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Small Claims and Arbitration—Parallel Alternative Methods of Dispute Resolution

HERBERT B. EVANS and WILLIAM A. BULMAN*

I. Introduction

Beyond the regular court process in New York State, there are two parallel methods of judicially resolving small civil actions for money only. The older and better known procedure, dating from 1934, is the "Small Claims Procedure," now established in local courts in each of the sixty-two counties of the State.¹ The newer procedure, dating from 1970, formerly called "Compulsory Arbitration," but now known as the "Alternate Method of Dispute Resolution by Arbitration," has been established in thirty-one counties in both local and superior courts.²

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1. The procedure is established by: the New York City Civil Court Act (N.Y. CITY CIV. CT. ACT §§ 1801-1814 (McKinney 1982)); the Uniform City Court Act (N.Y. UNIFORM CITY CT. ACT §§ 1801-1814 (McKinney 1982)); the Uniform District Court Act (N.Y. UNIFORM DIST. CT. ACT §§ 1801-1814 (McKinney 1982)); and the Uniform Justice Court Act (N.Y. [UNIFORM] JUST. CT. ACT §§ 1801-1814 (McKinney 1982)); Since these statutes are almost identical, only Article 18 of the New York City Civil Court Act will be emphasized in this article.

2. On Dec. 31, 1979, the arbitration program existed in experimental form in only four counties (Monroe, Broome, Bronx and Schenectady) of the State, having initially been authorized by the Laws of New York (1970 N.Y. Laws 1004). As of January 1, 1983, the date of this article, the program had been expanded to various courts in 31 counties of the State. These include: Albany, Bronx, Broome, Cayuga, Chemung, Dutchess, Erie, Kings, Livingston, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Ontario, Orange, Putnam, Queens, Rensselaer, Rockland, Schenectady, Schuyler, Seneca, Steuben, Suffolk, Tompkins, Ulster, Wayne, Westchester, and Yates. See *infra* note 24.

Both procedures have proven successful, and have been expanded in recent years to deal with growing civil caseloads and problems of calendar congestion and delay.³

With the dual expansion of small claims and arbitration, as we shall hereinafter refer to these procedures, many members of the bench and bar have raised the provocative question whether New York State needs both procedures. Should these procedures be merged, or should one supplant the other? Indeed, at first glance, the procedures may seem not only similar, but in some ways duplicative. Parts II and III of this article summarize small claims and arbitration procedures. Part IV compares their functions and assesses the appropriateness of their distinct operations. Part V recommends that some alteration in both procedures be considered to avoid overlapping, inefficiency and inconsistency. Finally, Part VI concludes that the two parallel procedures of small claims and arbitration, while similar in many respects, so differ in function and underlying purpose as to justify the separate and distinct continuation and expansion of both.

II. The Small Claims Procedure

The small claims procedure, first established in 1934 in the New York City Municipal Court, is now present in every county of the State.⁴ The philosophy of small claims courts has been the

3. Expansion of small claims occurred when the Laws of New York (1975 N.Y. Laws 177) extended the procedure to Town and Village Courts and increased small claims jurisdiction to \$1500 (1980 N.Y. Laws 902). As prologue to the expansion of arbitration, the Laws of New York (1977 N.Y. Laws 165) increased jurisdiction to \$6000 and (1978 N.Y. Laws 156) made the procedure permanent in N.Y. CIV. PRAC. R. 3405 (McKinney 1981). This facilitated the expansion of the arbitration program during 1980 and 1981 from 7 to 27 counties, and then to 31 counties by January 1, 1983.

4. Established initially in the former New York City Municipal Court by the Laws of New York (1934 N.Y. Laws 598); N.Y. CITY CIV. CT. ACT § 1802 (McKinney 1982) now provides:

§ 1802. Parts for the determination of small claims established. The chief administrator shall assign the times and places for holding, and the judges who shall hold, one or more parts of the court in each county for the hearing of small claims as herein defined, and the rules may regulate the practice and procedure controlling the determination of such claims and prescribe and furnish the forms for instituting the same. There shall be at least one evening session for each part every month for the hearing of small claims, provided however, that the chief administrator may provide for exemption from this requirement where there exists no

subject of in-depth study⁵ and its goals have been identified as accessibility, speed, low cost, simplicity, fairness, effectiveness and self-representation.⁶ At the option of the plaintiff, actions for money only, where the demand does not exceed \$1,500, exclusive of interest and costs, may be commenced in a small claims part of court.⁷ By commencing a small claims action, the plaintiff waives trial by jury; if the defendant demands a trial by jury, however, the action is transferred to a regular part of court.⁸ Arbitrators, who are lawyers serving *pro bono publico*,

demonstrated need for evening sessions. Such practice, procedure and forms shall differ from the practice, procedure and forms used in the court for other than small claims, notwithstanding any provision of law to the contrary. They shall constitute a simple, informal and inexpensive procedure for the prompt determination of such claims in accordance with the rules and principles of substantive law. The procedure established pursuant to this article shall not be exclusive of but shall be alternative to the procedure now or hereafter established with respect to actions commenced in the court by the service of a summons. No rule to be enacted pursuant to this article shall dispense with or interfere with the taking of stenographic minutes of any hearing of any small claim hereunder.

Id. See *supra* note 1 and accompanying text.

5. J. RUHNKA, S. WELLER & J. MARTIN, *SMALL CLAIMS COURT: A NATIONAL EXAMINATION* (1978).

6. *Id.* at 2-4.

7. N.Y. CITY CIV. CT. ACT § 1801 (McKinney 1982):

§ 1801. Small claims defined. The term "small claim" or "small claims" as used in this act shall mean and include any cause of action for money only not in excess of one thousand five hundred dollars exclusive of interest and costs, provided that the defendant either resides, or has an office for the transaction of business or a regular employment, within the city of New York.

Id.

8. N.Y. CITY CIV. CT. ACT § 1806 (McKinney 1982):

§ 1806. Trial by jury; how obtained; discretionary costs. A person commencing an action upon a small claim under this article shall be deemed to have waived a trial by jury, but if said action shall be removed to a regular part of the court, the plaintiff shall have the same right to demand a trial by jury as if such action had originally been begun in such part. Any party to such action, other than the plaintiff, prior to the day upon which he is notified to appear or answer, may file with the court a demand for a trial by jury and his affidavit that there are issues of fact in the action requiring such a trial, specifying the same and stating that such trial is desired and intended in good faith. Such demand and affidavit shall be accompanied with the jury fee required by law and an undertaking in the sum of fifty dollars in such form as may be approved by the rules, payable to the other party or parties, conditioned upon the payment of any costs which may be entered against him in the said action or any appeal within thirty days after the entry thereof; or, in lieu of said undertaking, the sum of fifty dollars may be deposited with the clerk of the court and thereupon the clerk shall forthwith transmit such original papers or duly attested copies thereof as may be provided by the rules to

may be utilized by small claims courts where the rules permit. New York City is the major geographical area where volunteer arbitrators are routinely used in most small claims parts.⁹ Small claims parts exist only in lower courts, not in the supreme court or county court.¹⁰ Appeal from a judge's decision in a small claims matter is permitted, but only on grounds that "substantial justice" was not accomplished by the determination.¹¹ Appeals from decisions of arbitrators in small claims matters, however, are not permitted.¹²

the part of the court to which the action shall have been transferred and assigned and such part may require pleadings in such action as though it had been begun by the service of a summons. Such action may be considered a preferred cause of action. In any small claim which may have been transferred to another part of the court, the court may award costs up to twenty-five dollars to the plaintiff if he prevails.

Id.

Details governing small claims procedures are governed in New York by appropriate court rules. *See, e.g.*, Official Compilation of Codes, Rules and Regulations of the State of New York (N.Y. ADMIN. CODE tit. 22C, § 2900.33 (1980)).

9. *See*, N.Y. ADMIN. CODE tit. 22C, § 3840.28(o) (1978). Arbitrators are also used in the Nassau County District Court. *Id.* Arbitrators are also used in the City Court of New Rochelle and some other cities. *Id.* § 3050.11 (1975) (Mt. Vernon); § 3070.11 (1975) (New Rochelle); § 3080.11 (1975) (Peekskill); § 3120.11 (1975) (White Plains); § 3210.9 (1974) (Albany); § 3515.7 (1978) (Syracuse).

10. N.Y. CITY CIV. CT. ACT §§ 1801-1814 (McKinney 1982). *See generally* N.Y. ADMIN. CODE tit. 22A, § 28.2(b) (1982). *Cf. infra* note 25 and accompanying text.

11. N.Y. CITY CIV. CT. ACT § 1807 (McKinney 1963):

§ 1807. Review. A person commencing an action upon a small claim under this article shall be deemed to have waived all right to appeal, except that either party may appeal on the sole grounds that substantial justice has not been done between the parties according to the rules and principles of substantive law.

Id.

12. Not all court rules authorizing the voluntary arbitration of small claims expressly provide that no appeal lies from an arbitrator's award. However, such appeals are not allowed. *See Sikes, Small Claims Arbitration: The Need for Appeal*, 16 COLUM. J.L. & SOC. PROBS. 399, 401 n.10 (1981), which extensively analyzes the adequacy of the appellate process. *See also* the MANUAL OF THE SMALL CLAIMS PART, CIVIL COURT OF THE CITY OF NEW YORK (1973). In some courts, such as the Nassau County District Court, the rules expressly require parties to waive in writing the right to appeal when choosing to submit the claim to an arbitrator rather than a judge. District Court Rules, Nassau County, N.Y. ADMIN. CODE tit. 22C, § 3840.28(o)(2) (1978). Some City Court Rules also expressly require a waiver procedure, under which parties who utilize the arbitration process must consent in writing that the arbitrator's decision is final and non-appealable. *See, e.g.* City Court of New Rochelle Rules, N.Y. ADMIN. CODE tit. 22C, § 3070.11(c) (1975). In other courts, when parties consent in writing to submit small claims to arbitration, they simultaneously must consent in writing to waive appellate review, although the rules do not expressly so provide. *See, e.g.*, Rules of the Civil Court of the City of New

There are certain salient features of a proceeding in a small claims court. First, only an individual plaintiff may commence an action;¹³ corporate plaintiffs may not use small claims court.¹⁴ Second, the notice of claim that commences a small claims action is mailed to the defendant by the clerk of the court; only if service cannot be completed in this manner must the plaintiff personally serve the defendant.¹⁵ Finally, if the defendant has a counterclaim, it must fall within the court's jurisdiction and may not be asserted in the small claims action if it exceeds \$1,500. Otherwise, it must be brought as a separate action in a regular

York, N.Y. ADMIN. CODE, 22C § 2900.33(o) (1980).

13. N.Y. CTRY CIV. CT. ACT § 1809(1) (McKinney 1982). *See infra* note 14.

14. N.Y. CTRY CIV. CT. ACT § 1809(1), (2), (McKinney 1982):

§ 1809. Procedures relating to corporations, associations, insurers and assignees.

1. No corporation, except a municipal corporation, public benefit corporation, school district or school district public library wholly or partially within the municipal corporate limit, no partnership, or association and no assignee of any small claim shall institute an action or proceeding under this article, nor shall this article apply to any claim or cause of action brought by an insurer in its own name or in the name of its insured whether before or after payment to the insured on the policy.

2. A corporation may appear in the defense of any small claim action brought pursuant to this article by a natural person who is a shareholder who owns not less than one-third of the issued shares of voting stock of such corporation or, in the case of a corporation having no more than ten holders of issued shares of voting stock, all of whom are natural persons, an officer of such corporation.

Id.

15. N.Y. CTRY CIV. CT. ACT § 1803(a) (McKinney 1982):

§ 1803. Commencement of action upon small claim.

(a) Small claims shall be commenced upon the payment by the claimant of a filing fee of three dollars and the cost of certified mailing as herein provided, without the service of a summons and, except by special order of the court, without the service of any pleading other than a statement of his cause of action by the claimant or someone in his behalf to the clerk, who shall reduce the same to a concise, written form and record it in a docket kept especially for such purpose. Such procedure shall provide for the sending of notice of such claim by certified mail with return receipt requested to the party complained against at his residence, if he resides within the city of New York, and his residence is known to the claimant, or at his office or place of regular employment within the city of New York if he does not reside therein or his residence within the city of New York is not known to the claimant. Such procedure shall further provide for an early hearing upon and determination of such claim. No filing fee, however, shall be demanded or received on small claims of employees who shall comply with § 1912(a) of this act which is hereby made applicable, except that necessary mailing costs shall be paid.

Id. See also, N.Y. ADMIN. CODE tit. 22C, § 2900.33(d)(3) (1980).

part of the court rather than in small claims part.¹⁶

Small claims court is intended to be a "people's court." This principle is manifested in the *Guide to Small Claims Court* which is provided, by statutory mandate,¹⁷ to each claimant by the clerks of the various small claims courts.¹⁸ The *Guide* provides that

[i]f you choose, you may be represented by an attorney at the trial at your own expense, but it is not necessary to have one since small claims is meant to be a "people's court" where claims may be tried speedily, informally, and inexpensively. The defendant has the same choice. If, however, both parties have an attor-

16. N.Y. CIV. CT. ACT § 1805(b) (McKinney 1982):
§ 1805. Power to transfer small claims, remedies applicable.

.....
(b) No counterclaim shall be permitted in a small claims action, unless the court would have had monetary jurisdiction over the counterclaim if it had been filed as a small claim. Any other claim sought to be maintained against the claimant may be filed in any court of competent jurisdiction.

Id. See *supra* note 7 and accompanying text.

17. 1980 N.Y. LAWS 39 § 5. See N.Y. CIV. CT. ACT § 1803(b) (McKinney 1982):
§ 1803. Commencement of action upon small claims.

.....
(b) The clerk shall furnish every claimant, upon commencement of the action, with information written in clear and coherent language which shall be prescribed and furnished by the office of court administration, concerning the small claims court. Such information shall include, but not be limited to, an explanation of the following terms and procedures; (sic) adjournments, counterclaims, jury trial requests, subpoenas, arbitration, collection methods and fees, and the utilization of section eighteen hundred twelve of this article concerning treble damage awards, and the claimant's right to notify the appropriate state or local licensing or certifying authority of an unsatisfied judgment if it arises out of the carrying on, conducting or transaction of a licensed or certified business or if such business appears to be engaged in fraudulent or illegal acts or otherwise demonstrates fraud or illegality in the carrying on, conducting or transaction of its business. The information shall be available in English. Large signs in English shall be posted in conspicuous locations in each small claims court clerk's office, advising the public of its availability.

Id.

18. A *Guide to Small Claims Court*, published in 1982, was prepared by the New York State Unified Court System with the assistance of Herbert Kline, Esq., of Binghamton, principal author of *Small Claims Guide for Town and Village Courts* (4th ed. 1981), Hon. Richard Lee Price, now Judge of the Civil Court of the City of New York, and with the cooperation of Gould Publications, publisher of the *Small Claims Guide*, as well as Citibank, New York Public Interest Research Group, Inc. and Eric A. Goldstein, Esq., who prepared the guide entitled *How to Get Your Day (Or Night) in Small Claims Court*.

ney, the claim may be transferred to the regular part of the court.¹⁹

Until recently, a corporation sued as a defendant in small claims part was required to retain a lawyer.²⁰ Representation by an officer or director, who was not a lawyer, was prohibited. This requirement, however, violated the underlying principle that small claims actions, unlike other actions, should be prosecuted and defended *pro se*. The relevant acts were, therefore, amended to permit certain corporations to defend a small claim without legal representation.²¹

III. The Arbitration Procedure

The Alternative Method of Dispute Resolution by Arbitration is authorized by New York Civil Practice Law and Rules 3405 and Part 28 of the Rules of the Chief Judge of the State of New York.²² It has been established in many courts and counties, although not everywhere in the State,²³ by administrative order of

19. *A Guide to Small Claims Court*, *supra* note 18, at 3.

20. N.Y. CIV. PRAC. LAW § 321(a) (McKinney 1972); N.Y. JUD. LAW §§ 478, 485 (McKinney 1982).

21. 1976 N.Y. LAWS 200. Section 1809 of the New York City Civil Court Act and the counterpart sections of the Uniform District Court Act, Uniform City Court Act and the Uniform Justice Court Act were amended. The amendments were, however, made in a somewhat cumbersome manner. *See supra* note 14.

22. N.Y. CIV. PRAC. R. 3405 (McKinney 1981) contains the statutory basis of the arbitration program.

Rule 3405. Arbitration of certain claims. The chief judge of the court of appeals may promulgate rules for the arbitration of claims for the recovery of a sum of money not exceeding six thousand dollars, exclusive of interest, pending in any court or courts. Such rules must permit a jury trial *de novo* upon demand by any party following the determination of the arbitrators and may require the demander to pay the cost of arbitration; and shall also provide for all procedures necessary to initiate, conduct and determine the arbitration. A judgment may be entered upon the arbitration award. The rules shall further provide for the recruitment and qualifications of the arbitrators and for their compensation. All expenses for compensation, reimbursement and administration under this rule shall be a state charge to be paid out of funds appropriated to the administrative office for the courts for that purpose.

Id. N.Y. Civ. Prac. R. 3405, in turn, is implemented by Part 28 of the Rules of the Chief Judge of the State of New York, Alternate Method of Dispute Resolution by Arbitration, N.Y. ADMIN. CODE tit. 22A, §§ 28.1-28.14 (1982).

23. N.Y. ADMIN. CODE tit. 22A, § 28.2(a) (1982):

§ 28.2. Mandatory submission of actions to arbitration.

(a) The Chief Administrator may establish in any trial court in any county

the the Chief Administrator of the Courts.²⁴ Unlike the small claims procedure, however, it may be established not only in lower courts but also in the supreme court and county court.²⁵ In the courts and counties where arbitration is established, it is mandatory for all money actions not exceeding \$6,000, exclusive of costs and interest, unless the action is commenced as a small claim and not subsequently transferred to a regular part of court.²⁶ The Chief Administrator's orders have directed that actions demanding not more than \$2,000, exclusive of costs and interest, will be heard by a single arbitrator; actions demanding more than \$2,000, but not more than \$6,000 exclusive of costs and interest, will be heard by three arbitrators unless the parties stipulate to be heard by a single arbitrator. The chairman of a panel or where appropriate, the single arbitrator, must be a member of the bar for at least five years; the second and third panelists need only be members of the bar.²⁷ Arbitrators under

the arbitration program authorized by this Part.

Id. See *supra* note 2 and accompanying text.

24. See *supra* note 22. Rule 3405 allows the Chief Administrator to establish the arbitration system in any county and court by administrative order.

25. N.Y. ADMIN. CODE tit. 22A, § 28.2(b) (1982):

§ 28.2. Mandatory submission of actions to arbitration.

. . . .

(b) In each county where an arbitration program is established by order of the Chief Administrator, all civil actions for a sum of money only, except those commenced in small claims parts and not subsequently transferred to a regular part of court, that are noticed for trial or commenced in the Supreme Court, County Court, the Civil Court of the City of New York, a District Court or a City Court, on or after the effective date of the order where recovery sought for each cause of action is \$6000 or less, or such other sum as may be authorized by law, exclusive of costs and interest, shall be heard and decided by a panel of arbitrators. The Chief Administrator may also, at any time, upon the establishment of the program in any particular court or county or thereafter, provide for the submission to arbitration of actions seeking recovery of such sums, that are pending for trial in those courts on the effective date of the order.

Id.

26. *Id.*

27. N.Y. ADMIN. CODE tit. 22A, § 28.4(b) (1982):

§ 28.4. Selection of panels of arbitrators.

. . . .

(b) Names of attorneys shall be drawn at random from the list. Where a three-arbitrator panel is utilized, the first name drawn for each three-arbitrator panel shall be the chairperson thereof. The chairperson of each panel shall have been admitted to practice in New York State as an attorney for at least five years; and the second and third members must be admitted to practice but not for any

this program, although volunteers, are compensated.²⁸

The underlying philosophy and goals of arbitration have been described as follows:

The foundation for a successful program of compulsory arbitration is enthusiastic reception by the bar, which necessarily involves familiarity with the program by lawyers. In the final analysis, the interest of the bar is more vital to the success of arbitration than the enthusiasm of judges and administrators, because arbitration essentially is a program operated by the bar, related to, but outside the court structure. While the prime beneficiaries of arbitration are members of the public—clients and litigants—the secondary beneficiaries are lawyers and the courts. Litigants are enabled to obtain legal remedies swiftly, through determination by panels of lawyers, without giving up substantial rights, in matters which are too large to be handled as small claims, but too small to justify the expense and delay of full blown court proceedings. Lawyers can dispose of smaller cases with dispatch. Courts are relieved of the necessity to try matters easily disposed of by arbitrators and judges are left free to preside over more complex cases. The compulsory arbitration experience, which predates the New York experience, indicates that once the bar becomes aware of the program, it takes the initiative in seeking its insulation, and then works hard to ensure its successful

specified period of time, unless the Chief Administrator shall, by order, otherwise determine. Not more than one member or employee of a partnership or firm shall be appointed to any panel.

Id.

28. Single arbitrators are paid \$45 per case, as are chairpersons of three-arbitrator panels. The two non-chairperson panelists in a three-arbitrator panel are paid \$35 per case. N.Y. ADMIN. CODE tit. 22A, § 28.10 (1982):

§ 28.10. Compensation of arbitrators.

(a) The Chief Administrator shall provide for the compensation, including expenses, payable to each arbitrator to the extent of money available to the administrative office for the courts for this purpose. Claims for such compensation shall be made to the commissioner after entry of the award on forms prescribed by the Chief Administrator, except that a claim for compensation of the chairperson of a panel also may be made where the action is settled or withdrawn after a panel hearing date has been scheduled but before the hearing is commenced, and a claim for compensation of an arbitrator other than a chairperson may be made where the action is settled or withdrawn within three days of the date scheduled for the hearing. The commissioner shall forward all claims approved by him to the Chief Administrator. Any arbitrator may apply to the commissioner for reimbursement of extraordinary expenses necessarily incurred by him in the same manner as provided for application for ordinary compensation.

Id.

operation.²⁹

Arbitration in this form began in Pennsylvania and was extended to New York and other states.³⁰ New York, in particular, has had noteworthy success with this method of dispute resolution.³¹

Unlike the small claims procedure, counterclaims of any amount may be asserted in arbitration.³² If, theoretically, a money action for \$6,000 were instituted, and a counterclaim for \$1,000,000 were interposed, the arbitration panel would have jurisdiction over that claim. Although this situation would be rare, many actions for more than \$6,000 are submitted to arbitration every day by stipulation of the parties.

A commissioner of arbitration, designated by the Chief Administrator in each county where the program is established, assigns between three and six actions to each randomly selected arbitration panel.³³ Hearings are held in a place provided by the

29. Evans & Bulman, *Alternate Dispute Resolution Method Holds Out Promise of Great Utility*, N.Y.L.J., Jan. 24, 1980, at 25, col.2.

30. See, *id.*; *An Evaluation of Compulsory Arbitration in Rochester, The Bronx, Binghamton, and Schenectady*, TWENTY-THIRD ANNUAL REPORT OF THE JUDICIAL CONFERENCE AND THE OFFICE OF COURT ADMINISTRATION 333 (1978); *Compulsory Arbitration and Court Congestion*, in THE PENNSYLVANIAN COMPULSORY ARBITRATION STATUTE-SUPPLEMENTARY REPORT, INSTITUTE OF JUDICIAL ADMINISTRATION (1959); Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961); Rosenberg & Sovern, *Delay and Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959); *Partial Elimination of Jury Trials in Civil Cases—New York Simplified Procedure versus the Pennsylvania System*, 18 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 615 (1963).

31. During the twelve terms of court commencing December 28, 1981 and ending November 28, 1982, the total number of actions statewide that entered the arbitration program was 17,516; the total number of actions disposed of through arbitration was 18,957. On July 12, 1981, the number of actions awaiting disposition by arbitration was 5,101. The percentage of actions in which awards were made where one party or another demanded a trial *de novo* was only 9.7 percent. Recapitulation of Arbitration Program, Computer Printout, January 11, 1983, prepared by the Statistical Unit of the New York City Office of Court Administration. The printout is available at the New York City Office of Court Administration.

32. N.Y. ADMIN. CODE tit. 22A, § 28.2(d) (1982):

§ 28.2(d). Mandatory submission of actions to arbitration.

In any action subject to arbitration under these rules or submitted to arbitration by stipulation, the arbitration panel shall have jurisdiction of any counterclaim or crossclaim for a sum of money only that has been interposed, without regard to amount.

Id. See *supra* notes 7 & 16 and accompanying text.

33. N.Y. ADMIN. CODE tit. 22A, § 28.5 (1982):

court, commissioner, chairperson, or panelist, but must be within the county, unless all consent to an out-of-county location.³⁴ Although in some areas arbitration hearings are held in courtrooms, the vast majority of hearings, statewide, are held in lawyers' offices. The chairperson is requested to fix a hearing date not less than fifteen nor more than thirty days after the case is assigned, and must give written notice to panelists and parties at least ten days before the date. If a case cannot be timely scheduled the commissioner must be so advised. If an action is twice continued after having been assigned to two panels, the commissioner must refer the matter to the court for action or direction.³⁵

§ 28.5. Assignment of actions to panel.

(a) The commissioner shall assign to each panel at least the first three, but no more than six, actions pending on the arbitration calendar.

(b) If an action is settled or discontinued before the hearing, the attorney for the plaintiff shall immediately notify the chairperson and the commissioner. If the plaintiff is not represented by an attorney, the chairperson, upon receiving notice of such settlement or discontinuance, shall immediately notify the commissioner. The commissioner, upon receiving such notice, shall assign the next available action to the panel.

Id.

34. N.Y. ADMIN. CODE tit. 22A, § 28.6(a) (1982):

§ 28.6. Scheduling of arbitration hearing.

(a) The hearing shall be held in a place provided by the court, by the commissioner, by the chairperson of the panel or, at the request of the chairperson, by a member of the panel. Unless otherwise agreed by the panel, parties and counsel, such place shall be within the county.

Id.

35. N.Y. ADMIN. CODE tit. 22A, § 28.6(b), (c), (d) (1982):

§ 28.6 Scheduling of arbitration hearings.

(b) The chairperson shall fix a hearing date and time, not less than 15 nor more than 30 days after the case is assigned, and shall give written notice to the members of the panel and the parties or their counsel at least 10 days before the date set. The commissioner may, on good cause shown, extend for a reasonable period the time within which the hearing shall be commenced. Such date and time shall not be a Saturday, Sunday, legal holiday or during evening hours except by agreement of the panel, parties and counsel.

(c) If the chairperson is unable to schedule a hearing within 30 days after the case is assigned, or within such further period as the commissioner may set, he shall notify the commissioner in writing of the reasons for such inability. The commissioner shall mark the action "continued" and place it on the arbitration calendar, and shall assign another action to the panel.

(d) Any action which is continued twice, after assignment to two panels, shall be referred by the commissioner to the court where the action was commenced or,

The arbitration panels, which have the general powers of a court including subpoena powers, conduct the hearings "with due regard to the law and established rules of evidence," which are liberally construed to promote justice.³⁶ Witness fees are the same as in a court of law, as is the assignment of costs. The panel is not required to make a stenographic record of the hearing but a party may obtain one by assuming the expense.³⁷

An award is signed by the panel, or a majority of the panel; the award and a report are then filed with the commissioner within twenty days of the hearing, at which time copies are also sent to each party. The commissioner files the original copy of the award with the appropriate court clerk who also notifies the

if the action was transferred, to the court to which it was transferred, for a hearing on the cause of the inability to hold an arbitration hearing. The court, upon such hearing, may order a dismissal, or authorize the entry of judgment by default pursuant to CPLR 3215, or refer the action to the commissioner for assignment to another panel.

Id.

36. N.Y. ADMIN. CODE tit. 22A, § 28.8(a), (b) (1982):

§ 28.8. Conduct of hearings.

(a) The panel shall conduct the hearing with due regard to the law and established rules of evidence, which shall be liberally construed to promote justice. In personal injury cases, medical proof may be established by the submission into evidence of medical reports of attending or examining physicians upon stipulation of all parties.

(b) The panel shall have the general powers of a court, including but not limited to:

- (1) subpoenaing witnesses to appear;
- (2) subpoenaing books, papers, documents and other items of evidence;
- (3) administering oaths or affirmations;
- (4) determining the admissibility of evidence and the form in which it is to be offered;
- (5) deciding questions of law and facts in the actions submitted to them.

Id.

37. N.Y. ADMIN. CODE tit. 22A, § 28.9 (1982):

§ 28.9. Costs of hearings; stenographic record.

(a) Witness fees shall be the same as in the court in which the action was commenced or, if the action was transferred, the court to which the action was transferred and the costs shall be borne by the same parties as in court.

(b) The panel shall not be required to cause a stenographic record to be made, but if any party, at least five days before the hearing, requests such record to be kept and deposits \$50 or such additional sum as the panel may fix to secure payment therefor, the panel shall provide a stenographer. Any surplus deposited shall be returned to the party depositing it. The costs of the stenographer shall not be a taxable disbursement.

Id.

parties. The award is final and judgment is entered unless a demand is made for trial *de novo*, or the award is vacated.³⁸ Within thirty days after the award is served upon a party, he may move to vacate the award if he has not demanded a trial *de novo*.³⁹ A party may also demand a trial *de novo* in the court where the action was commenced or to which it was transferred, with or without a jury. This demand must be served upon all adverse parties within thirty days of the filing of the award. When the demand is filed, the demandant must pay to the court clerk the amount of the compensation payable to the panel by the Office of Court Administration. At the trial *de novo*, the arbitrators may not be called as witnesses nor may the arbitrators' award report be admitted into evidence. If the judgment upon

38. N.Y. ADMIN. CODE tit. 22A, § 28.11(a), (b) (1982):

§ 28.11. Award.

(a) The award shall be signed by the panel of arbitrators or at least a majority of them. The chairperson shall file a report and the award with the commissioner within 20 days after the hearing, and mail or deliver copies thereof to the parties or their counsel. The commissioner shall mark his files accordingly, file the original with the clerk of the court where the action was commenced or, if the action was transferred, the court to which it was transferred, and notify the parties of such filing.

(b) Unless a demand is made for a *trial de novo*, or the award vacated, the award shall be final and judgment shall be entered thereon by the clerk of the court where the action was commenced or, if the action was transferred, the clerk of the court to which it was transferred, with costs and disbursements taxed in accordance with the Civil Practice Law and Rules, the Uniform City Court Act, the New York City Civil Court Act, or the Uniform District Court Act, as the case may be.

Id.

39. N.Y. ADMIN. CODE tit. 22A, § 28.13(a) (1982):

§ 28.13(a). Motion to vacate award.

(a) Any party, except one who has demanded a *trial de novo*, within 30 days after the award is filed, may serve upon all other parties who have appeared and file with the appropriate court clerk a motion to vacate the award on only the grounds that the rights of the moving party were prejudiced because:

- (1) there was corruption, fraud or misconduct in procuring the award;
- (2) the panel making the award exceeded its power or so imperfectly executed it that a final and definite award was not made; or
- (3) there was a substantial failure to follow the procedures established by or pursuant to these rules;

unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Id. These grounds for vacating are substantially the same as the grounds provided for vacating an award in an Arbitration proceeding under N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1980).

the trial *de novo* is not more favorable than the arbitration award, the demandant must pay costs to the other party and cannot recover interest from the time of the award.⁴⁰

IV. Comparison of the Two Procedures

Small claims and arbitration, like all judicial and quasi-judicial proceedings, seek to resolve disputes in society. Despite this and other evident similarities, however, small claims and arbitration perform different functions in our legal and judicial system and have different *raison d'être*. Basic differences in the functions of each procedure explain why the arbitration rules expressly exclude from the scope of arbitration actions commenced in a small claims part which are not transferred to a regular part

40. N.Y. ADMIN. CODE tit. 22A, § 28.12 (1982):
§ 28.12. *Trial de novo*.

(a) Demand may be made by any party not in default for a *trial de novo* in the court where the action was commenced or, if the action was transferred, the court to which it was transferred, with or without a jury. Any party who is not in default, within 30 days after the award is filed with the appropriate court clerk, may file with the clerk of the court where the award was filed and serve upon all adverse parties a demand for a *trial de novo*.

(b) If the demandant either serves or files a timely demand for a *trial de novo* but neglects through mistake or excusable neglect to do one of those two acts within the time limited, the court where the action was commenced or, if the action was transferred, the court to which it was transferred, may grant an extension of time for curing the omission.

(c) The demandant shall also, concurrently with the filing of the demand, pay to the court clerk where the award was filed the amount of the fees payable to the panel by the administrative office for the courts pursuant to section 28.10 of this Part. Such sum shall not be recoverable by the demandant upon a *trial de novo* or in any other proceeding.

(d) The arbitrators shall not be called as witnesses nor shall the report or award of the arbitrators be admitted in evidence at the *trial de novo*.

(e) If the judgment upon the *trial de novo* is not more favorable than the arbitration award in the amount of damages awarded or the type of relief granted to the demandant, the demandant shall not recover interest or statutory costs and disbursements from the time of the award, but shall pay such statutory costs and disbursements to the other party or parties from the time of the filing of the demand for the *trial de novo*.

Id. The court where the action was commenced or, to which it was transferred, hears and determines all collateral motions relating to arbitration proceedings *Id.* § 28.14.

A demand for a *trial de novo* is available only to a party not in default. *See id.* § 28.7(a), (b) for a discussion of when a party is in default.

Where all parties fail to appear at a hearing, the panel is obligated to proceed to an award and decision. Provisions are also made available for vacating a default and restoring the arbitration to the calendar. *Id.* § 28.7(b).

of court, and also why the New York City Civil Court rules require an action to be transferred out of small claims part when both parties are represented by attorneys. Small claims parts were primarily designed for *pro se* litigants, although in New York State, attorneys are permitted to appear.⁴¹ Arbitration, on the other hand, has often been called "trial by lawyer."⁴² While permitting *pro se* appearances, arbitration procedures are basically geared to appearances by lawyers. One example of this focus is reflected in the possibility of disposing of disputes in arbitration involving very large amounts of money, theoretically millions of dollars. Whereas such disputes are not mandated into arbitration, they may be submitted to arbitration by stipulation, by cross-claim, or by counterclaim.⁴³ Because small claims was designed primarily as a *pro se* court, these disputes would not be regarded as proper to small claims parts.⁴⁴

Small claims proceedings are heard before judges in courtrooms; arbitration hearings, however, are held routinely in lawyers' offices where the panel is not robed, and where there are no court attendants or uniformed officers to maintain order.⁴⁵ Such indicia of judicial power should be unnecessary to maintain order and decorum when lawyers are involved in arbitration, but may be necessary where heated, emotional disputes between *pro se* litigants are involved. These differences in function and philosophy are by no means limited to New York State. At last count, there were eight states where statute or rule actually barred lawyers from representing any parties in a small claims action.⁴⁶

41. See *supra* notes 17-19 and accompanying text. Recently, amendments have been made in the Uniform Acts to permit small corporations to defend small claims without being represented by an attorney, something heretofore disallowed because a court appearance on behalf of a corporation by a non-lawyer officer or shareholder technically constituted the practice of law without a license. See *supra* notes 20-21 and accompanying text.

42. Rosenberg & Schublin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961).

43. See *supra* note 32 and accompanying text.

44. See *supra* note 41 and accompanying text.

45. Rosenberg & Schublin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448, 469 (1961). See *supra* note 34 and accompanying text.

46. See J. RUHNKA, S. WELLER & J. MARTIN, *SMALL CLAIMS COURT: A NATIONAL EXAMINATION*, 15 n.6 (1978) which lists the following states: California, Colorado, Idaho,

A distinction between small claims procedures and arbitration, which accounts for the significant role of the judge in small claims, except where the parties voluntarily consent to appear before small claims arbitrators, is that small claims part is an integral part of court, and a small claims hearing is a real, albeit informal, in-court, judicial hearing.⁴⁷ In contrast, arbitration is essentially a program for diverting actions *out* of the court system, usually to the lawyers' offices, and returnable to the courts only through a demand for a *de novo* trial.⁴⁸ Arbitration is thus an out-of-court lawyer-operated procedure where the judges' role is minimal.

V. Recommendation

One procedure cannot replace the other. As a practical matter, arbitration might not be able to handle an avalanche of small claims if small claims parts were abolished. Lawyer arbitrators also might find it difficult to process *pro se* actions in their private offices because of the problem of keeping order without court security personnel, and without the indicia of judicial or even quasi-judicial authority in the presence of sometimes antagonistic *pro se* litigants. If, instead, arbitration were abolished, small claims procedures would be ill-equipped to cope with the variety of cases processed by arbitration, and the presence of lawyers would give rise to a motion practice not suited to small claims parts.

In summary, both procedures should be improved, strengthened, and expanded because both are needed. One helpful change recently made that relates to arbitration was an amendment to Part 28 of the Rules of the Chief Judge of the State of New York to permit actions for less than \$6,000 to be mandated into arbitration even if originally commenced in small claims parts, as long as they subsequently had been transferred from small claims parts to regular parts. The Rules, until the January 1, 1982 amendment, prohibited an action begun as a small claim from being mandated into arbitration, even if subsequently

Kansas, Michigan, Nebraska, Oregon, and Washington.

47. N.Y. CIV. CT. ACT § 1802 (McKinney 1982); *contra* N.Y. ADMIN. CODE tit. 22A, § 28.1(a) (1982). *See supra* note 4.

48. *See supra* notes 34 & 40 and accompanying text.

transferred to a regular part of court, thereby ceasing to be a small claim.⁴⁹ Another possible change relating to small claims procedures might be the expanded use of arbitrators to handle small claims outside New York City and other localities where currently used, to avoid unnecessary utilization of judicial time in minor matters.⁵⁰ Small claims arbitrators, unlike Part 28 arbitrators, preside in the same manner as small claims judges over hearings held in courtrooms, where the litigants usually are *pro se*. Small claims arbitration fully retains the aura of an "in-court" proceeding. If further study indicates that the expanded use of arbitrators is feasible, the existing rules of the several lower courts having small claims jurisdiction would have to be reviewed to determine what rule amendments are required to expand the use of volunteer arbitrators to additional small claims courts outside New York City. A provision such as section 2900.33(o) of the Rules of the Civil Court of the City of New York,⁵¹ which expressly provides for the arbitration of small claims by lawyers, might be enacted in rules of courts outside New York City which do not now provide for small claims arbitration. Section 206 of the Uniform Justice Court Act, however, prohibits any matter required to be decided by the court from being referred to an arbitrator unless expressly permitted by rule.⁵² In fact, no enabling provision has been inserted in the Uniform Justice Court Rules; consideration might be given to such an amendment.

Another potential change in the small claims procedures that would underscore the small claims *raison d'être* would be an amendment to section 1809 of the acts establishing the small claims procedure,⁵³ to permit any corporation to appear without an attorney in the defense of any action. This change would emphasize the *pro se* philosophy of small claims courts. In the 1982

49. Section 28.2 of the Arbitration Rules was amended January 1, 1982 to provide that the exception of small claims from mandatory arbitration shall be limited to actions "commenced in small claims parts and not subsequently transferred to a regular part of court." N.Y. ADMIN. CODE tit. 22A, § 28.2(b) (1982).

50. Most small claims actions in the Civil Court of the City of New York are not heard by judges but by volunteer lawyer arbitrators. See *supra* note 9 and accompanying text.

51. N.Y. ADMIN. CODE tit. 22C, § 2900.33(o) (1980).

52. N.Y. [UNIFORM] JUST. CT. ACT § 206 (McKinney 1982).

53. See *supra* note 1.

Report of the Advisory Committee on Civil Practice to the Chief Administrator of the Courts, the Advisory Committee made such a proposal, which would enable any corporate defendant in a small claims action to appear by an officer, director or employee.⁵⁴

54. 1982 ADVISORY COMMITTEE TO THE CHIEF ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK, REPORT ON CIVIL PRACTICE 87-91. The chairperson of the Advisory Committee to the Chief Administrator is Sheila L. Birnbaum, Associate Dean of the New York University School of Law, in explaining the proposal the Committee stated:

The Committee recommends the proposed amendment on the ground that the policy underlying the provisions which permit a corporate defendant to appear in small claims actions without an attorney would be fully implemented only by enactment of the proposed legislation. It should be noted that no change is recommended in the provisions which prohibit corporations from commencing small claims with or without an attorney.

The general provision of section 321(a) of the Civil Practice Law and Rules, which is salutary, provides that a corporation or voluntary association shall always appear in an action by an attorney, "except as otherwise provided in section 1809 of the New York city civil court act, the uniform district court act, the uniform city court and the uniform just court act". In 1976 these court acts all were identically amended to permit a corporation to appear in the defense of a small claim action, without an attorney, by "a shareholder who owns not less than one-third of the issued shares of voting stock of such corporation or, in the case of a corporation having no more than ten holders of issued shares of voting stock, all of whom are natural persons, an officer of the corporation".

The Advisory Committee on Civil Practice believes that small claims courts are designed primarily for *pro se* litigation and that the mandatory use of lawyers in these courts is counterproductive to speedy and inexpensive disposition and is unfair to both plaintiffs and defendants. The cumbersome exception that now permits certain corporations but not others to defend a small claims action without a lawyer is inconsistent with the simplicity of procedure desired in small claims courts, and is illogical because the complex formula does not actually distinguish on the basis of corporate size, even though such a distinction may have been intended. Conceivably, under the present statutory formula, a very large family corporation could appear without an attorney.

The traditional justification for requiring a corporation to appear by an attorney is that a corporation is not a natural person who can appear *pro se*. The Court in *Austrian, Lance & Stewart, P.C. v Hastings Properties, Inc.*, 87 Misc.2d 25, 26 (1976), states that "the reason corporations are required to act through attorneys is that a corporation is a hydra-headed entity and its shareholders are insulated from personal responsibility. There must, therefore, be a designated spokesman accountable to the Court".

The Advisory Committee believes it untenable that in actions for \$100 or \$200 against a corporation, the corporate officer familiar with the matter cannot represent the corporation. Often it is inconvenient to retain an attorney for this purpose and the expense is unwarranted. In addition, it is hardly equitable to insist that the small individual claimant, whenever he sues a larger corporation in small claims, must either appear *pro se* and argue against a corporate attorney or

VI. Conclusion

Small claims and arbitration procedures should each continue to be improved and expanded to prevent unnecessary overlapping, to promote effectiveness, and to enhance and clarify their different functions. Neither procedure should supplant the other, however, nor lose its distinct identity. The continued improvement of existing alternative methods of dispute resolution in civil, criminal and family law, together with the search for new methods, remains an important part of the effort to end court congestion and delay, and to provide for the swift and inexpensive resolution of disputes.

else undergo the expense of retaining counsel. The unfairness works both ways.

The Advisory Committee does not feel that shareholders who are not officers should appear for corporations in small claims actions, since this often could involve dissident or unrepresentative shareholders. However, it is proposed that a corporation named as defendant in a small claims action, if it does not choose to retain an attorney for the purpose, may appear by an officer, employee or director.

Id. at 89-91.