

University of Michigan Journal of Law Reform

Volume 16

1983

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Recommended Citation

A. L. Levin, *Court-Annexed Arbitration*, 16 U. MICH. J. L. REFORM 537 (1983).
Available at: <https://repository.law.umich.edu/mjlr/vol16/iss3/8>

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COURT-ANNEXED ARBITRATION

A. Leo Levin*

In his 1982 State of the Judiciary address, Chief Justice Warren E. Burger focused on arbitration as “a better way” to resolve a wide range of civil disputes than the formal trials that today clog our courts.¹ Arbitration indeed promises dispatch, economy, and user satisfaction. Understandably, it has become increasingly popular in the commercial world.

Arbitration, as an alternative to litigation, is voluntary in its most common form. Its use depends on the consent of the parties and, once agreed to, is binding. In order to cope with an ever-increasing flood of litigation, some courts have used arbitration in a different form — a court-annexed procedure — to resolve civil litigation already commenced. Court-annexed arbitration is unlike traditional arbitration in several ways: it is mandatory rather than voluntary; the arbitrators are typically assigned by a third party rather than chosen by the parties; and the award is not binding. Typically, the procedure is imposed upon litigants by statute and by rule. Moreover, court-annexed arbitration is a method of dealing with civil litigation subsequent to the filing of the case while traditional arbitration occurs prior to the institution of the lawsuit.

Court-annexed arbitration is utilized more extensively today than ever before. It commands widespread and increasing interest, not only because it serves the litigants well, but also because it offers to beleaguered courts a measure of relief from seriously overburdened dockets. This Article examines the use of court-annexed arbitration as an alternative method of dispute resolution. Part I describes how court-annexed arbitration works and the goals it is designed to achieve. Part II focuses on what the actual experience with court-annexed arbitration has been. Utilizing data from a recent empirical study on court-annexed arbitration by the Federal Judicial Center, this section sets forth the elements that are critical to the success of a model court-

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

annexed arbitration plan and discusses the general advantages a court-annexed approach holds over traditional formal trial proceedings.

I. OPERATION AND PROCEDURE

Although provisions governing court-annexed arbitration vary in detail, they generally have certain basic features in common.² Typically, they require that certain classes of civil cases be referred for arbitration prior to trial. Cases subject to mandatory referral are generally those involving personal injury or contract actions in which no more than a specified dollar limit is demanded. When court-annexed arbitration was first instituted in Pennsylvania a quarter of a century ago, the limit was fixed at \$1000;³ when the United States District Court for the Northern District of California launched a pilot arbitration program in 1978, it set the limit at \$100,000.⁴ Furthermore, the arbitration hearing is generally conducted as an informal trial, in which a panel of three arbitrators — lawyers who have agreed to serve — hear evidence and arguments and render a decision. A dissatisfied party may reject the decision by demanding a formal trial (or “trial de novo”). If so appealed,⁵ the case is treated as though there had been no arbitration; where the claim is one triable by a jury, the right to jury trial remains.

It was originally thought that some financial sanction should be imposed “to serve as a brake or deterrent on the taking of frivolous and wholly unjustified appeals.”⁶ Fashioning an appropriate sanction has not been easy, nor has there been ready agreement on the circumstances calling for imposition of sanctions. A nonrecoverable payment, imposed upon the appealing party, in the amount of the fees of the arbitrators was the Pennsylvania pattern a quarter of a century

2. See generally Connolly & Smith, *Description of Major Characteristics of the Rules for Selected Court-Annexed Mediation/Arbitration Programs*, ABA Comm. to Reduce Court Costs and Delay (1982). See also McEwen & Maidman, *Mediation and Arbitration: Their Promise and Performance as Alternatives to Court*, in *THE ANALYSIS OF JUDICIAL REFORM* 61 (P. Dubois ed. 1982).

3. See *Smith Case*, 381 Pa. 223, 234, 112 A.2d 625, 635 (1955), *appeal dismissed sub nom. Smith v. Wissler*, 350 U.S. 858 (1955). The Common Pleas Court for Philadelphia County recently increased the limit for arbitration fees to \$20,000.

4. N.D. CAL. TEMP. LOCAL R. 500-2(a)(i)(A), *reprinted in A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* 112 (1981) [hereinafter cited as *A. LIND & J. SHAPARD*].

5. The trial is in no sense an appeal, though the demand for trial is usually referred to that way, for the task of the court is not to examine the proceedings below to see whether they are tainted by error, but rather to make a fresh determination of facts and applicable law as it would in any case that had not been the subject of a hearing before arbitrators.

6. *Smith Case*, 381 Pa. 223, 233, 112 A.2d 625, 630 (1955), *appeal dismissed sub nom. Smith v. Wissler*, 350 U.S. 858 (1955).

ago.⁷ At that time the fee for each arbitrator was \$25, but the amount in controversy was usually quite limited. The concern of the Pennsylvania Supreme Court at that time about the nonrecoverable payments was the possibility of a chilling effect on the right to jury trial. The court, however, solved the problem by suggesting that, particularly in situations where only \$250 were at stake, arbitrators should be satisfied with less. The sacrifice involved, the court suggested, "is undoubtedly one that lawyers will cheerfully make."⁸ Today, arbitrators' fees have escalated, but so have the amounts in controversy. Where \$50,000 is at stake⁹ and with the cost of litigation such that fees of \$225 per arbitration panel do not loom large, it is doubtful that so small a sum serves as a serious deterrent. It may, however, be possible to provide a more significant deterrent. Consider, for example, the deterrent effect if parties were required to pay for the total costs of the action, including fees for attorneys, such payment being conditioned upon failure of the appealing party to gain a substantial advantage from the appeal.¹⁰

Experimentation with sanctions will no doubt continue. Some have viewed appropriate sanctions as an essential ingredient of a successful program of compulsory arbitration.¹¹ No consensus, however, has yet emerged, and successful programs do appear possible with minimal sanctions.

II. THE DYNAMICS OF A SUCCESSFUL PROGRAM

Pennsylvania first instituted court-annexed arbitration in 1951. The enabling act provided that the county courts of common pleas could, at their option, provide for mandatory arbitration in cases involving \$1000 or less, and in relatively short order it was adopted for use in approximately fifty counties of that state.¹² Currently, court-mandated arbitration is being used in nine states, the District of Columbia, and two United States district courts.¹³ Use of this procedure has increased dramatically during the past decade. The growing popularity of court-annexed arbitration is itself testimony to a series of successful ex-

7. *Id.*

8. *Id.* at 232-33.

9. E.D. PA. LOCAL CIV. R. 49 § 3(2)(B), reprinted in A. LIND & J. SHAPARD, *supra* note 4.

10. See, e.g., E.D. MICH. LOCAL R. 32.10 (a mediation program modeled after a state court provision and therefore limited to diversity cases).

11. See generally D. HENSLER, A. LIPSON & E. ROLPH, *JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR 17-18* (1981).

12. See A. LEVIN & E. WOOLLEY, *DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA 45-46* (1961).

13. See Connolly & Smith, *supra* note 2. The United States District Court for Connecticut has since terminated its arbitration program.

periences. Speaking of the Pennsylvania program, Chief Justice Burger recently observed the impact on court backlog: "In Philadelphia in the first two years after the jurisdictional level was increased to \$10,000, the entire civil calendar backlog was reduced from 48 months to 21 months. In 1974 more than 12,000 of approximately 16,000 civil cases were resolved through arbitration."¹⁴ At present, the Philadelphia bar considers the state court program "highly effective."¹⁵ "Without arbitration in Philadelphia," the chancellor of the Philadelphia Bar Association wrote in 1981, "we would have chaos."¹⁶

The success of the Pennsylvania state court program, however, did not necessarily make for a hearty reception of the federal court-annexed arbitration program in the Eastern District of Pennsylvania. When the federal court in Philadelphia first proposed court-annexed arbitration with a jurisdictional limit of \$50,000, there was some resistance on the part of the bar. Since its initial introduction, the court-annexed arbitration in the Eastern District of Pennsylvania has received more favorable reactions.

In other circumstances, local interests and local conditions have influenced the bench's and the bar's reception to arbitration programs. Compulsory arbitration in the state courts of California has been characterized as "popular, but no panacea."¹⁷ In the same vein, one report concluded that court-annexed arbitration did not "appear to have major promise as a solution . . . [but] seems to have made friends . . . and perhaps more important, it seems to have made no enemies."¹⁸ Nevertheless, not all opinion has been favorable. One federal court, for example, abandoned court-annexed arbitration in favor of another procedure designed to reduce the number of trials and to dispose of cases more expeditiously.¹⁹

The principal feature of court-annexed arbitration is the large number of adjudicators it makes available to supplement judges. Lawyers who are willing to serve as arbitrators are almost invariably in plentiful supply. In 1968, Frank Zal, Arbitration Commissioner for the County Court of Philadelphia, referred to his division as "a tribunal with the largest amount of judicial manpower in the world."²⁰ He was not far

14. Burger, *supra* note 1, at 277.

15. Letter from Joseph H. Foster, Chancellor of the Philadelphia Bar Association, to A. L. Levin, August 17, 1981, (on file with the *Journal of Law Reform*).

16. *Id.*

17. *Judicial Arbitration in California*, 5 RAND RESEARCH REV., Fall 1981, at 3.

18. *Id.* at 6 (quoting D. HENSLER, A. LIPSON & E. ROLPH, *supra* note 11).

19. This was true of the United States District Court for the District of Connecticut. See Shapard, *Updated Analysis of Court-Annexed Arbitration in Three Federal District Courts 5* (Feb. 17, 1982) (memorandum to be published in 1983) (on file with the *Journal of Law Reform*). For the original study see A. LIND & J. SHAPARD, *supra* note 4.

20. Zal, *Decade of Compulsory Arbitration Reviewed by Commissioner Zal*, THE LEGAL INTELLIGENCER, Jan. 2, 1968, at 1, 11, *reprinted in* F. ZAL, STATISTICAL REPORT AND EXPLANATORY

from the mark. By 1982, with eligibility for appointment as an arbitrator made more stringent, 3200 lawyers had volunteered and qualified in Philadelphia alone.²¹ Professor Rosenberg has made the same point in describing court-annexed arbitration as “a way to stretch the supply of judges when the legislature refuses to appropriate funds for additional judges who are sorely needed.”²² Thus, if this veritable army of adjudicators — 1000 panels in a single city — is properly tapped, the obvious effect will be to avoid the long delays that are typical of crowded and overburdened metropolitan courts.

There is a second benefit that accrues from adding to the supply of adjudicators. By reducing delay and bringing the day of threatened adjudication closer, arbitration makes for earlier settlement. To understand the significance of this contribution, it is important to be aware of how few civil cases actually go to trial and of the dynamics of the settlement process. In the federal system, for example, over 93 civil cases out of every 100 — jury and nonjury — are terminated before trial.²³ In less than 7% is a trial even commenced. Dispositive motions account for some terminations; voluntary dismissals also play a part. Settlements, however, appear to account for the great preponderance of the 93% that require no trial. We now turn to the dynamics. It is an unfortunate fact that settlement typically comes “on the steps of the courthouse.” Phrased differently, it is the imminence of trial, rather than the trial itself, that is the great terminator. Thus, a shortage of judges results in long delays even for the huge volume of cases for which no trial will ever be necessary.

Whether these benefits will in fact be realized turns in large measure on whether court-annexed arbitration results in fewer formal trials than would be required without arbitration.²⁴ To answer this question it is necessary to determine if trial *de novo* is demanded routinely, or phrased

REMARKS PERTAINING TO COMPULSORY ARBITRATION, FIRST DECADE: 1958 TO 1967, COUNTY COURT OF PHILADELPHIA, COMPULSORY ARBITRATION DIVISION 5 (1968).

See also E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 42-43, 48-49 (1977) (discussing lawyers' motivation and perspectives on compulsory arbitration).

21. The Retainer Supplement to 186 *THE LEGAL INTELLIGENCER*, Jan. 6, 1982, at 59.

22. Address by Professor Rosenberg, Eleventh Annual Judicial Conference of New Jersey (May 9, 1959), quoted in A. LEVIN & E. WOOLLEY, *supra* note 12, at 50. See also Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 *HARV. L. REV.* 448 (1961).

23. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *ANNUAL REPORT* 381 table C-4 (1981) [hereinafter cited as Table C-4].

24. It is possible that speeding up the settlement process in the large number of cases that never go to trial could add to the number that do go to trial. Because 90% of the litigants never go to trial, the benefit of speedy disposition may be worth the added delay and expense of the few additional cases that do reach trial. Of greater importance is the risk that administering a program of court-annexed arbitration will invite delays in arbitrated cases that do not reach trial. See generally *infra* notes 27-30 and accompanying text.

differently, if the appeal rate from arbitration is unacceptably high. In addition, it is important to know if these demands result in trials or if they more frequently represent tactical steps in a continuing effort to achieve more favorable settlements.

A. Reducing the Number of Trials

A rigorous, empirical study by the Federal Judicial Center of court-annexed arbitration in the Northern District of California and the Eastern District of Pennsylvania found that by referring cases to arbitration the incidence of trial was reduced by approximately 50%.²⁵ Of 943 cases only 18 — less than 2% — referred for arbitration in the Eastern District of Pennsylvania in 1979 reached trial de novo, with only a handful of cases still pending. It is helpful to present and to analyze the relevant data.

Eastern District of Pennsylvania, As of November 30, 1981

Cases filed in year:	<u>1978</u>	<u>1979</u>
Number designated for arbitration:	778	943
Number (and %) referred to an arbitration panel:	177(23%)	283(30%)
Number (and %) demanding trial de novo:	58(7%)	180(19%)
Number (and %) reaching trial de novo:	19(2.4%)	18(1.9%)
Number (and %) still pending:	5(0.6%)	35(3.7%)
Number (and %) that could possibly go to trial (sum of 2 preceding lines):	24(3.1%)	53(5.6%)

In the year 1979, only 30% (283) of the total number of cases designated for arbitration were actually referred to a panel. The balance "washed out," presumably by settlement. This percentage of surviving cases was larger than in the same court the preceding year; in 1978 only 23% (177) were actually referred to a panel. Of those 283 cases referred to a panel in 1979, trial de novo was demanded in close to two-thirds (180). This figure in itself, however, is of limited significance, because we are less concerned with the number demanding formal trials than with the number actually reaching trial; the settlement process tends to continue after the demand for trial de novo. In only 18 of the original 943, or 1.9%, did a formal trial actually begin.

25. See Shapard, *supra* note 19.

It is also important to note that 35 cases, or 3.7% of the original number designated for arbitration, were still pending. This illustrates the difficulty in projecting trials saved: the pace of litigation is such that cases remain open for years. The best one can do is to set outer limits for the number of trials that could occur, and then estimate the number that will actually take place. Thus, as the end of 1981 approached, a significant percentage of cases filed in 1979 and 1978 still remained open.²⁶

Analysis of the data, however, must go beyond determining the percentage of cases designated for arbitration that ultimately reach trial. The real concern is with the number of trials saved. This requires a determination of the outcome had there been no program of court-annexed arbitration.²⁷ Reference has already been made to the exceedingly small percentage of federal civil cases that reach trial: 6.6%. This is an overall figure; the incidence of trial will depend on the subject matter of the case²⁸ and the amount in controversy.²⁹ Many categories represented in the group designated for arbitration typically require trial at a rate twice as high as the overall average. Nevertheless, it is safe to estimate that court-annexed arbitration reduces the number of trials by 50%.

The significance of a 50% reduction in the number of trials requires

26. For data through June 30, 1982, see Broderick, *Compulsory Arbitration, One Better Way*, 69 A.B.A. J. 64 (1983).

27. See A. LIND & J. SHAPARD, *supra* note 4, at 27-36.

28. With respect to tort actions, the percentage reaching trial in 1981 was as high as 24.2% in marine personal injury cases, 15.1% in personal injury motor vehicle cases, and 12.9% in other personal injury cases. Table C-4, *supra* note 23, at 381. For data by district, see DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 384-85 table C-4A (1981).

29. The higher the stakes, the greater the probability that the case will require a trial. Where the amount in controversy is lower, the percentage of trials that would be expected if there were no program of court-annexed arbitration would also be reduced as would the resultant savings. Other benefits may be greater. For example, there is a heavy price paid when litigants feel coerced to settle simply because the cost of litigation makes a trial prohibitive. A fair hearing before impartial arbitrators might be a welcome substitute. There is evidence that court-annexed arbitration makes possible the adjudication of claims that otherwise would not have been brought. Professors Rosenberg and Schubin report "a delayed but discernible tendency [of court-annexed arbitration] to encourage the filing of small claims." Rosenberg & Schubin, *supra* note 22, at 463. See also A. LEVIN & E. WOOLLEY, *supra* note 12, at 48-49. This may well contribute to further congestion in the courts, but can hardly be viewed as a loss in itself. As Levin and Woolley observe: "Resolution of disputes is a function of society and to the extent that just demands which formerly went unredressed . . . are now being . . . adjudicated, to this extent there is a societal gain, regardless of any change in reports of backlog." *Id.* at 49.

A study of court-annexed arbitration in California found that "[c]ontrary to conventional wisdom . . . smaller-value suits account for a significant proportion of all civil damage cases that *do* reach jury verdict." D. HENSLER, A. LIPSON & E. ROLPH, *supra* note 11, at xi. These results must be considered in context. First, the maximum amount in controversy was \$15,000 and only "a small fraction of all suits" were found to require jury trial. *Id. Cf. id.* at x: "Those who volunteer for arbitration enter a faster track to adjudication than would otherwise be available to them."

analysis. Of course, for the individual litigants, avoiding trial can be expected to expedite disposition of the case, and is likely to save them money. In terms of the impact of court-annexed arbitration upon the system itself, much depends on the perspective. Alone, court-annexed arbitration cannot dissolve the backlogs. In a busy court, where the docket is heavily laden with cases not suitable for referral, one can readily conclude that mandatory arbitration offers no panacea. On the other hand, a savings of some forty trials a year should not be discounted lightly; this savings represents more than the total number of trials that any one judge can be expected to try over the course of an entire year.³⁰ This may mean the difference between ever-increasing backlogs and a court remaining current.

B. *Speed of Disposition*

Arbitration, properly administered, is typically far speedier than plenary trial. Philadelphia County's success in reducing calendar backlog from forty-eight to twenty-one months has already been noted.³¹ The Federal Judicial Center study documented substantial savings in elapsed time until termination, but of a much lower order of magnitude than the high range savings noted for the Philadelphia County courts.³² Understandably, in cases with \$100,000 or even \$50,000 at stake, discovery is usually necessary and takes time. The introduction of court-annexed arbitration in these circumstances, therefore, may have a less dramatic effect. It should also be noted as a general proposition that the speedier the course of litigation, the less dramatic the time savings that can be achieved with court-annexed arbitration.

A great deal depends on how the program is administered. If there is no effort to set and enforce time limits on the scheduling of the hearings, procrastination will occur and arbitration may prove even slower than the normal pace of litigation. In addition, if the situation is such that delay greatly benefits one of the litigants,³³ one can expect

30. The Eastern District of Pennsylvania averages between 32 and 44 completed trials per judgeship per year; in this respect it is among the busiest federal district courts in the country. MANAGEMENT STATISTICS FOR UNITED STATES COURTS 35 (1982). In the Northern District of California over the same period, trials completed per judgeship ranged from 22 to 38. *Id.* at 95. Of course, judges do much more than preside at trials. *Terminations* per judgeship in the Northern District of California ranged from 306 to 464 during this same period; in the Eastern District of Pennsylvania, terminations ranged from 247 to 329.

31. See *supra* text accompanying note 14.

32. See A. LIND & J. SHAPARD, *supra* note 4, at 76-77. In the Northern District of California scheduling of the hearing was left to the arbitrators, *id.* at 78, which may have accounted for the lack of speedier terminations. See also *infra* text accompanying notes 33-34 (discussing the need for deadlines and adequate monitoring of compliance by court personnel).

33. For example, the existence of high interest rates at the time the award is granted, coupled

a high rate of demand for trial de novo, particularly if there is a long wait for formal trial. Nevertheless, a court mindful of the factors that encourage delay can take steps to introduce counterincentives.

In short, arbitration can reduce the total elapsed time from filing to termination, and the savings can be dramatic. To realize this potential, judges and clerks of court must monitor the programs and introduce corrective action where appropriate.

C. Finding Public Funds to Make Economics Possible

A program of court-annexed arbitration requires that substantial costs be paid from the public fisc. To begin with, there are the fees of arbitrators. In addition, personnel must be assigned to the program in numbers sufficient to assign arbitrators, issue notices, and monitor compliance with established timetables. Where the arbitration docket involves thousands of cases, such high volume introduces additional administrative complexities, which make the need for adequate personnel even more evident.³⁴ Even though a successful program of court-annexed arbitration will ultimately save money, the technicalities of government budgeting may be such that this savings cannot be used to pay the administrative costs of running the program. For example, if a reduction in the number of trials obviates the need for the creation of additional judgeships, there is a very real savings to the public, but no funds are freed to pay for arbitrators or the salaries of additional administrative personnel. If a specific budgetary allocation for a program of compulsory arbitration becomes necessary, it will be significantly more difficult to implement a court-annexed arbitration scheme. An appropriation may or may not be forthcoming. If it is not forthcoming, a successful program may become impossible.³⁵

D. The Practical Significance of Perceptions: Viewing Compulsory Arbitration as a Mere Aid to Settlement

Court-annexed arbitration may be viewed as an adjudication; it is

with no judicial penalties for delay, may encourage demands for trials de novo expressly for purposes of delay.

34. Furthermore, judges simply cannot avoid expending time on some administrative matters; judges must draft rules and monitor their operation. For most programs, however, no additional judges will be required and therefore no special appropriation will be needed.

35. Indeed, the unavailability of such funds has in the past brought to a temporary halt an otherwise successful arbitration program. Similarly, in the case of federal courts, a separate budgetary justification has been required to appropriate funds for experimentation with court-annexed arbitration.

a determination of the rights of the parties by a legally constituted tribunal. Of course, it is not actually a judicial determination on the merits, because each of the litigants is entitled to reject the award and have the case tried as though there had been no arbitration. Thus, it is only the consent of the parties — the failure to appeal — that lends finality to the award. Some argue, however, that court-annexed arbitration should be considered a mechanism for achieving settlement and that arbitrators should not be content with simply rendering an award; rather like para-judicial personnel assigned to other programs of alternative dispute resolution³⁶ they should view their function as one of promoting settlements.³⁷

There are substantial risks involved with this approach. To appreciate the risks more fully, it is instructive to consider an ordinary court case. As long as there exists a right of appeal, not even the entry of judgment following a formal trial brings the litigation to a conclusion unless both parties consent. Although there is ample evidence that many appeals are filed for tactical reasons unrelated to the merits, and it is well known that the delay and expense involved in appellate review frequently forces parties to settle after notice of appeal has been filed,³⁸ these facts do not relegate the trial to a mere technique for achieving settlement. The trial is viewed as an adjudication, a determination of respective rights. Litigants are often willing to accept an informal tribunal as a legitimate alternative to the formalities and technicalities that are the hallmark of the courtroom, provided it has been charged with determining the merits of a claim or defense and provided it offers a fair hearing focused on legal rights. But this is very different from viewing the hearing as a means of exerting pressure on the parties to avoid the merits in order to reduce expense and delay.³⁹ To make court-annexed arbitration little more than a mechanism for achieving settlement is to run the risk of diminishing its effectiveness in terminating cases and reducing litigant satisfaction with the process.⁴⁰ The percep-

36. See A. LIND & J. SHAPARD, *supra* note 4, at 83-88.

37. See, e.g., A. LIND & J. SHAPARD, *supra* note 4, at 88-90, 95 (suggesting that the hearing procedure be modified to generate for the litigants a good view of the "strengths and weaknesses of the case" and to promote posthearing settlement). The changes argued for by Lind and Shapard can, however, create more cumbersome and inefficient hearings.

38. See D. HENSLEY, A. LIPSON & E. ROLPH, *supra* note 11, at 32-33.

39. It is theoretically possible to increase settlement efforts by discussing strengths and weaknesses of cases without coercing settlements. How much this would change the perceptions of the parties (whose counsel observe the proceedings in any event) is doubtful.

40. "Opinions of the fairness of the final outcome were as high for cases terminated by arbitration award as for cases terminated by settlement or trial." A. LIND & J. SHAPARD, *supra* note 4, at 77.

A study of the Rochester, New York compulsory civil arbitration program emphasizes litigant confidence in the arbitration process. "Attorney's opinions and the low settlement and appeal rates all tend to confirm that litigants trust the arbitration process to resolve their disputes in

tion of each party is important. For optimal utility, the arbitration process should be viewed as one focused solely on the merits. This is not to suggest that a losing party will willingly forego the tactical and economic advantage of seeking trial de novo. Indeed, the larger the amount in controversy, the greater the temptation to demand a trial de novo, regardless of whether the case ultimately will be settled. The same considerations operate in determining whether or not to appeal a lower court's ruling. Nevertheless, there is an important advantage in assuring the parties that arbitrators are neither mediators nor compromisers but are officers of the court who have undertaken to resolve the merits.⁴¹

CONCLUSION

From the perspective of the litigants, there are three important variables that must be considered in evaluating the operation of compulsory arbitration: speed of disposition, expense of litigation, and quality of justice. Properly administered, an arbitration program that reduces the number of trials will speed disposition and reduce the expense of litigation. The evidence also points toward litigant satisfaction with the quality of justice dispensed. From the perspective of the courts and of litigants whose controversies are susceptible to resolution other than by a court, there is much to be gained. Programs do not, however, run themselves. Effective administration is essential. Variations in administrative detail can dictate the difference between success and failure.

Court-annexed arbitration may not be the optimal approach for every jurisdiction, but it has been a dramatic success in some places, and has produced significant, albeit modest, results in others. Given the enormity of the twin problems of delay and expense in court litigation, it is reasonable to suggest that court-annexed arbitration be given the chance to reach its full potential as an alternative mechanism for dispute resolution.

The need for alternative mechanisms of dispute resolution is so great in our litigious society, and contemporary demands on the courts so heavy, that any procedure that can contribute to more efficient, more effective justice deserves to be tried. What is at stake, as Chief Justice

an impartial manner." Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 JUDGES' J., Summer 1981, at 36, 45.

41. Where the amount in controversy is relatively small, so that the cost of a formal hearing on the merits is rendered an unrealistic alternative, there may be all the more reason to assure litigants that an impartial tribunal has, in fact, heard the merits and judged them.

Burger warned recently, is nothing less than public confidence in the courts.⁴²

42. See Burger, *supra* note 1, at 276.