THE ARBITRATION ALTERNATIVE:
A COMPARATIVE ANALYSIS OF CASE PROCESSING TIME,
DISPOSITION MODE, AND COST IN THE AMERICAN
ARBITRATION ASSOCIATION AND THE COURTS*

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Alternatives to traditional litigation have been popular topics for discussions and
debate in recent years, though existing alternatives have seldom been the subject of
empirical inquiry. This note compares one particular alternative, arbitration
through the American Arbitration Association (AAA) to civil litigation in state and
federal courts. The analysis shows (1) that AAA cases are generally processed more
quickly than court cases, (2) that AAA cases are more likely to be "decided" (rather
than "settled"), and (3) that AAA processing is not necessarily less costly than court
processing.

Introduction

Seeking alternatives to the traditional methods of processing cases
through our court systems has become popular in recent years (Abel, 1982;
Alper and Nichols, 1981). Chief Justice Warren E. Burger has been a
strong spokesperson for those who would move large numbers of cases now
handled by the courts to other forums (see The Washington Post, January
25, 1982, p. 8). A recent national conference at the Harvard Law School
examined the potential role of lawyers in many of the alternatives now
being considered and used. The Center for Public Resources is about to
launch a new magazine, Alternatives (edited by Jethro Lieberman, author
of The Litigious Society) that will try to keep users of alternatives informed
of the most recent innovations. The interest in alternatives flows from a
variety of concerns. Some people, typified by the Chief Justice, see diversions
to alternatives as a way of easing the perceived burden on our courts.
Others believe that alternatives can yield qualitatively better results for
many kinds of disputes (e.g., family conflicts) because they can avoid the

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adversariness of the litigation model of dispute processing, or can bring in kinds of substantive expertise that judges lack. Still others view alternatives as potentially more "efficient," where efficiency is defined primarily in terms of speed and cost.

Despite the concern about alternatives, there is little evaluation research regarding the claimed advantages of various institutions and mechanisms that now exist. One of the most frequently mentioned alternatives is arbitration (see Brown, 1980; Coulson, 1980). A recent book described arbitration as

The submission of a disagreement to one or more impartial persons with the understanding that the parties will abide by the arbitrator's decision. Because the decision is binding, arbitration differs from mediation or conciliation. . . . In most instances arbitrators' decisions are private and only of interest to the parties involved, so few cases must come to the attention of courts (Coulson, 1980: 6).

The idea of arbitration is not new (see Mentschikoff, 1961: 854); arbitration clauses were included in construction agreements as early as 1871 (Coulson, 1980: 61).1 Yet, despite the long history of arbitration, there have been very few empirical studies (e.g., Mentschikoff, 1952; 1961) of arbitration as a general method of dispute processing, and there has been no effort to compare empirically arbitration to traditional litigation. The goal of this research note is to present an initial comparative analysis.

There are a variety of dimensions along which arbitration and traditional litigation could be compared. One such dimension is the pace at which cases are handled by a particular mechanism; one of the major advantages that is claimed for arbitration is that it is faster than the courts (Coulson, 1980: 89; Ferguson, 1980; Mentschikoff, 1961: 850). Although there has been extensive consideration of the pace of processing in the court context (see Adler et al., 1982; Church et al., 1978; Church, 1978; Ebener, 1981; Richert, 1981), there has been no systematic effort to examine the pace of dispute processing through arbitration. In the discussion below we will evaluate the "pace" of arbitration as compared to the "pace" of litigation. A second area of concern is cost, a topic that is much talked about, but seldom looked at systematically. In an analysis presented elsewhere, it has been shown that, from the viewpoint of the disputants, the bulk of the "cost of litigation" is the fees paid to lawyers (Kritzer et al., 1982; Trubek et al., 1982). In the analysis below, we will compare the fees paid to lawyers in

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court cases to the fees paid to lawyers in arbitration cases. A third area of comparison that we will look at below is mode of termination. Very few court cases ever go to trial; is it equally true that most arbitration cases are settled without a formal hearing?

Data And Cases

Data. The analysis presented below is based on data collected by the Civil Litigation Research Project (CLRP). One part of the data collected by CLRP is information abstracted from the court records of over 1,500 court cases in five federal judicial districts; the cases were evenly divided between the state and federal courts. In addition to the court cases, similar data were collected from eleven "alternative" third party dispute processing institutions; one of these institutions, from which cases were obtained from all five districts, was the American Arbitration Association (AAA). The AAA is a nonprofit public-service organization that was founded in 1926 to encourage the use of arbitration as a means of dispute settlement (Coulson, 1980: 6). Today, the AAA serves as a clearinghouse for information on arbitration, and provides administrative services for a series of arbitration programs. The individual arbitrators who decide cases processed under AAA auspices are selected from a National Panel of Arbitrators that consists of about 50,000 persons around the United States; arbitrators are not employees of the AAA, and they either serve without fee or are paid by the parties. All cases included in the sample, whether from courts or noncourts, involved either a monetary claim of at least $1,000 or a significant nonmonetary issue. The AAA cases consisted exclusively of monetary damage cases involving either tort or commercial contract issues; tort cases processed by the AAA consist almost exclusively of disputes between insureds and their insurance company over compensation by the latter for injury to the insured caused by an uninsured motorist. The issue in dispute is almost always the amount of compensation to be paid under the uninsured motorist clause of the insurance company’s automobile accident policy. A total of 147 AAA cases were included in the analysis we will present below. In addition to data abstracted from institutional records our discussion will draw upon information obtained from

2. Fees to lawyers account for most of the disputants’ expenses when cases are referred to lawyers (see Kritzer et al., 1982: 2).
3. The five federal judicial districts were Eastern Wisconsin, Eastern Pennsylvania, Central California, New Mexico, and South Carolina.
4. For a detailed description of the sample design, and data collection effort, see Grossman et al. (1981: 97-98); for a broader description of the overall study design, see Kritzer (1980-1981).
5. The other ten institutions consisted of two local institutions in each district.
interviews with lawyers involved in the cases in our analysis.  

Cases. In order to carry out a comparative analysis between the AAA and the courts, it was necessary to identify a set of court cases to use in the comparison that might be said to approximate the types of cases handled by the AAA. The coding of the case records used a very detailed scheme to record the "area of law" and the same scheme was used to code the "type" of case for AAA cases. Based on these coding schemes, a set of court cases having the "area of law" codes found in the AAA cases was identified. Table 1 shows the number of cases that were included for each source of cases by area of law (torts and contracts) for the federal and state courts in each geographic area.  

<table>
<thead>
<tr>
<th>Site</th>
<th>Type</th>
<th>Federal</th>
<th>Source State</th>
<th>AAA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern</td>
<td>Contracts</td>
<td>25</td>
<td>44</td>
<td>24</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Torts</td>
<td>9</td>
<td>58</td>
<td>13</td>
</tr>
<tr>
<td>Eastern</td>
<td>Contracts</td>
<td>26</td>
<td>33</td>
<td>18</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Torts</td>
<td>32</td>
<td>81</td>
<td>18</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Contracts</td>
<td>38</td>
<td>27</td>
<td>9</td>
</tr>
<tr>
<td>Carolina</td>
<td>Torts</td>
<td>36</td>
<td>62</td>
<td>1</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Contracts</td>
<td>48</td>
<td>39</td>
<td>9</td>
</tr>
<tr>
<td>Torts</td>
<td>29</td>
<td>25</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>Central</td>
<td>Contracts</td>
<td>34</td>
<td>33</td>
<td>17</td>
</tr>
<tr>
<td>California</td>
<td>Torts</td>
<td>15</td>
<td>61</td>
<td>23</td>
</tr>
</tbody>
</table>

While the federal and AAA cases were drawn from throughout the federal judicial districts, the state cases were drawn from one or two state courts in each district:


7. Note that in the analysis presented below, Pennsylvania state court cases were omitted from the pace analysis because of a local practice of not notifying the court when a case was settled. Also, because of local law, there were virtually no AAA-processed tort cases in South Carolina.
Even with this matching process, there are some important differences between the three sources (AAA, federal court, and state court) of cases. First, there are likely to be some important substantive differences. For example, in AAA uninsured motorist claim cases there is seldom any question of liability (except for contributory negligence); the issue in dispute is almost always one of the magnitude of damages. In court suits, the outcome of a case may turn on an issue of liability. (An informal survey of lawyers and insurance companies suggested, however, that only about 20 percent of lawsuits arising from automobile accidents involve a "real" issue of liability, so that the difference between the AAA cases and court cases is probably not too great in this regard.) Second, the level of stakes (as defined below) for AAA cases was larger than for state cases but smaller than for federal cases (see Figure 1).

Analysis

In comparing AAA arbitration and litigation in court, we look first at mode of termination, then at pace of case processing, and lastly at cost. Mode of Termination. For purposes of analysis, we grouped mode of case termination into four categories: settled, adjudicated, "quasi-adjudicated," and other. All cases that were voluntarily dismissed were classified as

8. There are two important ways in which AAA cases and court cases did not differ significantly that are worth noting: (1) AAA cases were no more likely to be appealed than were court cases; and (2) cases sampled from AAA records are no more likely to involve "other cases" (e.g., a parallel or prior action in another forum) than are court cases. Regarding "appeals," AAA cases were, if anything, less likely to be appealed than were court cases. As for other actions, it was the state courts that stood out as different with about 8 percent of the lawyers reporting other related actions; for both the federal government and the AAA, about 25 percent of the lawyers reported other actions.

9. The unit of analysis in Figure 1 is the lawyer respondent rather than the case.
settled; cases that were terminated by a decision or award handed down after a trial or hearing on the substance of the dispute were classified as adjudicated; and cases that were terminated by a ruling on a motion (e.g., an involuntary dismissal) were classified as "quasi-adjudicated." Figure 2 shows the striking differences in mode of termination that exist among case processing institutions. Only about 5 percent of court cases are fully adjudicated, compared to over 50 percent of AAA arbitration cases. Even if the "quasi-adjudicated" cases are added to the "fully" adjudicated cases, the proportion of adjudicated cases in the AAA is about double the corresponding proportion in court. This clearly suggests that the probability of obtaining adjudication is greater if a case is taken to arbitration (at least AAA sponsored arbitration) than if the case goes to court. This difference may reflect either the expectations of the actors involved, or the differences in the processing characteristics of the institutions; most likely both kinds of effects are involved.

Pace of Case Processing

Method. The pace of case processing is analyzed similarly to our earlier analysis of the pace of litigation (Grossman et al., 1981), using a form of
graphic presentation developed as part of the "survival analysis" technique; the graphs shown below display something known technically as "cumulative survival functions"—in reality, a graph that shows the proportion of cases that are still pending at each of a number of specified time points; the time points that we use are one-month intervals.

Variation in Pace Within the AAA. Our earlier analysis of pace in state and federal courts found substantial variation within and across geographic locations. In part for this reason, it would be useful to look at variation in processing time among AAA cases before we turn to a comparison of the AAA to the courts. There are two dimensions along which we can easily compare cases within the AAA context: type of case (tort versus contract) and location (the five federal judicial districts used as the research sites). Although the numbers of cases in some of the comparative categories were quite small (see Table 1 above), the results are so clear that it is unlikely that we are introducing significant biases into our findings.

Figure 3 shows the complete set of intra-AAA comparisons; nine separate pace patterns are shown, one for each combination of case type and location (except for South Carolina where a provision in state law resulted in virtually no AAA tort cases).
One can see quite clearly that there is little substantial variation within each site by the case type, except Wisconsin, where tort cases are notably slower than contract cases. There are, however, substantial differences across sites for both case types. New Mexico and South Carolina are both consistently fast, terminating all cases within ten months;\textsuperscript{10} in California, while 70 percent of the cases terminate within ten months, the remaining 30 percent can take up to two years.

The most obvious explanation for the patterns we see in Figure 1 is administrative. Arbitrations in the two fastest areas are administered by smaller offices, with relatively light case loads, while the other three sites involve substantially larger offices.\textsuperscript{11} Although caseload and administrative factors have not worked well as explanations of variations in pace in the courts, they may account for variation in the AAA. Obviously this can

\textsuperscript{10} The speed of processing in New Mexico may reflect a desire to get through the arbitration process, and then go on to court as permitted under New Mexico law. In most states arbitrators' awards are final and not appealable in the courts; this was not true in New Mexico. During some of our early field work in Albuquerque, several lawyers specifically mentioned the idea of going on to court, though our data on specific cases do not indicate that such a practice was widespread in AAA cases from New Mexico.

\textsuperscript{11} Eastern Wisconsin is administered by AAA's Chicago office.
be only a tentative explanation, because we have looked only at five localities.

A Comparison of Pace of Processing. Given the differences we found when we looked at variations within the AAA, we have retained the site and subject differentiation for our comparative analyses. Figure 4 shows separate comparisons by location for the three institutions. Recall that the state court in Pennsylvania has been excluded from this analysis because of problems with information regarding termination data.

The results are quite clear: The AAA tends to be faster. In South Carolina, New Mexico, and Central California, the AAA is clearly faster. In Pennsylvania (comparing only the federal court and the AAA) the AAA and the court have very similar patterns. And in Wisconsin, the AAA is appreciably faster for contract cases but not for torts. Overall, the AAA is not slower than the courts, and it is usually faster. If we were able to carry out the analysis separately by type of termination, the speed advantage of AAA might be even more consistent than it appears to be in Figure 4.

Cost of Case Processing. From the analysis presented so far, we see that

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**Figure 4A**

Termination Pattern For

Eastern District of Wisconsin

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Figure 4B
Termination Pattern For
Eastern District of Pennsylvania

Figure 4C
Termination Pattern For
District of South Carolina
the American Arbitration Association offers the possibility of relatively fast *adjudication* (compared to relatively slow nonadjudication in the courts). In order to determine whether the AAA represents an opportunity for the disputants to save money on processing costs (as indicated by fees paid to lawyers), we must control for what is at stake in a case, because, as noted earlier, there are substantial differences in the amounts at stake in the two types of courts and in the AAA. We obtained stakes information from the lawyers rather than relying upon the formal demand stated by the plaintiff or claimant in pleadings (or equivalent). Our measure of stakes represents the lawyer's view of the "value of the case" or the "case worth." The lawyers responded to the following question:

We are interested in your view of the stakes in the case (not in actual negotiations). Did you ever form an opinion about what case was worth in terms of what your client would be willing to take or do to settle the case? Based on that opinion, what did you think should have been done to settle the problem?

Those lawyers whose response involved something other than money were asked:

Suppose there could have been a settlement which involved only a lump sum of money. What would you think it should have been?

Information on the fees (and expenses) lawyers received was obtained through a direct inquiry ("How much were you paid? . . .").

Figure 5 shows the median lawyer's fees controlling for level of stakes. The interpretation of Figure 5 is ambiguous. Across the range of stakes values, no one institution emerges as most or least expensive. The AAA is least expensive for small cases, and most expensive for the remaining three categories. Federal court is least expensive in the $5,000 to $10,000 range, and state court is least expensive in the upper two ranges. What these results suggest is that one should not turn to arbitration if the goal is to save processing costs; if anything, the AAA may be a little more expensive. At the same time, in a sense, one gets "more" for the money in terms of the amount of institutional processing, with the AAA, because a much larger proportion of cases go through the "complete process," including a hearing and an award. Whether one achieves a better result through one institution or another we are not prepared to say.13

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12. In Figure 5 the unit of analysis is the respondent rather than the case.
13. For a discussion of some of the conceptual issues involved in evaluating the results of dispute processing, see Trubek *et al.* (1982: 60-93).
Conclusions

The picture of arbitration that emerges from this analysis is quite interesting. The American Arbitration Association presents a viable alternative to the courts. The style of processing in the AAA is quite different, as compared to the courts. Cases move through the AAA more quickly than through the courts. At the same time more of the AAA cases are actually decided by a third party. It is likely that parties who go to the AAA probably have very different desires and expectations than do parties filing cases in state or federal court. Furthermore, one might argue that the primary function of the courts today appears to be to "help" settle cases (this "help" may simply consist of the pressure that is brought to bear by the filing process), while the American Arbitration Association's function appears to be to provide a forum for the deciding of cases by a third party. Sketchy anecdotal evidence we have for other arbitration agencies suggests that this picture of arbitration is not unique to the AAA.

At the same time, the "deciding" function of the AAA carries a real cost. One does not save money by going to the AAA. However, given that the AAA is not substantially more expensive than the courts, it is likely that the cost of full adjudication in the AAA is less than the cost of full adjudica-
tion in the courts. Thus, overall, arbitration provides a "real" alternative to the courts for the processing of disputes; however, the nature of that difference may not be exactly what the common wisdom would lead us to expect.

REFERENCES


