

A SIGNIFICANT DEVELOPMENT IN ALTERNATIVE DISPUTE RESOLUTION

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Alternative Dispute Resolution

On March 24, 2014, the U.S. Supreme Court denied *certiorari* in *Strine v Delaware Coalition for Open Government, Inc.*, 2014 US Lexis 1984, and let stand a ruling from the Third Circuit (733 F3d 510). The Third Circuit ruling was a 2-1 decision.

The question before the Third Circuit was whether the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program. Chancellor Strine, then the presiding judge of Delaware Chancery Court and now chief judge of the Delaware Supreme Court, and the judges of the Delaware Chancery Court (Delaware's specialized commercial court) (appellants), who oversee the arbitration process, appealed from a judgment in favor of the Delaware Coalition for Open Government. The Third Circuit found that Delaware's arbitration program was subject to the same rules governing civil trials and thus must be open to the public. The appellants argued that the First Amendment does not mandate a right of public access to state-sponsored arbitration proceedings.

In 2009, the Delaware General Assembly adopted legislation authorizing the Court of Chancery to "arbitrate business disputes" upon the consent of the parties. The legislation provided that these arbitration proceedings would be "considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal" to the Delaware Supreme Court. The stated purpose of the legislation was to "preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters."

Delaware's arbitration program included other significant provisions. For example, the arbitrator did not need to be a Chancery Court judge, but *Strine* involved only arbitrations conducted by members of the court. The program was not open to all Delaware citizens. At least one party had to be a business entity formed or organized under Delaware law, and no party could be a consumer. Further, the minimum amount in dispute was \$1 million. All parties had to consent to arbitration. Substantial filing fees of \$12,000 and \$6,000 arbitration costs after the first day of arbitration were assessed. The proceeding could begin very quickly once all parties were in agreement.

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The arbitrator has substantial power in this program. For example, the arbitrator's final award, issued after the hearing, can include "any remedy or relief that the arbitrator deems just and equitable and within the scope of any applicable agreement of the parties." Challenges to the arbitrator's award are very limited: the Supreme Court of Delaware can consider motions to vacate, stay, or enforce an order of the Chancery Court, that is, the arbitrator, only in conformity with the Federal Arbitration Act (FAA). The FAA does not expressly permit *vacatur* of an arbitration award on grounds of legal error, although several of the federal circuit courts do still allow "manifest disregard of the law" by an arbitrator as such grounds. Rather, awards can be vacated only upon a showing of fraud, corruption, undue means in procuring the award; partiality, corruption, or certain misconduct on the part of the arbitrator; or lack of authority on the part of the arbitrator to make the final award.

For purposes of the issue raised in *Strine*, the confidentiality provision of the legislation was the basis for the legal challenge. None of the arbitration proceedings are open to the public, the arbitrator's file is confidential, and the final award is not made public even though a judgment is "entered in conformity therewith." Judgments are publicly available, but no case or party information is listed on the docket and, for the only judgment that has been made public, there was no information about the nature of the case, except that it was originally filed in the Chancery Court and converted into an arbitration proceeding.

The District Court in *Delaware Coalition for Open Government v Strine* (894 FSupp2d 493 [D Del 2012]) confronted motions by both parties on the pleadings, and analyzed the issue under *Richmond Newspapers, Inc. v Virginia* (448 US 555 [1980]), that is, right of public access to court proceedings under the First Amendment. *Richmond* and its progeny supported the public's right of access to criminal trials, which right has been extended to civil trials by numerous decisions in the circuit courts. The district court concluded that the arbitration process at issue was "sufficiently like a trial," particularly because a sitting judge presided over the proceeding, not a third-party neutral. Moreover, the judge/arbitrator conducted the proceeding in the Chancery courthouse with the assistance of Chancery Court staff. Thus, although deemed an arbitration, the proceeding was indistinguishable from a civil trial. Having found that the proceeding was essentially a civil trial, the district court did not apply the "experience and logic" test of *Publiker Indus., Inc. v Cohen* (733 F2d 1059 [3rd Cir. 1984]).

The Third Circuit, while agreeing with the result reached by the district court, found that the court's failure to apply the experience and logic test was "inappropriate." Applying that test, the Third Circuit concluded that the tradition of openness applied to the "arbitration" proceeding, which it characterized as "a binding arbitration before a judge that takes place in the courtroom." With respect to the logic portion of the test, the Third Circuit concluded that the benefits of access to the arbitration proceeding were significant, namely ensuring accountability and allowing the public to maintain faith in the Delaware judicial system. Responding to the dissent's accusation that the majority did not appreciate the distinction between adjudication and arbitration, the majority stated that the arbitration proceeding at issue "would be far less attractive without [its] association with the state."

The need for confidentiality and privacy in arbitration cannot be denied. As noted in the amicus brief of the United States Chamber of Commerce in support of the *certiorari* petition to the U.S. Supreme Court, businesses will rarely agree to arbitrate without the assurance of confidentiality. Confidentiality protects trade secrets and sensitive financial information "and provides an alternative to costly and timeconsuming litigation." While the advantages of arbitration in a business setting are significant, using the imprimatur of the state to achieve those goals means that the public has a right of access.

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As emphasized by both the district court and the majority in the Third Circuit, the proceeding in question involves state judges, during ordinary court hours, using court staff, all of whom are paid their usual salaries.

As a result of the Third Circuit's ruling and the denial of *certiorari*, parties in Delaware courts are not able to avail themselves of the arbitration program as it is presently codified. It will be interesting to see if Delaware changes its program to comply with the *Strine* decision, or by default allows the private sector ADR to continue to grow. It should be noted that there was a concurring opinion in the Third Circuit by Judge Fuentes. He agreed that the confidentiality provision of the legislation violated the First Amendment right of public access, but did not believe that the entirety of the legislation had to be struck down. Rather, he would have preserved the basic structure of the program without the confidentiality provision. That position accepts the role that states have to play in encouraging ADR through the public court system but reminds participants that the advantages of using the court system have to be balanced against the right of the public to access to those same court proceedings.

Judge Fuentes possibly sets the stage for future review of court arbitration programs in accepting that states have a legitimate role to play in encouraging ADR through the public court system, but with the proviso of balancing the advantages of arbitration against the right of the public to access court proceedings. That, however, leaves open the question of whether parties would agree to non-confidential arbitration proceedings in the first place, perhaps making the issue moot.