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In the words of ABA President Bill Robinson,

“State court underfunding is a threat to our system of justice and all we believe in as Americans and as an association. It is harming clients, slowing our nation’s economic recovery and undermining our liberty.”
Cries of alarm about underfunded courts, crowded dockets and justice delayed (which we all know is justice denied), have been sounded by lawyers and courts for over a half a century.
Some suggest this problem goes back, not just these sixty years, but for hundreds, or even thousands, of years. In short, the “crisis” of “underfunded” courts, crowded dockets and justice delayed may always be with us.
What are we to make of this perpetual crisis?

First, that it confirms the predictions one would make based on some simple economics.
Courts receive some of their revenue from fees paid by litigants, but most comes from the taxpayer. In short, litigation, and especially trials, are subsidized by government. As with other subsidized goods and services, demand exceeds supply.
Litigants must wait for a trial, sometimes for years. Trial time is allocated according to willingness to wait. In contrast, other goods and services are, in a market economy, allocated according to willingness to pay. If parties had to pay more to use the court system, fewer parties would use it so those who did would not have to wait as long.
Focus on this subsidy for parties in litigation enables a contrast with the absence of a subsidy for parties in the private-sector alternative to litigation, arbitration.

While arbitration and litigation are not identical, they do offer disputing parties the same basic service — legally binding adjudication.
A downside of arbitration for the disputing parties is that they have to pay for it. While litigation receives a sizable government subsidy, arbitration does not. The fees litigants pay to courts do not cover the full cost of the judge, jury, court clerk, other administrative personnel, and the courthouse itself.
By contrast, parties to arbitration must pay the arbitrator’s fee, as well as the administrative costs of the arbitration organization, and any cost of the hearing room.

In short, government subsidizes the “adjudicator costs” of litigation, but not of arbitration.
The public-sector court system provides legally binding adjudication virtually free of charge to the disputing parties, while the private-sector arbitration system generally charges them something like market rates for it.
Which disputing parties deserve subsidized adjudication which should have to pay market rates for it?

Our society’s failure to confront this important question allows all disputing parties to pursue the subsidy for themselves.
The result is that parties who do not deserve the subsidy — parties who should be paying market rates for adjudication — are consuming public resources that would be better spent on parties who do deserve the subsidy.
Which current recipients of subsidized adjudication should instead be paying market rates for it? For a paradigmatic case, imagine two large corporations (Seller and Buyer) who hire expensive lawyers to draft and negotiate their customized contract in which Seller agrees to manufacture and deliver to Buyer a one-of-a-kind machine in exchange for 20 million dollars.
After Buyer pays, a dispute arises because Buyer says the machine Seller delivered does not conform to the contract’s specifications, while Seller says the machine does conform to the specifications. All that is at issue in this dispute is whether this one of a kind machine conforms to this one of a kind contract.
It is difficult to justify using some of the public courts’ limited resources to subsidize adjudication of this dispute because:

(1) the parties can afford to pay adjudicator costs on their own, without any subsidy,
(2) the parties had a pre-dispute contract and thus an opportunity to include a good pre-dispute arbitration clause in that contract,

(3) the parties and their lawyers were sophisticated enough to include a good pre-dispute arbitration clause in their contract, and
(4) an adjudicator’s decision in this case is unlikely to produce any significant “public good,” (in either the economist’s or non-economist’s sense of that term) because all the adjudicator is likely to decide is whether a one of a kind machine conforms to the parties’ one of a kind contract.
One way to end the public subsidy for cases that do not deserve it is for courts to charge the parties to such a case a fee high enough to reimburse the court for its costs of adjudicating the case.
Imposing such “user fees” on litigants like Buyer and Seller might lead those parties to avoid newly-expensive litigation and choose instead to arbitrate, which would allow the court to devote more of its resources to other (more deserving) cases.
Or if Buyer and Seller chose to pay the now-high court fees then the money the court received from these fees could be devoted to other (more deserving) cases.

Either way, the subsidy now provided for cases that do not deserve it would be re-directed to cases that do deserve it.
User fees would make litigation look more like arbitration in terms of cost to the parties.

User fees on commercial-contract cases, for example, would have the public-sector court system competing against private arbitration organizations in the market for unsubsidized adjudication.
Conversely, private arbitration organizations could compete against the courts in the subsidized adjudication market.
This could be accomplished by giving “adjudication stamps” to all disputing parties. The stamps would be good at a variety of courts and arbitration organizations, much as food stamps are good at a variety of grocery stores, or much as publicly-subsidized student loans are good at a variety of private colleges and universities.
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From a Post-Dispute Perspective, Arbitration Provides the Shadow of the Law

- Arbitration privatizes adjudication (judges, juries, clerks, courthouses)
- Arbitration does not privatize enforcement (sheriff)
Pre-dispute

no arb. clause arb. clause

dispute no dispute dispute

litigate settlement arbitrate
When Arbitration Provides the Shadow of the Law, the Public Sector Saves on

- judges,
- juries,
- clerks,
- courthouses
Who Doesn’t Need Public-Sector Adjudication?

• Parties to Pre-Dispute Contracts (They can use private-sector adjudication, i.e., arbitration)