

Privatizing Delaware Courts

I was not aware of this development in Delaware, which was introduced by a statute of 2009.

For USD 6,000 a day and USD 12,000 filing fees, the prestigious Delaware court and judges can be rented for settling disputes above USD 1 million. One of the parties at least must be a Delaware business entity. The Delaware law maker called it “arbitration”, but the resulting decision is an “order of the Chancery Court”, not an arbitral award. The scheme is closer to litigation behind closed doors than to arbitration.

One of the goals is to compete to attract business disputes to Delaware by offering a *cheaper* mode of dispute resolution. As a US judge has recently emphasized:

The State of Delaware has become interested in sponsoring arbitration as a part of its efforts to preserve its position as the leading state for incorporations in the U.S. One of the reasons that Delaware has maintained this position is the Delaware Court of Chancery, where the judges are experienced in corporate and business law and readily available to resolve this type of dispute. Nevertheless, judicial proceedings in the Court of Chancery are more formal, time consuming and expensive than arbitration proceedings. For that reason, the Court of Chancery, as a formal adjudicator of disputes, may not be able to compete with the new arbitration systems being set up in other states and countries.

The constitutionality of this law, however, has been challenged, and the Supreme Court may decide to hear the case. In *Delaware Coalition for Open Government, Inc. v. Strine*, the U.S. Court of Appeals for the Third Circuit found the Delaware law unconstitutional as the proceedings would not be open to the public:

Because there has been a tradition of accessibility to proceedings like Delaware’s government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware’s government-sponsored arbitrations

See also this Op Ed of Judith Resnik in the *New York Times*.

I have tremendous respect for Judith Resnik, who is a professor at Yale Law School and one of the leading US scholars on civil procedure. Readers unfamiliar with the US legal academy should know, however, that Resnik belongs to a school of thought which is highly critical of alternative dispute resolution. This is probably the result of the development of arbitration for consumer and labour disputes in the US. I am not sure, however, that this peculiarity of US law should impact our perception and analysis of commercial dispute resolution.