St. Mary's Law Journal

Volume 16 | Number 2 Article 6

1-1-1985

Arbitration: Making Court-Annexed Arbitration an Attractive Alternative in Texas.

Peter F. Gazda

COMMENTS

Arbitration: Making Court-Annexed Arbitration an Attractive Alternative in Texas

Peter F. Gazda

I. INTRODUCTION

The methods of settling disputes outside the traditional legal process are known as alternative dispute resolution mechanisms.[1] They include, but

1. *See* Cratsley, *Community Courts: Offering Alternative Dispute Resolution Within the Judicial System,* 3 VT. L. REV. 1, 1 (1978) (interest in new mechanisms increasing); *see also* Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111, 113 (1976). Eric D. Green, Associate Professor of Law at Boston University School of Law, found that the goals of dispute resolution are "to allow the parties to reach a faster, less expensive and more appropriate resolution of their dispute than they would reach if they relied on the traditional processes of adjudication and negotiation." *See* Green, *Getting Out of Court—Private Resolution of Civil Disputes,* 28 BOSTON B.J., May-June 1984, at 11, 11. In 1981, the State Bar of Texas began its formal encouragement of alternative dispute resolution systems when it established the

are not limited to, devices such as mediation, negotiation, and mini-trials.[2] Arbitration, another alternative dispute resolution mechanism, involves referring a dispute to a chosen third person to decide the issue. The entire process is generally accomplished in a relatively short time and at a cost substantially lower than a judicial determination.[3] One specific type of arbitration is a court-annexed procedure which is imposed by statute, is mandatory, and occurs after a case is filed but before a judicial trial.[4]

Committee on Alternative Dispute Resolution. Telephone interview with Jose E. Castillo, Director of Bexar County Mediation Center (Nov. 15, 1984).

2. *See Alternative Dispute Resolution: Bane or Boom to Attorneys?,* 1982 ABA SPECIAL COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, at i (panel discussion series). Mediation is the process whereby "a mediator encourages communication, assists in the identification of areas of disagreement, as well as agreement, and then works to bring the parties to a resolution, but a resolution reached and defined by the parties themselves." *See* Cooke, *Mediation: A Boon or Bust? Mediation in the Justice System,* 1983 ABA SPECIAL COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION 3, 5 (dispute resolution papers series, no. 2). "Negotiation is a process of submission and consideration of offers until an acceptable offer is made, and accepted . . . ." United States v. John McShain, Inc., 258 F.2d 422, 424 (D.C. Cir. 1958), *cert. denied,* 358 U.S. 832 (1958); *see also* Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model,* 7 LAW & SOC'Y REV. 667, 667 (1973) (creates a model of a negotiation); Murray, *Principled Negotation Methods—Putting Theory into Practice,* CONFERENCE ON NEGOTIATION MEDIATION AND ARBITRATION—USEFUL SKILLS FOR THE LAWYER A-1, A-1 (1984) (negotiation should produce fair and lasting agreements). Another alternative dispute resolution mechanism is the mini-trial, where, with no arbitrator or judge, each side makes a brief informal presentation "designed to give each party's principals a clear, balanced conception of the strengths and weaknesses of the positions on both sides as preparation for settlement negotiations which begin immediately upon conclusion of the presentations." *See* Green, *Getting Out of Court—Private Resolution of Civil Disputes,* 28 BOSTON B.J., May-June 1984, at 11, 15; *see also* Green, *Reading the Landscape of ADR—The State of the Art of Extra-Judicial Forms of Dispute Resolution,* 100 F.R.D. 513, 515 (1983) (actual mini-trial described); Morris, *The Mini-Trial Method of Resolving Complex Cases, The "Neutral Advisor's" Perspective,* 100 F.R.D. 520, 520-23 (1983) ("mini-trial holds great promise for dispute resolution").

3. *See* Widiss, *Introduction,* in ARBITRATION—COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS 6-7 (A. Widiss ed. 1979) (speed and expense important factors to consider when choosing arbitration); Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 537 (1983) (arbitration promises "dispatch, economy, and user satisfaction"); Sturges, *Arbitration—What Is It?,* 35 N.Y.U. L. REV. 1031, 1032 (1960) (arbitration provides inexpensive and speedy resolution of controversy). Black's Law Dictionary provides a comprehensive definition: "[T]he reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." *See* BLACK'S LAW DICTIONARY 96 (5th ed. 1979).

4. *See* Knight, *Private Judging,* 56 CAL. ST. B.J. 108, 108 (1981) (also called judicial arbitration); Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111, 116 (1976) (also called compulsory arbitration); *see also* Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 537 (1983) (use of court-annexed arbitration has increased dramatically); Sikes, *Small Claims Arbitration: The Need for Appeal,* 16 COLUM. J.L. & SOC. PROBS. 399, 400 (1981) (arbitration is part of court system).

There is no debate over the usefulness of arbitration as a dispute mechanism, and it is now generally accepted as an attractive alternative to courtroom litigation.[5] United States Supreme Court Chief Justice Warren E. Burger maintains that "arbitration should be an alternative that will compliment the judicial system."[6] Court dockets continue to increase,[7] however, in an apparent ignorance of other effective means available to resolve

---

5. *See* Aksen, *What You Need to Know About Arbitration Law—A "Triality" of Research,* 10 FORUM 793, 796 (1975) ("a veritable explosion in the use of arbitration in all phases of legal practice"); *see also* Lippman, *Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives,* 24 ME. L. REV. 215, 215 (1972) (arbitration useful reform to overburdened courts); Max, *Arbitration—The Alternative To Timely, Costly Litigation,* 42 ALA. LAW. 309, 311 (1981) (arbitration can coexist with judicial system). Differences between courtroom litigation and arbitration include:

1. Arbitration is more expeditious than the courts in resolving disputes.
2. Arbitration is more informal and less technical than court procedures.
3. Arbitration is more economical than court litigation.
4. Arbitration is a private forum. Hearings are closed and proceedings are not a matter of public record.
5. The parties in arbitration select their own arbitrators who are experts or have specialized knowledge in the field of the dispute.
6. Unlike a court action, the informal atmosphere of the arbitration process works to promote good will in a dispute, allowing a long term business relationship to continue.
7. Except for narrow grounds of appeal, the decision of the arbitrators is final and binding upon the parties. This ends the dispute so that the parties can concentrate on other matters.
8. Arbitration, being more expeditious, can precipitate a quicker settlement of the dispute before having a hearing. *See id.* at 311. Arbitration does not have to be binding. *See* Nejelski, *Court Annexed Arbitration,* 14 FORUM 215, 215-16 (1978) (several jurisdictions allow arbitration to be compulsory and nonbinding). An additional advantage of arbitration is that, unlike court litigation, which must produce a settlement as well as decisional law, arbitration only has to resolve the dispute. *See* Rehnquist, *A Jurist's View of Arbitration,* 32 ARB. J. 1, 5 (1977) (arbitration has advantage of not having to set precedent, has only to settle dispute).

6. Burger, *Isn't There a Better Way?,* 68 A.B.A. J. 274, 277 (1982) (arbitration has important advantages). On Jan. 24, 1982, Chief Justice Burger delivered his annual report on the state of the judiciary to the American Bar Association. *See id.* at 274. He encouraged "arbitration, not as the answer or cure-all for the mushrooming caseloads of the courts, but as one example of 'a better way to do it.' " *See id.* at 276. United States Supreme Court Associate Justice William H. Rehnquist addressed the American Arbitration Association's Regional Advisory Council and noted that fairness, the adversary system, and written justification are advantages to the judicial system. *See* Rehnquist, *A Jurist's View of Arbitration,* 32 ARB. J. 1, 3 (1977) (there are advantages and disadvantages to the judicial process). Justice Rehnquist, however, described the problems of costliness and time consumption involved in the judicial process and stated "[Judge Learned Hand] once said that, on the basis of this experience, if he were a client he would dread major litigation second only to serious illness or death." *See id.* at 3 (citing Hand, *Deficiencies of Trial to Reach the Heart of the Matter,* 3 LECTURES ON LEGAL TOPICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 89, 105 (1921)). Texas Supreme Court Chief Justice Jack Pope contends that, "if we can develop a body of lawyers who are trained and familiar with the [arbitration] process . . . many would welcome its use." *See* Questionnaire reply from Chief Justice Jack Pope to

Peter F. Gazda (Sept. 11, 1984) (discussing specific issues on arbitration) (available in *St. Mary's Law Journal* office).

7. *See* 1983 DIRECTOR ADMIN. OFFICE U.S. CTS. ANN. REP. 118. A total of 241,842 civil cases were filed in U.S. district courts during the twelve month period ending June 30, 1983. *See id.* at 119. This indicates 17.3% growth over the same period the year before when 206,193 cases were filed. *See id.* at 114. The table provided below shows the steady increase in cases filed, terminated, and pending:

TABLE 1

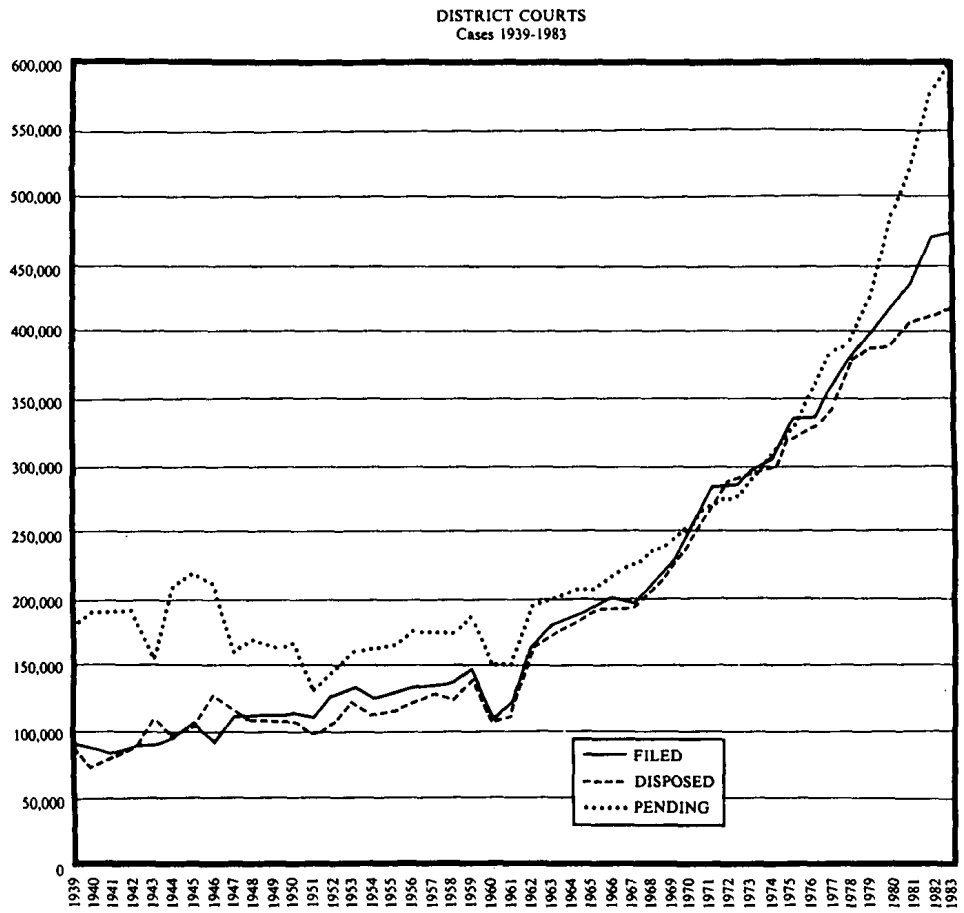
U.S. District Courts Civil Cases Filed, Terminated, and Pending During the Twelve Month Periods Ended June 30, 1960, 1965, 1970, and 1975 through 1983

Year	Filed	Terminated	Pending on June 30
1960 . . .	59,284	61,829	61,251
1965 . . .	67,678	65,478	74,395
1970 . . .	87,321	80,435	93,207
1975 . . .	117,320	104,783	119,767
1976 . . .	130,597	110,175	140,189
1977 . . .	130,567	117,150	153,606
1978 . . .	138,770	125,914	166,462
1979 . . .	154,666	143,323	177,805
1980 . . .	168,789	160,481	186,113
1981 . . .	180,576	177,975	188,714
1982 . . .	206,193	189,473	205,434
1983 . . .	241,842	215,356	231,920
Percent Change 1983 over			
1978 . . .	74.3	71.0	39.3
1982 . . .	17.3	13.7	12.9

Id. at 114. One commentator noted that from 1960 to 1978 the total number of cases resolved or settled had been surpassed by the number of civil cases filed. *See* Perlman, *Final Offer Arbitration: A Pre-trial Settlement Device*, 16 HARV. J. ON LEGIS. 513, 513 (1979) (between 1968 and 1978 there was a 30% increase in civil trials). This trend has continued and although the number of cases disposed of has increased, so has the number of cases pending. *See* 1983 DIRECTOR ADMIN. OFFICE U.S. CTS. ANN. REP. 114. Filings in southern Texas were up 59.9% during the twelve month period ending June 30, 1983. *See id.* at 119. There was a .5% increase in civil cases filed in Texas district courts. *See* 1983 TEX. JUDICIAL SYS. ANN. REP. 128. At the end of 1983, however, the number of civil cases pending was up 5.3%. *See id.* at 128. The following graph shows the increasing split between cases filed, disposed of, and pending:

disputes.[8]

Currently, there are common law,[9] federal,[10] and state[11] provisions re-



Id. at 129.

8. *See* Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111, 111 (1976) (lawyers are single-minded regarding dispute resolution in assuming that courts are the only dispute resolvers). Arbitration is opposed on two levels: by judges who fear they will be deprived of jurisdiction and lawyers who fear an adverse affect on their practices. *See* Burger, *Isn't There a Better Way?,* 68 A.B.A. J. 274, 277 (1982) (review of source of opposition to arbitration).

9. *See* Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality,* 23 UCLA L. REV. 936, 938 (1976) (common law origin of arbitration).

10. *See* 9 U.S.C. §§ 1-14 (1982). The federal courts strongly endorse arbitration. *See, e.g.,* Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568, 572 (2d Cir. 1968) (policy of federal act to eliminate expense and delay of court); Weight Watchers v. Weight Watchers Int'l, 398 F. Supp. 1057, 1058 (E.D.N.Y. 1975) (federal policy in favor of arbitration); Stockwell v. Reynolds & Co., 252 F. Supp. 215, 220 (S.D.N.Y. 1965) (arbitration clauses liberally construed).

garding the right to arbitrate. This comment will briefly examine arbitration on the federal and state levels, specifically review the past and present use of arbitration in Texas, and include a discussion of the Texas General Arbitration Act.[12] Finally, this comment will focus on the advantages and disadvantages of court-annexed arbitration and will recommend court-annexed arbitration as a viable alternative in Texas.

II. BACKGROUND

A. *Common Law Development*

Under common law,[13] a party to an agreement to arbitrate may refuse to

---

11. *See* ALA. CODE §§ 6-6-1 to -16 (1977); ALASKA STAT. §§ 09.43.010-.180, .190-.220 (1983); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1982 & Supp. 1984-1985); ARK. STAT. ANN. §§ 34-511 to -532 (Supp. 1983); CAL. CIV. PROC. CODE §§ 1280-1295 (Deering 1981 & Supp. 1984); COLO. REV. STAT. §§ 13-22-201 to -223 (Supp. 1984); CONN. GEN. STAT. ANN. §§ 52-408 to -424 (West 1960 & Supp. 1984); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1975); FLA. STAT. ANN. §§ 682.01-.22 (West Supp. 1984); GA. CODE ANN. §§ 7-101 to -111, 7-301 to -318, 7-401 to -424 (1973 & Supp. 1984); HAWAII REV. STAT. §§ 658-1 to -15 (1976); IDAHO CODE §§ 7-901 to -922 (1979); ILL. ANN. STAT. ch. 10, §§ 101 to 122, 201 to 214 (Smith-Hurd 1975 & Supp. 1984-1985); IND. CODE ANN. §§ 34-4-1-1 to -26, 34-4-2-1 to -22 (Burns 1973 & Supp. 1984); IOWA CODE ANN. §§ 679A.1-.19 (West Supp. 1984-1985); KAN. STAT. ANN. §§ 5-401 to -422 (1982); KY. REV. STAT. §§ 417.050-.240 (Supp. 1984); LA. REV. STAT. ANN. §§ 9.4201-.4217 (West 1983); ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1984); MASS. ANN. LAWS ch. 251, §§ 1-19 (Michie/Law. Co-op. 1980); MICH. STAT. ANN. §§ 27A.5001-.5065 (Callaghan 1980 & Supp. 1984-1985); MINN. STAT. ANN. §§ 572.08-.30(West Supp. 1984); MISS. CODE ANN. §§ 11-15-1 to -37, -101 to -143 (1972 & Supp. 1984); MO. ANN. STAT. §§ 435.010 -.280, 435.350 -.470 (Vernon 1952 & Supp. 1984); MONT. CODE ANN. §§ 27-5-101 to -105, -201 to -203, -301 to -303 (1984); NEB. REV. STAT. §§ 25-2103 to -2120 (1979); NEV. REV. STAT. §§ 38.015-.205 (1983); N.H. REV. STAT. ANN. §§ 542:1-:10 (1974); N.J. STAT. ANN. §§ 2A:24-1 to -11 (West 1952); N.M. STAT. ANN. §§ 44-7-1 to -22 (1978); N.Y. CIV. PRAC. LAW & R. §§ 7501-7514 (McKinney 1980); N.C. GEN. STAT. §§ 1-567.1-.20 (1983); N.D. CENT. CODE §§ 32-29-01 to -21 (1976 & Supp. 1983); OHIO REV. CODE ANN. §§ 2711.01-.16, -.21 -.24 (Baldwin 1977); OKLA. STAT. ANN. tit. 15, §§ 801-818 (West Supp. 1984-1985); OR. REV. STAT. §§ 33.210 -.340 (1983); 42 PA. CONS. STAT. ANN. §§ 7301-7320, 7341, 7361-7362 (Purdon 1982 & Supp. 1984-1985); R.I. GEN. LAWS §§ 10-3-1 to -20 (1970 & Supp. 1984); S.C. CODE ANN. §§ 15-48-10 to -240 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to -38, 21-25B-1 to -26 (1978 & Supp. 1984); TENN. CODE ANN. §§ 29-5-301 to -320 (Supp. 1984); TEX. REV. CIV. STAT. ANN. arts. 224-249 (Vernon 1973 & Supp. 1984); UTAH CODE ANN. §§ 78-31-1 to -22 (1977); VT. STAT. ANN. tit. 21, §§ 521-554 (1978); VA. CODE §§ 8.01-577 to -581 (1984); WASH. REV. CODE ANN. §§ 7.04.010-.220 (1961 & Supp. 1984-1985); W. VA. CODE §§ 55-10-1 to -8 (1981); WIS. STAT. ANN. §§ 788.01-.18 (West 1981 & Supp. 1984-1985); WYO. STAT. §§ 1-36-101 to -119 (1983). The District of Columbia and Puerto Rico also have arbitration statutes. *See* D.C. CODE ANN. §§ 16-4301 to -4319 (1981); P.R. LAWS ANN. tit. 32, §§ 3201-3229 (1968).

12. *See* TEX. REV. CIV. STAT. ANN. arts. 224 to 238-20 (Vernon 1973 & Supp. 1984).

13. *See* S. KAGEL, ANATOMY OF A LABOR ARBITRATION 139 (1981). The author states: When the courts have no written law on which to base its (sic) decision in a particular

abide by the agreement until the rendition of the arbitration award.[14] Thus, an agreement to arbitrate cannot be specifically enforced under common law,[15] and this includes an agreement to arbitrate a future dispute.[16] Arbitration under common law is only useful when both sides assent to arbitrate and abide by the agreement to its completion.[17] The doctrine of revocability of arbitration agreements developed in England in

---

controversy, it (sic) decides the case on the basis of custom and general principles of right and wrong. These decisions create precedents or rules, which are applied to similar future controversies. The body of law created in this fashion is spoken of as the common law.

Id. at 139.

14. *See* F. ELKORT & E.A. ELKOURI, HOW ARBITRATION WORKS 36 (3d ed. 1973) (citing ZISKIND, LABOR ARBITRATION UNDER STATE STATUTES 3 (U.S. Dept. of Labor, 1943)). A summary of the basics of common law arbitration provides:

Common law arbitration rests upon the voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement may be oral and may be revoked at any time before the rendering of the award. The tribunal, permanent or temporary, may be composed of any number of arbitrators. They must be free from bias and interest in the subject matter, and may not be related by affinity or consanguinity to either party. The arbitrators need not be sworn. Only existing disputes may be submitted to them. The parties must be given notice of hearings and are entitled to be present when all the evidence is received. The arbitrators have no power to subpoena witnesses or records and need not conform to legal rules of hearing procedure other than to give the parties an opportunity to present all competent evidence. All arbitrators must attend the hearings, consider the evidence jointly and arrive at an award by a unanimous vote. The award may be oral, but if written, all the arbitrators must sign it. It must dispose of every substantial issue submitted to arbitration. An award may be set aside only for fraud, misconduct, gross mistake, or substantial breach of a common law rule. The only method of enforcing the common law award is to file suit upon it and the judgment thus obtained may be enforced as any other judgment. Insofar as a State arbitration statute fails to state a correlative rule and is not in conflict with any of these common law rules, it may be said that an arbitration proceeding under such statute is governed also by these rules.

Id. at 36.

15. *See* S. KAGEL, ANATOMY OF A LABOR ARBITRATION 140 (1981). No adequate reasoning has ever been given to explain what renders an arbitration agreement inherently revocable. *See* Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements,* 17 U. CHI. L. REV. 233, 236 (1950) (a bewildering question since mid-19th century). The reason most cited is that arbitration agreements oust the court of jurisdiction. *See id.* at 236 (since judge's fees came from cases, perhaps it was against public policy to "oust" court of jurisdiction).

16. *See* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 3.01, at 21 (rev. ed. 1984) (reluctance of courts to encourage agreement to arbitrate future disputes since this would bypass court's jurisdiction).

17. *See* Fleming, *Arbitrators and the Remedy Power,* 48 VA. L. REV. 1199, 1199 (1962) (both sides have to agree to arbitrate). Generally, arbitration is a contract matter which requires an agreement by both sides. *See* Coleman v. National Movie-Dine Inc., 449 F. Supp. 945, 947 (E.D. Pa. 1978).

1609 from *Vynior's Case.*[18]

In *Vynior's Case,* Lord Coke discussed precedent and, in dictum, remarked that arbitration agreements were inherently revocable.[19] During the 18th century, the notion of revocability merged with the rationale that arbitration agreements oust courts of jurisdiction and are against public policy; the two concepts developed into unquestioned authority.[20] The revocability of arbitration agreements was adopted in the United States as part of the common law.[21] Congress sought to remove the hostility against arbitration by adopting the United States Arbitration Act in 1925.[22]

B. *Federal Use of Arbitration*

The United States Arbitration Act (the Act)[23] is a federal substantive law[24] which gives the courts jurisdiction over any interstate commerce or

---

18. *See* 4 Co. Rep. 302, 305 (K.B. 1609). The case involved an agreement to arbitrate, and the court ordered the forfeiture of a penal bond when performance was unfulfilled. *See* Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements,* 17 U. CHI. L. REV. 233, 235 (1950) (discussion of development of the revocability of arbitration). The doctrine of revocability of arbitration and its pronouncement in *Vynior's Case* is taken up extensively by the Second Circuit. *See* Kulukundis Shipping Co. v. Amtory Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942). The court in *Kulukundis* traced the minimum effect English laws had on removing the doctrine of revocability espoused by Lord Coke. *See id.* at 982.

19. *See* Kulukundis Shipping Co. v. Amtory Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942) (revocability of agreement stemmed from revocability of arbitrator to arbitrate) (citing Vynior's Case, 4 Co. Rep. 302 (K.B. 1609)). Commentators debate whether or not Lord Coke was correct in his summary of precedent. *See* Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements,* 17 U. CHI. L. REV. 233, 235 n.7 (1950). The authors note that some commentators have criticized Lord Coke's interpretation of arbitration precedent. *See id.* at 235 n.7 (citing COHEN, COMMERCIAL ARBITRATION AND THE LAW 84-93 (1918)). In contrast, the authors have found commentators that endorse Coke's summary of precedent. *See id.* at 235 n.7 (citing Sayre, *Development of Commercial Arbitration Law,* 37 YALE L.J. 595, 599 (1928)).

20. *See* Kulukundis Shipping Co. v. Amtory Trading Corp., 126 F.2d 978, 983 (1942) (courts rationalized that arbitration agreements were undesirable since they had no court supervision and, thus, were against public policy); Wolaver, *The Historical Background of Commercial Arbitration,* 83 U. PA. L. REV. 132, 138-40 (1934) (English courts supported doctrine of revocability).

21. *See* Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 406 (2d Cir. 1959) (courts in England and America attempted to protect "their jurisdiction" from agreements to arbitrate), *cert. granted,* 362 U.S. 909, *cert. dismissed pursuant to stipulation,* 364 U.S. 801 (1960). *See generally* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 3.01, at 21 (rev. ed. 1984) (discussion of United States common law arbitration).

22. *See* Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 406 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *cert. dismissed pursuant to stipulation,* 364 U.S. 801 (1960); United States Arbitration Act, 9 U.S.C. §§ 1-14 (1982) (allows for arbitration of maritime transactions and contracts involving interstate commerce).

23. 9 U.S.C. §§ 1-14 (1982).

24. *See* Kilbreath v. Rudy, 242 N.E.2d 658, 660 (Ohio 1968) ("Substantive law is that

maritime contract which has an arbitration provision.[25] Unlike the common law, agreements to arbitrate are specifically enforceable under the Act.[26] No independent ground of jurisdiction is created by the Act, so there must be a sufficient jurisdictional amount in controversy and diversity present before arbitration is allowed.[27]

---

which creates duties, rights and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.") (citing State *ex rel.* Holdridge v. Industrial Comm., 228 N.E.2d 621, 623 (Ohio 1967)); *see also* Kreindler, *Arbitration Practice Under Federal Law,* 18 FORUM 348, 348 (1983) (courts determined Act to be federal substantive law). The second circuit court clarified this area of the law when it held:

> [T]he Arbitration Act, in making agreements to arbitrate "valid, irrevocable, and enforceable," created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists.

See Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 409 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *cert. dismissed pursuant to stipulation,* 364 U.S. 801 (1960). Several student notes have discussed the importance of this case. *See, e.g.,* Note, *Federal Arbitration Act—State Law Not Binding on Federal Court in Diversity Suit,* 9 DE PAUL L. REV. 291, 293 (1959-1960) (*Robert Lawrence Co.* court held Act as binding substantive law); Note, *Federal Practice—Applicability of Federal Arbitration Act to Diversity Jurisdiction Cases—Constitutional Implications,* 34 TUL. L. REV. 831, 831 (1960) (*Robert Lawrence Co.* court held federal Act governs in arbitration question regardless of grounds for jurisdiction if interstate commerce involved); Note, *Contracts—Arbitration—Federal Arbitration Act Created Body of Substantive Federal Law Under Which Agreements To Arbitrate Are To Be Interpreted,* 46 VA. L. REV. 340, 340 (1960) (*Robert Lawrence Co.* found arbitration agreement enforceable under federal law even if voidable under state law).

25. *See* 9 U.S.C. §§ 1-2 (1982). Section 1 defines "maritime transactions" and "commerce"; § 2 pertains to the "validity, irrevocability, and enforcement of agreements" in these areas. *See id.* Maritime transactions, as defined, "means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matter in foreign commerce which, if the subjects of controversy, would be embraced within admiralty jurisdiction . . . ." *Id.* § 1. Commerce as defined "means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation. . . ." *Id.* § 1.

26. *See, e.g.,* National R.R. Passenger Corp. v. Missouri Pac. R.R., 501 F.2d 423, 426 (8th Cir. 1974) (Act overrules enduring judicial precedents which had prohibited enforcement of arbitration agreements on public policy grounds); Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967, 969 (9th Cir. 1941) (courts could not enforce such agreements prior to Act); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 584 (E.D. Cal. 1982) (intention of Congress was to overrule common law refusal to enforce arbitration agreements).

27. *See* Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 408 (2d Cir. 1959) (limited by art. III of United States Constitution), *cert. granted,* 362 U.S. 909, *cert. dismissed pursuant to stipulation,* 364 U.S. 801 (1960); *see also* Robinson Constr. Co. v. National Corp. for Housing Partnerships, 375 F. Supp. 446, 448 (M.D.N.C. 1974) (jurisdictional basis other

Initially, the court determines the validity of the agreement to arbitrate.[28] If the agreement is valid, the arbitrator resolves the conflict.[29] If the validity of the agreement is in issue, the court conducts a trial to determine validity and either orders arbitration to proceed or dismisses the proceeding.[30] The scope of the Act has been interpreted to include determinations such as whether or not there was fraud present in the inducement to the entire contract.[31] Generally, the Act is considered the governing law in both federal and state courts.[32] In addition to the statutorily prescribed arbitration procedure, the federal government initiated a limited court-annexed arbitration program, which requires that certain

---

than Act is necessary, such as diversity of citizenship or federal question); Goldberg, *The Agreement To Arbitrate,* 24 PRAC. LAW., Mar. 1, 1978, at 61, 66 (if commerce is involved, jurisdictional amount and diversity is required). The reasoning in *Robert Lawrence Co.* was reaffirmed two years later by the same court. *See* Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 384 (2d Cir.), *cert. denied,* 368 U.S. 817 (1961).

28. *See* 9 U.S.C. § 4 (1982). The statute requires, in pertinent part:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

Id.; see also Brown, *Some Practical Thoughts on Arbitration,* 6 LITIGATION 8, 12 (1979) (federal court to order arbitration when satisfied that making of arbitration agreement or failure to comply not an issue) (citing Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 403 (1967)); Goldberg, *The Agreement To Arbitrate,* 24 PRAC. LAW., Mar. 1, 1978, at 61, 65-66 (whether valid agreement exists is only issue for court); Kreindler, *Arbitration Practice Under Federal Law,* 18 FORUM 348, 349 (1983) (threshold question is valid agreement to arbitrate).

29. *See* Kreindler, *Arbitration Practice Under Federal Law,* 18 FORUM 348, 349 (1982) (arbitrators to resolve all other disputes if valid agreement to arbitrate exists).

30. *See* 9 U.S.C. § 4 (1982) (jury trial may be demanded to determine validity of agreement). The courts will resolve all doubts in favor of arbitration. *See* Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) (federal policy to promote arbitration).

31. *See* Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 399-400 (1967) (fraud in inducement of contract issue that arbitrators must decide). *See generally* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 4:03, at 31 (rev. ed. 1984) (scope of federal arbitration law).

32. *See* Robinson Constr. Co. v. National Corp. for Housing Partnerships, 375 F. Supp. 446, 450 (M.D.N.C. 1974) (federal law may supersede state law limiting arbitration agreements). The United States Court of Appeals for the Eighth Circuit determined that the Texas statutory requirement that arbitration agreements include the signature of counsel impedes the use of arbitration in interstate commerce. *See* Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 999 (8th Cir. 1972). The court also held that "special state laws or decisions governing the validity of arbitration agreements do not apply when those agreements are contracts, or parts of contracts, 'evidencing a transaction involving [interstate or foreign] commerce.' " *See id.* at 999 (quoting Federal Arbitration Act, 9 U.S.C. § 2 (1970)).

civil cases be arbitrated before a trial is granted.[33]

In 1978, the federal government established a court-annexed arbitration program in three federal district courts on an experimental basis.[34] The program mandates non-binding arbitration by an assigned third party after filing a case.[35] Subsequent analysis of the program shows a reduction in time delays and costs,[36] and there are recommendations for expanding the program.[37] Several states have similar court-annexed arbitration pro-

---

33. *See* A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS, at xi (rev. ed. 1983) (program initiated in three federal districts). Court-annexed arbitration is arbitration ordered by state law. *See* Snow & Abramson, *Alternative to Ligitation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 43 n.3 (1983) (also called compulsory or judicial arbitration). An additional attempt to initiate alternative dispute resolution by the federal government has been through the passing of the Dispute Resolution Act. *See* 28 U.S.C. app. §§ 1-10 (Supp. 1984). President Jimmy Carter signed the Act into law in 1980, although Congress never has approved any funds, and the Act expires in 1984. *See* L. FREEDMAN, LEGISLATION ON DISPUTE RESOLUTION 163 (A.B.A. Monograph No. 2, 1984); McGillis, *The Quiet [R]evolution in America Dispute Settlement,* 1980 HARV. L. SCH. BULL. 20, 24 (Spring ed.) (widespread agreement on the need for alternative dispute resolution mechanisms brought varied groups together to support Dispute Resolution Act).

34. *See* A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS, at xi (rev. ed. 1983). The three federal district courts were the Eastern District of Pennsylvania, the District of Connecticut, and the Northern District of California. *See id.* at xi.

35. *See id.* at xi. The rules provide for mandatory arbitration in cases seeking $100,000 or less in money damages. A panel of three arbitrators hold the hearing within a prescribed timetable. A party not satisfied with the award can file a demand for trial de novo. *See id.* at xi; *see also* Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story,* 42 MD. L. REV. 787, 788 (1983) (program also seeks to reduce time and expense).

36. *See* A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 93 (rev. ed. 1983). The results showed reduction of costs and time delay in two districts and no evidence of harm in the third. *See id.* at 93; *see also* Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 547 (1983) (evidence indicates satisfaction in quality of justice).

37. *See, e.g.,* A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 94 (rev. ed. 1983) ("it would not be unwarranted to continue"); Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 547 (1983) (advocating use of any procedure that contributes to more effective justice); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story,* 42 MD. L. REV. 787, 819 (1983) ("[E]xpanded experimentation would aid significantly the problems traditionally associated with adjudication: delay, expense, and an overburdened judiciary."). In Jan. 1985, contingent on funds available to pay arbitrator's fees, the United States District Court, Western District of Texas, will begin to mandatorily refer certain actions to non-binding arbitration. Telephone interview with Atty. Warren N. Weir, Chairman, Arbitration Rules Committee for the United States District Court, Western District of Texas (Nov. 2, 1984). The purpose of the proposed arbitration rule is "to provide an incentive for the speedy, fair, and economical resolution of controversies by informal procedures while preserving the right of a conventional trial." *See* Proposed Arbitration Rule, United States

grams in addition to general arbitration statutes.[38]

C. *Arbitration in the States*

State arbitration remedies include common law arbitration, statutory arbitration, or a combination of both.[39] Several states still follow the common law rule that arbitration of future disputes is not specifically enforceable.[40] Others have not abolished common law arbitration, but allow it to coexist with state statutory arbitration.[41] Modern arbitration statutes provide for arbitration of both existing and future disputes.[42] These modern arbitration statutes have led to a call for uniformity, which has resulted in the Uniform Arbitration Act.[43] Approximately half the states

---

District Court, Western District of Texas § 1 (available in *St. Mary's Law Journal* office). The proposed rule sets a jurisdictional monetary limit not to exceed $100,000, exclusive of interest and costs. *See id.* § 3.

38. *See, e.g.,* CAL. CIV. PROC. CODE § 1141.11 (Deering 1981) (mandatory court-annexed arbitration in superior courts with more than 10 judges); N.Y. CIV. PRAC. LAW & R. § 7501 (McKinney 1980) (compulsory arbitration for small claims); 42 PA. CONS. STAT. ANN. §§ 7301-7314 (Purdon 1982) (provides for judicial arbitration); *see also* Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 539 (1983) (at least nine states and the District of Columbia use court-annexed arbitration) (citing Connolly & Smith, *Description of Major Characteristics of the Rules For Selected Court-Annexed Mediation/Arbitration Programs,* 1982 A.B.A. COMM. TO REDUCE COURT COSTS AND DELAY).

39. *See* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 3:02, at 24 (rev. ed. 1984) (states differ in approach to arbitration).

40. *See* ALA. CODE § 6-6-16 (1977); KY. REV. STAT. § 417.050 (Supp. 1984); MONT. CODE ANN. § 27-5-101 (1984); NEB. REV. STAT. § 25-2104 (1979); N.D. CENT. CODE § 32-20-19 (1976 & Supp. 1983); W. VA. CODE § 55-10-1 (1981). Also, Vermont will not specifically enforce an agreement to arbitrate a future dispute since it follows the common law only and has no general arbitration statute; however, it does have a labor arbitration statute. *See* VT. STAT. ANN. tit. 21, §§ 521-554 (1978); G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 3:02, at 24 (rev. ed. 1984).

41. *See* Tripp Excavating Contractor v. Jackson County, 230 N.W.2d 556, 563 (Mich. Ct. App. 1975) (Michigan allows common law and statutory arbitration to coexist); Jones v. Johnson & Sons, Inc., 131 N.Y.S.2d 362, 363 (App. Div. 1954) (common law arbitration could not be barred by statute); Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 (Tex. 1977) (common law arbitration viable alternative to statutory arbitration).

42. *See* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 4:01, at 27 (rev. ed. 1984) (describes arbitration statutes that provide for irrevocability of future disputes as "modern"). Wilner considers the following jurisdictions to have "modern" statutes: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. *See id.* § 4:01, at 28.

43. *See* UNIFORM ARBITRATION ACT, 7 U.L.A. 1, 1 (Supp. 1984).

have adopted the Uniform Arbitration Act in whole or in part.[44] Several states have gone further and have included court-annexed arbitration programs within their statutes.[45]

States that have adopted court-annexed arbitration seek quality justice that is timely and less costly, but which also provides relief in a forum other than the overcrowded courtroom.[46] Pennsylvania offers the most experienced program of court-annexed arbitration.[47] The modern Pennsylvania court-annexed arbitration statute, dating back to 1951, originally had a jurisdictional limit of $1000, but this limit has been raised to $20,000.[48] By increasing the jurisdictional amount, more disputes have qualified for arbitration and, thus, more have been settled.[49] In contrast, California has three types of arbitration: voluntary,[50] mandatory,[51] and a

---

44. *See* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 4:02, at 30 (rev. ed. 1984) (notes that 26 states either completely or partially have adopted the Uniform Arbitration Act; however, cites only 25 in appendix I). The Uniform Laws Annotated lists 25 states and the District of Columbia as adopting the Uniform Arbitration Act: Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Wyoming. *See* UNIFORM ARBITRATION ACT, 7 U.L.A. 1, 1 (Supp. 1984). Wilner and the Uniform Laws Annotated disagree, in that, Wilner's list excludes Arkansas, Tennessee, and Texas but includes Hawaii, Iowa, and Louisiana as having adopted the Act in whole or in part. *See* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION app. I, at 1-3 (rev. ed. 1984); UNIFORM ARBITRATION ACT, 7 U.L.A. 1, 1 (Supp. 1984).

45. *See, e.g.,* ALASKA STAT. § 09.43.190 (1983) (provides arbitration of small claims equal to or under $3,000); ARIZ. REV. STAT. ANN. § 12-133 (1982) (provides compulsory arbitration of claims equal to or less than $5,000); PA. CONS. STAT. ANN. § 7361(b)(2) (Purdon 1982) (compulsory arbitration in specified counties for civil actions of $20,000 or less).

46. *See* Broderick, *Compulsory Arbitration: One Better Way,* 69 A.B.A. J. 64, 65 (1983) (court-annexed arbitration is relieving continually increasing caseload).

47. *See* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 44 (1983) (Pennsylvania has oldest established program in existence); Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 483 (1978) (Pennsylvania system most refined and most copied).

48. *See* 42 PA. CONS. STAT. ANN. § 7351(b)(2) (Purdon 1982) ($20,000 jurisdictional limit in specified counties); Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 539 (1983) (compulsory arbitration began in Pennsylvania in 1951 with a jurisdictional limit of $1,000).

49. *See* Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 463 (1960) (courts have been spared thousands of trials); Note, *Arbitration and Award—Study Predicts Effects of Increase in Jurisdictional Amount of Compulsory Arbitration,* 113 U. PA. L. REV. 1117, 1118 (1965) (studies show procedure reduces court congestion).

50. *See* Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 490 (1978) (California voluntary plan closer to traditional arbitration than court-annexed arbitration). The voluntary plan has had limited impact on the court's backlog of cases. *See id.* at 492.

hybrid, in which the defendant is compelled to arbitrate if arbitration is selected by the plaintiff.[52] Other examples of compulsory arbitration can be found in New York,[53] Alaska,[54] and Arizona.[55] Texas has no court-annexed arbitration program, though unlike most states, Texas has a long arbitration history in addition to its common law roots.[56]

D. *Texas Arbitration*

1. Historical

The origins of Texas arbitration laws have been attributed to Roman law and to Spanish and Mexican law.[57] Nonetheless, it is established that the legal right to arbitration is originally found in the 1827 Constitution of the Mexican State of Coahuila and Texas under the Mexican Federacy.[58] The Republic of Texas Constitution of 1836 makes no specific mention of the 1827 arbitration provision, but it specifically adopted the common law of England, which includes arbitration.[59] Every constitution of the State of Texas, however, has had a provision that requires the legislature to pass

---

51. *See* CAL. R. CT. 1600(c) (Deering Supp. 1984) (court rule for mandatory arbitration); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 48 (1983) (mandatory arbitration in all superior courts with 10 or more judges and claim not more than $15,000).

52. *See* CAL. CIV. PROC. CODE § 1141.12 (Deering Supp. 1984) (judicial arbitration statute authorizes arbitration either by plaintiff's election or voluntary stipulation of the parties).

53. *See* N.Y. CIV. PRAC. LAW & R. 3405 (McKinney 1983) (allows chief judge of court of appeals to create rules effecting arbitration of claims up to and including $6,000). Commentary describes rule's purpose as providing a type of mandatory arbitration to relieve court congestion. *See id.*

54. *See* ALASKA STAT. § 09.43.190 (1983) (authorizes supreme court to promulgate rules for arbitration of money disputes of $3,000 or less).

55. *See* ARIZ. REV. STAT. ANN. § 12-133 (1982) (superior court may order arbitration if amount in controversy less than $5,000). Statute specifically allows for the arbitration of disputes arising out of motor vehicle accidents. *See id.* § 12-133A.

56. *See* Carrington, *The 1965 General Arbitration Statute of Texas,* 20 SW. L.J. 21, 22 (1966) (Texas arbitration traced to Spanish influence).

57. *See id.* at 22 (arbitration maintained position of importance in Roman law); McKnight, *The Spanish Influence on the Texas Law of Civil Procedure,* 38 TEXAS L. REV. 24, 41 (1959) (Spanish influence stronger than common law influence in Texas).

58. *See* J. SAYLES, CONSTITUTIONS OF TEXAS 132 (1888) (arbitration and settlement by any extra-judicial manner was authorized); *see also* McKnight, *The Spanish Influence on the Texas Law of Civil Procedure,* 38 TEXAS L. REV. 24, 41 (1959) (trial would not be granted unless negotiated settlement was attempted first).

59. *See* TEX. CONST. art. XVI, § 13 interp. commentary (Vernon 1955) (several acts were passed regulating arbitration); REP. OF TEX. CONST. art. IV, § 13 (1836) (common law to be introduced by statute through Congress). *See generally* Carrington, *The 1965 General Arbitration Statute of Texas,* 20 SW. L.J. 21, 22 (1966) (discussing history of arbitration in Texas).

the laws necessary to settle disputes by arbitration.[60] In 1846, the first statutory arbitration provision enacted enabled parties to arbitrate a dispute in any manner they elected.[61] This statute remained in effect until 1965, when Texas adopted its first modern arbitration statute.[62]

2. The Texas General Arbitration Act, 1965

As originally adopted, the 1965 Texas General Arbitration Act[63] was a modern statute which provided for the enforcement of existing and future arbitration agreements.[64] The Texas Act, however, did not abolish the use

---

60. *See* TEX. CONST. art. XVI, § 13 (1876, repealed 1969). The language has been identical throughout the Texas constitutional development. *Compare id.* ("[i]t shall be the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial.") *and* TEX. CONST. art. XII, § 11 (1869) (no change in language) *with* TEX. CONST. art. VII, § 15 (1861) (essentially same language used) *and* TEX. CONST. art. VII, § 15 (1845) (same language used). The 1861 constitution had a slight variation from the other constitutions. *See* TEX. CONST. art. VII, § 15 (1861) (the word "mode" was used in place of the word "method"). In 1969, the constitutional arbitration provision was repealed because it was considered unnecessary. *See* TEX. CONST. art. XVI, § 13 (1876, repealed 1969); Note, *The 1979 Amendment to the General Arbitration Act: Will It Allow Arbitration to Become a Viable Tool for Settling Disputes?*, 32 BAYLOR L. REV. 314, 314 n.1 (1980) (effort made to remove unnecessary provisions) (citing 1 REPORT OF THE TEXAS LEGISLATIVE COUNCIL ON CONSTITUTIONAL REVISION, Rep. No. 56-10, at 122 (Dec. 1960).

61. *See* Law of Apr. 25, 1846, §§ 1-9, 1846 Tex. Gen. Laws, 2 H. GAMMEL, LAWS OF TEXAS 1433 (1898). Few substantive changes were made to the Act. *Compare id.* intro. 2 H. GAMMEL at 1433 ("to authorize the settlement of disputes by conciliation or arbitration") *with* TEX. REV. CIV. STAT. art. 56 (1879) (amended 1965) ("nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such manner as they may select").

62. *See* Texas General Arbitration Act, ch. 689, § 1, 1965 Tex. Gen. Laws, Gen. & Spec. 1593, 1593-1601 (amended 1979, 1983) (current version at TEX. REV. CIV. STAT. ANN. arts. 224 to 238-20 (Vernon 1973 & Supp. 1984)). The 1965 Act provided:

> A written agreement concluded upon the advice of counsel to both parties as evidenced by counsel's signature thereto to submit any existing controversy to arbitration or a provision in a written contract concluded upon the advice of counsel to both parties as evidenced by counsel's signature thereto to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Provided, however, that none of the provisions of this Act shall apply to any labor union contract or to any arbitration agreements or to any arbitrations held pursuant to agreements between any employer and any employee of that employer or between their respective representatives, to any contract of insurance or any controversy thereunder, or to any construction contract or any document relating thereto.

Id. at 1593-94.

63. *See id.* at 1593.

64. *See id.* at 1594. The statute covered both "existing controversy" and "any controversy arising thereafter." *See id.* at 1594; *see also* Dougherty & Graf, *Should Texas Revise Its Arbitration Statutes?*, 41 TEXAS L. REV. 229, 235 (1962) (statute intended to make future

of common law arbitration.[65] Unfortunately, the usefulness of the Texas Act was restricted because it required the signature of an attorney on the arbitration agreement as an assurance of adequate legal assistance.[66] The statute was also inapplicable to insurance and construction contracts, thereby severely limiting its availability to solve disputes.[67] Commentators described these restrictions as troublesome and of doubtful value.[68] In 1979, the legislature amended the 1965 statute, but did not succeed in correcting its limitations; on the contrary, it created new ones.[69]

---

disputes enforceable). The statute followed the constitutional mandate that legislation should support arbitration. *See* TEX. CONST. art. XVI, § 13 (1876, repealed 1969).

65. *See* Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 (Tex. 1977) (common law arbitration viable alternative for statutory agreements). Where requirements to statutory agreements could not be met, courts have imposed common law arbitration and have settled disputes. *See* Gerdes v. Tygrett, 584 S.W.2d 350, 352 (Tex. Civ. App.—Texarkana 1979, no writ). In 1983, the Texas legislature specifically abolished the rule of common law arbitration that executory agreements could not be specifically enforced, but limited the applicability of the statute to federal income tax exempt associations and corporations under § 501(c) of the U.S. Internal Revenue Code. *See* TEX. REV. CIV. STAT. ANN. art. 238-20 (Vernon Supp. 1984) (Act has no effect on arts. 224 to 238-6 of Texas General Arbitration Act); *see also* I.R.C. § 501(c) (1967 & Supp. 1984) (organizations exempt from taxation include: civic leagues, business leagues, organizations, or clubs operated for pleasure).

66. *See* Coulson, *Texas Arbitration—Modern Machinery Standing Idle,* 25 SW. L.J. 290, 293 (1971) (no arbitration agreement without attorney's signature); Note, *The 1979 Amendment to the General Arbitration Act: Will it Allow Arbitration to Become a Viable Tool for Settling Disputes?,* 32 BAYLOR L. REV. 314, 315-16 (1980) (signature requirement unique to Texas and destroys uniformity with other jurisdictions).

67. *See* Note, *Arbitration and Award—Commercial Law—Agreement to Submit an Existing or Future Dispute to Arbitration is Valid and Enforceable,* 44 TEXAS L. REV. 372, 373 (1965) (fear of form contracts kept insurance and construction from coverage under the Act). The legislature missed an opportunity to reduce court dockets by excluding those areas from coverage. *See id.* at 374.

68. *See* Carrington, *The 1965 General Arbitration Statute of Texas,* 20 SW. L.J. 21, 34 (1966) (unfair and unreasonable to require employment of attorney for every agreement to arbitrate); Note, *Arbitration and Award—Commercial Law—An Agreement to Submit an Existing or Future Dispute to Arbitration is Valid and Enforceable,* 44 TEXAS L. REV. 372, 373 (1965) (need for attorney's signature ill-founded if based on desire for equal bargaining position).

69. *See* TEX. REV. CIV. STAT. ANN. art. 224 (Vernon Supp. 1984). The 1979 amendment provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A court shall refuse to enforce an agreement or contract provision to submit a controversy to arbitration if the court finds it was unconscionable at the time the agreement or contract was made. Provided, however, that none of the provisions of this Act shall apply to:
>
> (a) any collective bargaining agreement between an employer and a labor union;
>
> (b) any contract for the acquisition by an individual person or persons (as distin-

3. The 1979 Amendment

Although the 1979 amendment changed the form of previous requirements, it did not remove the limitations on arbitration.[70] The amendment deleted the signature of counsel requirement which was necessary to make an arbitration agreement valid.[71] It replaced this requirement, however, with a provision calling for the signature of attorneys when the arbitration agreement is for total consideration of $50,000 or less.[72] Also, personal injury claims were excluded from arbitration unless attorneys from both sides signed a written agreement.[73]

The same criticisms of the signature requirement under the 1965 Act are equally applicable to the 1979 amendment; a person must hire an attorney to use statutory arbitration,[74] and the Act's harmony with other states and the Uniform Arbitration Act is destroyed.[75] The removal of the exclusions of arbitration in insurance and construction contracts in the 1979 amendment implies an intention by the legislature to encourage arbitration.[76]

---

guished from a corporation, trust, partnership, association or other legal entity) of real or personal property, or services, or money or credit where the total consideration therefore to be paid or furnished by the individual is $50,000 or less, unless said individual and the other party or parties agree in writing to submit to arbitration and such written agreement is signed by the parties to such agreement and their attorneys;

(c) any claim for personal injury except upon the advice of counsel to both parties as evidenced by a written agreement signed by counsel to both parties. A claim for workers' compensation shall not be submitted to arbitration under this Act.

Id.; see also Note, *The 1979 Amendment to the General Arbitration Act: Will it Allow Arbitration to Become a Viable Tool for Settling Disputes?,* 32 BAYLOR L. REV. 314, 320 (1980) (amendment created signature requirements).

70. *See* Note, *The 1979 Amendment to the General Arbitration Act: Will it Allow Arbitration to Become a Viable Tool for Settling Disputes?,* 32 BAYLOR L. REV. 314, 326 (1980) (statutory reform required to lift restrictions imposed on arbitration).

71. *Compare* Act of June 18, 1965, ch. 689, § 1, 1965 Tex. Gen. Laws, Gen. & Spec. 1593, 1593 (attorneys' signatures required to validate arbitration agreement) (amended 1979, 1983) *with* TEX. REV. CIV. STAT. ANN. art. 224 (Vernon Supp. 1984) (written agreement or written contract to arbitrate valid "save upon such grounds as exist at law or in equity for the revocation of any contract").

72. *See* TEX. REV. CIV. STAT. ANN. art. 224(b) (Vernon Supp. 1984) (if $50,000 or less involved and no signatures of parties and their attorneys, Arbitration Act does not apply). Although not onerous, the amendment also requires notice that the contract is subject to arbitration be conspicuously placed on the first page of the contract and either rubber stamped or underlined so it is clearly visible. *See id.* art. 224-1.

73. *See id.* art. 224(c) (advice of counsel and signatures required in personal injury claims).

74. *See* Carrington, *The 1965 General Arbitration Statute of Texas,* 20 Sw. L.J. 21, 34 (1966).

75. *See id.* at 34-35 (lack of harmony with other states may place Texas businessmen at disadvantage).

76. *See* Note, *The 1979 Amendment to the General Arbitration Act: Will It Allow Arbi-*

The omission of provisions to arbitrate small claims and personal injury without signature requirements, however, has had a limiting effect on arbitration in Texas.[77]

III. The Advantages and Disadvantages of Court-Annexed Arbitration

Court-annexed arbitration has both advantages and drawbacks. The benefits of court-annexed arbitration are generally the same as those espoused for arbitration in general: speed, economy, flexibility, expertise, and privacy.[78] If an arbitration program is properly managed, arbitration is generally faster.[79] This requires, however, continual supervision of deadlines.[80] An arbitrated dispute can also be resolved more quickly than a litigated dispute because it does not involve formalities of evidentiary and procedural rules.[81] The timely removal of arbitrated cases from court dockets allows more disputes to be resolved[82] and reduces the delay for litigated cases.[83] Court-annexed arbitration has been considered more economical because it requires less pretrial preparation.[84] It can also be less

---

tration to Become a Viable Tool for Settling Disputes?, 32 BAYLOR L. REV. 314, 318 (1980) (possibly repealed by implication).

77. *See id.* at 321.

78. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 14 (1979) (extensive research on advantages and disadvantages of arbitration has been done) (citing F. O'NEAL, CLOSE CORPORATIONS 30-35 (2d ed. 1971 & Supp. 1978)).

79. *See* A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 76 (rev. ed. 1983) (more rapid disposition of cases in two of three courts); Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 544 (1983) (calendar backlog reduced from 48 to 21 months in Philadelphia); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story,* 42 MD. L. REV. 787, 813 (1983) (arbitration hearing takes less time than civil trials); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 54 (1983) (trial averages 2-1/2 days; arbitration hearing averages two to three hours) (citing 1978 STATE OF NEW YORK ANN. REP. 339).

80. *See* A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 80 (rev. ed. 1983) (arbitration rules can expedite case termination); Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 501 (1978) (imposing time limits keeps average time down).

81. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 14 (1979) (less time-consuming because of informality).

82. *See* Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 501 (1978) (solving less complicated cases hastens movement of remaining cases).

83. *See id.* at 478 (direct effect on trial-bound cases).

84. *See* E. JOHNSON, A PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 68 & n.29 (1978) (other savings include reduced discovery and need for witnesses) (citing 1972 CALIFORNIA JUDICIAL COUNCIL, A STUDY OF THE ROLE OF

expensive than implementing a judicial court system since the only costs are administrative and arbitration fees.[85] Arbitration decisions can be flexible to meet the needs of the parties, and it does not involve setting precedent.[86] Moreover, a program designed to select arbitrators for their expertise removes the uncertainty of a judge and jury who are unfamiliar with a particular concern.[87] Finally, an arbitration hearing can remain in a private forum and protect the privacy and interests of the parties involved.[88]

One of the disadvantages of a court-annexed arbitration program is that the parties engage in a compromise, instead of a determination of rights.[89] The arbitrator is only concerned with settlement and not with future effects of his decision.[90] The fact that court-annexed arbitration removes cases from the docket is not enough; it should assure the removal of durable cases, cases that will return to the docket in a trial de novo or on appeal.[91] Some opponents argue that court-annexed arbitration circumvents the protection of trial by jury, although the courts have ruled that it does not if an appeal is allowed.[92] Finally, a major drawback of court-annexed arbitra-

---

ARBITRATION IN THE JUDICIAL PROCESS 92); *id.* at 59 (disputes settled at one-fifth cost of a judicial determination) (citing E. JOHNSON, JR., V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES, at ch. 5 (1977)).

85. *See* E. JOHNSON, A PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 68 & n.29 (1978) (between half-a-million and a million dollars saved by Philadelphia arbitration program) (citing E. JOHNSON, JR., V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES, at ch. 5 (1977)); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 54 (1983) (lower cost inviting to governments).

86. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 14 (1979) (solutions tailored to fit). General policy disagreements can also be resolved. *See id.* at 15; *see also* Rehnquist, *A Jurist's View of Arbitration,* 32 ARB. J. 1, 5 (1977) (settlement is arbitration's only function).

87. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 15 (1979); Burger, *Isn't There a Better Way?,* 68 A.B.A. J. 274, 277 (1982) (important advantage of arbitration is selecting arbitrator with special experience and knowledge); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 58 (1983) (nonattorneys may be preferable in certain cases).

88. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 15 (1979) (publicity and adverse business consequences can be avoided); Burger, *Isn't There a Better Way?,* 68 A.B.A. J. 274, 277 (1982) (confidentiality can be maintained).

89. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 16 (1979) ("a compromise, in which each side 'gives a little' ") (citing KESSLER, NEW YORK CLOSE CORPORATIONS § 16.01, at 464 (1968)).

90. *See* Rehnquist, *A Jurist's View of Arbitration,* 32 ARB. J. 1, 5 (1977).

91. *See* Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 467-68 (1961) (removal of trial-bound cases is real issue, small cases unlikely to go to trial).

92. *See* Kimbrough v. Holiday Inn, 478 F. Supp. 566, 571 (E.D. Pa. 1979) (no interference with seventh amendment rights); Parker v. Children's Hospital, 394 A.2d 932, 940 (Pa.

tion is the reliance on the bar, since their lack of cooperation can have a dramatic effect on the quality of the program.[93]

IV. COURT-ANNEXED ARBITRATION AS AN ALTERNATIVE IN TEXAS

Court-annexed arbitration is recognized as a viable tool for handling cases, relieving backlogged courts, and lowering costs in a timely manner and with effective justice.[94] The 1984 Conference of Chief Justices endorsed court-annexed arbitration as an alternative court procedure and noted that over one hundred state and federal courts have begun such programs.[95] A subcommittee to the Texas Senate-House Select Judiciary

---

1978) (arbitration program acceptable as long as access to jury trial available); *In re* Smith, 112 A.2d 625, 629 (Pa. 1955) (compulsory arbitration not a final adjudication of rights for seventh amendment purposes), *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1958).

93. *See* Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 470 (1961) (cooperation of bar essential for success); Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 476 (1978) (program relies on bar acting aggressively).

94. *See, e.g.,* Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 537 (1983) (used more today then ever); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story,* 42 MD. L. REV. 787, 787-88 (1983) (promising example of alternative to courts); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 59 (1983) (sound alternative to over-burdened courts).

95. *See* CONFERENCE OF CHIEF JUSTICES, RESOLUTION I, COURT-ANNEXED ARBITRATION AS AN ALTERNATIVE COURT PROCEDURE (Aug. 2, 1984) (adopted as proposed by Committee on Arbitration) (available in *St. Mary's Law Journal* office). The conference resolved that:

> WHEREAS, the Conference of Chief Justices has established a committee to study court-annexed arbitration and other alternative dispute resolution processes that are increasingly being used in the state courts in an effort to handle increased case filings; and
>
> WHEREAS, the committee has determined that more than 100 state and federal courts have implemented court-annexed arbitration programs; and
>
> WHEREAS, these programs have the potential to reduce court congestion, case backlog and the costs of court operations; and
>
> WHEREAS, those programs in existence have shown that litigants perceive the arbitration to be fair and just.
>
> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices endorses the concept of court-annexed arbitration as an alternative court procedure and recommends that state court systems adopt arbitration programs and continue to experiment in this area by refining the administrative aspects of such programs in order to achieve the goal of reducing the costs and delay so often associated with traditional litigation; and
>
> BE IT FURTHER RESOLVED that the Committee on Arbitration expand its study of arbitration to include an assessment of other alternatives to traditional litigation, such as the neighborhood justice centers, the use of mediation in civil disputes, and private judge programs; and

Committee is expected to recommend some form of arbitration to the full committee in the coming year.[96] Texas must implement a court-annexed arbitration program if it hopes to provide an effective system of justice—one that is fair, without delay, and without exorbitant costs.[97]

A successful program must include, at the very least, the following provisions: 1) compulsory arbitration; 2) liberal monetary limits; 3) either attorney or layman may arbitrate; 4) the court schedules the hearing and discovery deadlines; 5) hearings less formal with relaxed rules of evidence; and, 6) the right to appeal for a trial de novo. Several reasons can be given to support these elements:

1. Compulsory arbitration.

Compulsory arbitration will ensure that arbitration is utilized and disputes are settled.[98] Compulsory arbitration will also prevent the procrastination and hesitancy which accompanies new programs, both with the community and the bar.[99]

2. Liberal monetary limits.

The monetary limits must be sufficiently liberal to reach a substantial portion of disputes.[100] It is essential that the program ease the backlog in the judicial system.[101] This is accomplished by setting a statutory maximum amount high enough to remove sufficient disputes to the arbitration

---

BE IT FURTHER RESOLVED that the Conference designate this as a standing committee to be known as the Alternate Dispute Resolution Committee.

Id.

96. *See* Letter from Chief Justice Jack Pope to Peter F. Gazda (Sept. 11, 1984) (discussing current status of arbitration in Texas) (available in *St. Mary's Law Journal* office). As early as 1979, Chief Justice Joe Greenhill, in his 1979 State of Judiciary message to the 66th Texas Legislature, called for Texas to adopt alternative dispute resolution programs. Telephone interview with Jose E. Castillo, Director of the Bexar County Mediation Center (Nov. 15, 1984).

97. *See* Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story,* 42 MD. L. REV. 787, 818 (1983) (court-annexed arbitration may be most viable proposal to resolve problems with judicial system).

98. *See* Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 506 (1978) (compulsory arbitration superior to voluntary arbitration).

99. *See id.* at 506. The bar will act with caution toward any innovation, adopting a "wait and see" attitude. *See id.* at 506.

100. *See* Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 468 (1961) (the program must reach high-value cases to reduce backlog).

101. *See* Levin, *Court-Annexed Arbitration,* 16 U. MICH. J.L. REF. 537, 547 (1983) (if properly administered it will reduce backlog).

program.[102] California failed to establish a wholly successful arbitration program because the monetary limit was set too low.[103]

3. Either attorney or layman may arbitrate.

In certain cases, nonattorneys make better arbitrators because of expertise and training in a particular field.[104] If arbitrators are keyed to specialty, a judge or jury would have difficulty competing with the knowledge and assurance provided by an arbitration hearing of experts.[105] Attorneys would not be eliminated from the program.[106] Attorneys should properly provide the largest contingent of arbitrators, since problem solving is their profession.[107] An effective monitoring system to remove incompetent arbitrators must be maintained.[108]

4. The court schedules the hearing and discovery deadlines.

Having the court schedule hearing and discovery deadlines ensures that timeliness, one of the major thrusts of the program, is maintained.[109] A judge administrator or supervisor should rule on motions for continuance in order to keep tight control of the time factor.[110] Discovery should be completed far enough ahead of the hearing date to promote pre-arbitration

---

102. *See* Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 468 (1961) (removal of cases not enough, must remove trial-bound cases); *see also* Nejelski, *Court Annexed Arbitration,* 14 FORUM 215, 218 (1978) (larger monetary amounts more likely to go to trial).

103. *See* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 56 (1983).

104. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 15 (1979) (arbitrator with subject matter expertise can find fair solution).

105. *See* Di Benedetto, *Practical Guide—An Outline for Arbitration Under the Civil Practice Law and Rules,* 48 ALB. L. REV. 763, 778 (1984) (arbitrators bring in-depth background to adjudication process); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 56 (1983) (expertise should not be wasted).

106. *See* Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 470 (1961) (attorneys are essential to program).

107. *See* Address by Chief Justice Jack Pope, Conference on Negotiation, Mediation, & Arbitration 1 (Feb. 23, 1984) (available in *St. Mary's Law Journal* office); *see also* Sander, *Introduction: Alternative Dispute Resolution—A Special Issue,* BOSTON B.J., May-June 1984, at 5 (courts increasingly expect attorneys to be familiar with alternative dispute mechanisms); Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 503 (1978) (opportunity to improve legal community image).

108. *See* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 58 (1983) (system should make removal of poor arbitrators easy).

109. *See id.* at 59 (proposed model incorporates supervising judge who requires good cause to grant motion for continuance).

110. *See id.* at 59 (need judge to supervise program); Levin, *Court-Annexed Arbitration,*

settlement.[111]

5. Hearings less formal with relaxed rules of evidence.

A less formal hearing encourages settlement and also allows the arbitrator to find a solution that is fair to both sides.[112] Relaxed rules of evidence provide both time and cost savings which benefit both sides of the dispute.[113]

6. The right to appeal for a trial de novo.

Providing a right to appeal under a court-annexed arbitration program removes any questions of unconstitutionality under the seventh amendment.[114] This right to appeal, however, should be limited by time in order to encourage finality.[115] Since finality and speed are objectives, deterrents should be provided, such as paying costs and attorneys fees if the party achieves no more at trial than he received in arbitration.[116]

The strengths of the various court-annexed arbitration programs

---

16 U. MICH. J.L. REF. 537, 545 (1983) (program must be monitored by judges and clerks to ensure time savings).

111. *See* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 58 (1983) (promotion of pre-arbitration settlement through early discovery).

112. *See* A. WIDISS, ARBITRATION—COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 16 (1979) (arbitrator can find compromise and fair resolution).

113. *See* Nejelski, *Court Annexed Arbitration,* 14 FORUM 215, 216 (1978) (evidence rules relaxed); Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 59 (1983) (hearings less formal); Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes,* 29 HASTINGS L.J. 475, 501 (1978) (expenses are lowered by elimination of certain stages of jury trial and simplifying evidentiary procedures). There are no major differences between various jurisdictions in the conduct of a hearing; they are generally more relaxed than a trial. *See* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 59 (1983).

114. *See In re* Smith, 112 A.2d 625, 629 (Pa. 1955) (court-annexed arbitration not final determination of rights), *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1958); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story,* 42 MD. L. REV. 787, 804 (1983) (constitutional challenges to court-annexed arbitration programs that provided for appeal have failed).

115. *See* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration,* 20 CAL. W.L. REV. 43, 59 (1983) (perfecting time for appeal should be short to promote finality of arbitration awards).

116. *See* Letter from Chief Justice Jack Pope to Peter F. Gazda (Sept. 11, 1984) (discussing current status of arbitration in Texas) (available in *St. Mary's Law Journal* office). A tentative recommendation of the Senate-House Select Judiciary Subcommittee will include disincentives of costs and attorney fees if one achieves no more upon returning to the litigation process than he received in arbitration. *See id; cf.* Nejelski, *Court Annexed Arbitration,* 14 FORUM 215, 216 (1978) (states vary on disincentives to appeal).

throughout the country should be consolidated to create a program for Texas. The provisions noted above are only a foundation to a successful program of court-annexed arbitration.

V. CONCLUSION

If court-annexed arbitration can relieve court congestion, as well as undue cost and delay, it is a program worth implementing. The Texas legislature and state bar need only look at the benefits to be gained and at the experiences of federal and state courts that have implemented court-annexed arbitration to be convinced that, if properly administered, the program does work. Court-annexed arbitration is no longer an untested theory, but is now a proven commodity. Texas ought to enjoy its use.