The Pace of Litigation
Conference Proceedings

Jane W. Adler, William F. Felstiner, Deborah R. Hensler, Mark A. Peterson

1982
Figure 1 is a survival graph. In Figures 1-8, the broken curves represent contract cases, and the solid curves represent accident claim cases.

![Graph showing survival patterns]

**Fig. 1 — Termination pattern, American Arbitration Association cases**

Let me try to describe the many variations that are present. The rapid broken line in Fig. 1 that goes virtually straight down is South Carolina commercial contract cases. (Because of South Carolina law, there were virtually no accident cases.) In South Carolina, arbitration is very fast, so all of the cases in our sample, which are not many, were terminated within five months. Pairs of curves for other states tend to be very close together, suggesting that there is not a lot of variation within the sites by the area of the law. The one exception to the rule that patterns are the same for the two types of cases is Wisconsin. It appears that contract cases in Wisconsin move substantially faster than do the accident claims cases. I do not have any specific explanation for this. It just appears to be a pattern that has developed there.

If we are going to try to understand arbitration as an alternative to the courts, we really need to compare the two. This presents some interesting problems. We certainly cannot compare arbitration cases to all cases in the courts, because the American Arbitration Association is looking only at particular subsets of cases. We tried to develop a matched sample by identifying the area-of-law codes that were used by our field staff in coding the American Arbitration Association cases and selecting from our court samples the cases in which these
same codes appear. The mixes are not necessarily the same, but this approach does provide a base for comparison, albeit still somewhat crude.

Before turning to the pace comparisons, let us consider some other dimensions of comparisons. First, the level of states in the various groups of cases tends to be quite different. Figure 2 shows the lawyers' views of the value of their cases; this information is taken from a survey of the lawyers. Not surprisingly, since the bulk of these cases are going to be diversity cases, the federal cases involved substantially greater sums of money than did either the American Arbitration Association cases, or certainly the state cases. American Arbitration Association cases in some locales appeared to be very much like the federal cases, in some locales very much like state cases, and in some locales somewhere in between.

Incidentally, the bottom-most segments of the bars in Figure 2 represent the median lawyer fees in these same cases. It doesn't necessarily appear that lawyers' fees in American Arbitration Association cases are substantially less, proportionate to what is at stake, than is true for the other forums. American Arbitration Association cases fall somewhere between the federal and state courts in terms of magnitude of stakes, and so do the median lawyer fees in these cases. It is interesting to note that median stakes in all cases in our sample, both state and federal, as reported by the lawyers, are about $8000. Keep in
mind that the vast majority of cases are state cases, and the median state case is for something under $5000.

To return to the American Arbitration Association cases, the really crucial problem in comparing litigation and arbitration lies in the decision to file. There is an argument to be made that many filings in court do not represent a desire to have the case adjudicated: such filings are simply part of a standard process in getting the other side to talk; perhaps negotiations have broken down, so a case is filed to attract the opponent's attention, with no realistic expectation that it is ever actually going to be adjudicated. When a party takes a case to the American Arbitration Association, he is more likely to be thinking, "I really want a decision on this." He has none of the usual tactical reasons for filing the case in court, nor is he simply covering himself by getting in line for a distant trial date.

Figure 3 compares the way cases are terminated in the different forums. Almost 60 percent of American Arbitration Association cases are decided by arbitrator's award. In the state and federal courts, cases can be decided either by trial or some other process, such as summary judgment or involuntary dismissal of one sort or another. Only 5 percent of the cases in our state and federal courts sample were in fact tried, though a somewhat larger proportion were decided in other ways.

Fig. 3 — Mode of termination by source
Keeping these differences in mind, let us turn to the comparative analysis of pace. We will look at each geographic area separately. In South Carolina (Figure 4), we found that arbitration moves very fast, much faster certainly than court processing, either state or federal. In New Mexico (Figure 5), arbitration is also substantially faster than court processing but not to the same degree. Here it is not so much that arbitration is slower, but that the court processing is faster. We cannot explain the anomaly of New Mexico and why it seems to move much faster in its courts, but this does appear to be the case. In Los Angeles (Figure 6), American Arbitration cases are slower than they were in the other areas, but they are still faster than the courts (note that for the Los Angeles state court we are talking about time from date of filing rather than from the date at-issue). In Pennsylvania (Figure 7), we see a different pattern. Here we have only the federal courts as a comparison. (The state court’s information on termination, as it existed when we were collecting this data from court files, was more or less meaningless because there was no norm of notification of settlement of any sort that we could find. The court clerk would periodically clean house and publish a list of cases saying, “If we don’t hear from you, we’re assuming that these cases are dead, that you’ve settled them, and they are blotted from the record.” That was the date entered as termination, so we could not use state cases as a good comparison.) It is striking that the American Arbitration Association in Philadelphia is no faster than the federal court. Lastly, in Wisconsin

![Diagram showing termination pattern for District of South Carolina](image)

Fig. 4 — Termination pattern for District of South Carolina
Fig. 5 – Termination pattern for District of New Mexico

Fig. 6 – Termination pattern for Central District of California
Fig. 7 – Termination pattern for Eastern District of Pennsylvania

Fig. 8 – Termination pattern for Eastern District of Wisconsin
(Figure 8), an interesting pattern emerges. Contract cases are faster in the AAA than in court, while accident claim cases move at about the same pace.

The conclusion I would draw from this is fairly simple and straightforward. The American Arbitration Association is usually faster, particularly if you really want a decision; there are some noteworthy exceptions. Variations with the AAA probably reflect administrative practices. Whether the faster pace in the AAA is due to the procedural differences between the AAA and the courts, or to different expectations of the participants, is unclear.

We also collected data on pace in ten other “alternative” institutions, some involving arbitration and others involving various kinds of hearing procedures. Patterns for these institutions are shown in Figure 9. What we see in that figure is a lot of variation. The fastest procedure was that of an unemployment tribunal in New Mexico, which one would expect to be fast because if it is not it does not do anybody much good. Otherwise a couple of arbitration programs and a zoning board were the fastest procedures. The three slowest were those of the Wisconsin Equal Rights Division, the California Contractors’ Licensing Board, and the Pennsylvania Board of Review, which resolves questions of value in land condemnation cases. All of these were really quite slow, particularly the Board of Review in Philadelphia. So alternative institutions may or may not be faster.

Fig. 9 — Termination times for alternative institutions
What these alternative forms of adjudication suggest is that if one is going to think about alternatives, particularly alternatives as related to the pace of case disposition, it probably makes sense to distinguish between alternative institutions and alternative processes. In fact there is an alternative within the court: mediation using judges. It may well be that what is of more significance in understanding pace and speeding things up is an alternative process rather than an alternative institution.¹

¹Figures 10 and 11 provide some additional comparisons between the courts and alternative institutions, with controls for areas of law. What these figures tend to show is that alternatives tend to fall somewhere between state and federal courts, both with regard to what is at stake and with regards to the cost of case processing as indicated by legal fees.

Fig. 10 – Median stakes by area of law
Fig. 11 – Median lawyer fees by area of law