SECRET ARBITRATION PANELS

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Abstract : Arbitration as a form of Alternate Dispute Resolution (ADR) has proliferated widely, be it in national or international context. One of primary reason for choosing arbitration over ordinary court litigation has been the element of confidentiality, an aspect which the court litigation lacks. Incorporating this very concept as an alternative to the ordinary civil trials, the state of Delaware in 2009, came up with an amendment in their law which provided for State-Sponsored Arbitrations. However, it came under the scrutiny of the 3rd U.S. Circuit Court of Appeals which held the law as being unconstitutional as it violated the first amendment right, namely accessibility of the proceeding to the press and public. The ruling is about to be challenged in the US Supreme court, but for us it leaves a question worth debate, that whether the concept of arbitration can or cannot be dissociated from one of its very fundamental component, namely, confidentiality and privacy. This article endeavors to provide an answer to this very question by critically examining the reasoning adopted by the majority on one side and minority on the other. In Conclusion, the author evaluates the status of the Court-Sponsored Arbitration vis-à-vis the genesis of the commercial arbitration and its impact on the economy of the state of Delaware

Index Terms **– Secret Arbitration Panel, State Sponsored Arbitrations.**

I. INTRODUCTION

Arbitration as a form of dispute resolution method includes an array of procedures for private resolution of disputes[1]. Arbitration proceedings are generally considered to be private. In this method the pleadings are not publicly filed, arbitration sessions are closed, and the decisions are not released to anyone other than the parties[2] . Only in rare cases such as, when one of the parties to the arbitration challenges the authority to arbitrate, or the conclusion of the process, or when either of the parties challenges the award itself, the privacy faces its limitation as the case goes to the court where privacy gets dissolved. The class which arbitration mostly targets is the business class, a class which cannot sacrifice the efficiency of commerce and thus the parties want the most efficient system for the resolution of disputes. Under the arbitration, it is the parties who choose the panel of arbitrators who they think are the best in the specific commercial dispute; Secondly, Arbitration proceedings mostly happen in private conference rooms rather than typical court-setting. Also, the rules of evidence and procedures are relaxed and thus the parties have more flexibility which enhances the efficacy of the whole arbitration system. To promote the reputation of Delaware as a hotspot for the resolution of business disputes an amendment, Delaware House Bill (HB) 49[3], was introduced by the legislature of the state of Delaware, which provided the Delaware Chancery Courts judges the power to conduct arbitration hearings, provided they involved value of more than 1 million[4]. The same was to be held in a confidential manner[5]. Also the amendment provided for the confidentiality of the materials and the communications which were produced during the arbitration from disclosure in administrative or judicial proceedings[6].

The court-sponsored method was basically touted to provide for a quicker and cheaper alternative to traditional litigation for complex business and technology disputes; however the same was challenged by the Non-Profit Delaware Coalition For Open Government in 2011[7]. The coalition received the decision (2012) by U.S District Judge, Mary A. McLaughlin in their favour. The

[1] Steven C. Bennett, *Arbitration: Essential Concepts* (ALM Publ'g 2002).

[2] Ibid.

[3] 145th Gen. Assemb. (Del. 2009).

[4] Delaware law, Tit. 10 § 347(a)(5).

[5] Delaware law, Tit. 10, § 349(b); Del. Ch. R. 97(4).

[6] Del. Ch. R. 98(b).

[7] Matt Chiappardi, *Strine Asks High Court To Take Up 'Secret' Arbitration Case*. http://www.mayerbrown.com/files/News/20Case.pdf.

judge said, "The program did indeed run afoul of the First Amendment, likening it to a secret judicial proceeding." Aggrieved by the decision, the Chancery Court appealed to the Third Circuit, which concurred with the District Court' s decision noting that Delaware has a centuries-old tradition of open proceedings before a judge. Thus any proceeding violating this very right which is embedded in the First Amendment[8] would be unconstitutional. However, Judge Roth gave a dissenting opinion and called the programme of court-sponsored arbitration as a "Perfect model for commercial arbitration and said that it had been primarily introduced as an alternative and not as a substitute for the civil trials.

II. REASONING ADOPTED BY THE MAJORITY

The majority began analyzing the legal status of the Court-Sponsored Arbitration vis-à-vis the Constitution of the Supreme Court, by applying the Logic and Experience Test. The court said that:

> *"A proceeding qualifies for the First Amendment right of public access when "there has been a tradition of accessibility" to that kind of proceeding, and when "access plays a significant positive role in the functioning of the particular process in question."*

For justifying public access, both the experience of that particular proceeding and logic must be in the favour of opening the proceeding to the public. The court rightly said that, the district court by bypassing the logic and experience test was in error in reaching its conclusion as they considered the court-sponsored arbitration similar to any other trial and as a right of public access applies to a civil trial, they blindly applied the same concept to the court-sponsored arbitration as well. Under the experience test, the proceeding in question and the place is adjudged as to whether the place and process have historically been open to the press and general public, in case yes, then such a transition of accessibility implies the favourable judgment of experience[9]. In simple terms, experience test is hinged on the fact of analyzing the history of a particular proceeding, as to whether or not that particular proceeding has been accessible to the public. In the case of *Pg Publ'g Co. v. Aichele*[10], The United States of Courts of Appeal, Third Circuit said that in determining the bounds of our historical inquiry, we look:

> *"Not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding [has] historically been open in our free society."*

The court in order to avoid "begging the question" by either choosing the civil trial history or the arbitration history chose both of them and proceeded further.

III. THE EXPERIENCE TEST AND ITS CRITICISM

The logic and experience test in any case is restricted to the proceedings in question[11] and thus in the present case the question was about the arbitration and not the civil trials, still the court delved into the inquiry of the history of the civil trials.

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[8] The First Amendment, in conjunction with the Fourteenth, prohibits governments from 'abridging the freedom of speech, or of the press . . . . '" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (quoting U.S. CONST. amend. I)

[9] *N. Jersey Media Grp*., 308 F.3d at 211 (quoting Press II, 478 U.S. at 8).

[10] *PG Publ'g Co., 705 F.3d* at 108 (quoting Capital Cities, 797 F.2d at 1175) (internal quotation marks omitted) (emphasis in PG Publ'g Co.).

[11] For Instance in *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), the Logic and Experience test was restricted to the proceedings of criminal trials in question. Chief Justice Burger phrased the question presented as *"whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."*

For the history of the arbitration, court noted that initially the arbitrations were accessible by the public[12]; however the court admitted that these arbitrations per se were not arbitrations but only resemblances of arbitrations[13]. The court also said, that in the American colonies, arbitrations provided a way for colonists who harbored "suspicion of law and lawyers" to resolve disputes in their communities in a "less public and less adversarial" way[14]. The court then, after analyzing the civil trials history[15] and the early historical access to public of arbitration the proceedings said that, there has been a strong tradition of openness for proceedings like Delaware's government-sponsored arbitrations.

The author proposes that, the period prior to this, which allowed public access to arbitrations, should not have been relied upon by the court, as firstly, they only resemble arbitration and secondly, the genesis of commercial arbitration was not developed until the 20th century which advocated for the confidentiality as an inherent characteristic of the arbitration. The major institutions which play vital role in commercial arbitration came up in 20th century, such as International Chamber of Commerce (ICC) came up in 1919 which later became the voice of the international business community. Then, Geneva Protocol of 1923, Geneva Convention on the Execution of Foreign Arbitral Awards of 1927[16], New York Convention of 1958, the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model law of 1985[17], all of them came in 20th century. The various provisions of the abovementioned institutions advocate the concern of confidentiality[18]. The court should have taken care of the fact that the court-sponsored arbitrations are primarily targeted for the commercial disputes, thus relying on the history of earlier times when the genesis of the commercial arbitration itself was not developed was erroneous.

The court itself agreed that, "Although proceedings labeled arbitrations have sometimes been accessible to the public, they have often been closed, especially in the twentieth century[19]". The author proposes that, it was this time when the genesis of commercial arbitration actually developed. The conclusive reasoning adopted by the court was that:

> *"Although the Delaware's government arbitration shares characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a Courthouse."*

Here the court made an analysis on the place in question, namely, the court of chancery and the active judges involved therein.

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[12] *Delaware Coalition For Open Government, Inc v. The State of Delaware*, United States Court of Appeals For the Third Circuit, No. 12-3859, Page 14, First Line.
[13] *Ibid.*
[14] *Ibid.*
[15] Analysis of civil trials was not required as argued above, that, Court-Sponsored Arbitrations were always an alternative to the civil trials and thus the logic and experience test was applicable on the Court-Sponsored Arbitrations and not the civil trials.
[16] Dynalex, *Globalization of Commercial Arbitration*, https://dynalex.wordpress.com/2012/12/28/a-brief-history-of-commercial-arbitration, (2012).
[17] Other institutions which came up in 20th century and are major players in the commercial arbitration include, The London Court of International Arbitration (established 1892, The Stockholm Chamber of Commerce (established 1917), International Chamber of Commerce (established 1919), American Arbitration Association (established 1926), China International Economic and trade Arbitration Commission (1956), Hong Kong International Arbitration Centre (established in 1985), Singapore International Arbitration Centre (established 1991).
[18] AAA & ABA, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (2004); AAA Commercial Arbitration Rules R-23 (2009); UNCITRAL, Arbitration Rules art. 21(3) (2010).
[19] *Delaware Coalition For Open Government, Inc v. The State of Delaware*, United States Court of Appeals For the Third Circuit, No. 12-3859, Page 16.

This requirement has already been done away in the case of *PG Publ'g Co. v. Aichele*[20], in which the court said,

> *"Instead, after considering Richmond Newspapers, Globe and Press–Enterprise, we held that "[i]n each of these cases, the Court looked not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding had historically been open in our free society."*

Here the court deviated from the practice adopted by the courts in cases like Richmond Newspapers, Globe and Press–Enterprise, where the court got involved in not just the proceedings in question but also the place where they were being held. The primary question for the logic and experience test involved the question of the proceedings, namely, court-sponsored arbitration and not the place. Thus the court deviated from its own practice it adopted in *PG Publ'g Co. v. Aichele*.

IV. THE LOGIC TEST AND ITS CRITICISM

The logic prong of the experience and logic test is based on the idea, as to whether "access plays a significant positive role in the functioning of the particular process in question." The court in the case of *N. Jersey Media Grp*. laid down various benefits[21] public access could provide in a particular judicial proceeding. The author agrees with the reasoning adopted by the court as, the court rightly allowed the logic test in favour of the NGO. The only harm which public access could have had on the parties was the damage in terms of the protection of the patented information, trade secrets and other closely held information.

This sensitive information was already protected under the statue of Delaware Chancery Court Rule 5.1[22]. Also these protections were in conformity with the first amendment right of public access[23].

V. MINORITY DECISION AND ITS CRITICISM

Judge Roth gave her dissenting opinion and said that, arbitration as a category was different from the ordinary court litigations and that they were custom tailored for the efficient resolution of disputes and thus efficient functioning of the commercial world.
Judge Roth, very aptly explains the tussle between the legislature of Delaware, who is trying to protect the reputation of Delaware as a hotspot for business dispute resolution and judiciary who has to adjudge the law in question vis-à-vis the United States Constitution even if that costs losing the reputation of the Delaware as a commercial hub.
One of the reasoning adopted by Judge Roth involves the fact that, in adjudication it is the state which confers the power to the judges whereas in the case of arbitration it is the agreement between the parties which confers the power to the judge acting as an arbitrator. The author dissents from such a reasoning as even if the parties give consent to initiate an arbitration[24], the judge as Mr.

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[20] *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir. 2013).
[21] Del. Coal., 2013 WL 5737309 at *8, "*We have recognized that public access to judicial proceedings provides many benefits, including [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the [proceeding]; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the [proceeding] to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of [fraud]".*
[22] Delaware Chancery Court Rule 5.1 (b) (2), provides for the confidential filing of documents, including *"trade secrets; sensitive proprietary information; [and] sensitive financial, business, or personnel information" when "the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause."*
[23] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-36 (1984).

[24] Delaware law, tit. 10 § 347(a)(1); Del. Ch. R. 97(a).

Roth herself noted in the judgment[25] that, "The arbitrators are judges of the court of chancery or others authorized under the rules of the court of the chancery".

Thus, even if the judges are acting as an arbitrator still it is the rules of the court of chancery which are governing them. By the time state element is there, one cannot altogether dissociate the concept of the court-sponsored arbitration from the first amendment of the constitution just because the term arbitration is used. In the concluding part of the judgment Judge Roth, says that logically, the resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential so that the parties do not suffer the ill effects of this information being set out for the public. Author again dissents from her opinion as this sensitive information is already protected under the statue of Delaware Chancery Court Rule 5.1[26].

VI. CONCLUSION

Looking from the glass of the legislature who has the burden to improve the overall economy of the state, Court sponsored arbitration as a dispute resolution mechanism is required for a state like Delaware which has the obligation to retain its reputation in the resolution of the disputes. It is for this very reason, the state of Delaware came up with the court-sponsored arbitrations as the familiarity with the Delaware rules and the benefits of the arbitration system which involved the element of confidentiality had the potential to rebuild the image of Delaware as a hotspot for the resolution of business disputes. Whereas from the judiciary's perspective the legislature in question needs a strict check under the Constitution of the United States, First Amendment, which allows public access to the judicial proceedings.

The major area of contention in the present case arises from the fact that, the legislature of Delaware has combined two concepts, arbitration and court judges, which is nothing but a fusion of private and a state concept. The author proposes that the U.S Supreme court should analyze the judgment of the third court of appeal in light of the fact that, the experience of arbitration proceedings has been construed erroneously as, in earlier times the commercial arbitration and major institutions which presently govern commercial arbitration today did not evolve until 20th century and it is these institutions, as argued in Part II of this paper, which have developed the genesis of commercial arbitration, which advocated the concern of the confidentiality in arbitration proceedings. Thus the experience of the commercial arbitration should be analyzed from the 20th century and not 16th century when the arbitration was in its infancy stage. Lastly, the present case in the U.S Supreme Court will determine the future of the Delaware state in terms of protecting its reputation as a hotspot for business and will have serious adverse repercussions in case it is decided against the Delaware state.

[25] *Delaware Coalition For Open Government, Inc v. The State of Delaware*, United States Court of Appeals For the Third Circuit, No. 12-3859, Page 33, First Para.
[26] *Supra Note 22*.