the purposes of satisfying the experience test, a strong historical precedent for openly conducting the type of proceeding at issue must be present.⁹³

Unlike criminal or civil trials, arbitrations have historically been closed to the public.⁹⁴ “In English law . . . it has for centuries been recognized that arbitrations take place in private.”⁹⁵ Not only does the first American treatise on arbitration support this proposition,⁹⁶ but the court deciding *Delaware Coalition for Open Government*, itself, admits that “[a]s the product of private agreement between the parties, historically, arbitrations have been conducted outside the public view.”⁹⁷

The prevalence of privacy in arbitration is more recently recognized by the adoption of court sponsored arbitration systems, mediation programs, and early neutral evaluation programs in the 1970s.⁹⁸ By 1998, one-quarter of federal district courts and one-half of state courts had either mandatory or voluntary arbitration programs as part of their judicial process.⁹⁹ In 1998, Congress passed the Alternative Dispute Resolution Act, which requires each United States district court to “devise and implement its own alternative dispute resolution program, by local rule . . . to encourage and promote the use of alternative dispute resolution in its district,”¹⁰⁰ and to “provide litigants in all civil cases with at least one alternative dispute resolution process.”¹⁰¹ Even if the chosen alternative dispute resolution program is arbitration,¹⁰² the court must “provide for . . . confidentiality . . . and . . . prohibit disclosure of confidential dispute resolution communications.”¹⁰³

Because there is a clear history of arbitration being closed to the public, the experience test is satisfied.

⁹³ *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 213 (3d Cir. 2002).

⁹⁴ Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT’L L.J. 121, 122 (1995) (citing Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 432–34 (2d ed. 1989)).

⁹⁵ *Id.*

⁹⁶ See MORSE, *supra* note 75, at 116.

⁹⁷ *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 501 (D. Del. 2012).

⁹⁸ Katherine V.W. Stone, *Alternative Dispute Resolution*, in 1 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 131 (Stanley N. Katz ed. 2009).

⁹⁹ *Id.*

¹⁰⁰ 28 U.S.C. § 651(b) (2012).

¹⁰¹ *Id.* § 652(a).

¹⁰² Courts may not require participation in arbitration without the parties’ consent. *Id.* Courts may not arbitrate constitutional cases, civil rights cases, and cases in which damages of more than \$150,000. *Id.* § 654(a). A party to an arbitration may request a trial *de novo* for any reason. *Id.* § 657(c)(1). If neither party requests a trial within thirty days of the arbitration, however, the arbitration is binding *as a court judgment* and is not appealable on the merits. *Id.* § 657(a), (c)(1).

¹⁰³ 28 U.S.C. § 652(d). See, e.g., NIEMIC ET AL., *supra* note 7, 93–94 (“Confidentiality is generally considered a bedrock principle for most ADR procedures. Thus, participants in court-based ADR are usually assured at the outset of the process that their communications will be kept confidential.”).

B. The Delaware Coalition for Open Government Did Not Satisfy the Logic Test

Even if DelCOG could succeed in establishing the experience test, it would not be able to establish the logic test. The logic test provides that public access must play a “significant positive role in the functioning of the particular process in question” in order for a constitutional challenge to be sustained.¹⁰⁴ Any inquiry into whether a role is positive must also include an inquiry into whether that role is potentially harmful.¹⁰⁵ In the instant case, not only does public right of access to Chancery arbitration fail to actually provide access to the arbitrations in question, it also harms Delaware’s ability to employ a creative dispute resolution process, in effect, harming both potential users and the state itself.

First, pursuant to the logic test, one must look to whether right of access to a particular procedure plays a significant positive role in its functioning.¹⁰⁶ The purported benefits of openness generally include honesty from witnesses, reasoned decision making from the fact finders, public education about the judicial system, public awareness of social and legal issues, and public confidence in the judiciary.¹⁰⁷ In some instances, however, public scrutiny can undermine the very function of the procedure itself, particularly when the purpose of the procedure “is to further an alternative dispute resolution mechanism.”¹⁰⁸ Chancery arbitration must necessarily occur in private so that parties are free and encouraged to engage in non-adjudicative dispute resolution,¹⁰⁹ which often requires parties to disclose potentially damaging information that, if not for privacy, would otherwise be withheld.¹¹⁰ In addition, right of access undermines the cornerstone of Chancery arbitration: privacy.¹¹¹ An enforceable right of access to Chancery arbitration would therefore alter the way the process is conducted by impeding the Chancery Court’s ability to resolve the dispute.¹¹² Because the function of Chancery arbitration is undermined by public access, parties who would otherwise engage in Chancery arbitration will instead choose a private, alternative arbitral forum.¹¹³ Accordingly, the dispute will nevertheless be kept from the public’s purview and, as such, the benefits of right of access to Chancery arbitration will never materialize. Therefore, it cannot be said that right of access plays a substantial role

¹⁰⁴ N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 200 (3d Cir. 2002) (quoting *Press-Enter. v. Superior Court*, 478 U.S. at 8).

¹⁰⁵ See *id.* at 217 (“[W]ere the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access.”).

¹⁰⁶ *Id.* at 206.

¹⁰⁷ Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493, 504 (D. Del. 2012).

¹⁰⁸ B.H. v. McDonald, 49 F.3d 294, 301 (7th Cir. 1995) (holding that public scrutiny in in-chambers conferences undermined its very function).

¹⁰⁹ See *Del. Coal. for Open Gov’t*, 894 F. Supp. 2d at 503 (“In addition [Chancery arbitration] encourages settlement and non-adversarial resolution at nearly every stage.”); see also DEL. CH. CT. R. 98(a) (requiring both parties have a representative with decision-making power to be present); DEL. CH. CT. R. 97(d) (requiring parties to discuss the “possibility of mediation or other non-adjudicative methods of dispute resolution.”).

¹¹⁰ Steele, *supra* note 1, at 378.

¹¹¹ *Id.* at 380.

¹¹² See *id.* at 378 (“Confidentiality is essential to getting the dispute resolved.”).

¹¹³ *Id.*

in the functioning of Chancery arbitration.

Secondly, to fully analyze the experience prong, the harmful ramifications of the public's right of access must be assessed.¹¹⁴ Among the potentially harmful ramifications of public openness that courts have considered is whether "[f]orcing . . . proceedings into an older criminal procedure mold would have a stifling effect on a state's ability to use creative methods in solving its problems."¹¹⁵ Here, Delaware enacted its arbitration statute to "remain at the cutting-edge in dispute resolution" by providing a cost-effective and highly efficient program,¹¹⁶ and to offer a creative solution to the concern that local judgments are not enforced internationally.¹¹⁷ By requiring that Chancery arbitration be public, thereby effectively abrogating use of the proceeding, Delaware entities will be disadvantaged because they will not have access to a private, efficient, and predictable arbitration in a nationally renowned forum,¹¹⁸ and Delaware, itself, will be disadvantaged because it will be greatly hindered in attracting international corporations.¹¹⁹

V. IMPACT

The court's holding in *Delaware Coalition for Open Government*, ordering Chancery arbitration to be public, eliminates a substantial opportunity for Delaware entities to resolve their disputes in a confidential, predictable, and cost-efficient manner.¹²⁰ Ultimately, while business entities resolve their disputes in different fora depending upon each dispute's individual factual scenarios, business entities undeniably want access to a competent, expeditious resolution, with confidence and predictability of outcome from the chosen process.¹²¹ Chancery arbitration provided a forum in which parties could tailor the process to fit their individual needs and confidentiality concerns, while still providing confidence and predictability to clients unfamiliar and weary of private arbitration.¹²² With the order that the arbitration proceeding be open to the public, Delaware entities are

¹¹⁴ N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 206, 200–02 (3d Cir. 2002).

¹¹⁵ First Amendment Coal. v. Judicial Inquiry and Review Bd., 784 F.2d 467, 473 (3d Cir. 1986).

¹¹⁶ H.R. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009).

¹¹⁷ Defendants' Opening Brief, *supra* note 44, at 17 (quoting Daniel E. Gonzalez, *The Value of Arbitration*, in ALTERNATIVE DISPUTE RESOLUTION, LEADING LAWYERS ON THE ART & SCIENCE OF ARBITRATION MEDIATION, & MORE 49–50 (2004) ("The biggest advantage of arbitration overall is the ability to enforce it around the world.")).

¹¹⁸ Steele, *supra* note 1, at 378.

¹¹⁹ *Id.* at 377 (discussing that the General Assembly enacted the citizenship restriction on Chancery arbitration because it believed that only those paying dues to be a Delaware citizen should be entitled to participate in and benefit from the program).

¹²⁰ 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, 382–83 (describing a transaction where a European entity was not comfortable with the American legal system and the potential damages, but was comfortable in having a proceeding brought in Delaware by use of the arbitration proceeding).

¹²¹ Steele, *supra* note 1, at 377.

¹²² Griffin, *supra* note 114, at 386–87 (discussing that clients involved in a negotiation of a major acquisition, while comfortable with the Court of Chancery, are uncomfortable with the concept of arbitration).

forced to forego an innovative dispute resolution mechanism.

The court's holding, additionally, eliminates an opportunity for Delaware, itself, to gain a competitive edge in the field of international dispute resolution, which is developing rapidly in jurisdictions outside of the United States and, accordingly, attracting international corporations offshore.¹²³ Currently, at least three jurisdictions—Australia, India, and Ireland—have established specialized courts to handle international arbitration matters.¹²⁴ Other jurisdictions have developed courts or judges to hear cases to challenge or enforce arbitration awards.¹²⁵ In addition, France and many other nations have enacted new arbitration laws “to enhance their attractiveness as seats of arbitration.”¹²⁶ The above nations have adopted these changes in recognition that arbitration is important to their economies and to their positions in the world of global commerce.¹²⁷ Because Delaware is unable to maintain its private Chancery arbitration program, Delaware must forgo an opportunity to gain a significant share in the international dispute resolution market, possibly altering its position in the world of global commerce.¹²⁸

VI. CONCLUSION

The district court should have found that the Delaware Arbitration program is constitutional. The Delaware proceedings are different from constitutionally protected court proceedings because they do not involve civil or criminal litigation, but rather arbitration. Arbitration has not historically been open to the public and, therefore, the Delaware proceedings should likewise be private. As a consequence of this decision, Delaware entities have lost an opportunity to resolve their disputes in a private and predictable forum and Delaware, as a state, has lost an opportunity to gain a competitive edge in international dispute resolution.

¹²³ Defendants' Opening Brief, *supra* note 44, at 17; *see also* Monica Shilling, Address at the Journal of Business, Entrepreneurship, and the Law Symposium: Delaware's Closed Door Arbitration: What the Future Holds For Large Business Disputes and How It Will Affect M&A Deals (Oct. 30, 2012), *in* 6. J. BUS. ENTREPRENEURSHIP & L. 375, 385 (“[T]here’s a perception . . . of the American litigation system [a]s being not cost-effective, unpredictable, [and] that it takes a really long time, which is why you find London as one of the centers of dispute resolution.”).

¹²⁴ Defendants' Opening Brief, *supra* note 44, at 17.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*