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### Recommended Citation

Paul Nejelski, & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: the Philadelphia Story*, 42 Md. L. Rev. 787 (1983)  
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol42/iss4/9>

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# Articles

## COURT-ANNEXED ARBITRATION IN THE FEDERAL COURTS: THE PHILADELPHIA STORY

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AND  
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Our justice system's problems—primarily delay, expense, and overburdened courts—have received increased public attention recently, in large part because of public comments by the Justices of the Supreme Court.<sup>1</sup> It has become a truism that we are the most litigious people on earth, and that our machinery for processing all this litigation is sorely over-taxed. If we cannot learn to live together more harmoniously, we must find a means to disagree more efficiently.

Students of court reform know that these problems are not new, and that a number of solutions have been proposed for many years—some since the beginning of recorded time. One such proposal is the development of alternative dispute-resolution methods, and a promising example is the “court-annexed”<sup>2</sup> arbitration program currently underway since 1978 in the Eastern District of Pennsylvania<sup>3</sup> and the

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The views expressed herein are solely those of the authors. This article was not written in their respective capacities as Circuit Executive and Research Intern and does not necessarily reflect the views of the Circuit Executive's Office.

1. See, e.g., Remarks of Chief Justice Warren Burger at the Arthur T. Vanderbilt Dinner (Nov. 18, 1982) (available at the offices of the *Maryland Law Review* or the Federal Judicial Center Information Service); Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A.J. 274, 275-76 (1982).

2. The term “court-annexed arbitration” apparently was conceived by Assistant Attorney General Daniel J. Meador. See *The Court-Annexed Arbitration Act of 1978: Hearings on S. 2253 Before the Subcomm. on Improvements in Judicial Machinery*, 95th Cong., 2d Sess. 23 (1978) (statement of Attorney General Griffin B. Bell) [hereinafter cited as *Hearings*].

3. To initiate the court-annexed arbitration program, Local Rule 49 was adopted on February 1, 1978, for a period of one year on an experimental basis. After an extension of the temporary rule, “[o]n August 1, 1980 the [arbitration] program was extended indefinitely

Northern District of California (a program begun in the District of Connecticut has since been discontinued). Court-annexed arbitration differs from other kinds of arbitration<sup>4</sup> in that: it is compulsory for cases meeting the program's eligibility requirements; parties are entitled to a trial de novo in the district court; and perhaps most important, the entire program is conducted under the supervision of the district court.<sup>5</sup> Adopted by local rule in the district courts, the arbitration program seeks to improve access to justice for litigants in civil actions by reducing the time and expense required to resolve their disputes.<sup>6</sup> In addition, the program may ease the caseload of both the District Court and Circuit Court of Appeals by reducing the number of civil trials, and therefore the number of appeals.<sup>7</sup>

After a brief historical review of court-annexed arbitration, this

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with the adoption of Local Civil Rule 8." See M. KUNZ, ARBITRATION SUMMARY, FEB. 1, 1978 - JAN. 31, 1983, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 1 (1983) [hereinafter cited as ARBITRATION SUMMARY—1983].

4. Four federal district courts provide for voluntary arbitration in their local rules. See D. HAWAII R. CIV. P. 235.3f; N.D. ILL. R. CIV. P. 24; D. MD. R. CIV. P. 38A; W.D. WASH. R. CIV. P. 39.1.

In Hawaii, Local Rule 235.3f went into effect on October 1, 1981. At a status conference attended by the parties prior to trial, the arbitration procedure may be ordered by a judge after an action has been filed. The procedure is very rarely used. Telephone interview with Clerk's Office, District of Hawaii (Aug. 11, 1982).

In Illinois and Maryland, the parties to a civil action may stipulate, subject to the approval of the court, in writing for submission of the controversy, or particular issues therein, to arbitration. See N.D. ILL. R. CIV. P. 24; D. MD. R. CIV. P. 38A. In Illinois the rule is used minimally, if at all. Telephone interview with Perry Moses, Chief Deputy Clerk of the Northern District of Illinois (Jan. 13, 1983). The arbitration rule in Maryland has never been used. Telephone interview with Paul Schlitz, Clerk of Court for the District of Maryland (Jan. 13, 1983).

In Washington the local rule provides that parties to a dispute may stipulate to arbitration. See W.D. WASH. R. CIV. P. 39.1. It is being used successfully, but by only one judge. Telephone interview with Joseph Haas, Chief Deputy Clerk of the Western District of Washington (Jan. 13, 1983).

One commentator has noted that voluntary arbitration programs have not been as successful as compulsory programs. Because of the resistance of the Bar to innovation and the possible resistance of litigants to using unfamiliar procedures to settle their disputes, voluntary arbitration programs are not used with sufficient frequency to create an impact on court dockets. See Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475, 492, 506-07 (1978).

5. See Note, *supra* note 4, at 481-83. For a comparative analysis of traditional litigation and traditional (non-court-annexed) arbitration in the Eastern District of Pennsylvania see H. KRITZER & J. ANDERSON, THE ARBITRATION ALTERNATIVE: A COMPARATIVE ANALYSIS OF CASE PROCESSING TIME, DISPOSITION MODE, AND COST IN THE AMERICAN ARBITRATION ASSOCIATION AND THE COURTS *passim* (1983) (Available at Disputes Processing Research Program, University of Wisconsin—Madison Law School).

6. See *Hearings*, *supra* note 2, at 21 (statement of Attorney General Griffin Bell).

7. See *id.* at 20 (statement of Attorney General Griffin Bell).

article examines the factors that led to the implementations of the program, describes the characteristics of the program, and evaluates its success, after five years, in meeting the goals for which it was created. This Article concludes by urging that Congress and the federal judiciary expand the program.

## I. HISTORICAL PERSPECTIVE

### A. *General Background*

As today's justice system struggles to meet the ever-increasing demands of modern society's complexity, it seems logical to seek innovative alternatives to the problems of expense and delay which that complexity produces. Consequently, a risk arises that an alternative will be characterized as novel simply because it mitigates modern problems. In the case of arbitration, however, such a characterization would be inaccurate. The concept of arbitration may be traced back to ancient Egyptian<sup>8</sup> and Greek societies,<sup>9</sup> and is therefore among the oldest methods of dispute resolution.

Arbitration's popularity has waxed and waned in response to different forces at various periods in Anglo-American legal history. In England, arbitration has been practiced at least since the medieval period as merchants—often foreigners and residents for a short time—needed quick, impartial, and expert resolution of their disputes.<sup>10</sup> Ar-

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8. See Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME LAW. 182, 184 (1965). "[I]n Egypt . . . circa 2500 B.C., the grand chief Nekheb dictated that controversies between the priests [were to] be submitted to fellow members of the college for settlement." *Id.* (citing Mantica, *Arbitration in Ancient Egypt*, 12 ARB. J. 155, 158 (1957)).

9. See D.M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS*, 203-11 (1978). Arbitration apparently developed in Athens as an alternative to the expensive and elaborate procedures that characterized its administration of justice. *Id.* at 203. Initially, arbitration was a private agreement by which the parties consented to be bound by the award of the arbitrator. *Id.* at 204-06. Public arbitration, as distinguished from private arbitration, also existed in Athens. Unlike private arbitration, either party to public arbitration could appeal the arbitrator's award and retain the right to jury trial. The parties in private arbitration chose their arbitrator, but in public arbitration "they were compelled by law to submit their case to an arbitrator who was not of their own choosing." *Id.* at 209.

10. See Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 276 (1982).

[A] study of . . . commercial arbitration indicates that it is not a recent phenomenon. Mercantile disputes have been decided . . . in the Anglo-American world since at least the thirteenth century. In the early period the decision[s] of mercantile cases [were] assigned to courts staffed by merchants . . . ; the guilds and trading companies had their own tribunals . . . . Chancery referred its mercantile cases to arbitration, while the common law courts seemed to be using merchant juries.

Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-55 (1961).

For an analysis of the adoption of commercial arbitration in English law see Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928). Sayre suggests that commercial arbitration developed as "part of the regular judicial system" employed and

bitration's low cost, flexibility, and informality, together with the familiarity of many arbitrators with commercial issues,<sup>11</sup> enabled business arbitration to thrive throughout the seventeenth and eighteenth centuries even as the common law underwent reform.<sup>12</sup> One major problem that developed during the seventeenth century, however, was the inability of a party to enforce the arbitration award.<sup>13</sup> This drawback, some scholars argue, was responsible for arbitration's ultimate demise in England.<sup>14</sup> Although arbitration survived in form under statutory authority, it became subject to the stultifying effect of increasingly close supervision and intervention by the courts.<sup>15</sup>

Although scholars disagree about the extent of its use, arbitration was practiced in America as early as the colonial period.<sup>16</sup> By the late

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developed by the courts. *Id.* at 598. The earliest English case involving arbitration is stated to have occurred during the consolidation of the English Kingdom, after the Anglo-Saxon period. *Id.* at 597-98. *But see* Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 *ARB. J.* 193 *passim* (1961) (arbitration existed during Anglo-Saxon period).

11. *See* M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 145 (1977). The agricultural bent of the courts resulted in "mercantile questions [being] so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves." *Id.* at 147 (quoting Lord Campbell). When a group of merchants established a system of arbitration in their town, it was noted that "in addition to the fact that legal decisions 'were often grievously expensive,' they were 'frequently different from what sea-faring persons conceived to be just' because of 'the ignorance of lawyers in maritime affairs . . .'" *Id.*

12. *See* Address by H. Arthurs, Public Lecture to Faculty of Law, University of Saskatchewan (Mar. 26, 1982) (on file with the *Maryland Law Review*) noting that "by the middle of the nineteenth century, even as the formal legal system struggled to rationalize and reform itself, arbitration of business disputes [in England] was becoming particularly widespread." *Id.* at 8.

13. *See* M. HORWITZ, *supra* note 11, at 145 (citing *Vynior's Case* (1609) 4 Coke's Rep. pt. 8, 81a & 81b (K.B. 1609)).

14. *See* Boskey, *A History of Commercial Arbitration in New Jersey*, 8 *RUT.-CAM L.J.* 1 (1976). "[The English] courts . . . refused to recognize the validity of an agreement to arbitrate and were prepared to substitute their judgment for that of an arbitrator at any point prior to execution of the award." *Id.* at 2 (citation omitted). *But see* H. Arthurs, *supra* note 12, at 7-11 (courts review of award followed enactment of Arbitration Act in 1899).

15. *See* H. Arthurs, *supra* note 12, at 10. Arthurs argues that the one serious weakness of arbitration was that a party could withdraw his consent to arbitration. The enactment of the Arbitration Act of 1899 allowed courts "to extend to arbitrators full legal support for their procedures and decisions but also, . . . they acquired an open-ended mandate to review arbitrators' decisions." *Id.* Another author traces the beginning of the process of judicial interest in scrutiny and review of arbitration to the First Arbitration Act in England in 1698. *See* M. Horwitz, *supra* note 11, at 145. This development followed the breakdown of the self-policing mechanism of penalties which, before 1697, had been used to enforce arbitration awards. *Id.*

16. *See, e.g.,* M. Horwitz, *supra* note 11, at 145. "In America, use of extra-judicial means of settlement through arbitration and reference was very widespread among commercial interests during the colonial period but remained essentially unregulated by courts." *Id.* *But see* F. KELLOR, *AMERICAN ARBITRATION* 4-6 (1948). "Except for its adoption by a few trade and commercial organizations and its use in the settlement of some differences over

eighteenth century, arbitration had become a popular alternative among merchants for largely the same reasons—particularly the commercial expertise arbitration brought to bear on disputes—that had attracted merchants of an earlier period in England.<sup>17</sup> By the end of the eighteenth and into the nineteenth century, however, arbitration in America began to decline.<sup>18</sup> Although several theories have been advanced to account for this decline,<sup>19</sup> it is clear that, paralleling the earlier developments across the Atlantic,<sup>20</sup> arbitration's efficacy was severely eroded by restrictions imposed by a judiciary and bar hostile to extrajudicial settlement. This pattern emerged against the backdrop of the larger ideological struggle between the Hamiltonians and the Jeffersonians that shaped the organization and power of the judicial

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colonial rights and boundaries and in the collection of debts, arbitration does not appear to have struck deep roots in early American life." *Id.* at 6.

17. See M. HORWITZ, *supra* note 11, at 146-48.

18. This decline occurred despite the "great legislative advance in encouraging extrajudicial dispute resolution." *Id.* at 149.

19. One scholar notes that the decline occurred due to the indiscriminate application of the term "arbitration" to other processes, e.g., mediation and conciliation, which caused parties to become confused and disenchanted. Often, would-be litigants expected a judicial process, but instead were prodded to compromise. Therefore, general misunderstandings and dissatisfaction with arbitration developed. F. KELLOR, *supra* note 16, at 5. This theory suggests that as the common law and court machinery developed, the arbitration process was "caught" in a "period of confusion," and without the benefit of its own machinery, it was eclipsed by the former. As a result, the arbitration process fell into disuse. *Id.* at 5-6.

Another commentator contends that "[t]he need of the English courts to be self-supporting led them to develop a hostility towards alternative forums for the resolution of disputes, and arbitration, with its advantages of speed and economy, posed a serious threat to their jurisdiction. These courts, therefore, refused to recognize the validity of an agreement to arbitrate and were prepared to substitute their judgment for that of an arbitrator at any point prior to execution of the award." Boskey, *supra* note 14, at 2 (citations omitted).

Another commentator, in perhaps a more logical explanation, attributes the demise to sound judicial interpretation. He asserts that had the courts wished to secure the jurisdiction of all disputes for themselves they would have "ruled that a bond given to secure a submission to arbitration was against public policy, and void." Sayre, *supra* note 10, at 610. Instead these courts "have based their attitude solely on the interpretation of common law rights, holding that one could not contract away his right to revoke where the provision for settling the dispute by arbitration did not have the sanctions of due notice and fair hearing." *Id.*

For an analysis of the "doctrine of judicial jealousy" see *Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp.*, 126 F.2d 978, 982-84 (2d Cir. 1942). For a discussion of the origin of this theory see J. COHEN, *COMMERCIAL ARBITRATION AND THE LAW*, 153-69 (1918). For a discussion of the alternative, judicial protection - common law approach, see *Tobey v. County of Bristol*, 23 F. Cas. 1312, 1321 (C.C.D. Mass. 1845) (No. 14,065); Sayre, *supra* note 10, at 610-12.

20. See M. HORWITZ, *supra* note 11, at 154. Horwitz notes that the increased organization and self-consciousness of the legal profession, coupled with its developing accommodation of the merchants' interests through the transformation of the legal rules, produced a law that was capable of being the "one disputed and authoritative source of rules for regulating commercial life." *Id.* at 154-55.

branch during its formative years.<sup>21</sup> The Hamiltonians, concerned with stability and precedent, generally prevailed over the Jeffersonian interest in equity, individually tailored justice, and alternative means of dispute resolution.<sup>22</sup>

One author has observed that Americans traditionally have been more inclined to settle their disputes by force or its close substitute—litigation—than by arbitration.<sup>23</sup> Consequently, with judicial remedies firmly established as the means for dispute resolution, little effort was made to promote arbitration throughout the nineteenth century.<sup>24</sup> It was not until after the first World War, when arbitration agreements were held legally valid and enforceable,<sup>25</sup> that a new era in American arbitration began.<sup>26</sup>

21. See Nejelski, *The Jeffersonian/Hamiltonian Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE 450, 452 (1981). “[T]he mercantile classes, which had found the colonial legal rules hostile to their interests began, at the end of the eighteenth century, to find that common law judges themselves were prepared to overturn anticommercial legal conceptions.” M. HORWITZ, *supra* note 11, at 154. The commercial areas of New England and New York were Federalist (Hamiltonian) strongholds, favoring a strong national commercial economy and opposing alternatives to the court (i.e. arbitration). They feared that such innovations would create uncertainty with respect to the national economic system and thereby threaten their positions as creditors. See Nejelski, *supra*, at 452. The Jeffersonians, popular in the South and West, advocated a decentralized government and were unsupportive of a strong, elitist judiciary. *Id.* at 452-53. One thinker went even further. “[A] radical writing in 1786 . . . proposed the abolition of lawyers and, as a partial alternative, an extensive system of arbitration.” *Id.* at 453 n. 9 (citing R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 114 (1971)).

22. Nejelski, *supra* note 21, at 453-59. The Constitution reflects a compromise between the Hamiltonian and Jeffersonian positions with respect to the checks and balances system and the right to a jury trial. *Id.* at 452-53. However, alternatives to the courts were not generally accepted. For example, arbitration awards were “opposed by the judiciary, which refused to give [the awards] binding [effect].” *Id.* at 459 (citing W. STURGES, *CASES ON ARBITRATION LAW* (1953)). Also, administrative agencies and decisions were resisted by the judicial system. See Nejelski, *supra* note 21, at 459.

23. See F. KELLOR, *supra* note 16, at 6-7. “America was a rich country, full of adventure and could afford a considerable volume of disputes at a high cost of settlement . . . . Since in trade and commerce the margin of profit was then sufficient to allow for a very considerable waste, the attribute of economy was not an attraction to arbitration.” *Id.* at 6.

24. *Id.* at 5. “Education in the knowledge or use of arbitration was unheard of, nor was there source material available, nor had teachers thought of instruction in the subject . . . . Generally speaking, unawareness was the phenomenon of this early period.” *Id.* at 8.

25. Sarpy, *supra* note 8, at 184. Although agreements to arbitrate were not illegal, before the 1920’s parties generally could not compel performance of them. *Id.* Legislation, enacted in New York in 1920, authorized courts to validate agreements to submit disputes to arbitration. 1920 N.Y. Laws ch. 275 § 2. The Supreme Court, in upholding this statute, required that a court action must be stayed upon a showing that a valid contract provision mandates that the parties arbitrate their dispute. See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924). Subsequently, Congress enacted arbitration statutes. See, e.g., *Railway Labor Act* ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-164 (1964)). See generally Sarpy, *supra* note 8, at 184-85.

26. F. KELLOR, *supra* note 16, at 9.

### B. *Pennsylvania's Heritage*

Pennsylvania's experience with arbitration has been longer and richer than most parts of the country.<sup>27</sup> "Under the influence of Quaker antilegalism, Pennsylvania had been at the forefront of the colonies in providing for arbitration."<sup>28</sup> Pennsylvania adopted its first judicial arbitration statute in 1705,<sup>29</sup> enabling litigants by mutual consent to submit voluntarily to arbitration.<sup>30</sup> In 1810 a new Act<sup>31</sup> provided for compulsory arbitration upon the official request of one of the litigants.<sup>32</sup> The Act of 1836<sup>33</sup> incorporated the provisions of the prior acts and retained the Pennsylvania common law dealing with arbitration.<sup>34</sup> The procedure, however, was not widely used because of the inadequate compensation the arbitrators received.<sup>35</sup> The next major development came in 1951, when the legislature amended the 1836 statute to authorize the Common Pleas Courts to enact, by rule of court, a com-

27. See F. KELLOR, *supra* note 16, at 7. In addition to commercial arbitration, Pennsylvania has also had a long history of court-annexed arbitration. See *infra* notes 28-44 and accompanying text.

28. M. HORWITZ, *supra* note 11, at 151.

29. PA. STAT. ANN. tit. 5, § 8 (Purdon 1963) (originally enacted as 1705, 1 Sm. L. 49, § 3). In 1976, Pennsylvania began to recodify its laws. As a result, title 5, section 8 has been repealed, amended and recodified at 42 PA. CONS. STAT. ANN. § 7362 (Purdon 1982).

30. The Act provided that the parties mutually choose the arbitration panel. 42 PA. CONS. STAT. ANN. § 7362 (Purdon 1982) (PA. STAT. ANN. tit. 5, § 8 (Purdon 1963)). The standard of review for setting aside an arbitration award included "case[s] in which it appear[ed] that the principles whereon the award [was] founded [were] contrary to law." *O'Reilly v. Reading*, 3 Berks 410 (1911). The standard of review for an arbitrator's mistake of fact was that "the mistake must be plain, manifest, [and] unquestionable . . . . It must appear that there was no evidence sufficient to sustain the facts declared by the award." *Id.* at 411.

31. Act of March 20, 1810 cited in Comment, *Compulsory Arbitration in Pennsylvania—Its Scope, Effect, Application, and Limitations in Montgomery and Delaware Counties—A Survey and Analysis*, 2 VILL. L. REV. 529, 531 (1957).

32. See Comment, *supra* note 31, at 531.

33. Act of June 16, 1836, 1836 Pa. Laws 715 (codified at 42 PA. CONS. STAT. ANN. § 7301 *et seq.* (Purdon 1982)).

34. See Historical Note, PA. STAT. ANN. tit. 5, § 1 (Purdon 1963). "The act of 1836 . . . was intended to supply and to incorporate all the provisions of the acts of 1705, . . . 1806, . . . 1808, . . . 1809, . . . 1810, . . . 1813, . . . 1820, . . . 1824, . . . 1825 . . ." *Id.* Some question existed subsequent to the enactment of the Act of 1836 as to whether it incorporated the Act of 1806, thereby repealing it. This question was affirmatively resolved "in 1868 by the Pennsylvania Supreme Court in *Steel v. Lineberger*, 59 Pa. 308 (1868)." Comment, *supra* note 31, at 531 n.12.

35. Note, *Compulsory Arbitration to Relieve Trial Calendar Congestion*, 8 STAN. L. REV. 410, 411 n. 8 (1956) citing *Brandon & Marinaro, Butler County Tries Arbitration*, 23 PA. B.A.Q. 58 (1951). See *Elsbree, The Case For More Arbitration*, 30 PA. B.A.Q. 335, 339 n.4 (1959) (stating that the arbitration proceeding was a complicated one and that, because the arbitrators were not required to be members of the Bar, the level of their competence often was less than professional).



pulsory arbitration program for all cases with an amount in controversy below \$1,000.<sup>36</sup>

On the whole, the results of Pennsylvania's state program have been encouraging. The arbitration statute, which has been amended to increase the jurisdictional amount several times since 1951,<sup>37</sup> has withstood constitutional challenges.<sup>38</sup> The program has expedited case set-

36. Act of June 14, 1952, 1951 Pa. Laws 590 (codified at 42 PA. CONS. STAT. ANN. § 7361(b)(2) (Purdon 1982) (PA. STAT. ANN. tit. 5, § 30 (Purdon 1963))). The Act provided in pertinent part:

The several courts of common pleas, the County Court of Allegheny County and the Municipal Court of Philadelphia may, by rules of court, provide that all cases which are at issue where the amount in controversy shall be \$1,000 or less, except those involving title to real estate, shall first be submitted to and heard by a board of three (3) members of the bar within the judicial district.

1951 Pa. Laws 590 § 8.1.

37. The statute was amended in 1957 and 1959. See Historical Note, PA. STAT. ANN. tit. 5, § 30 (Purdon 1963). The award limit was increased to \$2,000 in 1958, \$3,000 in 1968, and to \$10,000 in 1971. See Note, *supra* note 4, at 483 n.45 (1978) (citing COMPILED MATERIALS IN THE PHILADELPHIA COMPULSORY ARBITRATION PROGRAM 2-3 (Apr. 1, 1973)). See also Terrill, *Arbitration Center Cuts Court Backlog*, Philadelphia Legal Intelligencer, (The Retainer Supplement), May 26, 1982, at 15, col. 2.

In September 1971, the Board of Judges of the Court of Common Pleas of Philadelphia County raised the arbitration limit to \$10,000 following the passage of enabling legislation by the Legislature that year, and two additional increases over the last ten years have brought that amount to \$20,000 at present. [See 42 PA. CONS. STAT. ANN. § 7361(b)(2) (Purdon 1982.)]

*Id.*

38. See, e.g., *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1955). In *Smith*, the petitioner had challenged the validity of a common pleas court rule which had been "adopted in pursuance of this [arbitration] legislation," 381 Pa. at 225, 112 A.2d at 627. Specifically, the petitioner objected that the rule would deprive him of a jury trial except under "burdensome, oppressive and unreasonable conditions." 381 Pa. at 228, 112 A.2d at 628. The rule provided for compulsory arbitration, and although de novo appeals were permitted, the appealing party was required to pay the cost of the arbitrator's compensation, \$25 per person or \$75 total, as a condition for the right to appeal. 381 Pa. at 227-30, 112 A.2d at 628-30.

The court rejected petitioner's challenges. It held that because the arbitrators' award was not final and the right to jury trial was preserved, the right to jury trial had not been violated. 381 Pa. at 230-31, 112 A.2d at 629. The court further noted that "[a]ll that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." 381 Pa. at 231, 112 A.2d at 629. The court concluded that the "requirement of the payment of costs before the entry of an appeal in order to obtain a jury trial" was not an infringement on the constitutional right to a jury trial, guaranteed by article I, section 6 of the constitution. 381 Pa. at 231, 112 A.2d at 629 (citations omitted).

A subsequent case challenged the validity of the Arbitration Act asserting that it violated the Pennsylvania Constitution, article V, section 15 "which provides that: 'All judges required to be learned in the law, . . . shall be elected' . . ." *Talhelm v. Buggy*, 9 Pa. D. & C.2d 482, 486 (1955) (quoting PA. CONST., art. V, § 15). The court determined that, although members of the arbitration board may engage in judicial activities, they are not judges, but are state officials in much the same way as court appointed masters, board mem-

tlement,<sup>39</sup> reduced the civil case backlog,<sup>40</sup> and reduced the cost of dispute resolution to both litigants and courts.<sup>41</sup> It has proved to be a model for effective dispute resolution around the country.<sup>42</sup>

This brief account of arbitration's history reveals several patterns that are instructive in examining contemporary proposals in the federal courts. Arbitration frequently has emerged as an independent alternative to judicial dispute resolution, usually in response to the practical needs of commercial parties. The reaction of the judiciary and the bar has been to attempt, generally with success, to eliminate this source of competition.

Despite the early development of a sophisticated arbitration system independent of the courts in Pennsylvania, judicial resistance and interference eventually spelled such a system's doom in that state as well.<sup>43</sup> Rather than falling into disuse, however, arbitration in Pennsylvania ceased to be independent and came under judicial supervision; ultimately it was limited to relatively minor disputes. Thus the threat of a body of commercial law developing independently of the judiciary disappeared because courts were authorized by statute to set aside awards for factual or legal errors. And the parties gained the benefit of judicial enforcement of the award.<sup>44</sup> This fundamental adaptation of arbitration, together with other historical factors that make alternative dispute-resolution mechanisms attractive, such as long delays and an

bers of the Workmen's Compensation Board, or members of the Public Utilities Commission. 9 Pa. D. & C.2d, at 486.

39. See A. LEVIN & E. WOOLLEY, *DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA* 49-50 (1961). See also Rosenberg & Schublin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448, 455-56 (1960).

"Compulsory arbitration of small claims, instituted in Pennsylvania in 1951, has disposed of more than 41,000 cases in Philadelphia County alone in the [first] seven years [of the program]." Note, *Arbitration and Award—Study Predicts Effects of Increase in Jurisdictional Amount of Compulsory Arbitration*, 113 U. PA. L. REV. 1117 (1965).

40. In Philadelphia County, "[w]hen compulsory arbitration was instituted, over 7000 cases were backlogged in that court with the list growing every month. Recent reports indicate that the list is current . . ." Note, *supra* note 39, at 1118 (quoting A. LEVIN & E. WOOLLEY, *supra* note 39, at 47-48). The removal of the small claims also expedites the disposition of larger cases. Note, *supra* note 35, at 418.

41. See Terrill, *supra* note 37, at 16, col. 1, 2. "The arbitration program saves money in the form of the cost of courtroom operation, salaries, jury fees and related expenses." *Id.* at col. 2.

42. Note, *supra* note 37, at 483. "The compulsory arbitration program in Pennsylvania has been described as 'the oldest, most refined, most utilized and most copied of any arbitration program . . . in the United States.'" *Id.* citing JUDICIAL COUNCIL OF CALIFORNIA, *A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS* 27 (1972).

43. See H. HORWITZ, *supra* note 11, at 151-54.

44. See *id.* at 152-53.

elected judiciary,<sup>45</sup> may explain why arbitration is today an accepted component of the Pennsylvania state court system.

Court-annexed arbitration has proved an effective innovation in jurisdictions other than Pennsylvania. By 1977, when the federal arbitration experiment began, at least ten states had some form of court-annexed arbitration.<sup>46</sup>

### C. *Contemporary Proposals in the Federal System*

A conservative philosophy initially dominated the American judicial system.<sup>47</sup> Although our civil courts have been the subject of popular dissatisfaction from their inception,<sup>48</sup> the system characteristically has failed to respond quickly to evolving conditions.<sup>49</sup> Dean Roscoe Pound noted over seventy-five years ago that "[the system] does not change until those ill effects are felt, often not until they are felt acutely."<sup>50</sup>

At the annual meeting of the ABA in 1958, Chief Justice Earl Warren described a heavy backlog of federal cases, then nearly 70,000, which was causing excessive delay in the civil docket<sup>51</sup> and was threatening the fairness of the judicial system.<sup>52</sup> The Judicial Conference

45. See *Above the Law*, Philadelphia Inquirer (Special Reprint of articles appearing May 15-17, 1983) (describing problems with Pennsylvania's elected state judiciary).

46. *Hearings*, *supra* note 2, at 21 (statement of Attorney General Griffin B. Bell).

47. See *supra* notes 21-22 and accompanying text.

48. See generally, Address by Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, at the American Bar Association meeting in St. Paul, Minnesota (Aug. 26, 1906), reprinted in *Proceedings in Commemoration of the Address . . . by Roscoe Pound*, 35 F.R.D. 241, 273 (1964) [hereinafter cited as POUND]. Pound explained:

Our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

*Id.* (emphasis added).

49. Address by Chief Justice Burger, *State of the Judiciary—1970*, at the American Bar Association Annual Meeting in St. Louis, Missouri (Aug., 1970) reprinted in 56 A.B.A.J. 929 (1970) [hereinafter cited as *State of the Judiciary*].

50. POUND, *supra* note 48, at 277-78.

51. See Address by Chief Justice Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, American Bar Association Annual Meeting in Los Angeles, California (Aug. 25, 1958) reprinted in 44 A.B.A.J. 1043, 1044 (1958) [hereinafter cited as *The Problem of Delay*]. The Chief Justice further noted in 1958 that "nearly 40 percent of all civil cases in federal district courts [were] subject to undue delay—from one to four years between the dates of issue and trial." *Id.* at 1044.

52. *Id.* at 1043. Chief Justice Warren remarked, "I must report that interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitu-

had found that the average time from issue date to trial in the federal system should be about six months, but only seven out of ninety-four districts had met that standard.<sup>53</sup> Warren asserted that judges were not responsible for the delay—they were handling 232 cases a year compared with 168 cases in 1941.<sup>54</sup> To reduce the backlog and delay, Warren recommended a number of changes in the system, including increasing the number of judges and the initiation of pretrial conferences in most civil cases.<sup>55</sup>

In 1959, other proposals suggested that some form of compulsory arbitration could help relieve the federal backlog. An early legislative proposal called for compulsory arbitration for automobile tort actions brought in federal courts under diversity jurisdiction.<sup>56</sup> Since the early 1950's diversity litigation had been recognized as a major source of court congestion.<sup>57</sup>

In the same year, Wayland Elsbree, the president and editor of *The Philadelphia Legal Intelligencer*, responded to Chief Justice Warren's speech by proposing that the federal system adopt a compulsory arbitration scheme to reduce the civil backlog rather than simply increasing the number of judges or use of pretrial conferences.<sup>58</sup> He suggested further that the success of the Pennsylvania compulsory arbitration program could be duplicated at the federal level.<sup>59</sup> It was to take almost twenty more years before these proposals for changes in the federal court system produced any tangible results. By 1970, pending federal cases had increased to 114,117,<sup>60</sup> and district court judges were

tional government in the United States." *Id.* See also Note, *supra* note 35, at 410. "The passage of time causes memories to dim and witnesses to die or disappear. And a plaintiff with a just claim may be deterred from prosecuting it or be compelled to make an inequitable settlement by financial inability to wait for trial." *Id.* (citations omitted).

53. *The Problem of Delay*, *supra* note 51, at 1044.

54. *Id.*

55. *Id.* at 1046.

56. See S. 2415, 86th Cong., 1st Sess. (1959). The bill was "introduced by Senator Scott of Pennsylvania, authorizing arbitration of 'certain automobile cases coming before the District Courts of the United States.'" Note, *supra* note 39, at 1117 n.9 (quoting S. 2415, 86th Cong., 1st Sess. (1959)).

57. See *State of Judiciary*, *supra* note 49, at 930. "Today automobile cases are the largest single category of civil cases." *Id.*

58. See Elsbree, *supra* note 35, *passim*. Elsbree noted that "there is a serious doubt whether the courts have the manpower to pretry cases and achieve settlements thereby in a volume sufficient to place the work of the courts on a current basis . . ." *Id.* at 336. He further commented that "[i]t is doubtful whether our legislatures or Congress will look kindly upon any increase [in judges] that would be needed to wipe out the backlog of cases now existing in some courts." *Id.* at 337.

59. *Id.*

60. MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS—1975 at 126 (Na-

terminating an average of 345 cases per year.<sup>61</sup> This gloomy condition of the federal courts prompted Chief Justice Warren Burger in his first State of the Judiciary address to note that the failure to heed Roscoe Pound's warnings had resulted in "still trying to operate the courts with fundamentally the same basic methods, the same procedures, and the same machinery [Pound] said were not good enough in 1906."<sup>62</sup> Burger outlined eight major steps to meet the crisis, including the formation of a judicial council that would consider, among other proposals, eliminating diversity jurisdiction for automobile collision cases.<sup>63</sup>

By 1976, when Chief Justice Burger helped convene the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference), conditions in the federal system had continued to deteriorate. Pending cases were approaching 160,000 and average terminations per judge had increased to 375.<sup>64</sup> Median time from issue date to trial for civil cases had remained relatively constant since 1970 at approximately eleven to twelve months;<sup>65</sup> but weighted filings per judge, which give heavier weight to cases known to be of a more difficult and time-consuming nature,<sup>66</sup> had jumped from 273 in 1970 to 432 in 1976.<sup>67</sup>

Favorably impressed with the results of state programs, several participants at the Pound Conference proposed arbitration as a potential remedy to meet the increasing overload of cases in both federal and state courts.<sup>68</sup> Chaired by former Circuit Judge Griffin B. Bell, the follow-up task force to the Pound Conference endorsed these proposals by recommending the experimental use of arbitration in the federal system.<sup>69</sup>

tional Statistical Profile from 1970-75) [hereinafter cited as MANAGEMENT STATISTICS—1975].

61. *Id.*

62. *State of the Judiciary*, *supra* note 49, at 929.

63. *Id.* at 933-34.

64. *Compare* MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS—1980 at 129 (National Statistical Profile from 1975-80) [hereinafter cited as MANAGEMENT STATISTICS—1980] *with supra* notes 51-54 and accompanying text (discussing the condition of the federal courts in 1958).

65. *Compare* MANAGEMENT STATISTICS—1975, *supra* note 60, at 126 *with* MANAGEMENT STATISTICS—1980, *supra* note 64, at 129.

66. MANAGEMENT STATISTICS—1980, *supra* note 64, at d.

67. *Compare* MANAGEMENT STATISTICS—1975, *supra* note 60, at 126 *with* MANAGEMENT STATISTICS—1980, *supra* note 64, at 129.

68. *See* E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 1 (1981). The authors' conclusions were based on the positive results attained by the several state courts in which court-annexed arbitration was operating. *Id. passim.*

69. *See id.* at 1-2.

When Judge Bell became Attorney General in 1977, he demonstrated his concern for this area of judicial reform by promptly creating a new office of Improvements in the Administration of Justice.<sup>70</sup> Under the direction of Assistant Attorney General Daniel J. Meador, the new office was charged initially with developing a wide range of court reform proposals. At the state level this included the creation of three neighborhood justice centers and a proposed national center for dispute resolution. At the federal level these proposals included increasing the use and power of magistrates, reducing or eliminating diversity jurisdiction, and "a proposal for court-annexed arbitration of civil cases in the federal courts."<sup>71</sup>

The Justice Department drafted a bill that would "authorize" from five to eight federal courts to experiment with court-annexed arbitration in specific types of civil cases, and submitted it to Congress in October, 1977.<sup>72</sup> Although Congress did not enact this legislation, it concurred in the need to experiment with court-annexed arbitration and appropriated funding for three federal district courts that had adopted compulsory arbitration in early 1978 by local rule<sup>73</sup> at the suggestion of the Justice Department.<sup>74</sup> Congress and the Justice Department made provisions for the Federal Judicial Center to evaluate these programs after approximately two years.<sup>75</sup> Congress then could review the programs to determine whether to continue funding and whether to encourage or to mandate expansion.<sup>76</sup>

Thus, a decade of effort to implement an arbitration program ultimately culminated in a tangible result. To test various aspects of the proposed court-annexed arbitration plans and to meet local needs and conditions, the three federal courts, the Northern District of California, the District of Connecticut (which since has dropped-out of the program), and the Eastern District of Pennsylvania, each adopted rules incorporating different requirements.<sup>77</sup> Bringing this effort full circle,

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70. See Nejeliski, *Court-Annexed Arbitration*, 14 FORUM 215, 215 (1978).

71. *Id.*

72. See *Hearings*, *supra* note 2, at 16-17.

73. D. CONN. R. CIV. P. 28; N.D. CAL. R. CIV. P. 500, E.D. PA. R. CIV. P. 49, *cited in full* in E. LIND & J. SHAPARD, *supra* note 68, at Appendix A.

74. See E. LIND & J. SHAPARD, *supra* note 68, at 2; *Hearings*, *supra* note 2, at 20-21.

75. See E. LIND & J. SHAPARD, *supra* note 68, at 2; *Hearings*, *supra* note 2, at 21.

76. See *Hearings*, *supra* note 2, at 21.

77. See *supra* note 73 and accompanying text. The program in the District of Connecticut operated from April 1978 to February 1981. ARBITRATION SUMMARY OF DISTRICT OF CONNECTICUT (1981) (on file with the *Maryland Law Review*). During that period only 449 of the 5425 civil cases that were filed in that district (representing 8% of those cases) were eligible for arbitration. *Id.* The district's program was unique because it provided for a control group of non-eligible cases that had the same characteristics as the eligible cases. E.

in May, 1978, judges from the three experimental districts discussed specific details of their respective programs with Justice Department officials and staff members of congressional committees at a conference held at the Federal Judicial Center<sup>78</sup> and attended by Chief Justice Burger and Attorney General Bell.<sup>79</sup>

## II. THE EASTERN DISTRICT OF PENNSYLVANIA ARBITRATION PROGRAM

According to Attorney General Bell, the courts in the three experimental districts had adopted the arbitration programs with the intention of achieving two specific goals: "(1) speeding up the resolution of cases that are now settled, and (2) resolving more quickly and less expensively many of the cases that now go to trial."<sup>80</sup> To achieve these goals, three major criteria were used to determine the specific categories of civil cases that would be selected for automatic referral to arbitration.<sup>81</sup>

First, as originally established, each local rule limited the claim to money damages.<sup>82</sup> Equitable issues, often more complex and requiring continued judicial supervision, were excluded.<sup>83</sup> Second, the local rules limited money damages to \$100,000 in the Northern District of California and to \$50,000 in the District of Connecticut and the Eastern Dis-

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LIND & J. SHAPARD, *supra* note 68, at 19. The results of the experiment show that 112 eligible cases were terminated during the period but only 100 control group cases were terminated. Twenty arbitration hearings were held, and in 13 of those cases a demand for trial de novo was made. See ARBITRATION SUMMARY OF THE DISTRICT OF CONNECTICUT (1981).

The program in the Northern District of California has operated since April 1, 1978. E. LIND & J. SHAPARD, *supra* note 68, at 7. During the first four years of the program only 21 trials de novo were held. Letter from Lee Derin, Arbitration Coordinator to Andrew Zeldin (July 1, 1982). The arbitration coordinator has noted that although 58% of the eligible cases "had request[ed] trials de novo almost all settle before trial." He concluded that "the feedback on these cases is that the arbitration helped greatly in the settlement of the cases." Interview with Lee Derin, Arbitration Coordinator (July 12, 1982).

In an updated study, John Shapard estimated that the trial rate for eligible cases during the first two years of the program will be between 3.0 and 3.4% after all the cases are terminated. The actual percentage of eligible cases which did reach trial, however, is now only about 2.33%, with another 2.78% pending trial. See J. SHAPARD, UPDATED ANALYSIS OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 2 (1982) (on file with the *Maryland Law Review*).

78. See *Hearings*, *supra* note 2, at 135-39. See also Nejeleski, *supra* note 70, at 217.

79. *Hearings*, *supra* note 2, at 136.

80. *Id.* at 17.

81. See *infra* notes 92-94 and accompanying text.

82. See E.D. PA. R. CIV. P. 8.3(1)(B); 8.3(2)(B); Nejeleski, *supra* note 70, at 218. See also *Hearings*, *supra* note 2, at 22.

83. Nejeleski, *supra* note 70, at 218.

trict of Pennsylvania in the belief that larger claims likely would be too complex for arbitration and that more trials de novo would result because of the larger amounts in controversy.<sup>84</sup> Although the rules, as originally designed, were intended to refer primarily factual rather than legal questions to arbitration,<sup>85</sup> as implemented, both questions of law and of fact are considered by the arbitration panel.

### A. *How It Works*

The Eastern District of Pennsylvania<sup>86</sup> became the first of the three pilot district courts to adopt a court-annexed arbitration program when it adopted Local Rule 49 on February 1, 1978.<sup>87</sup> The court has since extended the program indefinitely with the adoption of Local Rule 8.<sup>88</sup> Under the general limitations discussed previously, this rule provides for compulsory arbitration in even more circumscribed situations. Where the United States is a party, the action must be brought under: (1) the Federal Tort Claims Act, (2) the Longshoremen and Harbor Workers Compensation Act, or (3) the Miller Act.<sup>89</sup> Where the United States is not a party and federal jurisdiction exists, the action must be: (1) for injury or death of a seaman under the Jones Act, (2) based on a negotiable instrument or contract (generally all of which are diversity cases), (3) for personal injury or property damage (also virtually all of which are diversity cases), or (4) for personal injury under the Federal Employees Liability Act.<sup>90</sup> Cases based on a claimed violation of a right secured by the Constitution are not included.

The process begins when a complaint is filed with the district court. One of the two full-time deputy court clerks who work solely on the arbitration program<sup>91</sup> determines whether the case meets the re-

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84. *Id.*

85. *Id.*

86. The Eastern District of Pennsylvania is a large metropolitan district which holds court in Allentown, Philadelphia, and Reading. There are nineteen federal judges in the district. The complexity and large number of cases in that district have made it fourth among the ninety-four districts in civil case termination. See *Projected Workload and Staffing Requirements: Fiscal Year 1985*, REPORT OF CLERK OF COURTS FOR U.S. DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA 9 (on file with the *Maryland Law Review*). The district was also second of all the metropolitan district courts in the filing of average and heavier-than-average cases. *Id.*

87. See E. LIND & J. SHAPARD, *supra* note 68, at 7. The local rules were adopted on April 1, 1978 in the District of Connecticut and the Northern District of California. *Id.*

88. See ARBITRATION SUMMARY—1983, *supra* note 3, at 1.

89. See E.D. PA. R. CIV. P. 8.3.

90. *Id.*

91. Interview with Michael E. Kunz, Clerk of the Court for the Eastern District of Pennsylvania, in Philadelphia, Pennsylvania (July 12, 1982) [hereinafter cited as Kunz Interview].



quirements for Local Rule 8.<sup>92</sup> If so, the clerk stamps the case as eligible for arbitration unless one of the attorneys "certifies" that damages are in excess of \$50,000.<sup>93</sup> The court may disregard the certification if it is not satisfied that the damages will actually reach that amount.<sup>94</sup>

After the answer is filed, the clerk's office immediately notifies the attorneys that the case will be referred to an arbitration panel.<sup>95</sup> The notice further advises them of the date set for the hearing, which is approximately five months from the date of the notice.<sup>96</sup> The attorneys also are informed that they will have 120 days in which to complete discovery.<sup>97</sup>

The case is referred to arbitration on expiration of the 120 day discovery period,<sup>98</sup> unless the judge expands or contracts that period. If a party files a motion for summary judgment or similar relief before the referral, the action generally will not proceed to arbitration until after the court rules on the motion.<sup>99</sup> Once the court has referred a case to arbitration, it usually will not stay the proceedings for a motion for summary judgment.<sup>100</sup>

Prehearing settlements and dismissals prevail in district court, thereby eliminating the need, in most cases, for an arbitration hearing.<sup>101</sup> If the case is not settled or dismissed beforehand, however, the judge refers the case to arbitration by signing an order confirming the date and appointing the three arbitrators approximately thirty days before the date scheduled for the hearing.<sup>102</sup>

Panels composed of three volunteer lawyers chosen by the court conduct the arbitration hearings.<sup>103</sup> The provisions of Rule 8 require that an arbitrator must have been a member of the bar of the highest

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92. Broderick, *Schedule "B" Arbitration*, in REPORT OF THE HONORABLE ALFRED L. LUONGO, CHIEF JUDGE OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, THE 45TH ANNUAL JUDICIAL CONFERENCE OF THE THIRD CIRCUIT 4 (1982) [hereinafter cited as Broderick]. The case is then assigned to a judge who formally refers it to arbitration. See E.D. PA. R. CIV. P. 8.4.

93. See E.D. PA. R. CIV. P. 8.3.

94. *Id.*

95. See Broderick, *supra* note 92, at 5.

96. *Id.*

97. *Id.*

98. See E.D. PA. R. CIV. P. 8.4(a) requiring:

In the event that a third party is brought into the action, this notice shall not be sent until an answer has been filed by the third party.

99. See Ledwith, *Federal Court Arbitration: The Philadelphia Story*, FOR THE DEFENSE 12, 13 (April, 1982).

100. See Broderick, *supra* note 92, at 6.

101. See ARBITRATION SUMMARY—1983, *supra* note 3, at 2.

102. See Broderick, *supra* note 92, at 6.

103. See E.D. PA. R. CIV. P. 8.1, 8.4.

court of a state or of the District of Columbia for at least five years and must have been admitted to practice before the District Court for the Eastern District of Pennsylvania.<sup>104</sup> In addition, the Chief Judge must make the determination that the individual is "competent to perform the duties of an arbitrator."<sup>105</sup>

After lawyers have been certified, the clerk's office places their names on one of three lists.<sup>106</sup> The lawyer makes the determination as to whether he is primarily a plaintiffs' lawyer, a defense lawyer, or cannot be categorized.<sup>107</sup> In the alternative, the parties have the option of selecting their own panel, provided that the arbitrators are qualified to serve.<sup>108</sup>

Arbitrators must disqualify themselves from any action in which they are biased—including "any action where a justice, judge, or magistrate . . . would be required to do so under 28 U.S.C. § 455."<sup>109</sup> In addition, the members of the panel must take the oath or affirmation prescribed by section 453 of that title before the hearing.<sup>110</sup>

The clerk's office schedules the panel to serve at three hearings,<sup>111</sup> usually all completed in one day, and each arbitrator is paid \$75 per hearing.<sup>112</sup> The hearings generally are held from four to six months after the complaint is filed. The arbitrators are authorized to change the date and time of the hearing provided the hearing is commenced within thirty days of the hearing date set forth in the court's order. All other continuances must be sought from the judge.<sup>113</sup> At the hearing the Federal Rules of Evidence are used, but in an informal manner.<sup>114</sup>

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104. *Id.* at 8.1.

105. *Id.* at 8.1(b)(3).

106. Interview with Janis Lutz, Arbitration Clerk for the Eastern District of Pennsylvania, in Philadelphia, Pennsylvania (Jan. 4, 1983) [hereinafter cited as Lutz Interview].

107. *Id.* There are presently 823 attorneys who have been certified to serve as arbitrators. ARBITRATION SUMMARY—1983, *supra* note 3, at 7.

108. E.D. PA. R. CIV. P. 8.4(b). The parties rarely, if ever, exercise the option of choosing their own panel. See Lutz Interview, *supra* note 106.

109. E.D. PA. R. CIV. P. 8.4(c).

110. *Id.* at 8.1(c).

111. See Broderick, *supra* note 92, at 5. See also Lutz Interview, *supra* note 106.

112. E.D. PA. R. CIV. P. 8.2. "In the event that the arbitration hearing is protracted, the courts will entertain a petition for additional compensation." *Id.* Arbitrators in the Eastern District of Pennsylvania are not reimbursed for expenses incurred in performing their duty, i.e., travel, meals. Compare E.D. PA. R. CIV. P. 8.2 with S. 2253, 95th Cong., 2d. Sess. § 643 (1978). Senate Bill 2253, the Court-Annexed Arbitration Act of 1978, if passed, would have provided reimbursement to arbitrators for actual expenses. This type of reimbursement seems warranted, particularly for travel and clerical expenses.

113. The judges' policies vary from freely granting continuances to granting them only in extreme emergencies. Lutz Interview, *supra* note 106.

114. See E.D. PA. R. CIV. P. 8.5(f). For example, expert testimony is normally not needed to authenticate medical records, but the adverse party must receive a copy of the

Unless a party requests that a court reporter be present and agrees to bear the cost of the recording, no written transcript is made of the proceeding.<sup>115</sup> After hearing the testimony of the parties and of the witnesses, the panel renders its decision by promptly filing an award with the clerk.<sup>116</sup>

Either party may file a written demand for a trial *de novo* in the district court within thirty days after the filing of the award.<sup>117</sup> The clerk's office treats the complaint as if it had not been referred to arbitration.<sup>118</sup> No prejudice attaches from the arbitration award.<sup>119</sup> Evidence from the hearing is admissible at trial only for impeachment purposes.<sup>120</sup> No additional cost is assessed for filing for trial *de novo*. But upon making a demand for trial *de novo*, the moving party generally must deposit a sum equal to the arbitration fees with the court. If the moving party fails to obtain a judgment at trial that is more favorable than the arbitration award, exclusive of interest and costs, that deposit is lost.<sup>121</sup>

### B. *Challenges to the Program*

A test of the Eastern District of Pennsylvania's experiment was not long in coming. The challengers, defendants in the diversity action of *Kimbrough v. Holiday Inn*, demanded a jury trial under Federal Rule of Civil Procedure 38(b) and moved to prohibit arbitration and to vacate the order of referral.<sup>122</sup> They challenged the arbitration program as violating: (1) the right to a jury trial guaranteed by the seventh amendment, (2) equal protection guaranteed by the fifth amendment, and (3) several rules of federal civil procedure and federal statutes dealing with limitations on the court's rulemaking authority.<sup>123</sup> The district court upheld the program's validity on each ground.<sup>124</sup>

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exhibit ten days before the hearing. Unless the adverse party notifies counsel at least five days prior to the hearing that he intends to contest the authenticity of any exhibit, the arbitrator will receive the exhibit into evidence without formal proof. *Id.* Thus the hearing can progress expeditiously, with some of the facts and evidence stipulated to by the parties. Interview with Judge Raymond J. Broderick, Judge for the Eastern District of Pennsylvania, in Philadelphia, Pennsylvania (July 12, 1982).

115. See Broderick, *supra* note 92, at 7.

116. See Lutz Interview, *supra* note 106.

117. See E.D. Pa. R. Civ. P. 8.7(a). If the 30-day period expires without filing for trial *de novo*, the decision becomes final. See *id.* at 8.6.

118. *Id.* at 8.7(b).

119. *Id.* at 8.7(c).

120. *Id.*

121. *Id.* at 8.2, 8.7(d).

122. *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 567 (E.D. Pa. 1979).

123. *Id.*

124. *Id.* at 577.

1. *The seventh amendment issue*—The Supreme Court has long recognized that the seventh amendment did not fossilize jury trials as they were practiced in 1791; rather, matters of form and procedure may be modified so long as the substance of the right is preserved.<sup>125</sup> In distinguishing substantive change from procedural innovations, the *Kimbrough* court looked to the series of Supreme Court decisions over the last decade that have held six-member juries permissible under the seventh amendment.<sup>126</sup>

*Ex parte Peterson*,<sup>127</sup> however, quoted by the *Kimbrough* court, provides a closer analogy. In that case, the Court upheld a district court's order appointing an auditor, without the parties' consent, to examine documents and to hear testimony on the case's complex factual questions in order to narrow and to clarify the issues for trial. Because all final determinations were made by the jury, the Court found that the auditor's hearing did not infringe upon the right to a jury trial, even though no official exercising the powers delegated to the auditor existed in England or America in 1791.<sup>128</sup> Court-annexed arbitration, like the auditor's hearing, does not finally determine any factual questions if the case goes to trial.<sup>129</sup> Additionally, the *Peterson* Court found that, rather than imposing a burden on the exercise of the right in terms of cost or delay, "such a tentative trial [the auditor's hearing] acts as a sifting process by which misunderstandings and misconceptions as to facts are frequently removed."<sup>130</sup> Similarly, arbitration assists in trial preparation by clarifying and simplifying the issues. Because discovery must be conducted in any event, the only additional burden imposed by court-annexed arbitration is the one-day hearing, which seems no more onerous than the "full hearing" described in *Peterson*.<sup>131</sup>

Noting the absence of federal cases concerning compulsory arbitration, the *Kimbrough* court also looked to cases upholding Pennsylvania's compulsory arbitration programs under Pennsylvania's constitution. In *Smith's Case*,<sup>132</sup> the Pennsylvania court ruled that compulsory arbitration neither finally determined the rights of persons or property for seventh amendment purposes nor imposed onerous

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125. *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 596 (1897).

126. 478 F. Supp. at 568-69 (discussing *Ballew v. Georgia*, 435 U.S. 223 (1978); *Colgrove v. Battin*, 413 U.S. 149 (1973); *Williams v. Florida*, 399 U.S. 78 (1970)).

127. *Ex parte Peterson*, 253 U.S. 300 (1920).

128. *Id.* at 307-09.

129. 478 F. Supp. at 569 (citing *Capital Traction Co. v. Hof.*, 174 U.S. 1, 19, 23 (1899)).

130. 253 U.S. at 307.

131. *Id.* at 306-07.

132. *In re Smith*, 381 Pa. 223, 112 A.2d 625 (1955), *appeal dismissed sub nom.* *Smith v. Wissler*, 350 U.S. 858 (1958).

conditions on the right's exercise.<sup>133</sup> Similarly, the Pennsylvania court in *Parker v. Children's Hospital*<sup>134</sup> held that the state's medical malpractice arbitration program did not unduly burden the exercise of the right to a jury trial, even though the losing party on appeal would be charged all costs of both arbitration and trial if the court found the appeal was arbitrarily or capriciously taken.<sup>135</sup> The *Kimbrough* court likewise evaluated the burden of arbitrator's fees imposed by Rule 49 [later Rule 8] on litigants who fare no better at trial than at arbitration, and concluded that "[t]he conditions for appeal de novo do not outweigh the benefits of arbitration in providing an efficient alternative for dispute-resolution."<sup>136</sup> In sum, although the court acknowledged that court-annexed arbitration, in some instances, may burden a defendant's access to a jury trial, it concluded that the seventh amendment was flexible enough to tolerate such experimentation.

2. *The equal protection issue*—The *Kimbrough* defendants alleged that the program violated their equal protection rights guaranteed by the fifth amendment because litigants in other districts, as well as litigants with greater amounts in controversy within the district, were treated differently from the litigants in that case.<sup>137</sup> Because the court found that the program did not interfere with the seventh amendment—the only fundamental right potentially implicated—it applied a "rational-basis" test in evaluating the program.<sup>138</sup> The court concluded that the local rule was rationally related to important government interests: "promoting [the] speedier administration of justice and [the] efficient use of resources."<sup>139</sup> Hence the court held that the program did not violate the fifth amendment.

133. 381 Pa. at 230-31, 112 A.2d at 629-30. See *supra* note 38 for a discussion of *Smith*.

134. *Parker v. Children's Hosp.*, 483 Pa. 106, 394 A.2d 932 (1978).

135. *Id.* at 120, 394 A.2d at 939. The part of the Health Care Services Malpractice Act (section 309 of the Act, 40 P.S. § 1301.309) that gave health care arbitration panels exclusive jurisdiction over medical malpractice claims was subsequently declared unconstitutional by the Pennsylvania Supreme Court in *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980). The court determined that the "lengthy delay occasioned by the arbitration system . . . burden[ed] the right of a jury trial with 'onerous conditions, restrictions or regulations which . . . made the right practically unavailable.'" 491 Pa. at 395, 421 A.2d at 195 (quoting *In re Smith*, 381 Pa. at 231, 112 A.2d at 629).

136. 478 F. Supp. at 571.

137. *Id.* at 575. Because the arbitration program was a federal court innovation, the court noted that "equal protection under the Fourteenth Amendment [did] not technically apply . . . . Consequently, defendants ground[ed] their equal protection allegation in Fifth Amendment due process." *Id.* at 574 n.19.

138. *Id.* at 574.

139. *Id.* at 576. The court noted that arbitration programs existed in only three federal districts and that the procedures vary in each of those districts causing "allegedly 'unequal treatment'" of litigants in and between those districts. But "[t]he local arbitration rule is a

3. *The statutory and Federal Rules of Civil Procedure issues*—The court further determined that the local rule<sup>140</sup> was consistent with both the federal statutes and the Federal Rules of Civil Procedure.<sup>141</sup> The defendants challenged the program under the federal statutes that provide rulemaking power to the Supreme Court and to the district courts, which specifically preserve “the right of trial by jury as at common law and as declared by the seventh amendment to the Constitution.”<sup>142</sup> The defendant also alleged that Local Rule 49 violated Federal Rule of Civil Procedure 83, which requires local rules to be consistent with the federal rules, because Local Rule 49 interfered with their right to a jury trial immediately upon demand under Federal Rules of Civil Procedure 38 and 39.<sup>143</sup> The *Kimbrough* court in essence concluded that none of these provisions provided “a more expansive right to jury trial than the seventh amendment,” and hence were not violated by Local Rule 49.<sup>144</sup>

### III. EVALUATION

In testimony supporting legislation for court-annexed arbitration, Attorney General Griffin Bell stated that such programs sought to “broaden access for the American people to their justice system and to provide mechanisms that will permit the expeditious resolution of disputes at a reasonable cost.”<sup>145</sup> To achieve this objective, an arbitration program would have to reduce the time and expense of litigation while preserving the quality of justice.<sup>146</sup>

Court-annexed arbitration seeks to address the problems of backlog and increasing expense in litigation in several respects. For the eligible litigants, the program offers a faster, less costly method of resolving their disputes. As an alternative to the judicial system, arbitration potentially can offer savings in the time and cost inherent in an individual civil trial. For the judicial system, arbitration can reduce the demand on judicial resources created by overcrowded dockets. It also reduces expenditures for the system by resolving cases at a lesser cost than would be required for the judicial system to reach the same result. Court-annexed arbitration cannot be considered successful, however, if

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first step to develop a fast, efficient, and inexpensive system of dispute resolution on a national scale.” *Id.* at 575.

140. E.D. PA. R. CIV. P. 49.

141. 478 F. Supp. at 572-73.

142. 28 U.S.C. § 2072 (1982). *See also* 28 U.S.C. § 2071 (1982).

143. 478 F. Supp. at 572 nn. 12-14.

144. *Id.* at 573.

145. Hearings, *supra* note 2, at 21.

146. E. LIND & J. SHAPARD, *supra* note 68, at viii.

it produces results of an inferior quality. If the result varies significantly from the norm produced by the judicial system, litigants will perceive and possibly will suffer a denial of the fundamental goals of our legal system: justice and fairness.

In empirically evaluating the program's performance,<sup>147</sup> two limitations on the data must be kept in mind. First, no control group existed in the civil caseload with characteristics similar to the experimental eligible caseload.<sup>148</sup> Consequently, to test the program's ability to reduce time and expense, comparisons must be made to adjusted data from earlier civil cases or from similar jurisdictions.<sup>149</sup> Second, to the extent that the program's success can be determined, the applicability of those results to other jurisdictions may be limited. The Eastern District of Pennsylvania enjoyed several circumstances—such as prior experience with a state program of court-annexed arbitration and lawyer acceptance of the program—that might not exist elsewhere.<sup>150</sup>

#### A. *Time and Expense*

Rule 8 was intended to decrease the time and expense required for the disposition of civil actions by (1) decreasing the pending caseload, (2) encouraging early case settlement, (3) requiring that the arbitration hearing be held promptly, (4) reducing the time of the hearing itself, and (5) terminating the case through acceptance of the arbitration award.<sup>151</sup>

1. *Impact on the system*—Since the program began, the pending civil caseload in the Eastern District of Pennsylvania has increased every year except 1982,<sup>152</sup> and the combined civil and criminal filings have increased each year.<sup>153</sup> If the program effectively can reduce the caseload, it will save judges' time which can be devoted to other cases,

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147. The data used for this evaluation was collected from: E. LIND & J. SHAPARD, *supra* note 68; J. SHAPARD, *supra* note 77; ARBITRATION SUMMARY—1983, *supra* note 3; REPORT OF THE HONORABLE ALFRED L. LUONGO, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA TO THE 45TH ANNUAL JUDICIAL CONFERENCE OF THE THIRD CIRCUIT (1982); MANAGEMENT STATISTICS FOR UNITED STATES COURTS for the years 1982 and 1978.

148. E. LIND & J. SHAPARD, *supra* note 68, at 18-19.

149. *Id.*

150. *See supra* notes 27-39 and accompanying text.

151. E. LIND & J. SHAPARD, *supra* note 68, at 7-13.

152. *See* MANAGEMENT STATISTICS FOR UNITED STATES COURTS—1982, at 35 [hereinafter cited as MANAGEMENT STATISTICS—1982]. In 1978 the pending caseload in the Eastern District was 4737. By 1981 it rose to 5247, but it dropped to 5146 in 1982. *Id.*

153. *Id.* In 1978 combined filings were 5024; in 1982 they had increased to 6155.

and it will save the system the expense of handling at least a portion of the increased demand.

The data suggests that the program has produced savings. Of all civil cases on the docket, 18.5% were eligible for the program in its first five years.<sup>154</sup> Of these eligible cases, 86% were terminated within the same period, with only 1.8%<sup>155</sup> requiring a trial de novo. The median time for termination of eligible cases was five months from date of issue.<sup>156</sup> Although the majority of ineligible civil cases also have been terminated before trial, largely through negotiated settlements, these cases seem to have demanded more judicial attention than cases in the program.<sup>157</sup> The program thus has terminated 15.25%<sup>158</sup> of all civil cases without substantial judicial involvement, and has terminated them expeditiously.

Examination of the factors outside the program provides additional support for a positive conclusion. The increasing rate of filings<sup>159</sup> has seen a corresponding increase in the rate of civil case terminations per judgeship.<sup>160</sup> The weighted filings per judgeship also have increased since the adoption of the arbitration program.<sup>161</sup> If these heavier weighted, more complex cases are the ones being terminated at the current rate, the program possibly has permitted the judges to spend more time on more difficult cases by removing the less complicated actions from their workload. Moreover, since the program began, the Eastern District has had a total of 45.4 vacant judgeship

154. ARBITRATION SUMMARY—1983, *supra* note 3, at 2.

155. *Id.*

156. *Id.* at 1.

157. See E. LIND & J. SHAPARD, *supra* note 68, at 9-12.

158. ARBITRATION SUMMARY—1983, *supra* note 3, at 2. In the first five years of the program, only 72 of the 4066 terminated cases required trials de novo. Thus, 3,994 cases (15.6%) of the 25,547 civil cases were terminated without a civil trial. *Id.*

159. See *supra* note 153.

160. See MANAGEMENT STATISTICS—1982, *supra* note 152, at 35.

Year	Civil & Criminal Filings Per Judgeship	Civil & Criminal Terminations Per Judgeship
1978	264	247
1979	270	268
1980	284	271
1981	296	285
1982	324	329

Despite the increased terminations per judgeship, the increased number of filings per judgeship has made the goal of reducing the court backlog an elusive one in the Eastern District of Pennsylvania. In 1982, however, the rate of termination per judgeship finally exceeded the rate of filings.

161. *Id.* In 1978 weighted filings per judgeship were 288, increasing in 1982 to 381.



months<sup>162</sup> compared to the five-year period preceding the program's adoption when only 25.9 vacant judgeship months occurred.<sup>163</sup> Thus, although correlation is not dispositive of causation, especially in a system as complex as a federal district court, the Eastern District of Pennsylvania has been able to process more weighted cases more quickly and with relatively fewer judges since the program's inception.

A reduction in the incidence of trials may have an incidental, though not necessarily negligible, impact on the workload of the Third Circuit Court of Appeals. A conservative trial rate for civil cases in the arbitration program is about 2.5%<sup>164</sup> compared to approximately 5.5% for similar cases in other jurisdictions.<sup>165</sup> If, for example, 812 eligible cases were terminated annually outside the program, at the normal 5.5% trial rate, approximately forty-five cases would be tried annually in district court. At an appeals rate of ten percent,<sup>166</sup> 4.5 cases could require circuit court panels. Over the past five years, only seventy-two eligible cases were tried in district court.<sup>167</sup> With an annual appeals rate of ten percent, this would amount to an average of only 1.4 appeals of eligible cases annually, a direct reduction of 4.1 appeals. Because appeals are also taken from pre-trial disposition, e.g. summary judgment, the program results in an additional indirect reduction in appeals. The impact of the program would be greater if the scope of the program were expanded by adding new classes of cases or increasing the dollar limit.

The program's time savings at the trial level also can translate into economic savings to the judicial system if the combined administrative costs and arbitrators' fees amount to less than the cost of having these eligible cases remain part of the civil caseload. Administrative costs include the cost to the clerk's office of the two arbitration clerks and the overhead attributed to processing the cases.<sup>168</sup> The arbitration clerks'

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162. *Id.* The number of vacant judgeship months represents the "[n]umber of months during [each] profile year that an authorized judgeship was not filled." *Id.* at d.

163. MANAGEMENT STATISTICS FOR UNITED STATES COURTS—1978, at 31.

164. See J. SHAPARD, *supra* note 77, at 3-5. See ARBITRATION SUMMARY—1983, *supra* note 3, at 2 (stating that the average trial rate in the Eastern District of Pennsylvania's arbitration program was 1.8%).

165. See J. SHAPARD, *supra* note 77, at 4-5.

166. The 812 "eligible cases" figure is based upon the total number of cases terminated over the past five years (4066). The trial rate is from J. SHAPARD, *supra* note 77, at 4-5. The appeals rate is from MANAGEMENT STATISTICS—1982, *supra* note 152, at 4, 39.

167. ARBITRATION SUMMARY—1983, *supra* note 3, at 2.

168. Interview, *supra* note 91. Usually arbitration hearings are held in an available courtroom, but if no courtroom space is available, a room must be rented in an office building. Although rentals undoubtedly increase the cost of the compulsory arbitration system to some extent, use of attorney/arbitrator's offices for hearings might cast doubt on the neutral, judicial nature of the process.

salaries have totalled \$123,384 over the first 56 months,<sup>169</sup> and arbitrators' fees over the past five years have added another \$222,490 to the program's costs.<sup>170</sup> Assuming that the overhead cost would have remained constant if the cases were in the general civil caseload, the cost of the program less the overhead common to both the arbitration program and the general civil caseload has totalled approximately \$345,874 over the past four and a half or five years.<sup>171</sup>

What would the cost be without the program? As described below, the incidence of trial for civil cases with the same characteristics as eligible cases would be about 5.5%.<sup>172</sup> This rate alone would add at least an additional twenty-one trials in the district per year.<sup>173</sup> Nineteen district judges currently are assigned to the remaining 81.5% non-eligible cases<sup>174</sup> and to additional criminal actions. The clerk of the court has estimated that at least one additional judge would be required to handle the litigation that falls within the current program.<sup>175</sup> One judge and his staff alone costs approximately \$180,000 per year or \$720,000 for the past four years.<sup>176</sup> These figures do not include the cost of the chambers and facilities required for the judge and his staff.<sup>177</sup> Even at this basic cost comparison level, it is obvious that the arbitration program can save the judicial system not only time but money.

The practical economies achieved by the program are not limited to salaries and overhead. The realities of trying to add an additional judge to the bench and finding additional chamber space in an already crowded courthouse are forbidding.<sup>178</sup> Finally, the arbitration pro-

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169. Memorandum from Michael E. Kunz, Clerk of Court, to Andrew S. Zeldin (Nov. 19, 1982) (on file with the *Maryland Law Review*).

170. ARBITRATION SUMMARY—1983, *supra* note 3, at 7.

171. *See supra* notes 169-70.

172. J. SHAPARD, *supra* note 77, at 4-5.

173. If the trial rate under the arbitration program is conservatively estimated at 2.5% and the estimated trial rate of these cases would have been 5.5%, at 812 cases terminated per year, the savings is approximately 24 trials, i.e., 3% of 812.

174. Although the 18.5% eligible cases remain on the judges' dockets, they generally do not consume judicial time in the same way that non-eligible cases do. *See Broderick, supra* note 92, at 4-6 (describing how a case proceeds to arbitration and the stages at which a judge's involvement is necessary).

175. Kunz Interview, *supra* note 91.

176. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, COST TO THE JUDICIARY OF ESTABLISHING A NEW DISTRICT JUDGESHIP (1981) (on file with the *Maryland Law Review*).

177. Cost of chamber space, furniture, library services, and travel expenses could exceed \$100,000 per year. *Id.*

178. *See, e.g., The Problem of Delay, supra* note 51, at 1046; Burger, *Chief Justice Burger Issues Yearend Report*, 62 A.B.A.J. 189 (1976).

gram saves the valuable time of judges and their chambers' staff.<sup>179</sup>

2. *Impact on the Litigants*—The direct impact of the arbitration program on the litigants whose cases fall within Rule 8 may be measured more reliably than the effect of the arbitration program on the entire civil caseload.<sup>180</sup> Examination suggests that the impact has been favorable.

The program's benefit to the individual litigants often derives from the strict timetable imposed by Rule 8. Although a great number of civil cases are terminated through negotiated settlements,<sup>181</sup> many remain unsettled for a year or more while the attorneys direct their attentions to more immediate concerns.<sup>182</sup> Attorneys often have no incentive to settle their cases until it becomes absolutely necessary.<sup>183</sup> By contrast, Rule 8 requires that upon expiration of the 120 day period or expiration of discovery, the eligible actions must be referred to arbitration by judge's order.<sup>184</sup> Nearly 64% of all terminated Rule 8 cases were terminated before an order of referral.<sup>185</sup> In the arbitration program the median time from filing of the case to disposition was 150 days.<sup>186</sup> The time limitations placed on counsel to prepare within the allotted time period appear to have expedited pre-hearing settlement in at least some cases.<sup>187</sup>

In addition to encouraging termination before a hearing, the program allows eligible cases to reach the hearing stage in less time than

179. Kunz Interview, *supra* note 91.

180. The many factors that might affect the entire civil caseload (e.g. increased filings and pending caseload) as well as the relatively small number of cases eligible for arbitration (20%) make it difficult to test what effect the program has had on the civil caseload. Because all cases meeting the requirements of Local Rule 8 *must* be arbitrated, there is no control group of similar cases with which to compare the effect of the arbitration program.

181. E. LIND & J. SHAPARD, *supra* note 68, at 9-12.

182. *Id.* at 9.

183. *Id.* at 9-10.

184. E.D. PA. R. CIV. P. 8.4(a).

185. ARBITRATION SUMMARY—1983, *supra* note 3, at 3.

186. *Id.* at 29. The 2593 cases terminated prior to the entry of an order of referral to an arbitrator were terminated in the following manner: 1336 cases (54.9%) by settlement or dismissal; 1092 cases (38.6%) by court order or motion; and 165 cases (6.3%) by entry of default judgment. *Id.* at 16.

187. See E. LIND & J. SHAPARD, *supra* note 68, at 48-50. The researchers noted that:

A likely explanation for these findings is that counsel in arbitration-eligible cases, prompted by efforts of the clerk's office to schedule a hearing, turn their attention to the case and initiate negotiations. Because a thorough examination of the strengths and weaknesses of the case is necessary to prepare for the arbitration hearing, and because a settlement at this point would avoid the expenditure of time and effort that would be required if the hearing were held, termination of the case by settlement occurs earlier than it would absent the arbitration rule.

*Id.* at 78.

other civil cases.<sup>188</sup> The median time for eligible cases to reach an arbitration hearing was five months.<sup>189</sup> The corresponding median time for other civil cases to reach trial was approximately thirteen months.<sup>190</sup> Several factors mitigate this direct comparison of the median time for cases to reach arbitration hearings and cases to reach trial. First, the characteristics of the eligible, arbitrated cases differ significantly in complexity from non-eligible cases.<sup>191</sup> Second, the arbitration hearing does not necessarily end the litigation between the parties.<sup>192</sup> Arbitrated cases that are appealed could take even longer than thirteen months to reach trial.<sup>193</sup> Although a low rate of actual trials de novo exists, some cases proceed beyond the arbitration award for varying lengths of time before terminating. Nevertheless, the impact of the program on the amount of time required for an eligible case to reach an initial hearing is substantial. Several economies of time result from removing the case from the regular civil docket. For example, once the judge signs the order appointing the arbitrators, the program's strict deadlines, which may be extended only for good reason, apply.<sup>194</sup> Because eligible cases are not heard by juries, delays for jury selection are eliminated. In addition, the backlog within the civil system does not affect the eligible cases because they have been separated from the judicial track.<sup>195</sup>

Arbitration hearings themselves involve less time than that required for most civil trials.<sup>196</sup> Civil trials require application of the Federal Rules of Evidence and other formalities. Scheduling problems often lead to continuance and other motions which could delay a trial. Although arbitrators use the Federal Rules of Evidence as a "guide"

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188. See ARBITRATION SUMMARY—1983, *supra* note 3, at 1.

189. *Id.*

190. *Id.*

191. See *supra* notes 82-85, 89-90 and accompanying text (describing limitations on types of cases eligible for arbitration).

192. Any party may request a trial de novo after the arbitration decision. E.D. PA. R. CIV. P. 8.7(a). Chief Justice Burger cautioned that "we must . . . in setting up arbitration procedures . . . make sure they become a realistic alternative rather than an additional step in an already prolonged process." Burger, *supra* note 10, at 277.

193. But if the arbitration hearing serves as a "dress rehearsal" for trial, it may expedite the pre-trial and trial process. See E. LIND & J. SHAPARD, *supra* note 68, at 12.

194. Lutz Interview, *supra* note 106.

195. Kunz Interview, *supra* note 91.

196. "A panel of arbitrators is assigned three cases, to start at 9:30 in the morning, and can usually dispose of all three in one day." Ledwith, *supra* note 99, at 14. By contrast, on a national level, the average jury trial in federal court is approximately 3.5 days long while the average bench trial is approximately 1.9 days. G. BERMANT, J. CECIL, A. CHASET, E. LIND & P. LOMBARD, PROTRACTED CIVIL TRIALS: VIEWS FROM THE BENCH AND THE BAR 86 (1981). After excluding trials lasting 20 days or longer from the data, the average jury trial lasts 3.3 days and the average bench trial lasts 1.8 days. *Id.*

for the admission of evidence at arbitration hearings, parties often rely on stipulation and other time-saving practices.<sup>197</sup> Once the case is scheduled for a specific date, the hearing generally takes less than one day.<sup>198</sup>

As noted before, the arbitration program would not be considered successful if a significant number of cases that completed the arbitration hearing subsequently returned for trial in district court.<sup>199</sup> Analysis demonstrates that the great majority of eligible cases filed during the past five years terminate without going to trial. Only seventy-two cases, or 1.8% of all eligible cases terminated, required a trial de novo.<sup>200</sup> The incidence of civil trials for cases outside the program in the Eastern District averages greater than eight percent.<sup>201</sup>

When comparing the arbitration trial rate with the general civil caseload trial rate, an additional factor must be accounted for: this 1.8% figure reflects only the percentage of all eligible cases that have required trials de novo and does not take into account the cases that are not yet terminated. Analysis of these 671 non-terminated cases does not suggest, however, that trials de novo will predominate.<sup>202</sup> Although parties are awaiting trial de novo in seventy-one of these non-terminated cases, not all will be tried. In the last five years, of the 508 cases appealed after an award, only 72 cases, or 14.9% of all cases appealed, resulted in a trial de novo.<sup>203</sup> If this pattern continues, non-terminated cases will not result in a substantially greater incidence of trial than the current 1.8% of all eligible cases. Detailed analysis of the program's first two years suggests that the trial rate should not exceed

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197. E.D. PA. R. CIV. P. 8.5(f).

198. See *supra* note 196.

199. See *supra* notes 155, 192.

200. ARBITRATION SUMMARY—1983, *supra* note 3, at 1.

201. But Shapard estimated that the trial rate for arbitration-type cases under \$50,000 in controversy would be approximately 5.5% without the program. See J. SHAPARD, *supra* note 77, at 4.

202. A review of the status of the non-terminated cases demonstrates that the majority are in the initial stages of the arbitration process.

The status of the 671 cases eligible for arbitration which have not been terminated is as follows: (a) 88 (13.1%) service of process has not been made; (b) 122 (18.1%) an answer has not yet been filed; (c) 78 (11.6%) the 120-day discovery period has not elapsed; (d) 58 (8.6%) motions are pending; (e) 16 (2.4%) have been transferred to the suspense docket; (f) 215 (32.2%) are scheduled for hearing; (g) 23 (3.4%) are awaiting expiration of the 20-day time period for the filing of an appeal for trial de novo or entry of judgment; and (h) 71 (10.6%) a trial de novo is pending. See ARBITRATION SUMMARY—1983 *supra* note 3, at 2-3.

203. ARBITRATION SUMMARY—1983, *supra* note 3, at 3-4.

three percent of all eligible cases.<sup>204</sup>

To isolate the impact of the arbitration program it is necessary to compare the trial rate for eligible civil cases with the rate at which cases would reach trial had they been in the general civil caseload. Because the program did not include a control group of cases, it is helpful to look at data collected in 1975 from the Eastern District and several other metropolitan districts. This data shows that the incidence of trial was about 15% for arbitration-type cases without any limit on amount in controversy, and approximately 7% for those cases that met both the subject matter and amount in controversy requirements of Rule 8.<sup>205</sup> Since 1975, the trial rate for civil cases has fallen for all courts and it has been estimated from annual court reports that for cases involving the same subject matter controversies as the eligible cases, the rate is now approximately 11%.<sup>206</sup> From that figure, Shapard concluded that the trial rate would be about 5.5% for cases that meet the same subject matter and amount in controversy criteria as the eligible cases.<sup>207</sup> At the most conservative estimate, the trial rate for eligible cases is approximately one third (the difference between 5.5% and 3%) less than what it would be if there were no arbitration program in the district.

### B. *Quality*

No matter how great the savings of time and money afforded by court-annexed arbitration, Rule 8 would not satisfactorily meet its goals if it produced a lesser quality of justice. Analyzing the quality of justice under the arbitration program involves both objective and subjective considerations.<sup>208</sup> That is, arbitrations may produce objectively correct or true results, but if those results vary significantly from judicial dispositions in similar cases, the public may perceive them as un-

204. See Memorandum, *supra* note 169 (indicating that in 1978 and 1979 approximately 3% of all cases referred to arbitration ultimately went to trial).

Analysis of eligible cases filed  
prior to 1979; prior to 1980

	Total	1978	1979
Number of cases filed	8814	4063	4751
Number of cases referred to arbitration	1727	778	949
Number of demands for trial de novo	252	66	186
Number of trials held	38	20	18
Number of cases pending trial	15	2	13

205. J. SHAPARD, *supra* note 77, at 4.

206. *Id.*

207. *Id.*

208. E. LIND & J. SHAPARD, *supra* note 68, at 13-14. These evaluators admit the difficulty in objectively evaluating the quality of justice.

fair. Ascertaining the objective correctness of the results achieved by arbitration or by the courts is beyond the scope of this article. Although the lack of a control group also restricts evaluation of the subjective quality of the program, some limited comparisons can be made.

Although a comparison of the results of cases in the arbitration program with those in the civil courts does not exist, a favorable picture emerges from comparison of the relative accuracy of the arbitration awards with the results from trials *de novo*. In only twenty-five of the seventy-two cases (34% percent) requiring trial *de novo* did a different party prevail from the winner of the arbitration award.<sup>209</sup> In approximately two-thirds of the cases that reached trial *de novo*, the prevailing party remained the same.

One potential criticism of this comparison, aside from the small number of cases involved, is that the *de novo* verdicts actually represent the result of the litigants' second opportunity to try their cases. If all civil cases could have a complete dress rehearsal, a similar rate of reversal might result. This so-called "dress rehearsal" effect, however, may strengthen the inference concerning the objective accuracy of the arbitration award. In undergoing arbitration, the parties may discover weaknesses and clarify the issues in their cases. The trial *de novo* therefore would represent a refined presentation of the case.<sup>210</sup> If counsel thus make better presentations in trials *de novo*, and two-thirds of the awards still survive, the relative accuracy of the award arguably is reinforced and parties may be deterred from challenging the awards.

The low number of trials *de novo* alone may indicate subjective acceptance of the awards by the parties. One might object that the additional expense of a trial, as well as the potential imposition of a penalty on the movant, might discourage a party from going to trial in favor of acceptance of a post-hearing settlement or outright acceptance of the award even if the loser felt it was unfair.<sup>211</sup> This objection is reinforced by the fact that the maximum amount at stake in these cases is less than \$50,000. These objections, however, are countered by the realities of the arbitration process. Because the parties must conduct discovery anyway, the only additional burden imposed by arbitration is the hearing itself. But, as mentioned, hearings generally take no more than one day and can provide a useful dress rehearsal for trial. The failure of a party to seek trial *de novo* thus may mean that he is indeed satisfied with the result.

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209. ARBITRATION SUMMARY—1983, *supra* note 3, at 22-28.

210. See E. LIND & J. SHAPARD, *supra* note 68, at 10.

211. *Id.* at 14.

Another available measure of acceptance comes from the opinions of counsel who have participated in the arbitration program. Two years after initiation of the program, researchers sent a questionnaire regarding various aspects of the arbitration program to all participating attorneys in the three experimental districts.<sup>212</sup> Sixty-nine percent of the attorneys responded, and they expressed approval of the individual local rules by a margin of two to one.<sup>213</sup> When cases terminated before demand for trial de novo, 82% of responding counsel said that the final outcome of their cases was fair to all parties involved.<sup>214</sup> This approval percentage declined only slightly when cases terminated after demand for trial de novo were considered.<sup>215</sup> This evidence of attorney approval rebuts initial concerns that arbitration panels, although designed to consist of balanced partisan support, would tend to favor plaintiffs.<sup>216</sup> Moreover, discussing the perspective of the local bar, one commentator has concluded that the arbitrators performed competently and conscientiously.<sup>217</sup>

Attorneys responded differently when surveyed on questions concerning time involved. In cases terminated without a demand for a trial de novo, over two-thirds of the lawyers felt the program resolved the cases more rapidly, but only approximately 40% thought that less of their time or their clients' time was required.<sup>218</sup> When cases involved a demand for trial de novo, opinion shifted somewhat. Although 50% still felt overall resolution was more rapid, a majority of attorneys responded that the case took more of their time and their clients' time.<sup>219</sup>

Researchers were unable to obtain opinions from a significant sample of clients. But if the arbitration program does achieve ultimate economies of time and money while achieving the same result that the party would obtain in court parties should be relatively more satisfied with arbitration.

#### CONCLUSION

Although our evaluation of the program has been qualified by the data's limitations, especially the absence of a control group, some conclusions can be drawn with confidence. The indications are positive:

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212. *Id.* at 57 n.16.

213. *Id.* at 60.

214. *Id.* at 59.

215. *Id.*

216. Ledwith, *supra* note 99, at 15.

217. *Id.*

218. E. LIND & J. SHAPARD, *supra* note 68, at 59.

219. *Id.*



the program has seen an increase in pre-hearing settlements, a reduction in the incidence of trials, and an expedited hearing process for eligible cases—all of which have saved time and expense for the litigants. The judicial system has benefited by the program's removal of relatively uncomplicated cases from the dockets with little or no intervention by judges. From all indications it appears that the quality of justice has remained at the same level as that in the regular civil caseload. Finally, the effect of the program on the rest of the civil caseload has probably been beneficial because a substantial segment of the potential backlog has been removed, thereby decreasing overall delay and reducing the number of potential appeals.

As a result of these successes, the program has won the support of both Chief Judge Alfred L. Luongo<sup>220</sup> of the Eastern District and Chief Judge Collins J. Seitz<sup>221</sup> of the Third Circuit as a successful means of expediting civil litigation.

Recently Griffin Bell noted: "I do not know why the arbitration program has not caught on, but it has not. I think necessity is still the mother of invention and we continue to add judges . . . Most courts are inclined to stay with their old ways."<sup>222</sup> Although the history of the program's development is itself evidence of judicial inertia, surely a time must come when the forces for change become irresistible. If the sentiment currently expressed from within the highest levels of the judiciary itself is any indication, that time has arrived.

As this article has sought to document, court-annexed arbitration may provide a prescription to today's judicial malaise. The historical antipathy of the bench and the bar to arbitration was based on considerations that court-annexed arbitration does not raise: (1) the program presents no competition for business—it is plain that the courts have more than they can handle and the program in no way excludes attorneys; (2) the program presents no ideological threat to the development of the law—it is controlled by the court itself and therefore represents a reform originating within the judiciary, not independent of it.

When compared with the other contemporary proposals—abolition of diversity jurisdiction, increasing the number of judges as well as the number and power of magistrates, and institution of pre-trial conferences—court-annexed arbitration may offer the most viable solution available. Pre-trial conferences have become standard practice and, al-

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220. See REPORT OF THE HONORABLE ALFRED L. LUONGO, *supra* note 147.

221. See State of the Circuit Address by the Honorable Collins J. Seitz, Chief Judge, Judicial Conference of the Third Circuit (Sept. 10, 1982), *reprinted in* 96 F.R.D. 71, 71 (1982).

222. Letter from Griffin Bell to Paul Nejeleski (Oct. 19, 1982).

though useful, give no indication of providing further relief. Furthermore, a judge's heavy pre-trial involvement in civil litigation may not accomplish the goal of judicial efficiency and may threaten a judge's impartiality at trial.<sup>223</sup> Fiscal and other practical obstacles, such as diminishing returns, impede limitless expansion of the judiciary. And the number and power of magistrates seem presently to be at optimal levels. Finally, in view of the current political climate, abolition of diversity jurisdiction seems remote.

Court-annexed arbitration is the most effective of the current court-reform proposals. It expands the concept of pre-hearing conferences to provide a mechanism for dispute termination. Court-annexed arbitration is an excellent means of achieving the benefits of case management without the burden of the loss of judicial impartiality. Further, court-annexed arbitration allows more matters to be terminated in the same number of judge hours, and it removes a significant proportion of diversity cases from the federal civil caseload.

To realize these benefits on a national level, and thus to provide meaningful relief to the federal judicial system, Congress and the judiciary must cooperate to create a national program of court-annexed arbitration. Expanded experimentation would aid significantly the problems traditionally associated with adjudication: delay, expense, and an overburdened judiciary.

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223. "Proponents of managerial judging . . . claim that case management decreases delay, produces more dispositions, and reduces litigation costs. But close examination of the currently available information reveals little support for the conclusion that management is responsible for efficiency gains (if any) at the district court level . . ." Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 417 (1982) (citation omitted). In fact, extensive involvement in pre-trial matters may threaten the impartiality of the judge when he sits and hears the case at trial. *Id.* at 426-31.

**TABLE I**  
**DISTRIBUTION OF ELIGIBLE CASES TERMINATED IN THE EASTERN**  
**DISTRICT OF PENNSYLVANIA, 2/1/78 TO 1/31/83**

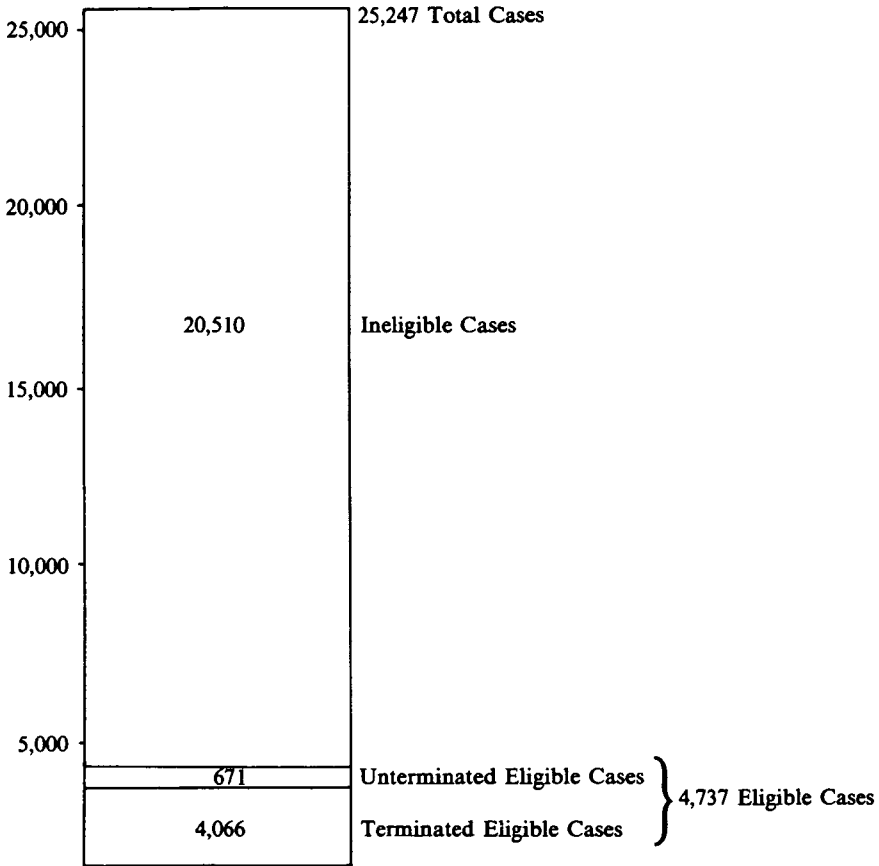
Manner in which eligible cases were terminated	Cases terminated prior to order of referral to arbitration		Cases terminated after order of referral to arbitration		Total of all eligible cases terminated in E.D. Pa. (2/1/78- 1/31/83)	
Settled	913	22.4%	836	20.5%	1749	43.0%
Dismissed and other <sup>a</sup>	1680	41.3%	235	5.9%	1915	47.1%
Judgment on award of arbitrators	0	—	330	8.1%	330	8.1%
Terminated by trial de novo	0	—	72	1.8%	72	1.8%
<b>Total Cases Terminated</b>	<b>2593</b>	<b>63.7%</b>	<b>1473</b>	<b>36.2%</b>	<b>4066</b>	<b>100.0%</b>

Source: Office of E.D. of Pa. Clerk of Courts, unpublished report, Table II, at 16.

Note: During the first five years of the arbitration program, 25,547 civil cases were filed, of which 4737 were eligible for arbitration. 4066 or 86% of the eligible cases were terminated as of 1/31/83. In over two-thirds of the non-terminated cases (428), an answer had not been filed, service of process had yet to be made, or the 120-day discovery period had not elapsed.

a. There were 977 cases terminated by dismissal or judgment by the court, 266 dismissed by stipulation, 172 voluntarily dismissed by plaintiff, 186 terminated by default judgment, and 130 transferred or remanded to state court.

**TABLE II**  
**TOTAL CIVIL ACTION CASES FILED IN EASTERN DISTRICT OF**  
**PENNSYLVANIA, 2/1/78 TO 1/1/83**



Source: Clerk's Report, 2/4/83

**TABLE III**  
**STATUS OF 671 UNTERMINATED, ELIGIBLE CASES**

671	71 (10.6%)	Trial de novo pending
600	23 (3.4%)	Awaiting expiration of 20-day time period for filing an appeal for trial de novo or entry of judgment
500	215 (32.2%)	Scheduled for hearing
400	16 (2.4%)	Transferred to the suspense docket
300	58 (8.6%)	Motions pending
200	78 (11.6%)	120-day discovery period not yet expired
100	122 (18.1%)	Answer not yet filed
	88 (13.1%)	Service of process not yet made