A RAND NOTE

WHAT WE KNOW AND DON'T KNOW ABOUT COURT-ADMINISTERED ARBITRATION

Deborah R. Hensler

March 1986

N-2444-ICJ

Prepared for

The Institute for Civil Justice

THE INSTITUTE FOR CIVIL JUSTICE
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The Institute for Civil Justice, established within The Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.

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The Institute examines the policies that shape the civil justice system, the behavior of the people who participate in it, the operation of its institutions, and its effects on the nation's social and economic systems. Its work describes and assesses the current civil justice system; analyzes how this system has changed over time and may change in the future; evaluates recent and pending reforms in it; and carries out experiments and demonstrations. The Institute builds on a long tradition of Rand research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

The Institute disseminates the results of its work widely to state and federal officials, legislators, and judges, to the business, consumer affairs, labor, legal, and research communities, and to the general public.
PREFACE

This Note is a reprint of an article that appeared in the February-March, 1986 issue of *Judicature*, Volume 69:5. It summarizes the results of research conducted by The Institute for Civil Justice in the area of court-administered arbitration, describing what we have learned to date and what questions remain to be answered. Other ICJ publications on this subject are listed at the back of this Note and can be obtained from the Institute.
Over the past decade, interest in alternative dispute resolution has increased enormously. Initially, attention focused on establishing alternative forums, such as neighborhood justice centers, outside the court system. Proponents of such alternatives believed that they would relieve pressure on the criminal and civil justice systems, while providing a qualitatively better form of dispute processing—one that would be more reflective of community norms and better tailored to the needs of individual disputants. Although many communities now have community-based dispute resolution programs, the available evidence suggests that most disputants do not seek out these programs on their own.  

In recent years, as the dispute resolution movement has acquired legitimacy, attention seems to have shifted to the use of alternative dispute resolution procedures within the court system. Most of these alternatives provide some sort of arbitral or mediative process, diverting particular classes of cases from the regular trial court calendar while retaining administrative control over them. Some legislatures view the establishment of such alternatives primarily as a means of reducing judicial workload, and hence, reducing the demand for new judgeships. Judges and court administrators frequently view them as components of a differentiated strategy for caseload management, in which specific categories of cases are assigned to different treatments. Lawyers may view the alternatives as a means of clearing the trial calendar for "more important" litigation. Public and private interest groups may regard alternative dispute resolution procedures as a means of saving litigants' time and money, while perhaps providing a better quality of justice. Just what is meant by "better quality" is often unclear.

Despite the attention that the dispute resolution movement has drawn, there has been little systematic study of its outcomes. It is difficult to determine how much implementation there is to back up the rhetoric, what types of procedures have been established, and what has resulted from different approaches. Thus, it is difficult for policymakers to decide whether they should adopt any of the available approaches and to determine how to design a specific procedure to
maximize its potential for producing benefits to the courts, lawyers and litigants.

Since 1979, the Institute for Civil Justice (ICJ) at the Rand Corporation has been engaged in a program of research on a particular alternative dispute resolution procedure, court-administered arbitration, that many court officials and lawyers feel has particular promise for civil lawsuits. In the course of this research we have monitored the spread of court-administered arbitration programs, evaluated the effects of implementing programs, and studied the implications of alternative program designs. Our work has encompassed systematic surveys of court officials, case studies of specific programs, surveys of lawyers’ and litigants’ attitudes toward court arbitration, and technical assistance to local court officials involved in designing or modifying court programs. This article describes what we have learned to date, and what questions remain to be answered.

A profile

Court-administered arbitration programs may be established by statute, by supreme court rule, or by local court rule. However established, all programs authorize trial courts to require arbitration of civil damage suits that fall within a specified jurisdictional limit, as a precondition for placing those suits on the trial calendar. Arbitration results in a verdict that has the force of a court judgment. If any of the parties is dissatisfied with the verdict, however, he or she may reject it and request that the case be calendared for a trial de novo. In many programs, appellants who request de novo trials are required to reimburse the court for the arbitrators’ fees; in addition, in some programs, court costs and attorney fees may be levied on unsuccessful appellants. Such fees are intended to discourage frivolous appeals.

This article is based in part on a presentation delivered by the author to the First National Conference on Court-Administered Arbitration, sponsored by the National Institute for Dispute Resolution, May, 1985.


Court-administered arbitration is neither voluntary nor binding.

In all court-administered arbitration programs, cases assigned to arbitration are heard by one or more private attorneys or retired judges who volunteer to serve as arbitrators. Usually, attorneys’ time is provided, at least in part, pro bono, since they typically receive only a small honorarium for their participation. Arbitration hearings are private, informal, and usually quite brief, the proceedings are generally not recorded, and relaxed rules of evidence prevail. In particular, in lieu of witnesses, medical and other reports are usually sufficient as evidence. In some programs only limited discovery is permitted prior to the hearing. Before they begin the hearing, some arbitrators may ask the parties if they would like assistance in attempting to settle the case, but once a hearing begins, arbitration proceeds as an adjudicative process. The facts of the dispute are heard, albeit in an abbreviated fashion, and the litigants are usually present and may testify. The neutral third party(ies) deliberates and issues a verdict, usually within a few days.

Although court-administered arbitration shares many features with other alternative dispute resolution procedures, it is distinguished from them in several important ways. Unlike private commercial arbitration, court-administered arbitration is neither voluntary nor binding. Unlike a traditional mediator, the arbitrator is not trying to help the disputants fashion a mutually agreeable compromise. And unlike most judicial settlement conferences, there is a true hearing of the case and an opportunity for litigants to participate in that hearing.

The spread of arbitration

The first court-administered arbitration program was established in 1952, in Philadelphia, by amending an 18th century statute that provided for the referral of trial cases to arbitrators. By the 1960s, similar arbitration programs had been established in courts across Pennsylvania, and word of their success in resolving small money damage suits had spread outside the state’s limits. In the early 1970s, as many trial courts were struggling to find ways of dealing with sharply increasing civil caseloads, a number of states adopted mandatory arbitration programs patterned after Pennsylvania’s.

More recently, during the late 1970s and early 1980s there was a third wave of program adoption. By December 1984, 16 states had authorized mandatory court-administered arbitration programs. A national conference on court-administered arbitration, sponsored by the National Institute of Dispute Resolution in May 1985, may have given further impetus to this recent wave of adoptions; by October 1985, two additional states had passed legislation authorizing mandatory arbitration programs (Illinois and North Carolina).

Early interest in court-administered arbitration was confined to the state court systems. But in 1978, the federal courts decided to experiment with mandatory arbitration in three district courts. Following the formal completion of the experiment, one of the three courts discarded its program while the remaining two maintained theirs. In 1984, under Public Law 98-411, Congress appropriated $500,000 of fiscal year 1985 funds to support a new arbitration initiative in the federal district court system. The new funds are being used to mount mandatory arbitration “demonstrations” in eight districts, bringing the total number of federal courts with authorized systems to ten. Table 1 lists the states and federal district courts that have authorized mandatory court-administered arbitration programs to date.

Once established, arbitration programs have tended to spread within regions from one state to another, and within states from one jurisdiction to another. Table 1 indicates what we learned about the status of local arbitration programs in the course of our last national survey. Based on this information, we estimate that court-administered arbitration programs now exist in approximately 200 of the country’s trial courts.
## Table 1: Mandatory court-annexed arbitration programs

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Program title</th>
<th>Authorization</th>
<th>Earliest date authorized</th>
<th>Current scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Arbitration of Claims</td>
<td>State Law—A.S. 09.43.190</td>
<td>1972</td>
<td>Never implemented; jurisdictional limit too low to make program useful</td>
</tr>
<tr>
<td>Arizona</td>
<td>Arbitration of Claims</td>
<td>State Law—A.R.S. 12-133</td>
<td>1974</td>
<td>Operational in at least 2 counties including Phoenix and Tucson</td>
</tr>
<tr>
<td>California</td>
<td>Judicial Arbitration</td>
<td>State Law—C.C.P. 1141.10-32</td>
<td>1978</td>
<td>Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Fact Finding and Arbitration</td>
<td>State Law—Conn. Statutes 52-549N</td>
<td>1963</td>
<td>Statewide implementation but far more cases processed by fact-finding than by arbitration</td>
</tr>
<tr>
<td>Delaware</td>
<td>Compulsory Pretrial Arbitration</td>
<td>Superior Court Rule 16(c)</td>
<td>1964</td>
<td>Program began statewide in mid-1984</td>
</tr>
<tr>
<td>Illinois</td>
<td>Mandatory Arbitration</td>
<td>State Law—C.C.P. Ch. 110 Part 10A</td>
<td>1965</td>
<td>Rule drafting underway</td>
</tr>
<tr>
<td>Michigan</td>
<td>Mediation</td>
<td>Supreme Court Rule (except Wayne County Court): General Court Rule 316</td>
<td>1978</td>
<td>Operational in 28 of 55 circuit courts</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Judicial Arbitration</td>
<td>State Law—Minn. Statutes 484.73</td>
<td>1984</td>
<td>Experimental implementation in Hennepin County (Minneapolis)</td>
</tr>
<tr>
<td>Nevada</td>
<td>Motor Vehicle Damage Actions Arbitration</td>
<td>State Law—N.R.S. 38.215-245</td>
<td>1971</td>
<td>Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damage cases 2 counties (Merrimack, Rockingham)</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Compulsory Arbitration</td>
<td>Supreme Court Rule, Temporary Rules of Compulsory Arbitration</td>
<td>1978</td>
<td>Statewide implementation</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Judicial Arbitration</td>
<td>State Law—Laws of N.J. Ch.358</td>
<td>1983</td>
<td>Awarding funding</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Alternative Dispute Resolution by Arbitration</td>
<td>State Law 22 N.Y.C.R.R. Part 28</td>
<td>1984</td>
<td>Operational in 31 counties, including New York City</td>
</tr>
<tr>
<td>New York</td>
<td></td>
<td>Supreme Court Rule</td>
<td>1984</td>
<td>Pilot program authorized in 3 districts</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Court-ordered Arbitration</td>
<td>State Enabling Act</td>
<td>1985</td>
<td>Operational in approximately 15 counties including Cleveland and Cincinnati</td>
</tr>
<tr>
<td>Ohio</td>
<td>Varies by county</td>
<td>Local Judicial Rules—Cuyahoga County Rule 29</td>
<td>1970</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>Arbitration Program</td>
<td>State Law—Ch. 670 Oregon Laws</td>
<td>1983</td>
<td>Operational in 9 counties</td>
</tr>
<tr>
<td>Washington</td>
<td>Mandatory Arbitration of Civil Actions</td>
<td>State Law—R.C.W. Ch.7.06</td>
<td>1979</td>
<td>Operational in at least 3 counties (King, Pierce, Yakima)</td>
</tr>
<tr>
<td>Federal district courts</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>California—Northern Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule—Rule 500</td>
<td>1978</td>
<td>Ongoing program</td>
</tr>
<tr>
<td>Florida—Middle Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Operational</td>
</tr>
<tr>
<td>Michigan—Western Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Operational</td>
</tr>
<tr>
<td>Missouri—Western Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Operational</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Program to commence by January 1986</td>
</tr>
<tr>
<td>North Carolina—Middle Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Operational</td>
</tr>
<tr>
<td>Oklahoma—Western Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Operational</td>
</tr>
<tr>
<td>Pennsylvania—Eastern Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule—Civil Procedure 8</td>
<td>1978</td>
<td>Ongoing program</td>
</tr>
<tr>
<td>Texas—Western Dist.</td>
<td>Court-annexed Arbitration</td>
<td>Local Rule</td>
<td>1985</td>
<td>Operational</td>
</tr>
</tbody>
</table>


Years have also expanded by extending their case jurisdiction: typically, the first arbitration program(s) within a state is established with a monetary jurisdictional limit in the neighborhood of $15,000; over time the limits are increased to $25,000 or more. In recent years, the initial jurisdictional limits of programs have been set higher, especially in the federal district courts. Figure 1 shows the change in monetary jurisdictional limits across courts from 1979 to 1985.

### Program objectives

Whatever their historical origins, most court-administered arbitration programs now share the following objectives:

- Reduce congestion on the civil trial calendar by diverting and disposing of cases through arbitration;
- Reduce (or stabilize) court costs by reducing judicial time spent on the civil caseload;
- Reduce time to disposition by providing an expedited process for arbitration-eligible cases and by removing these cases from the trial queue, thereby reducing time to trial for other cases;
- Reduce litigation costs for parties;
- Improve access to court for diverse users by reducing the time and expense required and by providing a simpler and, perhaps, fairer form of dispute resolution.

Supporters of court-administered arbitration programs do not generally expect to change case outcomes. Instead, the distribution of outcomes prevailing prior to establishing an arbitration program is frequently viewed as the benchmark for assessing arbitration's effect on equity, and a program is viewed as successful if it does not perceptibly alter that distribution to the advantage or disadvantage of any of the major participants in the system.

### Evaluating effectiveness

As in the case of other “court reforms” there has been no comprehensive attempt to evaluate court-administered arbitration programs' effectiveness in meeting these objectives. During the past five years, however, the ICJ has conducted evaluations of arbitration programs in California, Pittsburgh (Allegheny County) and Bucks County, Pennsylvania, and Burlington and Union Counties in New Jersey that shed considerable
light on the issue. The empirical data from these studies suggest that court-administered arbitration can contribute significantly to reducing court congestion, costs and delay and to diminishing the financial and emotional costs of litigation for parties. But the data also indicate that arbitration’s ability to fulfill this potential is critically dependent on program design and implementation decisions, and on lawyers’ responses to arbitration, and that arbitration cannot, by itself, be depended upon to “solve” all of the problems that characterize contemporary civil litigation.

**Reducing court congestion.** In both California and Pittsburgh, about 60 per cent of civil money suits (including personal injury, property damage and contract disputes) are diverted to arbitration; in Bucks County the percentage is closer to 90 per cent. The percentage of cases diverted by any particular program is dependent on the program’s eligibility rules, the proportion of cases that are eligible under those rules and the procedures that are used for determining eligibility. Some state program rules permit so few cases to be diverted to arbitration that local jurisdictions have been reluctant to invest resources in program implementation. Some assignment procedures provide incentives and opportunities for parties and their lawyers to bypass arbitration and obtain placement on the trial calendar. In every court it is possible for arbitration cases to appear on the court’s trial calendar after arbitration is completed, as a result of the trial de novo process.

It is clear, however, that it is possible for any court to develop rules and procedures that will result in the diversion of a substantial fraction of its civil money suits and it is likely (as we shall see below) that most of these cases can be permanently diverted. Policymakers should note, though, that a court’s total civil damage caseload may only represent a modest fraction of its overall caseload, which will generally include many criminal cases, family law cases, equitable disputes, and other matters. As long as arbitration is considered appropriate only for civil damage suits, and only for the lower-value cases among these, it may ease court congestion but cannot eliminate it.

**Reducing court costs.** Cost savings due to arbitration depend on three factors: how much the court would spend on arbitration-eligible cases in the absence of an arbitration program, how much it costs to administer the arbitration program itself, and how many cases require court attention after arbitration. Unfortunately, most courts cannot provide reliable data on all three factors, making estimation of savings due to arbitration extremely problematic.

The best data available relate to program administration costs. These generally have two components: costs to process cases (determining eligibility, notifying parties to assign to arbitration, selecting arbitrators to hear specific cases, etc.) and fees to arbitrators. How much it costs to administer an arbitration program depends critically on program design and implementation decisions. California’s statutory requirement that the court assess whether a case is eligible for arbitration placed a new burden on judges’ time. In addition, a complex procedure that provides for the parties’ attorneys to participate in arbitrator selection adds to the tasks that must be carried out by the program’s administrative staff. An honorarium of $150 per day paid to the single arbitrator who hears each case further drives up the cost of the program. A recent Judicial Council report estimated that the cost to process a case through arbitration in California in Fiscal Year 1982 was about $125 for each case assigned to the program, and about $299 for each case actually heard by an arbitrator. These estimates do not include the cost of judge time allocated to determining arbitration eligibility.

In Pittsburgh, when the plaintiff’s attorney files a case, he or she is asked whether it is eligible for arbitration. If it is declared eligible, the court clerk automatically assigns it to the program and schedules a hearing date for it. Arbitrators are assigned to hear cases on the day of the hearing, using a pragmatic approach to achieve a roughly random assignment. Three-person panels hear each case, but in a single day they are likely to hear four or five cases. Although each arbitrator is paid $100 per day, the average arbitrator fee per case works out to about $65. When
fee reimbursements from appellants are taken into account, this amount is reduced even further. The average cost to process a case diverted to arbitration in Pittsburgh in 1982 was about $76 for each case assigned to the program, and about $175 for each case heard.\(^7\)

Figure 2 compares the costs of processing arbitration cases to the costs of processing non-arbitration cases that remain on the civil trial calendar. In the upper section of the figure, we see the cost differential between the average per case processing costs for California and Pittsburgh. In the lower section, we have broken out the costs of those cases "tried" (either by arbitrators or jury). These comparisons suggest that, overall, arbitration offers a three- to five-fold savings over traditional civil case processing. The difference in the average cost to "try" a case in arbitration and the average cost to try a case before a jury is many times greater.

The cost differentials shown in Figure 2 may be deceptive, however, if a substantial fraction of the arbitrated cases turn up on the trial calendar thereafter, as a result of de novo appeals. It is reasonable to assume that cost savings will be substantial where appeal rates are low, and smaller or non-existent where they are high. (Indeed, one can imagine situations in which arbitration programs would actually increase the net costs of processing civil cases.)\(^8\)

Across the country, de novo appeal rates vary substantially from program to program. In California, the rate of appeal has been running in the neighborhood of 50 per cent. In the older Pennsylvania programs it ranges between 15 per cent and 25 per cent of all cases heard, and some court administrators elsewhere report even lower appeal rates.\(^9\) But the majority of appealed cases in all jurisdictions settle without trial. In California, a Judicial Council docket study in a sample of four Superior Courts found that the rate of trial after arbitration was about seven per cent.\(^10\) In Pittsburgh, the ICJ found that three-quarters of all cases that were appealed settled without trial.\(^11\) It is an open question whether the costs to courts of disposing of these de novo appeals generally outweigh the savings attributable to arbitration.

**Expediting disposition.** Success in expediting cases through arbitration depends on formal program rules and informal implementation practices. When courts want to use arbitration to speed case disposition, when they have the resources available to process cases efficiently, when they are not unduly constrained by statutory or other formal limits on the speed of disposition, and when attorneys cooperate in making the program work, arbitration can result in speedy case disposition.

In California, we found that arbitration's effectiveness in reducing time to disposition was constrained by the availability of judge time to assess case value, by statutory requirements that established relatively lengthy time intervals for different stages of the process, by the practice of placing administrative control over the hearing process in the arbitrators' hands, and by the lack of court resources to monitor the arbitrators' performance in carrying out these responsibilities. As a result of these factors, we found that in some courts arbitration did little to expedite case resolution, while in others it increased time to disposition. Time to disposition by arbitration varied between nine months and more than three years.

In Pittsburgh, on the other hand, the practice of scheduling cases for arbitration at the time of filing, a policy of encouraging all active bar members, regardless of type or length of experience, to serve as arbitrators, and a centralized form of program administration combine to expedite case processing. The average time to reach arbitration hearing in Pittsburgh is three months from the filing date; awards are decided immediately after the hearings and sent to the parties at the close of business each hearing day. Other Pennsylvania courts have achieved similar results: in Philadelphia in recent years cases have reached arbitration hearings within eight months of filing. In Bucks County, cases are heard within four months of the filing of a certificate of readiness.

Whether speeding cases through arbitration actually reduces the time to disposition for cases on the regular trial calendar is still an open question. The factors that affect time to disposition generally are so complex and so difficult to measure that there has yet to be an empirical analysis of the connection between expediting arbitration cases and expediting regular jury trial cases.

**Reducing costs to litigants.** Some supporters of court-administered arbitra-
tion assume that it will produce substantial cost savings for litigants. Our research suggests that such savings are possible, but whether they are realized depends on the behavior of lawyers in response to arbitration.

Individual plaintiffs' costs to litigate generally have three components: the value of their own time spent on the process, lawyers' fees, and expert witness and other direct expenses. In Pittsburgh and New Jersey we found that litigants on average spent 1 to ½ days preparing for and participating in arbitration hearings. As might be expected given liberal evidentiary requirements, they spent less than $50 on expert witness fees and other direct expenses.

Lawyers' fees were by far the largest component of litigants' expenses. Plaintiffs in Pittsburgh either had a traditional contingent fee arrangement with their lawyer (typically paying one-third the amount obtained in arbitration or settlement) or paid a flat fee to the lawyer (usually $250) for preparing the case and representing them at the hearing. Lawyers offering flat fee arrangements to clients usually conducted a high volume arbitration practice, representing several different clients at hearings in the course of a single morning. This type of practice was made possible by the brief duration of the hearings (45 minutes on average) and tightly-administered hearing schedule. Efficient use of attorney time was also reflected in hourly rate defense costs of approximately $400 per arbitrated case.

In California and New Jersey, on the other hand, most plaintiff and defense lawyers have apparently not changed their billing practices as a result of arbitration. Thus, any cost savings due to the streamlined arbitration procedure may be passed on to defendants, who are usually billed on an hourly rate basis, but not to plaintiffs who retain lawyers on a contingent fee basis.

Even if fee arrangements are not substantially revised litigants on both sides should save when their cases are arbitrated rather than tried, because they will generally spend less of their own time in arbitration than at trial, and they will pay less in expert witness fees and other direct expenses. In the absence of arbitration programs, however, most civil money damage suits are not tried, but settled. The difference between litigants' costs to arbitrate cases and their costs to settle these cases is not yet known. Current ICJ research comparing litigants' outcomes when different modes of disposition are used may shed some light on this question.

Access to justice

When considering the adoption of court-annexed arbitration programs, some policymakers assume that litigants must benefit from the provision of a rapid, inexpensive form of dispute resolution. Others, however, are concerned that arbitration, with its abbreviated procedures and rapidly decided outcomes, will provide "second-class" justice. Our study of court arbitration in Pittsburgh systematically examined what litigants obtain from the program and how they feel about it. We investigated the pattern of program usage, the distribution of arbitration awards, and the role of the appeals process. We also measured litigants' satisfaction with arbitration, and, in particular, their views of the fairness of the arbitration procedure. More recently, we have been able to replicate some of these analyses among New Jersey and Bucks County litigants.

Based on the results of these analyses, we have concluded that court-administered arbitration delivers generally acceptable outcomes and is viewed by most individual litigants as a fair way of resolving civil disputes. Attorneys sometimes demur at court arbitration's departure from traditional trial norms, but most view arbitration as an acceptable procedure for resolving smaller civil damage suits.

Program usage. In Pittsburgh, we found that the program was used by a diverse set of litigants, with a broad range of disputes involving money. Arbitrated cases included consumer disputes (sometimes brought by the consumer, sometimes brought by a business person seeking payment), contract disputes, automobile and other property damage cases, and personal injury cases. The amount of money involved in these cases was generally less than $5,000. (At the time of our study the jurisdictional limit in Pittsburgh was $10,000.) The types of disputants included private citizens, small and large businesses, and public agencies. Our Bucks County sample was limited to personal injury cases, although the program handles all money damage suits worth $20,000 or less. Preliminary data analyses in Bucks indicate that arbitration litigants are a cross-section of that county's population.

Case outcomes. About 80 per cent of the Pittsburgh plaintiffs whose cases we sampled obtained some amount of compensation from the arbitrators. Burlington County, New Jersey pilot program data indicate a similarly high level of plaintiff victories. Of course, in both Pittsburgh and Burlington many plaintiffs obtained lower awards than the amount they originally claimed. In Pittsburgh, there was some variation in the relative success of plaintiffs (i.e. award amount compared to prayer) but we could find no evidence that any particular class of litigants or suits is disadvantaged by arbitration. The only exception in this finding regards pro se litigants: surprisingly numerous in Pittsburgh, these litigants appeared to be systematically disadvantaged when they faced represented opponents.

Outcomes of appeals. About 25 per cent of the arbitrated cases in our Pittsburgh sample were appealed, but most of the appealed cases were settled without further court intervention. After examining the outcomes of settlement and trial alter appeal, we concluded that the appeal mechanism serves its intended purpose as a corrective device for individual arbitration errors or misjudgments, while preserving the pattern of outcomes delivered by the arbitrators. We also concluded that the costs of appealing were rarely worth the mone-

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12. It may be that volume arbitration practices of the sort we observed in Pittsburgh take many years to develop.
13. Insurance company representatives frequently assert that lengthy court calendars increase their transaction costs for small cases. If arbitration reduces time to disposition for these cases, these defendants may obtain additional cost savings as a result.
14. In many jurisdictions, plaintiff lawyers charge a somewhat lower contingent fee for settling a case rather than trying it, for example, 33 per cent compared to 40 per cent. In California and perhaps elsewhere, plaintiff attorneys may treat the arbitration hearing as a trial, charging the same percentage of the amount won if a case is arbitrated as they would if it had been tried. Since many cases that reach arbitration hearings formerly would have been settled, plaintiffs could actually be paying increased fees with the advent of arbitration. Of course, if outcomes at arbitration are significantly better for plaintiffs than plaintiffs might nevertheless obtain a net benefit.
tary gain obtained post arbitration.

Litigants' perceptions. We have now measured litigant satisfaction with arbitration programs in four different jurisdictions, with substantially different program rules. In each jurisdiction, the overwhelming majority of individual litigants whom we surveyed were quite satisfied with the program. Although winners are generally more satisfied than losers, a majority of the latter are at least somewhat satisfied with the program. This high level of satisfaction is apparently attributable to litigants' satisfaction with the arbitration procedure itself. We have found that most individual litigants have a simple definition of what constitutes a fair dispute resolution procedure: they want an opportunity to have their cases heard and decided by an impartial third party. In courts that offer an arbitration alternative, unlike most metropolitan courts in which an expensive and time-consuming trial is the only alternative to settlement, litigants with small suits are accorded this opportunity. Most find it a fair process.

Program design variations

As should be clear from the discussion above, although all court-administered arbitration programs share certain key features, program design varies substantially. Even within a state, where all programs are operating under the same authorizing statute, there may be considerable variation from jurisdiction to jurisdiction. Typically, programs are designed in part through legislative decisionmaking (with inputs from state judicial councils or court administrative offices, from the bar, and from other lobbying organizations) and in part through the formal court rulemaking process. Often special bench and bar committees are established locally as well to draft rules of local program operation.

Historically, there was a tendency for these groups to fashion new programs after previously established programs in neighboring states and jurisdictions. Now that information about program design is more readily available, the process of program design may be somewhat more systematic. But ensuring that a program is acceptable to key constituencies—lawyers, insurance companies, public advocates—is still a key component of program design. Our evaluation research suggests that there are many ways of designing court-administered arbitration programs to meet their objectives.

ICJ researchers have identified a small number of key decisions that must be made in designing and implementing court-administered arbitration programs. We discuss the range of options open to policymakers and administrators in making these decisions, and their implications for program outcomes, in a manual entitled Introducing Court Arbitration: A Policymaker's Guide.15 Below I briefly summarize this material, highlighting the most significant design features.

What cases should be eligible for the program? Most programs are limited to money damage suits that fall below a specified dollar amount. The higher a program's jurisdictional limit, the greater the proportion of the caseload that may be diverted from the trial calendar, and the greater the potential for reducing congestion on that calendar.

Who should determine eligibility? In the normal court routine, the court does not attempt to determine the dollar value of a suit, and the plaintiff's own assessment has a strategic purpose, which raises questions about its accuracy. If court personnel assess case value, they can be assured of diverting most eligible cases to arbitration, but the time they must take to do so increases court costs. If litigants (e.g., the plaintiff's attorney) assess eligibility, a considerable number of cases may evade the program16 and be placed on the trial list, but the court will be spared additional expense.

What qualifications should be required of those who volunteer to serve as arbitrators? If arbitrators are required to have extensive and/or specialized experience (e.g., at least five years of personal injury trial experience), then they are more likely to deliver awards that are satisfactory to other practitioners. But the candidate pool will be limited, and the supply of arbitrators may therefore be insufficient to hear cases in a timely fashion. If qualifications are loose, the supply will be greater but the decisions may be less acceptable, leading to more appeals for trial.

How many arbitrators should decide a case? If only one arbitrator is required to hear each case, it will be easier to administer the program and easier to meet the demand for volunteer arbitrators. But attorneys may be more inclined to question the decision of a single arbitrator, leading to a higher rate of appeal. If three or five arbitrators are required, the task of administering the program will be greater, and the per case costs for arbitrator fees may be more, but practitioners may be more inclined to accept the arbitration outcome.17

Who should select the arbitrators to hear each case? If the attorneys have some say in the selection, they may be more inclined to accept the award, but providing for attorney participation may require a cumbersome and time-consuming process. If the court is in charge of assigning the arbitrators, the process may be expedited but litigant and attorney satisfaction may decrease.

Where should the hearings be held? If they are held outside the courthouse, there is no need to set aside space for them, and litigants will be spared the possible emotional strain of coming into court. But it will be more difficult for the court to monitor the scheduling of hearings, and the arbitrators may grow lax in adhering to the court's guidelines for timely disposition. If the hearings are held in the courthouse, court personnel can maintain control over the schedule and the litigants may be more inclined to feel they have had their "day in court." Rather than moving cases "out of the courthouse," however, the court will simply have set up another specialized division to resolve cases.

Should there be a financial disincentive for appeal? If there is no disincentive, the rate of appeals may be so high as to wipe out any reductions in the size of the trial list due to case diversion. If the disincentive is too high, achieving political acceptance of the program will be difficult, and the disincentive itself may ultimately be declared an unconstitutional burden on the right to trial.

Who should fund the arbitration program? If a legislature requires courts to adopt the program, perhaps the state

16. Plaintiffs' attorneys may bypass arbitration because they wish to delay setting a value on the claim, because they want to send a signal to the defense regarding the strength of their position, or because they object to the program per se.
17. Multiple-arbitrator panels are often constructed to represent plaintiff and defense perspectives, which may lead to greater acceptance of their decision.
should pay for the additional administrative expenses. (Traditionally, most trial court expenses are borne by county governments.) But if the program effectively reduces trial court workload, the court should experience savings in the trial division that it can divert to supporting the arbitration program and it may, over the long run, actually experience a reduction in total court costs. Alternatively, if arbitration provides litigants with a more expeditious and less expensive means of resolving their disputes, perhaps they should pay a special arbitration fee to support the program. If the court requires such a payment, however, it is put in the position of charging litigants with small-value suits a higher fee to file their cases than is charged for filing higher-value, trial-bound cases.

**Necessary information**

With the multiplication of research monographs and conferences on court-administered arbitration, judicial policymakers may find themselves in the position of having more assistance in designing and implementing programs than they can handle. But it is too early to conclude that we understand the full ramifications of instituting mandatory arbitration requirements. As pressure from legislators and interest groups to adopt and expand arbitration mounts, I believe we need to give more attention to answering the following questions.

**What kinds of cases are not good candidates for arbitration?** As jurisdictions become comfortable with arbitration, there is often a move to expand the jurisdictional limits of a program, either by incorporating new kinds of cases, or raising the monetary limits on money damage suits, or both. Is it sensible to subject all kinds of civil suits to mandatory court arbitration? In my conversations with court officials and practitioners, I frequently ask: “What kinds of cases do you think are inappropriate for arbitration?” The usual reply is that some cases are simply too complicated to be amenable to a streamlined process: they require extensive discovery, briefing of the issues and the full panoply of a court trial. Complicated cases, I am told, occur with some frequency among smaller value monetary claims and there are simple cases in which large amounts of money are at stake. Should we relegate all small cases to alternative dispute resolution mechanisms, while preserving more expensive traditional procedures for big stakes cases whether or not they “need” them? We need to think even harder about the possible cases for arbitration, regarding this question.

**What factors affect decisions to appeal?** Most judicial policymakers feel that some financial disincentives are necessary to discourage frivolous appeals from arbitration but that it is improper (and probably infeasible) to require that litigants pay substantial amounts of money as a precondition for appeal. We know very little about how the average litigant decides whether to appeal, or indeed whether the lawyer or the litigant plays the primary role. Where appeal rates from arbitration are low, we tend to assume that most litigants find the arbitration verdicts roughly acceptable; instead, they may simply decide that they have no other option but to “lump it.”

18 Institutional litigators presumably assess the costs of appeal somewhat differently; even if these costs outweigh the amount of money at stake in the individual case, they may take appeals as a matter of policy, in order to “keep the system honest” — that is, operating in a fashion that is acceptable to them. Understanding the role of appeals in the arbitration litigation process is important to understanding the equity implications of instituting mandatory arbitration programs.

**How does arbitration affect settlement?** Much of the discussion and research about arbitration focuses on differences between arbitration and trial, but most cases that are currently arbitration-eligible have little or no likelihood of being tried. The real significance of instituting arbitration may lie in its effects on the settlement process. How does arbitration affect lawyers’ and insurers’ negotiation strategies? How does it affect the timing of settlements? Perhaps most important, how does it affect settlement outcomes? We need to focus more attention on these questions as well.

**How does arbitration affect the practice of law?** Finally, underlying all these questions is perhaps the most important of all, how does arbitration affect what lawyers do? Lawyers in many jurisdictions are understandably wary of arbitration programs. Some believe mandatory arbitration represents a small but dangerous step away from the right to jury trial. Some see it as moving further in the direction of production line litigation that is the antithesis of the individually-crafted form of lawyering that they learned at school. Underlying many lawyers’ discomfort with arbitration is a concern about its impact on their fees. How lawyers modify their behavior in the light of arbitration may ultimately determine the future of this form of alternative dispute resolution.

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