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Chancery Continues Fight to Remain Leader in Business Dispute Resolution

By Jennifer H. Rearden and Sharon I. Grysman

In an international, interdependent economy where multinational corporations abound, countries and states vie to serve in the coveted income-generating role of "domicile," in part by passing laws that are attractive to businesses. Delaware has distinguished itself as the leading forum of choice for incorporation in the United States, with more than one million domiciliaries, including the majority of all publicly traded companies in the United States and roughly 64 percent of the Fortune 500. (See Delaware Division of Corporations, http://1.usa.gov/1nLuoat.)

In 2009, recognizing "the competitive threat to our country's attractiveness as a domicile" due to "the cost and delay of litigating in U.S. courts," as said in the petition in *Strine v. Delaware Coalition for Open Government*, Delaware's legislature passed a law "designed to provide the state's corporate citizens with an innovative option for resolving business disputes—arbitration conducted by judges widely recognized as expert in business law issues."

HB 49 stated that the new statute is "intended to preserve Delaware's preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." A core attribute of these proceedings, which, since 2011, has been the focus of constitutional litigation in the District of Delaware and the U.S. Court of Appeals for the Third Circuit, is confidentiality. The Delaware Court of Chancery now seeks the grant of certiorari by the U.S. Supreme Court to clarify the First Amendment "right of public access," in order to bring legal certainty that legislatures can leverage in crafting nontraditional means of corporate conflict resolution.

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In pursuit of the high court's guidance, the Delaware Chancery Court judges tasked with administering this novel confidential arbitration program petitioned the U.S. Supreme Court on Jan. 21, seeking to rehabilitate the program after a divided Third Circuit (and the district court before it) deemed the 2009 law unconstitutional on right of access grounds. The petition requests that the court address the lower courts' disparate application of the qualified right of access doctrine stemming from its seminal holding in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), in which the court recognized the public's right to attend criminal judicial proceedings.

For First Amendment purposes, in litigation brought by the Delaware Coalition for Open Government in October 2011, the District of Delaware likened the confidential process to a nonjury civil trial before a Chancery Court judge, focusing particularly on the judges' role as arbitrators. The Third Circuit took a different tack. In a split decision where each member of the panel wrote separately, the Third Circuit applied the "experience and logic" test first articulated by the Supreme Court in *Richmond Newspapers* in determining that the right of access also applies to Delaware's arbitration program. The "experience and logic" test generally requires public access when there has been a tradition of accessibility to the type of proceeding in

question, and when public access benefits that proceeding.

As discussed in the petition, the circuits, and other lower courts, are divided on the proper application of the "experience and logic" test, utilizing a spectrum of disparate thresholds for recognizing a First Amendment right of access. The legal standards applied under the more critical, and arguably less malleable, "experience" prong have required everything from a long and unbroken history of openness, to something of a mixed tradition of openness, to no tradition of openness at all. The petitioners argue that, in order for the United States to compete internationally, on a world stage where businesses are increasingly portable, concrete guidance is needed to bolster the credibility of legislation across the nation enacting arbitration and other alternative dispute resolution tools, rather than permitting incongruous rulings by lower courts "to upend legislative policy choices about the propriety of public access to government proceedings."

Contrary to the majority opinions, Third Circuit Judge Jane Roth's dissent recognized that the benefits of public access and its hallmarks, including the promotion of fairness, accountability, honesty, accessibility, understanding of the judicial system, outlets for emotion, and public scrutiny, are seemingly inapplicable to—and even work against the virtues of—confidential arbitration in the types of high-stakes matters that the program was developed to address. Indeed, the parties who bring such matters to the program place significant weight on the speedier discovery and dispute resolution the program offers, as well as the relief it provides from any immediate concern that sensitive financial information and trade secrets will be publicized.

In defense of Delaware's arbitration program, both the Chancery Court's petition and Roth's dissent cite the increasing demand for such arbitration, observing that a litany of other states and other countries have developed new, competing arbitration programs, many of which also enlist judges and other government officials to serve as arbitrators. Moreover, major national and international arbitral organizations, such as the American Arbitration Association and the United Nations Commission on International Trade Law, have placed a premium on confidentiality. Against this backdrop, Delaware's chancellor and vice chancellors, as petitioners, stress that overcoming "the competitive threat to our country's attractiveness as a domicile for multinational businesses," particularly given the spate of international domiciles with "user-friendly arbitral forums," is an issue of national importance. To that end, the petitioners maintain that the U.S. Supreme Court has ample reason to clarify whether the Third Circuit's invalidation of Delaware's 2009 arbitration law, calling into question the constitutionality of myriad state and federal laws promulgating government-facilitated confidential arbitration, should stand.

Considering the complex issues of First Amendment law presented here, within the context of the novel arbitration program that Delaware's Chancery Court judges strongly believe will advance the public policy goals of Delaware and the United States as a whole, the petition appears to merit both the unusual action of state court judges serving as petitioners in the U.S. Supreme Court and the keen scrutiny it is likely to receive from business organizations, arbitration forums and other interested observers.

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