Model Uniform Product Liability Act: An Analysis of Arbitration Claims under Section 116

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A DEQUATE access to effective justice in America today is hampered by clogged courts and mounting case backlogs.\(^1\) Nationally, 23,494 tort cases and 19,928 contract cases in which the United States was not a party, were filed in United States District Courts during the year ending June 30, 1977.\(^2\) Statistics provided by the administrative office of the United States Courts show that 7,396 of those 23,494 tort actions involved claims under $50,000.\(^3\) In an additional 4,724 cases the amount of the claim was not reported. If those cases are prorated among the cases where the amount of the claim was reported, the projected number of tort actions for claims of less than $50,000 rises to 9,257.\(^4\) Using the same criteria, an estimated 12,279 contract cases can be added to the tort case totals.\(^5\) A potential 21,536 cases could thus be eliminated from the crowded federal judicial calendar, if a viable alternative to costly, time-consuming litigation existed.

One of the results of an overburdened judicial system is ever-increasing delay to the parties who must resolve their disputes through litigation.\(^6\) One method of settling disputes in lieu of litigation is arbitration.\(^7\) Arbitration may result from either a

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\(^1\) *Hearings on S. 2253 Before the Subcomm. on Improvements in Judicial Machinery, 95th Cong., 2d Sess. 16 (1978)* (statement of Griffin B. Bell) [hereinafter cited as *1978 Hearings*].

\(^2\) *Id.* at 19.

\(^3\) *Id.*

\(^4\) *Id.*

\(^5\) *Id.*

\(^6\) *Id.*

\(^7\) Omaha v. Omaha Water Co., 218 U.S. 180 (1909); Housing Auth. v.
contract or voluntary agreement to arbitrate, or it may be mandatory if a compulsory arbitration statute is in effect. Each of these forms of arbitration has separate and identifiable characteristics. Voluntary arbitration is usually binding on the parties, carries with it a limited right to appeal decisions, and precludes the parties' right to a trial de novo if one of them is dissatisfied with the result. Mandatory arbitration, on the other hand, usually does not bind the parties, and either party may seek a trial de novo. The use of arbitration in the area of products liability could offer parties a less expensive and more efficient method of settling their disputes.

In addition, the use of arbitration could ease the burden of the federal courts since sixty-five percent of all tort actions filed each year are filed under diversity jurisdiction. Even on the state and local level, arbitration could have a significant impact on lessening the strain caused by overcrowded dockets. For example, in Philadelphia, which has a claim limit of $10,000, 84,210 out of 87,471 available cases have been disposed of since 1971. At the present time, the Philadelphia court system is trying jury cases in which suit was instituted in 1973. In contrast, the great majority of cases heard by arbitration panels in Philadelphia are presented to the panels within one year of their filing date.

With these factors as support, the Department of Commerce included an arbitration provision in the Model Uniform Product


8 Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956). Judicial review of an arbitration award is more limited than judicial review of a verdict at trial; whether the arbitrators misconstrued a contract is not an issue for judicial review, and questions of the fault or neglect of the parties are solely for the arbitrators' consideration.

9 1978 Hearings, supra note 1, at 34.


11 1978 Hearings, supra note 1, at 19.

12 Id. at 74 (statement of Lewis Gordon, chairman, Compulsory Arbitration Committee, Philadelphia Bar Association).

13 Id. at 76.

14 Id. at 74.
Liability Act" (Act). The Act is now being offered to the states for their consideration and adoption. This comment explores how arbitration is used to settle disputes, the constitutionality of mandatory versus voluntary arbitration, and the provisions of section 116 of the Act.  


(A) Applicability.

(1) Any party may by a motion institute a pre-trial arbitration proceeding in any claim brought under this Act, if the court determines that:

(a) It is reasonably probable that the amount in dispute is less than $50,000, exclusive of interest and costs; and

(b) Any non-monetary claims are insubstantial.

(2) Arbitration may not be used if both the claimant and one or more defendants state that they do not want an arbitration proceeding.

(B) Rules Governing.

(1) Substantive Rules. The substantive rules of an arbitration proceeding under this section are those contained in this Act as well as those in applicable state law.

(2) Procedural Rules. These are the procedural rules of an arbitration proceeding under this section. If this section does not provide a rule of procedure, reference may be made to the "Uniform Arbitration Act" or other sources of law. Any reference to other sources of law must conform to the intent and spirit of this section.

*Optional Subsection

(3) Additional Rules and Administration.

(i) The _____ (legislature to specify appropriate state agency or administrative body) is empowered to promulgate additional procedural rules for this section.

(ii) The _____ (legislature to specify American Arbitration Association or similar organization) shall carry out the day-to-day administration of arbitration under this section.

(C) Arbitrators.

(1) Unless the parties agree otherwise, the arbitration shall be conducted by three persons: an active member of the state bar or a retired judge of a court of record in the state; an individual who possesses expertise in the subject matter area that is in dispute; and a layperson.

(2) Arbitrators shall be selected in accordance with applicable state law in a manner which will assure fairness and lack of bias.

(D) Arbitrators' Powers.

(1) Each arbitrator to whom a claim is referred has the power, within the territorial jurisdiction of the court, to conduct arbitration hearings and make awards consistent with the provisions of this Act.

(2) State laws applicable to subpoenas for attendance of wit-
ARBITRATION AS A MEANS TO SETTLE DISPUTES

A brief overview of how arbitration operates to settle civil disputes is necessary to place section 116 of the Act in its proper context and the production of documentary evidence apply in proceedings conducted under this section. Arbitrators shall have the power to administer oaths and affirmations.

(E) Commencement.

Arbitration hearings shall commence not later than thirty (30) days after the claim is referred to arbitration unless, for good cause shown, the court shall extend the period. Hearings shall be concluded promptly. The court may order the time and place of the arbitration.

(F) Evidence.

(1) The Federal Rules of Evidence [or a designated state evidence code] may be used as a guide to the admissibility of evidence in an arbitration hearing.

(2) Strict adherence to the rules of evidence, apart from relevant state rules of privilege, is not required.

(G) Transcript of Proceeding.

A party may have a transcript or recording made of the arbitration hearing at his own expense. A party who has had a transcript or recording made shall furnish a copy of the transcript or recording at cost to any other party upon request.

(H) Arbitration Decision and Judgment.

The arbitration decision and award, if any, shall be filed with the court promptly after the hearing is concluded. Unless a party demands a trial pursuant to subsection (I), the decision and award shall be entered as the judgment of the court. The judgment entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be subject to appeal.

(I) Trial Following Arbitration.

(1) Within twenty (20) days after the filing of an arbitration decision with the court, any party may demand a trial of fact or a hearing on an issue of law in that court.

(2) Upon such a demand, the action shall be placed on the calendar of the court. Except for the provisions of subsection (3), any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At trial, the court shall admit evidence that there has been an arbitration proceeding, the decision of the arbitration panel, and the nature and amount of the award, if any. The trier of fact shall give such evidence whatever weight it deems appropriate.

(4) A party who has demanded a trial but fails to obtain a judgment in the trial court which is more favorable than the arbitration award, exclusive of interest and costs, shall be assessed the cost of the arbitration proceeding, including the amount of the arbitration fees, and—

(i) If this party is a claimant and the arbitration award is in its favor, the party shall pay the court an amount equivalent to interest on the arbitration award from the time it was filed; or

(ii) If this party is a product seller, it shall pay interest to the claimant on the arbitration award from the time it was filed.
Arbitration is a means of settling differences between parties through the investigation and determination of the disputed matter by one or more unofficial persons selected for that purpose. The parties submit the matter to the arbitrator for decision and award in lieu of trial.\textsuperscript{17}

The method of settling disputes by arbitration originated in the common law, but arbitration agreements meant very little because they were not subject to specific enforcement.\textsuperscript{18} Common law arbitration developed through court decisions and today it coexists with statutory arbitration.\textsuperscript{19} Under arbitration statutes, arbitration agreements may be specifically enforced by either party and are not revocable at will.\textsuperscript{20} The essential features of modern arbitration statutes include:

1. Irrevocability of any agreement to submit future disputes to arbitration;
2. Power of a party, pursuant to a court directive, to compel a recalcitrant party to proceed to arbitration;
3. Provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;
4. Authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation, or when arbitrators withdraw or become unable to serve during the arbitration;
5. Restrictions on the court's freedom to review the findings of facts by the arbitrator and his application of the law;
6. Specification of the grounds on which awards may be attacked for procedural defects and of the time limit for such challenges.\textsuperscript{21}

Arbitration traditionally refers to the voluntary agreement of the parties to submit their dispute to an impartial arbitrator for a final disposition.\textsuperscript{22} When voluntary arbitration is used, there are no problems with the right to a jury trial or the right of access

\textsuperscript{17} See note 7 supra.
\textsuperscript{18} M. Domke, The Law and Practice of Commercial Arbitrators 17 (1968).
\textsuperscript{19} Id. at 18. See also Wark & Co. v. Twelfth & Sansom Corp., 107 A.2d 856 (1954). The New York Arbitration Act of 1921 resulted in basic changes in the common law concept of arbitration.
\textsuperscript{20} See M. Domke, supra note 18, at 20.
\textsuperscript{21} Id.
\textsuperscript{22} K. Seide, A Dictionary of Arbitration and Its Terms 27 (1970).
to the courts. The right to a jury trial in civil cases can be waived, and even if there is no express waiver, voluntary entry into a binding arbitration agreement can readily be characterized as a waiver of the right. Similarly, voluntary arbitration agreements do not violate a party's right of access to the courts.

In addition to voluntary arbitration, statutes can mandate that the parties arbitrate their dispute prior to seeking relief in the courts. Few states have adopted compulsory arbitration plans, primarily because of the serious constitutional obstacles such plans present to the right to a jury trial. To avoid constitutional problems, the statutes generally provide for non-binding mandatory arbitration with either side having the right to seek a trial de novo. If a trial de novo is allowed, the statute will withstand either Seventh Amendment challenges, or a state's equivalent to the Seventh Amendment.

The decision of the arbitrator is called the award and is binding on the parties to the extent of all matters properly submitted

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23 See, e.g., City of St. Louis v. International Harvester Co., 350 S.W.2d 782, 785-86 (Mo. 1961). California requires that a contract to arbitrate medical malpractice disputes provide in bold red type that "you are giving up your right to a jury or court trial." Cal. Civ. Proc. Code § 1295 (West. Supp. 1980). Adoption of the notice requirement helps avoid constitutional problems with the right to trial by jury. See generally U.S. Const. amend. VII.


25 Tuschman Steel Co. v. Tuschman, 181 N.E.2d 322, 327 (Ohio 1961). Arbitration statutes do not oust the jurisdiction of the court, but merely provide an additional remedy for the parties. See generally In Re Smith, 381 P. 223, 112 A.2d 625 (1955). The court held that restrictions on obtaining a jury trial did not violate the right of access to the courts.


27 Minneapolis Ry. v. Bombolis, 241 U.S. 211 (1916). See also Chicago R.I. & P. Ry. v. Cole, 251 U.S. 54 (1919), in which the Court discussed the nearly unlimited power of the states to govern the use of a jury in state civil cases; see generally U.S. Const. amend. VII.


29 See note 10 supra.

30 See generally Cal. Const. art. 1, § 7; N.Y. Const. art. 1, § 2; Ohio Const. art. 1, § 5; Pa. Const. art. 1, § 6.
and investigated by him under the authority of the submission. The award can be enforced as an ordinary contract at common law, by a decree of specific performance, or it may be entered and enforced as a court judgment. When the parties voluntarily agree to arbitrate their dispute, courts have uniformly held that the only grounds for vacating the award are those provided by statute. Therefore, the award will not be vacated unless it was procured by corruption or fraud, the arbitrators were partial, there was misconduct on the part of the arbitrators, or the arbitrators exceeded their authority. Since arbitration statutes do not address the effect of errors of law or fact, courts generally have not vacated awards made on the basis of a mere misinterpretation of the law or some error of fact.

The decision to resort to an arbitration panel may result in a radically different consequence than would have been the case with a jury trial. Therefore, the parties to the dispute should carefully consider the advantages and disadvantages of arbitration before electing to utilize the procedure. One of the primary advantages of arbitration is the speed with which a decision is rendered. The judicial system has reached the point where simply adding more judges will not necessarily insure adequate and effective justice for the volume and variety of disputes which the courts face.

31 See M. Domke, supra note 18, at 275.
32 Baldwin v. Moses, 319 Mass. 401, 66 N.E.2d 24 (1946); Olston v. Oregon Water Power & R. Co., 52 Or. 343, 96 P. 1095 (1908); cf. Martin v. Vansant, 99 Wash. 106, 168 P. 990 (1917) (case contrasted the activities of an appraiser and those of an arbitrator and held that the term "award" cannot properly be applied to the findings of an appraiser).
35 See note 10 supra.
36 United States v. Gleason, 175 U.S. 588 (1900); 9 U.S.C. § 13 (1970). A judgment entered under the United States Arbitration Act enforcing an order which confirms, modifies or corrects an award has the same force and effect as, and is subject to, all the provisions of law relating to a judgment in an action, and it may be enforced as if it had been rendered in an action in the court in which it is entered.
38 1978 Hearings, supra note 1, at 16.
The consequence of clogged courts and mounting backlogs is not only an overworked judiciary but also litigants frustrated with unconscionable delays and great expenses in their efforts to resolve their legal disputes. Another advantage obtained when voluntary arbitration is used is a final disposition of the case.

When the parties voluntarily agree to arbitrate their dispute, they waive their right to a jury trial. The only grounds for vacating a voluntary arbitration award are those provided by statute. Typically, statutes do not provide for vacation of an award unless there was gross misconduct by the arbitration panel; therefore, once the award is rendered, the result is final and is not subject to a lengthy appeal process.

Several disadvantages accompany the use of arbitration, and they warrant careful scrutiny by the parties. Arbitration usually carries no constitutionally guaranteed right to trial under either a state or the federal constitution. Arbitrators generally do not have the benefit of judicial instruction concerning the law applicable to the dispute before them. The arbitrators are not required to give the reasons for their decisions nor are they required to make a record of the proceedings, thus considerably reducing the availability and scope of judicial review of an award.

Arbitration Under State Statutes

Voluntary or compulsory non-binding arbitration in civil cases has not been used on the national level, but it has been successfully utilized by several states. In Pennsylvania, arbitration has been used for over twenty-five years. New York, Ohio, Michi-

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59 Id. at 14.
60 Id. at 34.
61 See note 23 supra.
63 Id.
64 See M. Domke, supra note 18, at 158-59.
65 1978 Hearings, supra note 1, at 16.
66 See notes 8, 9 supra.
67 1978 Hearings, supra note 1, at 17.
68 Id.
69 Id.
71 Ohio Rev. Code Ann. § 2711.01 (Page 1979).
gan, Arizona and California all have adopted statutory arbitration schemes, as have many other states.

The use of arbitration at the state level is gradually expanding. Parties to civil litigation are free to arbitrate any dispute within the statutory limits of their state’s arbitration act. State arbitration plans have proven so successful that no state which has initiated one has abandoned it.

Appeal rates following arbitration have ranged from five to fifteen percent of all cases arbitrated. In Philadelphia, arbitration has proven extremely successful, with an appeal rate of less than ten percent. It is also worth noting that the pattern of monetary awards and liability determinations in trial de novo verdicts is markedly similar to that of the arbitration awards. A majority of the trial court awards are for less than $3,000 and close to eighty percent are for less than $5,000.


57 1978 Hearings, supra note 1, at 17.
58 Id.
59 Id. at 64.
60 Id.
Ohio has developed one of the most successful state arbitration plans. It is designed to dispose of a large class of cases, involving relatively small money damages, with a minimum expenditure of judicial time and funds. The system is mandatory but the awards are not binding upon the parties. The arbitrators are trial lawyers who sit in panels of three. They render an award for the plaintiff or for the defendant and determine the amount of damages, but they do not make a formal finding of fact or render an opinion. The Ohio plan has proven so effective that only 1.5 percent of all cases ordered into arbitration are taken before a jury for a trial de novo.

Under the Ohio system, the judge to whom the case is assigned under the individual docket system orders a case into arbitration at the first pre-trial conference. This occurs only after a reasonable time for discovery has elapsed. The arbitrators are instructed that they are not to attempt settlement, nor are they to inquire as to the offers or counteroffers which may have been made. Their function is solely to make a decision. The arbitration system in Ohio coexists with jury trials, and arbitration awards parallel the current jury verdicts, without the extremes that jury trials can produce.

**Constitutional Aspects of Arbitration**

*Basic Constitutional Challenges to Mandatory Arbitration*

State arbitration statutes have been subjected to specific and complex attacks based upon both the federal and state constitutions. Three basic constitutional challenges have been raised: (1)
that the statutes violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;\textsuperscript{29} (2) that they violate the right to free access to the courts under a provision of a state constitution,\textsuperscript{25} and; (3) that they violate the right to a trial by jury as guaranteed by either the state or federal constitution.\textsuperscript{24} With properly worded statutes, mandatory arbitration can withstand each of these challenges.

The equal protection argument is based upon the fact that arbitration legislation establishes a separate classification as it applies only to a particular class or group of claimants.\textsuperscript{25} In an equal protection challenge, the court first determines the degree of judicial scrutiny to which the challenged statute will be exposed.\textsuperscript{26} Traditionally, equal protection challenges have involved one of two standards of review: the strict scrutiny test or the rational basis test.\textsuperscript{27} The strict scrutiny test is invoked when a statute creates a suspect classification\textsuperscript{28} or when it infringes upon fundamental rights.\textsuperscript{29} Classifications based upon national origin and race traditionally have been defined as suspect.\textsuperscript{30} Fundamental rights include the right of interstate travel\textsuperscript{31} and the right of procreation.\textsuperscript{32}

\textsuperscript{22} U.S. CONST. amend. XIV, cl. 1.
\textsuperscript{23} Lenore, Mandatory Medical Malpractice Panels—A Constitutional Examination, 44 INS. COUNSEL J. 416 (1977); Stewart, Constitutionality of Remedial Legislation in the Field of Professional Liability, 18 FOR DEF. 73 (1977).
\textsuperscript{24} See note 30 supra.
\textsuperscript{25} Strykowski v. Wilkie, 81 Wis. 2d 291, 299, 261 N.W.2d 434, 442 (1978). The court held that a statute which applied only to a particular class of persons (medical malpractice claimants) did not violate constitutional guarantees of equal protection and of due process, did not constitute an unlawful delegation of judicial authority, and did not impair the right of trial by jury.
\textsuperscript{26} P. FREUND, CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS 914-16 (1977).
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Loving v. Virginia, 388 U.S. 1, 9 (1967). A Virginia statute which prevented marriages solely on the basis of racial classifications was violative of the due process and equal protection clauses of the fourteenth amendment.
\textsuperscript{31} Shapiro v. Thompson, 394 U.S. 618, 631 (1969). The Supreme Court held that prohibiting the payment of welfare benefits to parties who had been county residents for less than one year created a classification which constituted an invidious discrimination and which denied those residents the equal protection of the law.
\textsuperscript{32} Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The Supreme Court
For a statute to withstand constitutional challenges under this test, the state must demonstrate that the statute satisfies a compelling state interest and that no less drastic alternative can accomplish the compelling government interest.

The rational basis test is applied when the statutes do not involve a suspect classification or fundamental right. A statute is constitutional under this test if a reasonable relationship exists between the objective of the statute and the classification created. Statutes analyzed under this minimal level of scrutiny are almost always upheld.

Arbitration statutes which require a screening panel for claims or some other form of pre-trial review have been challenged as a denial of free access to the courts. The fundamental argument is that such a requirement imposes a financial burden upon the plaintiff in addition to the expenses of trial and thus restricts his right of free access to the courts. State courts unanimously have refused to hold this type of requirement unconstitutional. The approach of the Florida Supreme Court is typical. In Carter v. Sparkman, the court noted that because of the constitutional guarantee of access, courts are generally opposed to the imposition reversed an Oklahoma statute requiring sterilization of certain habitual criminals, ruling that it violated the fourteenth amendment rights of those parties.

Roe v. Wade, 410 U.S. 113, 154 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). In Roe v. Wade, the Supreme Court held a Texas statute which prohibited abortions during any stage of pregnancy, except to save the mother’s life, unconstitutional, because the state could not show a compelling governmental interest in formulating the statute.

Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 483 (1965). In Griswold, the Supreme Court held that the fourteenth amendment prohibits states from abridging fundamental rights if the state cannot prove a compelling governmental interest and the absence of alternatives which would be less intrusive upon the right.

McGowan v. Maryland, 366 U.S. 420, 426 (1961). The Supreme Court found that a reasonable relationship existed between an ordinance which required some stores to be closed on Sundays and the objectives of the ordinance.

See P. Freund, supra note 76, at 914-16.


Id.

Id.


Id. at 805.
of any burden on the rights of aggrieved persons to enter the courts; however, reasonable restrictions might be prescribed by law.\textsuperscript{92} After discussing the Florida act\textsuperscript{93} which provided for a re-view panel in medical malpractice cases, the court held: "Even though the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance, we do not deem it sufficient to void the medical malpractice law."\textsuperscript{94}

In Strykowski v. Wilkie,\textsuperscript{95} the plaintiff claimed that his right of free access to the courts was violated by several sections of the Wisconsin statute which provided for a screening panel.\textsuperscript{96} In up-holding the constitutionality of the statute, the court applied this general rule:

Whatever the precise status of the right of access to the courts, it is clear that due process is satisfied if the statutory procedures provide an opportunity to be heard in a court at a meaningful time and in a meaningful manner . . . . Due process is flexible and requires only such procedural protections as the particular situation demands.\textsuperscript{97}

The Massachusetts Supreme Judicial Court in Paro v. Long-wood Hospital\textsuperscript{98} held that the requirement of the Massachusetts act that a plaintiff post a $2,000 bond as a condition to pursuing his claim in court, after he had suffered an adverse ruling from the screening panel, did not violate the principle of free access to the courts.\textsuperscript{99} Referring to the act's provision allowing the trial judge to reduce the amount of the bond for an indigent plaintiff,\textsuperscript{100} the court avoided the constitutional issue in the case because the statute gave the judge broad discretion to set the appropriate amount of bond.\textsuperscript{101} The court noted that as long as the discretion was exercised without unreasonably prohibiting meritorious claims,

\textsuperscript{92} Id.
\textsuperscript{93} Fla. Stat. Ann. § 682.01 (West 1980).
\textsuperscript{94} Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976).
\textsuperscript{95} 81 Wis. 2d 491, 261 N.W.2d 434 (1978).
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 501-03, 261 N.W.2d at 444-46.
\textsuperscript{98} 369 N.E.2d 985 (Mass. 1977).
\textsuperscript{99} Id. at 990.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
no constitutional violation would exist.\textsuperscript{102}

Virtually every state constitution contains a provision that guarantees the right to trial by jury.\textsuperscript{103} Most such provisions provide that the right to trial by jury shall remain inviolate.\textsuperscript{104} Challenges to state legislation establishing mandatory arbitration have relied upon the applicable state constitutional provisions because the right to trial by jury in civil matters guaranteed by the Seventh Amendment to the United States Constitution has not been applied to the states.\textsuperscript{105}

The United States Constitution does not prescribe the stage of an action at which trial by jury must be conducted, or the conditions which may be imposed upon a demand for a jury trial.\textsuperscript{106} The Fourteenth Amendment\textsuperscript{107} does not guarantee that the right to trial by jury in civil cases will exist in state courts.\textsuperscript{108} Almost every state constitution contains such a guarantee, however, stated in terms that have been construed to preserve the right to a jury trial as it existed at common law.\textsuperscript{109}

The only other requirement that restrictions on the right to a jury trial must meet, on both the state and federal level, is that they satisfy the reasonableness test articulated in \textit{Capital Traction Co. v. Hof}.\textsuperscript{110} In \textit{Hof} the plaintiff challenged the constitutionality of a District of Columbia statute which gave justice of the peace courts the authority to render verdicts by using a jury, subject to a trial de novo by either party.\textsuperscript{111} The Court held that the legislature in distributing judicial power should be given considerable discretion unless the right to trial by jury is taken away by the act.\textsuperscript{112} Recent state court decisions have adopted the reasonable-
ness test of Hof and have overruled objections to mandatory arbitration if a trial de novo is available to the parties.\(^{113}\)

In 1976, a compulsory arbitration requirement was held to violate the right to trial by jury guaranteed by the Ohio Constitution in Simon v. St. Elizabeth Medical Center.\(^{114}\) In Simon, the arbitration award was final and there was no provision for a trial de novo.\(^{115}\) The court held that requiring medical malpractice claimants to undergo compulsory arbitration without a trial de novo violated both the Ohio Constitution and the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution.\(^{116}\)

In contrast to the result in Simon, courts have repeatedly sustained mandatory arbitration provisions if they state that the decision of the arbitrator is not final. The Supreme Court of Arizona held that an Arizona act which required parties to submit their malpractice claims to a medical liability review panel\(^{117}\) did not violate the right to jury trial, even though the panel's findings could be introduced at a subsequent jury trial.\(^{118}\) The court said "[t]he jury remains the final arbiter of the issues and facts presented. The statute does not take away the right of the party to have the matter finally and fully determined by the jury."\(^{119}\)

In another case involving a medical malpractice review panel,\(^{120}\) the Supreme Court of Nebraska held that the Nebraska act only provided for a review to determine if there was any basis for the claim.\(^{121}\) If the plaintiff disagreed with the determination of the panel, he still could obtain access to the courts.\(^{122}\) Answering the


\(^{114}\) 355 N.E.2d 903 (Ohio 1976).

\(^{115}\) Id. at 907.

\(^{116}\) Id. at 906-07.


\(^{119}\) Id.


\(^{121}\) 199 Neb. at 103, 256 N.W.2d at 663.

\(^{122}\) Id. at 104, 256 N.W.2d at 664.
defendant's contention that use of the medical review panel interfered with the constitutional right to trial by jury because its report could be introduced as evidence and might be adverse to the plaintiff's ability to obtain a favorable jury verdict, the court held: "Historically, jurors for the most part have proven their independence. They guard their roles with a unique jealousy."\(^\text{123}\)

The Court of Appeals of Maryland in *Attorney General of Maryland v. Johnson*\(^\text{124}\) considered a health care malpractice statute which required that claims be presented to an arbitration panel for an initial assessment of liability and damages before they could be brought before a trial court. In holding for the defendants, the court noted that the right to trial by jury is violated only where the statute closes the courts to the litigants and makes the decision of the arbitrator final and binding upon the parties.\(^\text{125}\) The statute in *Johnson* merely required that malpractice claims be submitted to nonbinding arbitration before suit could be filed.\(^\text{126}\) The decision of the panel was not a final determination of the controversy.\(^\text{127}\)

**Constitutional Problems of Voluntary Arbitration**

While it is clear that statutes cannot mandate that parties be bound by the results of compulsory arbitration, voluntary arbitration is usually binding upon the parties and judicial review of the arbitrator's decision is limited.\(^\text{128}\) Binding arbitration is a process in which the parties voluntarily submit specified present or future controversies to a neutral party for final determination of the issues.\(^\text{129}\) When voluntary arbitration is conducted according to the terms of the arbitration agreement and the legal prerequisites, the determination of the arbitrator is enforceable as a court judgment.\(^\text{130}\) Voluntary agreements to arbitrate are made enforceable


\(^{125}\) Id. at 177, 395 A.2d at 66.


\(^{128}\) See note 8 supra.

\(^{129}\) 1978 Hearings, supra note 1, at 34.

by statute in forty states.\textsuperscript{131} Voluntary arbitration can be binding upon the parties without violating their constitutional guarantee of a trial by jury because the agreement to arbitrate constitutes a waiver of the constitutional right.\textsuperscript{132}

The Supreme Court has ruled that a voluntary agreement to arbitrate should be accorded the same deference as is given to any other clause by which the parties select a specific forum.\textsuperscript{133} In \textit{Wilko v. Swani},\textsuperscript{134} the Court held that reasonable interpretations of law made by the arbitrators are not subject to judicial review for errors in interpretation; only a manifest disregard of the law by the arbitrators would prompt judicial review.\textsuperscript{135}

Furthermore, courts uniformly have held that the only grounds for vacating a voluntary arbitration award are those provided by statute.\textsuperscript{136} Typically, an arbitration statute provides for vacating an award where it was procured by corruption or by fraud, where the arbitrators were partial, where there was misconduct by the arbitrators, or where the arbitrators exceeded their authority.\textsuperscript{137} In addition to withstanding constitutional attacks regarding the denial of the right to trial by jury, voluntary arbitration agreements can withstand constitutional attacks based upon their supposed denial of access to the courts and their alleged violation of equal protection under the Fourteenth Amendment for the same reasons that mandatory arbitration statutes withstand such attacks.\textsuperscript{138}

Arbitration statutes that change the substantive or procedural rights of the parties, as those rights were defined by the common law, have been upheld over numerous constitutional objections.\textsuperscript{139}

\textsuperscript{131}Lash, \textit{Arbitration of Medical Malpractice Disputes as a Response to the Medical Malpractice Crisis: Panacea or Pandora's Box for Insurers?}, 46 INS. COUNSEL J. 102, 105 (Jan. 1979).


\textsuperscript{134}346 U.S. 427 (1953).

\textsuperscript{135}Id. at 436.


\textsuperscript{137}See, e.g., 9 U.S.C. § 10 (1976); CAL. CIV. PROC. CODE § 1286.2 (West 1972); LA. REV. STAT. ANN. § 9:4210 (West 1951).

\textsuperscript{138}See notes 71-75 supra, and accompanying text.

\textsuperscript{139}See In Re Smith, 381 Pa. 223, 112 A.2d 625 (1955).
Courts of various jurisdictions have held that arbitration statutes do not deprive the parties of their property without due process of law,140 that the statutes do not unconstitutionally confer judicial power upon private individuals,141 that they do not violate constitutional provisions which vest the judicial power solely in duly constituted courts,142 and that they do not impair the obligation of contracts.143 The parties waive these rights when they voluntarily submit to arbitration.144

ARBITRATION PROVISIONS OF SECTION 116 OF THE MODEL UNIFORM PRODUCT LIABILITY ACT

With the tremendous judicial backlog of cases in mind,145 the Department of Commerce included an arbitration provision in the Model Uniform Product Liability Act (Act) when it was published on October 31, 1979.146 One of the primary purposes of the Act, which is currently being offered to the states for their consideration, is to ensure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries.147 Prior to formulating the Act, the Department of Commerce had chaired an eighteen month long interagency study of product liability problems and had issued an extensive report. The origin of the Act can be traced to that final report which examined product liability problems from the viewpoints of the manufacturer, the user of component parts (such as the airline industry) and the injured consumer.148

The Final Report of the Federal Interagency Task Force on Product Liability149 (Task Force Report) found that there was a

141 See Snyder v. Superior Court of Amador County, 24 Cal. App. 2d 263, 265, 74 P.2d 782, 784 (1938).
144 Id. at 264, 130 N.E. at 291.
145 1978 Hearings, supra note 1, at 16.
147 Id.
149 Id.
need for uniformity in product liability insurance rates because they are set on a national basis. This problem does not exist with other forms of liability insurance because the rates are set on a state-by-state basis. Stabilization of product liability insurance rates could have a significant effect on the airline industry by giving the industry a degree of control over one of its costs, and could even result in decreased airline fares.

The model law is designed to meet the needs of the users, sellers and insurers of products. Sellers and insurers require uniformity in product liability law so that they can know the rules by which they will be judged. Users, on the other hand, are entitled to assurances that their rights will be protected and that those rights will not be restricted by reform legislation drafted in a crisis atmosphere. Six criteria were used in formulating the provisions of the model law: (1) to ensure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries; (2) to ensure the availability of affordable product liability insurance with adequate coverage to protect sellers that engage in reasonably safe manufacturing practices; (3) to give incentives for loss prevention on the parties who are best able to accomplish that goal; (4) to expedite the reparations process from the time of injury to the time the claim is paid; (5) to minimize the total amount of accident costs, prevention costs and transaction costs, and; (6) to use clear and concise language.

The Task Force Report suggests that mandatory non-binding arbitration may result in more accurate decisions, that it may reduce the overall costs of litigation, and that it may expedite the decision-making process in product liability cases. The Task Force Report concluded that cases which were submitted to arbitration would be decided more accurately because a small group, with a member who is an expert in the field, should be more able

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144 Fed. Reg. 62,714 (1979). (Other forms of liability insurance, such as medical malpractice and automobile insurance are set on the state level.)
151 Id.
153 Id.
154 Id.
155 Id. at 62,714-15.
156 Id. at 62,742 (section 116(A)(2)).
to comprehend the esoteric details of complex product liability cases. Over time, the arbitration process would develop a resource pool of neutral experts who would be less easily misled in technical areas than a jury of laypersons. In addition, the arbitrators themselves would be less affected by the emotional aspects of the case and by the artistry of counsel. Finally, the privacy of arbitration compared to the openess of a judicial proceeding, would prompt more complete revelation of special manufacturing designs or processes, which in turn, would permit more accurate judgments.

Contrary to the recommendation of the Task Force Report, section 116 of the Act does not provide for mandatory arbitration. Instead, section 116 provides for voluntary non-binding arbitration, with the possibility of being assessed costs as the only deterrent to demanding a trial following arbitration.

Analysis of Section 116

Delays in the reparations process seriously injures claimants who cannot afford long delays between the time they are injured and the time they are paid. The Act, therefore emphasizes arbitration and other devices that will help to expedite the reparations process. Section 116 of the Act discusses the availability of arbitration to settle adverse claims.

Under section 116 any party, by filing a motion, may request that a non-binding, pre-trial arbitration proceeding be instituted for any claim brought under the Act, if the court determines that it is reasonably probable that the amount in dispute is less than $50,000, exclusive of interest and costs, and that any non-monetary claims are insubstantial. Arbitration under the Act is strictly vol-

\[^{157}\text{id. at } 235.\]
\[^{158}\text{id.}\]
\[^{159}\text{id.}\]
\[^{160}\text{id.}\]
\[^{162}\text{id. at } 62,742-43.\]
\[^{163}\text{id. at } 62,715.\]
\[^{164}\text{id.}\]
\[^{165}\text{id. at } 62,742-43.\]
\[^{166}\text{id. at } 62,742 \text{(Section 116(A)(2))}.\]
untary; it may not be used if the claimant or any of the defendants state that they do not desire an arbitration proceeding.\(^{167}\)

The substantive rules of an arbitration proceeding under section 116 are used in addition to the applicable state law.\(^{168}\) Procedural rules are also contained within the Act, where a procedural point is not covered by the Act, reference to the Uniform Arbitration Act\(^{169}\) or to any other source of law which conforms to the intent and spirit of the Act is proper.\(^{170}\) The procedural framework of section 116 is constructed to assure that states have the flexibility to meet their individual needs, therefore, the states have considerable freedom in selecting arbitration procedures.\(^{171}\)

**Panel Selection Procedure**

Unless the parties agree otherwise, arbitration under the Act is conducted by a panel of three persons: (1) an active member of the state bar or a retired judge of a court of record in the state; (2) an individual who possesses expertise in the subject matter of the dispute, and; (3) a layperson.\(^{172}\) The Act provides that the arbitrators are to be selected in accordance with state law in a manner which will assure their fairness and lack of bias.\(^{173}\) The Act does not fix the amount of compensation to be paid to the arbitrators, leaving the determination of the appropriate payment to the individual states.

The composition of the arbitration panel assures the parties that an individual familiar with the scientific nature of product liability problems will hear their dispute, and should serve as a deterrent to the presentation of biased expert testimony.\(^{174}\) In addi-

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\(^{167}\) *Id.* (section 116(A)(1)(c)).

\(^{168}\) *Id.* (section 116(B)(1)).


\(^{170}\) 44 Fed. Reg. 62,714, 62,742 (section 116(B)(1)).

\(^{171}\) *Id.* at 62,742 (section 116(B)(3)(i), (ii)). The Act contains two optional clauses which deal with the procedural aspects of the arbitration provision. The first optional provision allows the state legislature to specify that a particular state agency or administrative body is empowered to promulgate additional procedural rules to supplement those in the section. The second provision allows the state legislature to specify that the American Arbitration Association or a similar organization should carry out the day-to-day administration of arbitration under section 116.

\(^{172}\) *Id.* (section 116(C)(1)).

\(^{173}\) *Id.* (section 116(C)(2)).

\(^{174}\) *Id.* at 62,743.
tion, the presence of a layperson on the panel is intended to ensure that the consumer perspective toward product liability and product safety is represented. 179

While the Act does not describe how a state is to select its arbitrators or specify the compensation they are to receive, several procedures are available to aid the parties in selecting qualified persons for the panel. To ensure that the panel is impartial, a state may require that each candidate discloses any personal acquaintance he may have with the parties or their counsel and that each candidate submit to voir dire examination. 179 The arbitrators may be court-appointed, or the parties and the court may combine to select them. 177 The state also retains the option to have an outside body, such as the American Arbitration Association, 178 select a pool of candidates and then to allow each party to reject certain candidates, with the panel being selected from the remaining candidates in accordance with the parties' preferences. 179

The Act is silent on the question of when the arbitration panel surrenders its authority but under general arbitration provisions, the authority of the arbitrators terminates with the making of a valid, final award. 180 After that time, they are powerless to modify or revoke the award, or to make a new award relating to the same issues. 181 An exception to this rule exists when the parties agree to further action by the arbitrators as a continuation of the original submission after a supposedly final award has been made; in such cases, the panel is again clothed with its former authority. 183

179 Id. at 62, 744.
178 The American Arbitration Association is primarily used to settle commercial disputes and it conducts its hearings under an extensive set of rules.
181 Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 553 (1957). Where arbitrators returned an award that purported to be complete and final they became functi officio, and the fact that the award was subject to successful attack in the courts did not restore authority to the arbitrators to make a supplementary award.
In conducting the hearing, the arbitration panel must observe the jurisdictional boundaries conferred upon it by the agreement of the parties. Since the function of the arbitrators is analogous to that of a court and since their duties require that they exercise their judgment, arbitrators enjoy immunity from private civil actions for damages caused by the judicial acts necessary to arrive at their decision. They are not liable for negligence, fraud or misconduct, even where it is sufficient to invalidate the award.

Rules of Evidence in Arbitration Proceedings

The essence of the arbitration process is its freedom from the formalities of ordinary judicial procedure. Respecting this concept, the Act provides that strict adherence to the rules of evidence, other than the rules of privilege, is not required. The Federal Rules of Evidence are suggested as a guide, but a state can designate that its own evidence code be followed.

It is a well-established principle of arbitration law and practice that judicial rules of evidence regarding the admissibility of evidence will not prevail. The fundamental differences between the factfinding process of a judicial tribunal and that of a panel of arbitrators are summarized in Commercial Solvents Corp. v. Louisiana Liquid Fertilizer. The court ruled that arbitrators are not bound by the rules of evidence and that they may consider hearsay and other incompetent testimony; that their decision may be against the weight of the evidence presented; that they may draw upon their personal knowledge in making an award; that they need not disclose the facts or the reasons behind their award;

185 See Sapp v. Barenfeld, 34 Cal. 2d 431, 212 P.2d 233 (1949); Cassara v. Wofford, 55 So. 2d 102 (Fla. 1951).
186 44 Fed. Reg. 62,714, 62,742 (1979) (section 116(F)(2)).
187 Id. at 62,742 (section 116(F)(1)).
that they are not subject to judicial review on the issue of their allegedly erroneous construction of a contract; that they have exclusive authority to decide questions of the parties' fault or neglect; and that their errors of judgment are merely a risk of selecting arbitration.\footnote{Id. at 362.}

The common law rules of evidence are not binding upon and do not apply to arbitration panels.\footnote{Id. at 362.} Arbitrators have discretionary power to admit any evidence the parties may wish to present through witnesses or by documents.\footnote{Brotherhood of R.R. Trainmen v. St. Louis Southwestern Ry. Co., 252 F. Supp. 961 (D.D.C. 1966).} Rulings of arbitrators on the admissibility of evidence are not subject to judicial review, since such a practice would "result only in waste of time, the interruption of the arbitration proceeding, and encourage delaying tactics . . . ."\footnote{Compania Panamena Maritima San Gerassimo, S.A. v. J.E. Hurley Lumber Co., 244 F.2d 286, 289 (2d Cir. 1957).}

In Petroleum Separating Co. v. Interamerican Refining Corp.,\footnote{Id.} the court noted that in a traditional arbitration proceeding the arbitrator could admit hearsay evidence.\footnote{Id. at 362.} When one of the parties objected to the admission of the hearsay statements, the court held that "[i]f the parties wish to rely on such technical objections they should not include arbitration clauses in their contracts."\footnote{Id.} While an award will not be annulled because the arbitrators admitted hearsay evidence, the practical rule requires that such evidence be admitted sparingly as the party who made the original statement cannot be examined to ascertain the circumstances under which the statement was made.\footnote{Petroleum Separating Co. v. Interamerican Refining Corp., 296 F.2d 124, 130 (2d Cir. 1961).}

Where exceptions to the rule against hearsay have been established, either by statute or by the courts, arbitrators have been inclined to apply them.\footnote{F. KELLOR, ARBITRATION IN ACTION 100-01 (1941).} For example, exceptions applicable to

\footnote{\textit{Id.} at 362.}
\footnote{Compania Panamena Maritima San Gerassimo, S.A. v. J.E. Hurley Lumber Co., 244 F.2d 286, 289 (2d Cir. 1957).}
\footnote{Id. at 362.}
\footnote{296 F.2d 124 (2d Cir. 1961). See also Weinstein, \textit{Probative Force of Hearsay}, 46 IOWA L. REV. 331, 347 (1960).}
\footnote{Petroleum Separating Co. v. Interamerican Refining Corp., 296 F.2d 124, 130 (2d Cir. 1961).}
\footnote{Id.}
\footnote{F. KELLOR, ARBITRATION IN ACTION 100-01 (1941).}
\footnote{Id. at 101.}
admissions, to declarations against interest, and to business entries are usually enforced by arbitrators.\textsuperscript{200} If doubt exists whether certain evidence is admissible under one of the exceptions, the better practice is to admit it because the exclusion of relevant evidence may lead to an annulment of the award.\textsuperscript{201}

Formal rules concerning the admissibility and the weight and sufficiency of evidence do not bind arbitrators unless a statute\textsuperscript{202} or the agreement to arbitrate\textsuperscript{203} directs that they shall do so. In the absence of such a statute or an agreement, the requirement that evidence, if offered, will be received and considered.\textsuperscript{204} Arbitrators should balance the evidence they receive from each party. They should be careful not to receive excessive evidence from one party while excluding evidence from the other party.\textsuperscript{205} Even if an arbitrator is satisfied that a sufficient amount of evidence has been received, it is better for him to accept additional evidence because courts rarely vacate awards due to the admission of questionable testimony.\textsuperscript{206}

Arbitrators have the discretion to solicit evidence by questioning a witness themselves\textsuperscript{207} and to request that a party's attorney produce additional evidence which may prove pertinent in supporting or disallowing the claim.\textsuperscript{208} One of the principal differences between a trial and an arbitration hearing is that the fact-finder at a trial, either a judge or a jury, must rely entirely on the facts adduced by the witnesses, while the arbitrators may draw upon their personal knowledge in making the award\textsuperscript{209} and even them-

\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Burchell v. Marsh, 15 U.S. (17 How.) 344 (1856). (Although admissibility of evidence is predominantly a question of law, it may be ruled on by arbitrators.)
\textsuperscript{203} Pacific Vegetable Oil Corp. v. C.S.T. Ltd., 29 Cal. 2d 288, 174 P.2d 441 (1946). Where a controversy is submitted to arbitration under local rules that permit a written statement of facts and written arguments, no special proof beyond such statements is required.
\textsuperscript{205} M. Domke, supra note 18, at 237.
\textsuperscript{207} Graham v. Graham, 9 Pa. 254 (1848).
\textsuperscript{208} See M. Domke, supra note 18, at 237.
\textsuperscript{209} American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448 (2d Cir. 1944).
selves testify where the exigencies of the case require this extraordinary procedure.\textsuperscript{310}

Receiving evidence in the presence of the parties is a fundamental right applicable to arbitration proceedings. It is grounded in both practice and law and is based upon a party's right to hear what is said against him and to have the opportunity to reply to such statements.\textsuperscript{311} An exception to the presence requirement is when a party has been notified of a hearing and fails to attend. This failure to attend is considered a waiver of the right.\textsuperscript{312}

\textit{Judicial Review and Requests for New Trials}

An award before a court for any purpose will be construed to be upheld if at all possible. Every factor will be interpreted in its favor, consistent with the law. Courts favor arbitration proceedings since they provide a quick, amicable and inexpensive method of settling private disputes, and they will make every fair presumption to sustain awards.\textsuperscript{313} A court will enforce or set aside an award based upon its validity, but the merits of a controversy submitted to arbitration and the amount of the award are not subject to judicial review.\textsuperscript{214} The form and sufficiency of the evidence upon which the arbitrators base their decision likewise are not matters for judicial review.\textsuperscript{315} Any basis for review of an award which does exist must be established by statute; thus an award generally will not be vacated unless it was procured by corruption or fraud, unless the arbitrators were not impartial, unless there was misconduct by the arbitrators, or unless they exceeded their authority.\textsuperscript{316}

Section 116 allows either party to exercise its option to demand a jury trial following arbitration; however, the demand must be made within twenty days of the issuance of the award.\textsuperscript{317} If the

\begin{footnotesize}
\textsuperscript{310} Graham v. Graham, 9 Pa. 254 (1848).
\textsuperscript{311} See M. Domke, supra note 18, at 101.
\textsuperscript{312} Id.
\textsuperscript{214} Park Constr. Co. v. Independent School Dist., 216 Minn. 27, 11 N.W.2d 649 (1954).
\textsuperscript{315} Firemen's Fund Ins. Co. v. Flint Hosiery Mills, Inc., 74 F.2d 533 (4th Cir. 1935).
\textsuperscript{316} See note 36 supra.
\textsuperscript{317} 44 Fed. Reg. 62,714, 62,742 (1979) (section 116(1)(1)).
\end{footnotesize}
request is timely made, the case will be placed on the trial calendar. At trial, the court will admit evidence showing that an arbitration proceeding was held, documenting the decision of the arbitration panel, and describing the nature and amount of the award, if one was made. The trier of fact is allowed to weigh this evidence as it deems appropriate.

In addition to admitting evidence of the results of the arbitration hearing, section 116 contains other provisions which serve as deterrents to ill-considered appeals. If a party appeals and fails to obtain a judgment more favorable to it than was the arbitration award, the court will assess the cost of the arbitration proceeding against the party. If this appealing party is a claimant and the arbitration award was in its favor, the party shall pay to the court an amount equivalent to interest on the award from the date it was issued. If this appealing party is a seller of the product, the seller shall pay interest to the claimant on the arbitration award from the date it was issued.

CONCLUSION

One of the basic functions of any arbitration is to expedite the reparations process from the time of the injury until the claim is paid. This objective is accomplished by removing the parties and their disputes from crowded judicial dockets. The objective is defeated if a substantial number of cases are restored to the dockets because one of the parties was dissatisfied with the results of the arbitration proceeding.

An initial problem which will confront judges in their application of section 116 is the determination of which claims fall below the $50,000 limit of the statute. The only language section 116 offers to resolve this problem is the phrase “it is reasonably probable that the amount in dispute is less than $50,000.” No

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218 Id. at 62,742 (section 116(I)(2)).
219 Id. (section 116(I)(3)).
220 Id.
221 Id. at 62,743 (section 116(I)(4)(i), (ii)).
222 Id. (section 116(I)(4)).
223 Id. (section 116(I)(4)(i)).
224 Id. (section 116(I)(4)(ii)).
225 Id. at 62,742 (section 116(A)(1)).
guidelines are provided for making the determination of whether
the value of a claim is more or less than $50,000. Since section
116 deals with voluntary arbitration, this potential problem might
never sufficiently mature to invoke a decision by a court because
the parties will have agreed that their dispute falls below the
$50,000 limit.

Another criticism of the Act is that the rules of evidence under
which the arbitration will be conducted are not articulated with
a sufficient degree of definiteness. Section 116 provides that the
Federal Rules of Evidence may be adopted for arbitration pro-
ceedings or that a state can adopt its own evidence code. The
Act also provides that strict adherence to the rules of evidence,
with the exception of those rules pertaining to privilege, is not
required. The Act gives no guidance on the question of how
evidentiary conflicts should be resolved. After reading section 116,
the parties would not know that hearsay statements are accept-
able testimony in an arbitration proceeding, that the decision of
the arbitrators may be against the weight of the evidence, that
the arbitrators may draw upon their personal experience when
making an award, or that the award is not subject to judicial
review.

The Act is also deficient in failing to inform its readers that
even the common law rules of evidence are not binding upon arbi-
tration panels. Rulings of arbitrators on the admissibility of
evidence are not subject to judicial review, but the Act fails to
address the problem. Granted, the essence of arbitration un-
doubtedly is its informal nature, but the Act leaves too many ques-
tions unanswered in the area of evidentiary procedures.

The major criticism of the Act is that its drafters elected to have
voluntary instead of mandatory arbitration. The decision to utilize
voluntary arbitration probably will have a debilitating effect on

\[\text{[References]}\]
one of the stated goals of the Act, "[t]o expedite the reparation process from time of injury to the time the claim is paid." This is especially true since the voluntary arbitration is also non-binding. Arbitration, under the traditional definition, is "the referral of a dispute by voluntary agreement of the parties to one or more impartial arbitrators for a final and binding decision" (emphasis added).

The decision to adopt voluntary, non-binding arbitration is even more puzzling when compared to the successful state arbitration models, which use compulsory non-binding arbitration. Under compulsory arbitration statutes, all cases which meet the statutory qualifications are removed from the judicial framework and heard by arbitration panels. Former United States Attorney General Griffin Bell has claimed that mandatory arbitration could significantly reduce the backlog of cases clogging the federal courts since many actions filed in federal courts are resolved by settlement before trial, and many other settlements occur only after substantial preparation expenses have been incurred.

The potential effectiveness of section 116 in reducing the number of product liability claims facing the courts must be questioned since the section has taken its provisions from two different types of arbitration statutes and has effectively discarded the best parts of each type. To be effective by traditional standards, arbitration should either be voluntary and binding or it should be mandatory with either party being given the right to appeal the decision and the award. Each of these systems has proven independently effective, but they are incompatible when combined.

When binding voluntary arbitration is used, courts are assured that they will never hear the case because the decision of the arbitrator is final and is not subject to appeal. Likewise, when mandatory non-binding arbitration is used, courts are similarly assured that the vast majority of cases will be disposed of outside the judicial framework since appeals historically have occurred in no more than fifteen percent of all cases.

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234 Id. at 62,715.  
235 1978 Hearings, supra note 1, at 34.  
236 Id. at 16.  
237 Id. at 36.  
238 Id. at 42.
Under section 116 of the Act, the primary incentives for the parties to submit their dispute to voluntary arbitration would be the possibility of avoiding long delays and the likelihood that a shorter hearing would result. Another possible inducement to the parties would be that less expensive preparation is required for an informal arbitration hearing than for a formal trial. It has been estimated, however, that in cases involving claims of less than $50,000 the cost of preparing and conducting a formal trial would not be substantially more than the expenses incurred in arbitration.\textsuperscript{329}

The penalties for unnecessarily requesting a trial de novo are minimal under section 116. If a litigant demands a trial following arbitration and fails to obtain a judgment more favorable to him than was the arbitration award, he is required to pay the costs of arbitration.\textsuperscript{340} Since the expenses for an arbitration are usually rather small and since the arbitrator's fees are generally not more than $150, the proposed disincentive will seldom be significant. An additional penalty forces the appellant to pay interest on the arbitration award from the date the case was filed, but this would be a substantial penalty only if a large arbitration award were involved.

It is doubtful that section 116 will have any significant impact on reducing the number of product liability cases which enter our already overburdened judicial system. Since section 116 only provides for voluntary arbitration, many claims which would be decided by arbitrators under a mandatory system will escape the arbitration process. In addition, the disincentives imposed by section 116 are not sufficient to serve as an economic deterrent to parties who desire to demand a trial following arbitration. Finally, statutes which provide for a trial de novo following arbitration involve significantly lower claim limits than the $50,000 ceiling of section 116. Rates of appeal when the claims involve up to $50,000 will probably be significantly higher than the five to fifteen percent rate experienced by various states, thus requiring many parties to incur the costs of two trials.\textsuperscript{341}

\textsuperscript{329} Id.


\textsuperscript{341} 1978 Hearings, supra note 1, at 93.