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"I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."[1] *Judge Learned Hand.*

"Every expansion of the use of arbitration contributes to the goal of speedy, impartial and responsible administration of justice."[2] *Judge Harold R. Medina.*

"It is time we reverse our habits of thinking and acting and begin to build a tradition of speedy justice in this important [personal injury] field of law."[3] *Judge Henry L. Ughetta.*

Arbitration offers a practical solution of the problem of processing automobile accident claims efficiently. It provides a means of compensating claimants without doing injustice to defendants or their insurers, while significantly relieving court conjestion. This article reviews the present use of arbitration in this field, considers some of the objections that have been raised against it, examines the functioning of the arbitral process, and presents an argument for greater use of voluntary arbitration in automobile accident claims.

Court congestion is a national problem.[4] Even with the appointment of additional judges and the creation of many new judgeships, the problem remains. It is perhaps significant that the problem is not a recent development. Even in the time of Shakespeare there were references to the law's delay. That there have been important and significant efforts at improvement cannot be denied. Basic procedural

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1. As quoted in FRANK, COURTS ON TRIAL 40 (1949).

2. As quoted by Dworkin, *Arbitration: An Obvious Solution to a Crowded Docket*, 29 CLEVELAND B.J. 167, 168 (1960).

3. Ughetta, *Congestion and Automobile Negligence Cases*, 27 BROOKLYN L. REV. 3, 7 (1960).

4. See Luce, *The Rule of Law and the Administration of Justice*, 45 J. AM. JUD. SOC'Y 86, 89 (1961): "[I]n the United States district courts the number of cases pending more than three years number 6,200, and . . . in state courts, far from there being any improvement, the average time taken for disposal of a case has gone up from ten months in 1959 to over 11 months in 1960 and even longer in 1961. Personal injury cases often drag on more than five years."

reforms have immeasurably aided the courts to expedite their business. The creation of new courts to handle particular matters such as domestic relations and juvenile cases has done much to relieve the calendars of courts of general jurisdiction. But in spite of new courts, administrative agencies and procedural reforms, much room for improvement remains. It does not require a great deal of imagination to foresee the constancy of the demand for expanding court facilities with the ever increasing population in a rapidly accelerating world economy. As life becomes more complicated, the points of friction between competing legal interests become more numerous.

There can be little question that the automobile accident rate in this country contributes substantially to the total work load of the courts. With some 1,250,000 persons injured and an additional 38,000 or more killed by automobiles each year, not to mention the 6.5 billion dollars in estimated costs,[5] it follows inevitably that the disputes arising out of these accidents add materially to the delay in the courts.[6]

Motivated only in part by delay in the courts, it has become a general pastime in the last several years to propose solutions of the problem of the compensation of traffic accident victims in one form or another. Some have advocated more drastic measures than others. One state goes so far as to provide a compensation plan for injured victims without regard to the normal requirement of negligence.[7] This plan has found favor in at least one province in Canada.[8] In other states compulsory liability insurance is provided for,[9] while in still others the compulsion takes a more indirect form;[10] but both require the presence of negligence for the imposition of legal liability. One of the more original proposals in recent years was presented by Professor Leon Green in his book *Traffic Victims*.[11] Professor Green proposed a system of universal loss insurance covering each motor vehicle, the elimination of negligence as a basis of liability, and the administration of claims through a system of special masters appointed by the courts. These masters would make reports to the

5. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1961).

6. See Application of Smith, 381 Pa. 223, 229, 112 A.2d 625, 629 (1955); Heuston, *The Law of Torts in 1960*, 6 J. SOC'Y PUB. TEACHERS OF LAW (n.s.) 26, 27 (1961); Ughetta, *Congestion and Automobile Negligence Cases*, 27 BROOKLYN L. REV. 3 (1960); Wright, *The Adequacy of the Law of Torts*, 6 J. SOC'Y PUB. TEACHERS OF LAW (n.s.) 11, 18 (1961). *But see* Betts, *The False Premise of Court Congestion*, 2 FOR THE DEFENSE 17 (1961).

7. N.D. CENT. CODE ch. 39-17 (1960, Supp. 1961).

8. REV. STAT. SASK. ch. 371 (1953) and amendments.

9. MASS. ANN. LAWS ch. 90, §34A-34J (1933), ch. 175, §113A-113G (1948).

10. *E.g.*, N.Y. VEHICLE & TRAFFIC LAW §§301-321; S.C. CODE §§46-701 to 46-750.33 (1952, Supp. 1960).

11. TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958).

courts indicating the damages to which parties might be entitled, and would give judgments, subject to court review.

The role of arbitration in the process of determining disputes between potential litigants is of increasing importance. Commercial arbitration is widely accepted by businessmen as a forum for prompt and final determination of their disputes.[12] Labor arbitration has become well established as a substitute for strikes and other economic pressures in the settlement of disputes between labor and management.[13] The suggestion that arbitration of traffic accident claims would be a method of providing for better and speedier administration of justice is not new.[14] But the fact that the vast majority of lawyers and judges have had no direct contact with arbitration, or only a very limited experience with it, justifies examination of the subject in some detail to consider its potentialities for alleviating the appalling situation in some areas where justice is being effectively denied to traffic accident victims. Necessarily, anything that would help remove traffic accident cases from court calendars would also assist in speeding adjudication of other cases.

THE PRESENT USE OF ARBITRATION

Anyone not familiar with the field may think that the use of arbitration to settle automobile accident claims is a fanciful idea. The fact is, however, that many such claims are being determined by arbitration every year. The uninsured motorist endorsement[15] now in-

12. Kramer, *Foreword* to 17 LAW & CONTEMP. PROB. 471 (1952): "During the past decades commercial arbitration has firmly established itself in this country and abroad, both in common and civil law jurisdictions, as a method for handling and settling certain types of disputes, many of which might otherwise have been tried in the regular courts." See also 2 O'NEAL, CLOSE CORPORATIONS §§9.08-.25 (1958).

13. *E.g.*, "A total of 2,039 arbitrator appointments were made in fiscal year 1960, 282 more than the 1,757 made in fiscal year 1959." THIRTEENTH ANNUAL REPORT, FEDERAL MEDIATION AND CONCILIATION SERVICE 33 (1960); 3231 labor arbitration cases were administered by American Arbitration Association in 1960, American Arbitration Association, Arbitration News, No. 2. (1961). These figures do not include many other cases not referred to either agency.

14. See Braden, *The Use of Arbitration in Settling Insurance Claims*, 396 INS. L.J. 15 (1956).

15. *E.g.*, the typical endorsement usually contains the following provision: "To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident, and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and

cluded by many casualty insurance companies in their standard liability policies provides for arbitration of any dispute between the insured and the company as to liability or damages.[16] Disputed claims against the New York State Motor Vehicle Accident Indemnification Corporation, which performs the same function as the uninsured motorist endorsement, are also settled by arbitration.[17] In 1957 alone, 14,261 cases involving property damage to automobiles and totaling $4,130,139.84 were disposed of under the Nationwide Inter-Company Arbitration Agreement, participated in by more than 270 insurance companies.[18] In the Municipal Court of Philadelphia alone, 5,740 cases were disposed of by arbitration in 1958 under the rules of that court requiring arbitration of all claims (not limited to automobile accidents) of no more than $2,000.[19]

Under a Pennsylvania statute[20] enacted in 1951, which permitted the courts of common pleas to adopt rules providing for arbitration of all claims involving no more than $1,000, the results were so gratifying[21] that the statute was amended in 1957 by raising the maximum to $2,000 and including the Municipal Court of Philadelphia.[22] In 1959, another amendment included the County Court of Allegheny County (Pittsburgh).[23] By 1958, forty-eight of Pennsylvania's sixty-seven courts of common pleas had adopted the arbitration procedure.[24] In 1959, Senator Hugh Scott of Pennsylvania introduced a bill in the

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if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, *by arbitration.*" (Emphasis added.)

16. The arbitration clause usually is as follows: "If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, *upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association,* and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part." (Emphasis added.)

17. Aksen, *Uninsured Motorist Coverage: A Guide to MVAIC and Arbitration,* 15 ARB. J. 166, 178 (1960).

18. Demer, *270 Insurance Companies Arbitrate Inter-Company Claims,* 42 J. AM. JUD. SOC'Y 92, 94 (1958).

19. Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 459 (1961).

20. Pa. Laws 1951, No. 590.

21. See Application of Smith, 381 Pa. 223, 229, 112 A.2d 625, 629 (1955); Rosenberg & Schubin, *supra* note 19, at 449.

22. Pa. Laws 1957, No. 66.

23. PA. STAT. ANN. tit. 5, §30 (Supp. 1959).

24. Rosenberg & Schubin, *supra* note 19, at 453.

United States Senate to require the United States district courts to refer personal injury automobile accident cases to arbitration.[25] It was referred to the Judiciary Committee.

In October 1960, seventeen Chicago area insurance companies offered, through newspaper advertisements, to arbitrate personal injury controversies with motorists under the rules of the American Arbitration Association.[26] The results precipitated the following observation from that association in its report of its 1960 activities: "The first few months of experience with this plan have been encouraging. Policyholders show no reluctance to accept the offer to arbitrate."[27]

The use of arbitration in the settlement of automobile accident claims is not an untested or impractical proposal. Nor is it an entirely recent development. The following excerpt is from an article by Mr. J. Noble Braden, late Executive Secretary of the American Arbitration Association:[28]

> "In 1933 much concern was expressed regarding the congestion of court calendars and particularly the congestion of the calendars of the Municipal Court of the City of New York. . . .

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25. Senator Scott's bill, S. 2415 86th Cong. 1st Sess. (1959), provides in part: "Upon such conditions as the Supreme Court may prescribe under section 2072 the several district courts may adopt and rescind, as the volume of their business requires or warrants, rules (1) requiring that all civil actions commenced under section 1332, involving personal injury as a result of operation of a motor vehicle, and at issue, shall be heard by a board of three arbitrators appointed by the court under section 757; and (2) prescribing the proceedings before such board, and the form of their awards. Such awards shall have the effect of judgments from the time of their entry in the court and until reversed on appeal or satisfied. Any party to an award under this section, upon repaying the costs thereof to the United States, or upon filing an affidavit of inability to pay the same, shall be entitled to appeal within thirty days to the court in which the action is pending, and to have a trial de novo."

26. "The American Arbitration Association is a national organization, devoted wholly to the advancement of the knowledge and use of voluntary arbitration. The Association is a non-profit, membership corporation, chartered under the laws of New York State. It is a privately organized and financed institution of a scientific and educational nature, and is non-partisan and non-political. *Arbitration Tribunals* of the Association service several thousand labor-management, commercial and international trade disputes annually. For this purpose, the Association maintains, in more than 1600 cities, a National Panel of Arbitrators. The Panel includes some 13,000 men and women, experts in all trades and professions as well as leading specialists in labor-management relations. Through joint agreements with international and foreign organizations, the Association also renders arbitration services to nationals of all countries outside of the Iron Curtain in their trade with the United States." American Arbitration Association, *Foreword* to Accident Claims Tribunal Rules (1961).

27. American Arbitration Association, Arbitration News, No. 2, p. 2 (1961).

28. Braden, *supra* note 14, at 17.

"The bar moved into action and a lawyers' committee . . . was organized by the American Arbitration Association. After a short investigation . . . a report was submitted to the then Superintendent of Insurance . . . . It was also discussed with the president justice of the Municipal Court, and meetings were held at which the president justice and the Superintendent of Insurance suggested to attorneys and claims vice-presidents of the casualty insurance companies that arbitration be used to relieve the court congestion. In the next few years over 100 insurance companies agreed to submit cases pending on the municipal court calendar to arbitration, and the American Arbitration Association was asked to undertake the operation of an accident claims tribunal. It also had an even more difficult task, the education of the plaintiffs' attorneys to use the process. Money was contributed mainly by lawyers, and a group of unemployed businessmen were recruited who visited every plaintiffs' attorney in the city and endeavored to advise him of the arbitration process and the speed and economy which would be available to him and his client if cases were submitted to arbitration. Some 18,000 cases were submitted by insurance companies. More than fifty per cent of the cases submitted were either arbitrated or settled as a result of that effort. By the early 1940's the municipal court calendars were up to date. The incentive to submit such cases to arbitration was ended and the plan unfortunately was allowed to lapse."

Arbitration is not mediation. It does not seek to compromise the positions of the parties and assist them to agree to a settlement.[29] It is the settlement of a controversy by an impartial third party,[30] whose final and binding decision is subject to defeat in the courts only in limited instances.[31] An agreement to arbitrate carries with

29. Fuller, *Extra-Judicial Settlements of Insurance Claims*, 407 INS. L.J. 816 (1956); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961).

30. 3 AM. JUR., *Arbitration and Award* §2 (1936); Sturges, *Arbitration — What is it?*, 35 N.Y.U.L. REV. 1031 (1960).

31. See, *e.g.*, Gramling v. Food Mach. & Chem. Corp., 151 F. Supp. 853, 857 (1957): "The statutory grounds for vacating an award, 9 U.S.C.A. §10, are substantially the same as those at common law. They are as follows: (1) Where the award was procured by corruption, fraud or undue means; (2) Where there was evident partiality or corruption in the arbitrators; (3) Where the arbitrators were guilty of misconduct or misbehavior prejudicial to the rights of a party; and (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award was not made." See also United Fuel Gas Co. v. Columbia Fuel Corp., 165 F.2d 746, 751 (4th Cir. 1948): "We cannot say that the arbitrators misinterpreted the contract or that they considered improper evidence in making their award; but, had they done so, this would not vitiate the award."

it certain minimum "due process" guarantees[32] that attach by operation of common law or statute, but the parties may waive them by stipulation or otherwise.[33]

At least eighteen states now have modern arbitration statutes[34] that overcome the long-time common law rule, based on the hostility of courts to what they saw as attempts to oust their jurisdiction, that courts will not lend their power to the enforcement of agreements to arbitrate future controversies.[35] The United States Arbitration Act,[36] especially as recently interpreted by the United States Court of Appeals for the Second Circuit,[37] has enhanced the usefulness of agreements to arbitrate. The change in court attitudes has been described as follows: "Whatever the reason for its upsurge in popularity, the fact remains that the arbitral mode of dispute settlement has now even achieved a favored position in both state and federal courts of the country."[38]

Arbitration and Lawyer Attitudes

The long-standing hostility to the arbitration process, which has found frequent expression in the opinions of the courts, is reflected to a considerable extent in the attitudes of lawyers, as is attested by

32. See Eastman, *Accident Claims Arbitration Under Uninsured Motorist Coverage*, Prac. Law., Apr. 1959, pp. 67, 70.

33. See 3 Am. Jur., *Arbitration and Award* §8, (1936); Sturges, *supra* note 30.

34. Ariz. Rev. Stat. Ann. §12-1509 (1956); Cal. Civ. Proc. Code §1280; Conn. Gen. Stat. Rev. §52-408 (1958); Fla. Stat. §57.11 (1961); La. Rev. Stat. Ann. §9:4201 (1950); Mass. Ann. Laws ch. 251, §1 (1956, Supp. 1961); Mich. Stat. Ann. §27.2483 (1943); Minn. Stat. Ann. §572.08 (1947, Supp. 1960); N.H. Rev. Stat. Ann. 542.1 (1955); N.J. Rev. Stat. §2A:24-1 (1952, Supp. 1961); N.Y. Practice Manual §1448 (Clevenger 1961); Ohio Rev. Code Ann. §2711.01 (Page 1954, Supp. 1961); Ore. Rev. Stat. §33.220 (1961); Pa. Stat. Ann. tit. 5, §161 (1930); R.I. Gen. Laws Ann. §28-9-1 (1956); Wash. Rev. Code Ann. §7.04.010 (1961); Wis. Stat. Ann. §298.01 (1958); Wyo. Stat. Ann. §1-1048.3 (1957, Supp. 1961).

35. See, *e.g.*, Jones v. Enoree Power Co., 92 S.C. 263, 267, 75 S.E. 452, 454 (1912), in which the court said with reference to arbitration agreements: "As to the validity of such contracts, the authorities, with entire unanimity, now lay down this rule. An agreement to submit to arbitration all questions of law and fact that may arise under a contract is contrary to the public policy and void, as an attempt to oust the Courts of their jurisdiction and establish in their place a contract tribunal." That there is some doubt that the rule was ever so unanimous, see Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 Law & Contemp. Prob. 580, 581, n.2 (1952): "This common law non-enforceability rests more in judicial lore than in positive decisions."

36. 9 U.S.C. §§1-14 (1954).

37. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed on stipulation*, 364 U.S. 801 (1960).

38. Gotshal, *Arbitration's Importance to Lawyers*, 1 Boston Coll. Ind. & Com. L. Rev. 151 (1960).

the following recent appeal from a past president of the American Arbitration Association:[39]

> "Lawyers should forget any past prejudices against arbitration and realize that hesitation may cause the loss of future business. This is well illustrated in the tax and management-labor fields where attorneys not schooled in arbitration are deprived of great sources of revenue by their failure to keep abreast of the times, as many accountants and labor relations counselors have done. A lawyer must have familiarity with all aspects of arbitration and its procedures in order to enable his client to utilize this forum adequately and advantageously. In order to advise businessmen whether to use or consent to arbitration, or in drafting an arbitration clause in a contract, he must know the nature of the process, its best areas of utility, the character of the agency administering the hearings and its rules. Furthermore he should know the type of controversy which is arbitrable — as both the legislature and courts have made restrictions — as well as any requirements of statutes and judicial decisions."

Some of the hostility of lawyers to the use of arbitration no doubt stems from the conviction that most arbitration is conducted without the participation of lawyers and therefore is an arrangement to bypass them. There is no doubt that one of the purposes of arbitration is economy, and therefore an effort is often made to trim off all unnecessary expenses by elimination of a court reporter or attorneys, or both. What lawyers must do is to recognize that there is no more reason to resent the settlement of disputes by the arbitral method without the participation of attorneys than there is to resent the settlement of disputes by direct negotiations between the parties without the participation of lawyers. In both instances the lawyer's usefulness will be measured by his contribution to the proper settlement of his client's claim. Some controversies lend themselves more readily to participation by lawyers than others.[40]

Many trade associations and other business groups have long resorted to arbitration to settle differences among group members.[41] Many of these have developed their arbitration procedures to fit the

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39. *Id.* at 156.

40. *Id.* at 155: "Of course, there are advantages and disadvantages to both court litigation and arbitration. In order to serve properly the interests of his clients the lawyer must be in a position to anticipate the most expedient forum for disputes that may arise."

41. "In 1768 the New York Chamber of Commerce was founded with one of its purposes being the arbitration of disputes among its members. . . . Later, trade associations came into the picture." Mentschikoff, *supra* note 29, at 855.

particular needs of the industry, and they often rely only on trade association sanctions for ultimate enforcement. Since the parties do not have to be concerned about the enforceability of the award in the courts, their need for the services of lawyers has been very limited. Often the arbitrators are persons with specialized knowledge of some phase of the trade and are expected to apply the norms or standards of that trade or industry without regard to the general legal norms, with which lawyers are more familiar. Furthermore, the participation of lawyers who are not sympathetic with or do not understand the arbitration process may be a great deal less than helpful if they insist on the application of general legal norms, particularly when this may be a cover-up for failure to prepare the case properly for presentation — perhaps because the lawyer feels that he need not take the matter too seriously, since it will not be heard in a court. One observer has reported:[42]

> "In almost all self-contained trade associations and exchanges . . . lawyer participation in the arbitration proceedings is either forbidden or discouraged, and very few of the arbitrators are lawyers or law-trained. . . . We frequently heard, both orally and in writing, that lawyer participation was not desired for two reasons: (1) *lawyers did not understand the business usages* and practices that were typically involved in adjudicating the dispute *and were therefore not helpful*; and (2) *lawyers made the proceedings unduly technical and tended to create unnecessary delays.* This second complaint about lawyers has some support in our analysis of the [American Arbitration] Association records [of commercial arbitration]. Both delays in the selection of arbitrators and postponements between hearings occur more frequently in cases in which the parties are represented by attorneys. When both parties were represented by attorneys 43 per cent of the cases were decided in less than 90 days and 21 per cent in less than 60 days. When neither party brought an attorney, 78 per cent of the cases were decided in less than 90 days and 49 per cent in less than 60 days. Of course, the figures also showed that attorneys were more likely to be employed as the amount involved in the case became larger. Personal observation at the Association leads me to the reluctant conclusion that in the great majority of the cases observed, *lawyer participation not only failed to facilitate decision but was so inadequate as to materially lengthen and complicate the presentation of the cases.* Nonetheless, the Association encourages lawyer participation. Lawyers represent

42. *Id.* at 859. (Emphasis added.)

one or more of the parties in 80 per cent of the cases, and serve as arbitrators in about 30 per cent."

As is usually the case, knowledge leads to understanding. The more knowledge lawyers have of arbitration and its advantages and disadvantages, the more readily they accept it in those situations in which it can be advantageously used, instead of expressing a blind hostility to all arbitration regardless of circumstances.[43] The more adequately lawyers prepare themselves to make an effective contribution to their clients' interests in arbitration cases, just as they must do in litigation, the more they will be called on for their services.[44] The rules of the American Arbitration Association guarantee the right to representation by counsel.[45] Of course, all parties do not always avail themselves of that right, particularly in labor and commercial arbitration, but all have done so in the accident claims cases.[46] Furthermore, in the latter cases only lawyers are used as arbitrators;[47] this no doubt has been one factor encouraging the representation of those parties by attorneys.

That many lawyers are converted to the advantages of arbitration once they have had the experience is illustrated by the following letter received by the American Arbitration Association from an attorney in upstate New York:[48]

> " 'I have just completed my first trial in an arbitration proceeding conducted by the American Arbitration Association. The matter involved approximately $90,000.00 and with that amount of money at stake I felt that the rights of the parties should be determined in a formal legal proceeding such as an action in the Supreme Court, rather than in the informal manner usually employed in arbitrations. My client having

43. Dworkin, *supra* note 2, at 168.

44. Eastman, *supra* note 32, at 72. See also Gotshal, *supra* note 38, at 157: "In bringing a dispute to arbitration the attorney should remember that careful preparation of the case is just as essential as careful anticipation of a courtroom appearance."

45. American Arbitration Association, Commercial Arbitration Rules, Rule V, §21 (1954); Accident Claims Tribunal Rules, Rule V, §15 (1961); Voluntary Labor Arbitration Rules, Rule V, §20 (1958) are all the same: *"Representation by Counsel*: Any party may be represented by counsel. A party intending to be so represented shall notify the other party and file a copy of such notice which shall contain the name and address of counsel with the Tribunal Clerk at least three days prior to the date set for the hearing at which counsel is first to appear. When the initiation of an arbitration is made by counsel, or the reply of the other party is by counsel, such notice is deemed to have been given."

46. Conversation with Edward A. DeGross, Regional Manager, American Arbitration Association, Atlanta.

47. *Ibid.*

48. Quoted in Braden, *supra* note 14, at 18.

actually signed the agreement to arbitrate, I was compelled to lay my objections aside and proceed with the arbitration. The subsequent developments demonstrated that my fears and objections to arbitration were groundless, and I am now convinced that it was I who was mistaken, not my client. . . .

" 'The most impressive feature of the proceeding was the speed with which it was accomplished. We tried a complete case in three days, which, in my opinion, would have required at least two weeks to try in a regular court proceeding, and possibly longer. . . .

" 'To use the vernacular, the whole proceeding was an "eye opener" to me. I never realized that so much could be accomplished in so short a time and done so well. This proceeding made a convert out of me.' "

The antipathy of most lawyers to the use of arbitration is rooted in their fear of what they may refer to as "Star Chamber" proceedings, or, in a more restrained mood, "the lack of traditional courtroom safeguards."[49] Such an attitude reflects an obvious misunderstanding of arbitration. Somewhat typical of the reaction of some lawyers is the following quotation from a letter to the editor of the *Journal of the American Judicature Society* in response to an article[50] describing the operation of the Nationwide Inter-Company Arbitration Agreement which the *Journal* had published:[51]

"What Mr. Demer [author of the article] has portrayed as arbitration is a new bloodless revolution. It is a rejection of established and cherished principles of legal practice for a new regime of 'peoples' courts.' It bears evidence of the approach of a fresh social and political schism of the magnitude of the French and Russian Revolutions, or the Chinese 'Republic's' land reform movements. These revolutions embodied new forms of lay courts as a solution to cumbersome legal proceedings."

Why the utilization of voluntary arbitration procedures for the settlement of private disputes should conjure up images of "the French and Russian Revolutions, or the Chinese 'Republic's' land reform movements" is hard to imagine. As was pointed out in the article to which the letter writer referred:[52]

"Neither the theory nor the practice of arbitration is new to

49. Rosenberg & Schubin, *supra* note 19, at 457.

50. Demer, *270 Insurance Companies Arbitrate Inter-Company Claims*, 42 J. AM. JUD. SOC'Y 92 (1958).

51. 43 J. AM. JUD. SOC'Y 65 (1959).

52. Demer, *supra* note 50, at 94.

our legal system. It was known and used in the time of the ancient Greeks and Romans. In the Anglo-American system of law it dates back to the days of the Hanseatic League and the period from the 12th to the 14th centuries. The merchants and mariners of those days were reluctant to wait for the ponderous workings of the courts of the land. They had their own tribunals and rules of law. They were informal, swift and final in their justice. Many of their rules were incorporated into English law and have come down to us in the United States at present. Much of our law of negotiable instruments, maritime or admiralty law and insurance law itself can be traced to those long-gone days."

Certainly it is not accurate to describe arbitration as "new"; nor is it any more accurate to describe it as a "bloodless revolution." The revolution, if any, would be in the clearing of court calendars so that justice could in fact be administered in those situations demanding litigation. The use of arbitration, of course, waives the jury trial; but there is much support for the argument that the jury makes no substantial contribution to the attainment of justice in accident cases.[53] More information as to how arbitration works may help dispel some of the fears.

How Arbitration Works

Perhaps the single most important characteristic of arbitration is its flexibility. The number and qualifications of the arbitrators[54] and the method of choosing them, the procedure for selecting the time and place of hearing, the procedure at the hearing, and the time allowed for the award as well as the nature of the award as to length and style, may be adjusted to accommodate the convenience of the participants without offending the basic requirement that the parties get a fair and impartial hearing.

In the first place, it should be recognized that arbitration is an adversary proceeding before an impartial person[55] acting under oath.[56]

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53. Garwood, *Breakfast Observations on Selection of Judges*, 44 J. Am. J. Soc'y 134, 138 (1960): [T]he plaintiffs in personal injury suits do not lament the absence of a jury."; Ughetta, *supra* note 6, at 6: "[I]t may well be that the use of jury trials in negligence cases can be reduced without impinging upon the fundamental fairness of such trials."

54. For an extensive discussion of the use of tripartite boards in arbitration, see Note, 68 Harv. L. Rev. 293 (1954).

55. *E.g.*, American Arbitration Association, Accident Claims Tribunal Rules, Rule IV, §§12, 13 (1961).

56. *Id.* §20.

Testimony is heard from sworn witnesses,[57] who are subject to cross-examination. Each party is entitled to full opportunity to present his evidence.[58] The right to appeal to the courts to vacate the award because of the arbitrator's corruption, fraud, misconduct, or abuse of authority is preserved. It is true that in many arbitrations the parties by voluntary agreement do limit these rights. They may waive the arbitrator's oath and the swearing of witnesses, and they may even agree to submit all evidence in written form.[59] Often lawyers do not enter the situation until the parties have determined the procedure by prior agreement. Surprised at what they find, they condemn all arbitration. The fact that arbitration procedure is so flexible invalidates any generalization from a single instance.

Among the advantages offered by arbitration is the elimination of technical pleadings.[60] Not only does this eliminate the work involved and the risk that a technical defect may defeat a meritorious claim or defense but it also saves a tremendous amount of time, both in the preparation of the pleadings and in the time lag—waiting for responses. For example, instead of twenty days to answer, the Arbitration Association rules allow seven days, and failure to answer is assumed to be a general denial.[61]

One of the features receiving as much praise from lawyers as anything else is the ability to establish a specific hour when the case will be heard. This prevents the all too frequent occasions when the attorneys, their parties and their witnesses have to wait in the courts for their cases to be called.[62] The place and hour for arbitration is usually set by mutual agreement, and under Association rules five days' notice is all that is required.[63] Not the least time-saving item is the fact that much more rapid progress is made in the actual hearing than in the normal court trial; as a result, it is a rare case that requires more than one day for the hearing.

The hearings are informal; the surroundings are often more pleasant than a courtroom. The participants are often more relaxed than in a courtroom, if for no other reason than because arbitration is a private affair and there is no gallery of spectators to increase tensions. The hearings are often held in an office, a hotel room, or some similarly comfortable place. The arrangement usually includes

57. *Ibid.*

58. *Id.* §§22, 24, 26. See also Note, 12 U. FLA. L. REV. 93, 96 (1959).

59. See Demer, *supra* note 50, at 93.

60. *E.g.*, American Arbitration Association, *supra* note 55, Rule III, §7 (1961).

61. *Ibid.*

62. See Application of Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1955); Fuller, *Extra-Judicial Settlement of Insurance Claims*, 497 INS. L.J. 816, 819 (1956); Rosenberg & Schubin, *supra* note 19, at 456.

63. American Arbitration Association, *supra* note 55, Rule V, §14.

chairs around large tables arranged in a "T" shape, with the arbitrator at the head. The fact that no record of the proceedings is usually made may also help to ease the tension.

The informality of the hearings does not interfere with orderliness in the presentation of the case.[64] In litigation, the better the judge and attorneys, the better the case will be presented. The same is true of arbitration. The normal order is for the claimant to make a brief opening statement informing the arbitrator of the nature of the case. Normally, there will have been a written demand for arbitration[65] or a submission agreement[66] in which the parties have stated the issues involved. This is followed by the opposition's opening statement. Then witnesses are heard and any other evidence is presented — first by the claimant, then by the defendant — though this sequence is not required. Full opportunities for cross-examination are afforded. A frequent form of questioning on direct examination is "Tell what you know about this incident."[67]

Objections to the admission of evidence are seldom sustained unless the inadmissibility is clear-cut.[68] The arbitrator would risk having his award set aside in a court action by refusing to admit evidence that should have been admitted; but rarely indeed would an award be upset by a court because an arbitrator had admitted more evidence than he should have.[69] In other words, the safest thing is for the arbitrator to admit all evidence that is reasonably relevant. He can give it the weight it deserves in the light of all the circumstances when he considers it in making his decision.[70]

64. See Prac. Law., Apr. 1960, p. 70.

65. *"Demand for Arbitration.* Where there is an arbitration clause in a contract referring to these Rules, either party may initiate arbitration by giving notice to the other in writing. Such notice should include the following: (1) Name and address of the party upon whom the demand is made; (2) Date of the contract(s) and *complete* text of the arbitration clause; (3) Brief but specific statement of the dispute(s) to be arbitrated, amount claimed, if any, and the relief sought; (4) A request of the other party to comply with the arbitration agreement; (5) Signature and address of an authorized person.

"Printed forms of Demand for Arbitration may be had on request." American Arbitration Association, *Foreword* to Commercial Arbitration Rules 2 (1954).

66. *"Submission Agreements.* When no previous agreement to arbitrate exists, the parties may submit an existing dispute by an agreement in writing (Submission). The Submission should include the following: (1) Name and address of the parties; (2) Brief but specific statement of the dispute(s) to be arbitrated, amount claimed, if any, and the relief sought; (3) Written signatures of persons authorized to submit to arbitration.

"Printed forms of Submission may be had on request." American Arbitration Association, *Foreword* to Commercial Arbitration Rules 2 (1954).

67. *Id.* Rule V, §22.

68. *Id.* Rule V, §24.

69. See Aksen, *supra* note 17.

70. American Arbitration Association, Commercial Arbitration Rules, Rule V,

Probably the most accurate criticism of arbitration is that the common law rules of evidence are not strictly adhered to. But the accuracy of the criticism does not necessarily establish its validity. The arbitrator is a person *chosen by the parties,* or at least named with their consent.[71] He is selected because the parties have confidence in his good sense and impartiality. Exclusionary rules of evidence designed to prevent an uneducated jury from giving undue consideration to evidence worthy of little if any weight are unnecessary before an arbitrator. Since it is common practice for most businessmen and lawyers to make many important decisions without excluding hearsay — decisions that may involve many thousands of dollars — it should not be a shock to lawyers to learn that businessmen and other clients may feel that they can get a thoroughly fair and impartial decision without having to exclude hearsay. Especially is this true when it is remembered that the rule against hearsay permits some fourteen exceptions. When life or liberty is not involved, it does not always follow that the most important factor in justice is accuracy of facts. The parties may prefer a *prompt* decision and an *end to the matter* — even if it is a "wrong" decision — rather than a prolonged period of suspension in order to get a "right" decision. "Justice delayed is justice denied." Obviously the smaller the sum involved, the more this would be likely to be true.

Arbitration is not governed by substantive rules of law, but neither is there any prohibition against their application.[72] Criticism by lawyers of this feature of arbitration overlooks the fact that by agreement the parties may bind the arbitrator to follow such rules. But even in the absence of a commitment that the rules of law shall govern, there would be nothing to prevent urging the arbitrator to accept such rules as the norms by which he will decide a particular case. A recent study has revealed that many arbitrators do in fact apply the substantive rules of law as they know them unless some compelling reason persuades them otherwise:[73]

§§25, 26.

71. Under the rules of the Accident Claims Tribunal, the arbitrator is named by the administrator; but, in fact, any objection from a party is considered reason enough to replace the arbitrator. Under the American Arbitration Association rules for both commercial and labor arbitration, as well as under the rules of the Federal Mediation and Conciliation Service, which supplies only labor arbitrators, the parties usually select the arbitrator from panels furnished to them. The usual method is for each party to strike those members that are objectionable and then to number the remainder in order of preference. The Association will supply three panels if need be, but if there is still no agreement, the Association names the arbitrator.

72. For a concise discussion of the general rule and the doubt raised as to its continued application to common law arbitration in Florida, see Note, 12 U. FLA. L. REV. 93 (1959).

73. Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846, 861 (1961).

> "Eighty per cent of the experimental arbitrators [180 selected from the American Arbitration Association Commercial Arbitration Panel] thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing. In other words, what they were saying is that rules of law were entitled to very heavy respect but could be re-examined in the interests of justice. This result is curiously parallel to the attitudes that seem to be implicit in our appellate courts."

The award is normally in writing[74] and, except in labor cases, it does not usually include an opinion. The maximum time normally allowed for the decision is thirty days after the close of the hearing.[75]

For those who acknowledge arbitration's advantages for small claims but contend that it cannot work in cases involving larger sums, the answer is found in the record of decisions than include large sums. In the recent case of *Grayson-Robinson Stores v. Iris Construction Corp.*,[76] the New York Court of Appeals upheld an arbitrator's award requiring specific performance of a five-million-dollar contract for the construction of a shopping center. In a 1957 federal case in South Carolina, the arbitration involved a controversy concerning $187,500.[77] In the case mentioned in the letter to the American Arbitration Association, quoted previously,[78] the sum involved was $90,000. Just as a trial judge without a jury is capable of handling cases involving claims of any amount, so is an experienced arbitrator capable of handling claims of any size.[79]

Not the least of the advantages of voluntary arbitration is that it costs the taxpayers nothing. Since the trial of an arbitration case is less complicated and normally takes less time than a court case, it usually results in reducing the parties' expenses, including witness fees and attorneys' fees. Those parties who use the facilities of the American Arbitration Association are charged a fee for its services.

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74. American Arbitration Association, Accident Claims Tribunal Rules, Rule VII, §33 (1961).

75. *Id.* §32.

76. 8 N.Y.2d 133, 168 N.E.2d 377 (1960), 109 U. PA. L. REV. 744 (1961).

77. Gramling v. Food Mach. & Chem. Corp., 151 F. Supp. 853 (W.D.S.C. 1957).

78. See note 51 *supra* and accompanying text.

79. "I suggest, also, that the average arbitrator drawn from the field of interest from which the case arises is perhaps even better qualified to make a sound, forthright and final decision on the issues than even a blue ribbon juror or a judge who must first be educated in the customs and practices of the industry involved in a given case." Fuller, *supra* note 62, at 822.

Those who use its Accident Claims Tribunal pay $50 for the first day of a hearing and $25 for each subsequent day.[80]

THE AMERICAN ARBITRATION ASSOCIATION[81]

The most important forum for the arbitration of commercial disputes is the American Arbitration Association, which provides arbitrators, rules and facilities. The Association is a non-profit organization that maintains national panels of arbitrators who are qualified experts in their respective fields and who are available for the arbitration of disputes anywhere in the country. The Association maintains offices throughout the country,[82] and its personnel are available to handle all the administrative details of arbitrating disputes. The focus of the administration of an arbitration by the Association is on providing orderly procedures that will result in a legally enforceable award. Thus the advantages to be derived from arbitration are not limited to those who are within a group that may be able to impose some disciplinary action to enforce the award, but may be enjoyed by those who have no special relationships and must depend on the courts for enforcement.

The American Arbitration Association has established its Accident Claims Tribunal for the specific purpose of arbitrating accident claims between certain participating insurance companies and their insureds. The specific need arose when companies began adding uninsured motorist endorsements to their liability policies. As a result, the companies often found themselves in dispute with their own policyholders about the amount or validity of a claim against an uninsured motorist. Recognizing that court litigation of such disputes would not be conducive to continued harmonious relations with insureds as premium-paying customers, the companies turned to arbitration. In an informal proceeding without the usual publicity attendant on court proceedings, the parties could obtain a full hearing with due regard for orderly procedure that would aid in reaching a just result by a fair and impartial third person. And, just as important, this could be done promptly and with little expense.

Through an arrangement by which the insurance companies agreed

80. American Arbitration Association, Accident Claims Tribunal, Rule VIII, §37 (1961).

81. The material in this section is based on a combination of the American Arbitration Association Rules; various pamphlets distributed by the Association; Aksen, *Uninsured Motorist Coverage*, 15 ARB. J. 166 (1960); Eastman, *supra* note 32, p. 67; Annual Reports of the Association.

82. Atlanta, Boston, Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Detroit, Hartford, Los Angeles, Philadelphia, Pittsburgh, San Francisco, Washington, D.C. The main office is at 477 Madison Ave., New York 22, N.Y. Copies of the rules for any of its tribunals may be obtained by request to any of its offices.

to underwrite the expense, the Accident Claims Tribunal was established, with the American Arbitration Association as the administrator. The Association's Commercial Arbitration Rules were adopted for the new tribunal with little change. A special panel of arbitrators, limited to attorneys who neither work for an insurance company nor specialize in negligence cases, was organized to supply the arbitrators. These attorneys, located throughout the country, have been recommended by attorneys on other panels of the Association or by local bar associations as persons qualified for the assignment. They serve without compensation. The Association rules provide that either party may give reasons for any objection to an arbitrator named in a case and that "the Administrator, after consideration thereof, may declare the office vacant and appoint a substitute Arbitrator." The rules provide that the case will be heard by one arbitrator unless either party requests three, in which event three will be appointed.

To initiate the proceeding, either party may file a Demand for Arbitration with the opposing party, furnishing two copies to the Association. The demand should state briefly the nature of the claim made and quote the arbitration provision of the policy. The rules make provision for an answering statement to be filed in the Association office in duplicate, with a copy to the opposing party, within seven days. Failure to file an answering statement is assumed to be a denial of the claim.

Once the arbitrator has been named and the preferences of the parties have been obtained through the administrator, the arbitrator sets a date for the hearing. At least five days' notice to the parties is required. The locality of the hearing is selected by the administrator unless the parties request a particular locality within seven days from the date of the filing of the Demand for Arbitration. If only one party requests a particular locality and there is no objection, that locality will be prescribed.

The Arbitration Association's agents act as tribunal clerks at the hearing and keep minutes of the hearing, in which a record of all exhibits in evidence and all witnesses testifying is entered. All communications between the arbitrator and the parties are transmitted through the administrator. Filing of briefs, submission of additional evidence agreed upon at the hearing, a re-convening of the hearing if need be, transmission of a transcript of the record — if one is made — are all handled through the administrator. This practice relieves the arbitrator of much detail and paper work and insulates him from the risk of receiving *ex parte* offerings of further evidence or arguments from one party without the knowledge of the other.

Compulsory Arbitration

The success of the arbitral method of settling disputes under

uninsured motorists endorsements[83] induced the Motor Vehicle Accident Indemnification Corporation, which had been set up by the state of New York to administer such claims,[84] to make provision for arbitration of its disputed claims. In doing so, the MVAIC adopted the Accident Claims Tribunal Rules of the American Arbitration Association. One observer has said of the arrangement:[85]

> "The provision for arbitration of certain disputes is extremely advantageous to any injured claimants and is of substantially greater value to the injured party than it is to the MVAIC. It establishes a means whereby he can collect for his injuries, when disputed by the Corporation, quickly and with negligible expense."

Under the Pennsylvania compulsory arbitration plan,[86] which has attracted a great deal of attention, court rules require the arbitration of all claims for $2,000 or less as a condition precedent to an action at law in the courts. Although the right of a trial de novo before a jury is guaranteed, the appellant must pay the full costs of the arbitration, limited to not more than fifty per cent of his claim, before he can appeal. Nor is this payment recoverable in his costs, even if he succeeds. Three arbitrators selected alphabetically are named by the court clerk from a roster of local attorneys who have previously indicated a willingness to serve in such cases. Fees to the arbitrator, of up to $50 per case, are set by the courts and paid by the counties. Certain of the procedural rules vary in different counties. For example, the rules of evidence to be observed are not uniform;[87] in practice, however, they may be more uniform than appears from the rules. Awards must be filed within twenty days of the hearing, and hearings are usually[88] held within a few weeks of appointment of the arbitrator.

The constitutionality of the plan was challenged, but the Supreme Court held that there is no infringement of the right to trial by jury when a party who is dissatisfied with the arbitration result can get a jury trial.[89] It also held that assessment of arbitration costs

83. Aksen, *Uninsured Motorist Coverage*, 15 ARB. J. 166, 179 (1960).

84. For a description and analysis of the New York statute's operation see Aksen, *supra* note 81.

85. *Id.* at 188.

86. For an excellent description and analysis of the Pennsylvania plan, see Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961). For an earlier and shorter discussion see Note, *Compulsory Arbitration to Relieve Trial Calendar Congestion*, 8 STAN. L. REV. 410 (1956).

87. Rosenberg & Schubin, *supra* note 86, at 451 n.23.

88. *Id.* at 455 n.43.

89. Application of Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.*

against the appellant does not impose such a burden as to effectively deny him his constitutional rights.

In concluding an article in the *Harvard Law Review* setting forth and analyzing the results of a study of the Pennsylvania system, the authors said:[90]

> "Ultimately, the teaching of the Pennsylvania experience is neither that arbitration heals nor that arbitration fails. The moral takes longer to phrase and it has qualifications. At a price, the evidence strongly suggests, the Pennsylvania plan for compulsory arbitration will achieve savings for a heavily congested court of lesser jurisdiction. On the other hand, Pennsylvania's experience provides no basis for the conclusion that compulsory arbitration as there practiced would be desirable or effective to unburden backlogged courts of major civil jurisdiction throughout the country. In a state willing to pay the price of curbing trial by jury, that end could doubtless be achieved by deflecting large cases from the courts to arbitration panels and raising severe obstacles to their return, but no one has yet urged that expedient. Nor do we."

Voluntary Versus Compulsory Arbitration

Although the writer does not urge the adoption of compulsory arbitration, at least not at this time, it is urged that voluntary arbitration can be more extensively utilized to solve the problem of court congestion and, just as important, to improve the present system of compensating auto accident victims.

In the use of a compulsory arbitration system such as Pennsylvania's and such as was proposed in Senator Scott's bill in the United States Senate, the opportunity for a trial de novo before a jury is retained, in order to overcome constitutional objections, even though hurdles are placed in the way of exercising this right. One of the criticisms of the application of this system to larger claims is that as the amounts involved become increasingly large, the costs of arbitration, which the appellant would have to pay to get a trial de novo, are less significant in relation to the amount at stake and therefore would be of little deterrent effect. None of these problems is present in voluntary arbitration. If the parties should make a valid agreement to submit their dispute to arbitration, there would be no right to appeal for a trial de novo by a jury — or by the court. The limited grounds for setting aside an arbitration award, as discussed previously,[91] would, of course, be available.

Smith v. Wissler, 350 U.S. 858.

90. Rosenberg & Schubin, *supra* note 86, at 471.

91. See note 31 *supra*. See also Note, 63 HARV. L. REV. 68 (1950).

The award of the arbitrator in voluntary arbitration (assuming that the normal requirements have been observed) is just as enforceable as the award in compulsory arbitration. "Compulsory" refers to the fact that the parties are required to submit to arbitration. "Voluntary" refers to the fact that the parties voluntarily assumed the obligation to arbitrate; they may be compelled to comply with the award by court action if necessary.[92] But the vast bulk of cases would be ended with the arbitrator's award, as is true of those arbitrated today in commercial, accident claims, international trade and labor relations contexts. And this would have been done without having to go into court at any stage. The fact that such cases would not reach the courts would surely make a substantial reduction in the work load of the courts and would thereby relieve court congestion. If the use of voluntary arbitration should become widespread enough, obviously there would be no need for compulsory arbitration.

Since more and more legislation is being directed toward requiring all motorists to carry liability insurance, it is obvious that the greatest agency for promotion of the use of arbitration would be the casualty insurance company. The insurance industry would have much to gain in the long run from any improvement in the administration of automobile accident claims. Even though there may be those who argue that the insurance companies would not fare as well at the hands of arbitrators,[93] this would be difficult to establish.[94] Assuming it to be true, however, would it not be better than a system of compensation without consideration of fault?[95] The long-run gains to the insurance companies would not only be in building better public relations by having outstanding claims settled more promptly but would include money savings as well. The savings could come

92. "The principle that the courts will not question the merits of the dispute on a motion to compel arbitration carries over to the post-award position of refusing to review the arbitrator's findings of fact or application of the law. This doctrine has been reaffirmed this year in California, New York, Connecticut, and Pennsylvania." *Arbitration*, Domke, 1960 ANNUAL SURVEY AMERICAN LAW 375, and authorities there cited.

93. See Rosenberg & Schubin, *supra* note 86, at 466.

94. See *id.* at 466 n.95.

95. See GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE 67 (1958). See also Editorial, *Some Signs of Approaching Disaster*, 1 FOR THE DEFENSE 1 (1960); "Lewis C. Ryan, past president of the American College of Trial Lawyers, in a statement before the Insurance Section of the New York State Bar Association on January 29 in New York City, pointed out that it can now be said with certainty that the danger of losing the court-and-jury-administered system of liability-for-fault-only to commission-administered-liability-without-fault is clear and present, and that the signs of that danger are found in the spoken and written words of judges, tort professors, editors, insurance executives, and office holders in high places." This sounds as though most of the persons mentioned are persons with no special interest to serve!

from the more rapid release of funds set up as reserves for claims. If $100,000 is set up as a reserve and the case is concluded for $50,000 six months later, instead of a year later, the company saves money. Another advantage would be that the prompter determinations of cases would save personnel time. Anything tending to reduce the administrative costs of the industry would help to prevent competition from other systems.

Since there was no contractual relation between the usual third party claimant and the insurance company, or its insured, there would, of course, have been no opportunity for an agreement to arbitrate future disputes. Consequently, any agreement to use arbitration would have to come after the dispute had arisen. This is the area in which expansion of the use of voluntary arbitration could make its greatest strides and could do most to improve the situation in the courts. If insurance companies would promptly seek to obtain a submission to arbitration agreement from the claimants when they find that a claim is in dispute, many such agreements would undoubtedly be obtained. The mere fact that an arbitration hearing would be informal and private would be a great inducement to many persons, not to mention the advantages of a speedier determination, with the attendant advantage of an earlier financial settlement. The latter advantage would not be objectionable to the claimant's attorneys, nor would the first fail to be recognized as an advantage in many cases involving reluctant witnesses. To avoid a reaction from the bar that the insurance companies were attempting to take advantage of claimants by ousting the courts and depriving claimants of representation by counsel,[96] the companies would do well to start with an intensive educational campaign among their own employees, who could thus be prepared to answer such criticisms. If this were followed by a program to inform the bar and the public of the purpose of such efforts, and especially if accompanied by encouragement of claimants to have representation by counsel in any arbitration hearings, the result could not be less than wholesome. It would be entirely possible that after a number of claimants had had experience with arbitration, the advantages would become so well known that claimants and their attorneys would themselves seek from the companies agreements to arbitrate.

Insurance companies, with the collaboration of such organizations as the American Arbitration Association and the American Bar As-

96. See, *e.g.*, S.C. CODE §46-750.23-6 (Supp. 1960): "No such endorsement [Uninsured Motorist] or provision shall contain any provision requiring arbitration of any claim arising thereunder, nor may anything be required of the insured except the establishment of legal liability, *nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.*" (Emphasis added.)

sociation, could furnish appropriate literature with every liability policy issued, explaining arbitration and the advantages to be gained by its use. Every liability policyholder is a potential plaintiff as well as a potential defendant. If he understands what is involved should he become a defendant, he would also understand if he became a plaintiff.

Since the American Arbitration Association has established accident claims tribunals with appropriate rules, it would seem sensible to continue to utilize this mechanism for obtaining arbitrators. But as the volume of business increases, it may well become necessary to devise a system in which the arbitrators on such panels would be compensated for their services.[97] Perhaps it would also be advantageous to adopt a system whereby the arbitrator is chosen by the parties from panels submitted to them, as in commercial and labor arbitration. But in spite of the association rules, there would be nothing to prevent the parties from making an independent choice of the arbitrator if they should so desire.[98] Many lawyers would feel that the right to participate in the selection of the "judge" of the cases to a larger extent than is now possible in the courts would in itself be reason enough to turn to arbitration. This would be particularly true when complicated technical questions of fact were involved. Greater use of arbitration would no doubt build up a reserve of arbitrators who would be specialists in all aspects of automobile accident cases.

Not the least important result of greater use of arbitration would be that those lawyers who serve as arbitrators would have an opportunity to gain greater appreciation of the judge's role in a trial and thus become more effective lawyers, not to mention the opportunity for training as future judges.

There is no reason why the organized bars, national and state, should not vigorously support a program to encourage increased use of arbitration to settle automobile accident claims. If for no other reason, the increase in good will toward the legal profession would justify such action. Too many laymen already feel that lawyers are not interested in adapting the legal system to meet modern demands for justice. Encouragement from the bench would go a long way toward promoting greater acceptability of arbitration. A growing number of states have adopted the pre-trial conference procedure. This gives the judges, federal and state, an ideal opportunity to inquire whether arbitration has been considered. Some judges have spoken out in support of wider use of arbitration; more should do so.

97. Since they are all attorneys, a practice of compensation for such services might eliminate some of the opposition by the bar.

98. The parties may by agreement waive the rules.

Conclusion

Until a more concerted effort has been made to persuade the bench, bar and public to give strong support to increased use of voluntary arbitration in disposing of automobile accident claims, there seems to be no justification for an extension of "compulsory arbitration," as it is practiced in Pennsylvania and contemplated by Senator Scott's bill. The New York City experience of the 1930's and the more recent experience with uninsured motorist endorsements seem to justify the conclusion that voluntary arbitration is a thoroughly competent means by which congestion in the courts can be relieved. At the same time arbitration can provide a more satisfactory method of compensating accident victims than litigation in the courts.