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## THE SIGNIFICANCE OF ARBITRATION— A PRELIMINARY INQUIRY

SOIA MENTSCHIKOFF\*

Dispute settlement is a fundamental aspect of any legal system and one of the prime requisites of a peaceful society or group is that the settlement of trouble cases be by processes which are non-violent in character. Although the courts are our official organs for that purpose, we have long known that many of the trouble cases of our society are settled by methods other than the formal legal process. These methods can be methods either of compromise or of decision.<sup>1</sup> Every lawyer is conscious of the extent of settlement negotiated directly between the disputants and is to some extent also cognizant of the amount of negotiated settlement achieved through the aid and intervention of an agreed or volunteer third party (mediation or conciliation). These two methods of settling disputes are our most informal and their essence lies in the fact that the solution achieved is acceptable to the immediate parties to the dispute and that it typically gives each party less than he originally desired or felt was his due. Mediation or conciliation or negotiation are means of compromising disputes on a give-and-take basis and as informal compromises combine to constitute a distinct and well recognized phase of trouble shooting. But when the method of settling a dispute shifts from one of compromise to one of decision, we tend to think primarily of the court process and to overlook or discount the importance of the arbitration process or else to dismiss it as another type of compromise machinery. The thesis of this paper is that in so doing we fail to perceive the importance and generative power of the arbitration process.

I have not been able to find complete or even semi-complete figures on the extent of arbitration in this country, but preliminary inquiry suggests that if we lay aside first the cases in which the government is a party and second the accident cases, then the matters going to arbitration rather than to the courts represent 70 per cent or more of our total civil litigation. This suggests that the major decisional process of dispute settlement may be the arbitration and not the formal legal process. If, as further appears to be the case, the trend to arbitration seems to be increasing, then we are now living through a more violent change of judicial machinery than was present when equity emerged into conflict with the common law courts. It is not impossible to envisage a future in which the adjudicatory work of the formal

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<sup>1</sup>The importance of determining whether a particular method is essentially one of compromise or of decision lies in the psychological attitude which accompanies resort to it. In the one context, "bargain" and the emotive connotations of that word are evoked; in the other, "judgment" and the emotive connotations of that come into play. This distinction is of peculiar significance in evaluating the arbitration process and in attempting to place it in the general machinery of our legal institutions.

legal system will be limited to the regulatory type of litigation while the resolution of private disputes becomes almost entirely a matter of consensual tribunals.

What then are the major characteristics of this growing system of resolving disputes? Why is the system being used to the extent it is? What effect on life in general do the decisions of its judges have? How do the errors of such a system get cured? And for the lawyer and law school teacher there are the more immediate questions: Who is handling the trial of issues in the arbitration process? Is legal education preparing our young men for the handling of matters in such a tribunal and is our working substantive law in fact the law of the legislatures and courts or is it being made all unknowingly in the privacy of the arbitration chamber?

We can describe the essential characteristics of arbitration and in so doing define the term as it is used in this paper. We do not really know the answers to any of the other questions but we hope to. The University of Chicago Law School is now considering a project which would at least by sample tend to give the answers, but that cannot be completed for at least three years. In the meantime, it is important that we start to think about some of the implications of this trend towards arbitration or, stated negatively, away from the courts.

The four essential aspects of arbitration are (1) it is resorted to only by agreement of the parties; (2) it is a method not of compromising disputes but of deciding them; (3) the person making the decision has no formal connection with our system of courts; but (4) before the award is known it is agreed to be "final and binding."<sup>2</sup>

Inherent in the consensual character of the arbitration process is the fact that its procedure can be adjusted to fit the particular needs of the particular case or disputants. This, as is shown later,<sup>3</sup> does not mean that there are no rules of evidence or of procedure or of presentation. It only means that these may and frequently do vary from those used in our formal legal system.

The decisional nature of arbitration is what distinguishes it from the more informal types of settlement with which we are all familiar and makes it true kin to our court process. This aspect of arbitration has been the most frequently misunderstood and this misunderstanding has in turn led to a general lack of perception of the importance and significance of the process itself. The misunderstand-

<sup>2</sup> Some of the federal courts in construing the Federal Arbitration Act as inapplicable to labor controversies have been motivated, at least in part, by the fear of "compulsory arbitration." See, e.g., *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (4th Cir. 1948).

This is a misuse of terms. The only semi-compulsive element in arbitration is that the award is final and binding, but this results only from the agreement of the parties. Arbitration is an essentially consensual process, even though the agreement may have been made prior to the existence of the dispute. I suggest that in discussion of "compulsory arbitration" what is really involved is a process of compelling parties by law to resort to a peaceful method of settlement in which the decider is a person having no formal connection with our system of courts. The basic question is one of peaceful or violent settlement of labor controversy, not at the option of the parties, but by legislative decree. No such issue is involved in the application of the Federal Arbitration Act to an agreement to submit labor disputes to arbitration.

<sup>3</sup> See pp. 704-707, *infra*.

ing stems, I think, from the fact that most present reactions to arbitration are conditioned by the dramatic publicity about labor arbitration. Labor arbitration still, though decreasingly, tends to be thought about as a means of compromising the differences between labor and management.<sup>4</sup> "Compromise" in this sense is a correct word only if we should think of our courts as "compromising" the differences between buyers and sellers, pedestrians and automobilists, and the like. In that sense decision of any matter which does not turn wholly on an attempt to determine what happened in fact would be classified as an attempt at compromise. But such a classification destroys the usefulness of differentiating the concept of compromise from the concept of judgment. The formal legal system and arbitration are alike in the sense that both are essentially decisional procedures. They can indeed be distinguished on the method of decision, but not by saying that in the courts the decisions are foreshadowed and limited by the tradition of authority and its use. For I find a like limitation to exist in fact on arbitrators and the parties before them. The difference lies rather in the explicit criteria of decision.

The essential thing to note at this stage is that although there are indeed standards or criteria for decision in arbitration, they are as in matters of procedure and evidence more flexible and more dependent on the requirements of the particular case or particular disputants than we normally find in the formal legal system. Whether those arbitration standards are as live to the needs of all-of-us as are our formal legal criteria is, however, open to question.<sup>5</sup>

The fact that the person chosen to make the decision in the arbitration process is not connected with the formal legal system bears an important relation (1) to the type of proof necessary in a proceeding, (2) to the explicit criteria involved in

<sup>4</sup> I do not mean to suggest by this that all arbitrators realize that their function is to judge rather than to make a bargain for the parties. In the labor field, in particular, a non-justiciable issue tends to be frequently arbitrated. It is the kind of issue which can be stated simply as "what should the clause about X be in the new contract between the parties?" Since the context of the issue is necessarily one of bargain, the attitude of the arbitrator and the result can and often is one of bargain, a placing of himself into the position of the parties and the working out of a reasonable provision which represents a compromise between the two positions urged upon him by the parties. Some of the excitement about the wage aspects of the steel decision seems to center on the fact that the Stabilization Board failed to adopt this attitude. Whether fact finding boards should operate as arbitration boards is beyond the scope of this paper.

Interestingly enough, the attitude of the Board in the steel case was foreshadowed by an earlier decision in an aircraft case based on an opinion by Harry Shulman, whose reputation as an arbitrator is well known. A.A.A.I.W. of America, Local 669, Case No. D-8-C, Jan. 31, 1952, p. 10.

The vital thing is that with the exception of this one type of issue, the issues going to arbitration are identical with those going to the courts. In other words, in only a single area is the scope of arbitration greater than the scope of the justiciable.

<sup>5</sup> One of the curses of modern civilization is our dependence upon experts and the unnecessary but unfortunate fact that expert training, whether it be in law or medicine or engineering or anything else, seldom is accompanied with training in the function and needs of the totality of the civilization. Similarly business experience or training, as it approaches expert status, tends to become narrowed to the needs of the particular business group being served. We are familiar with the fact that judges, although they acquire more breadth by assumption of the robe, still tend to bring with them much of the attitudes and values of their prior practice. The safeguard lies in the fact that our highest courts sit as benches. There are, of course, individual exceptions; but the net picture is not changed by them.

decision, and (3) to the growth and extent of the doctrine of precedent in arbitration.

One obvious illustration of the difference in the proof necessary is the use made of experts. If the arbitrator is himself an expert the concept of "judicial notice" is automatically enlarged to cover the area of his expertness and the proof tends to become limited to the particulars of the dispute before him. This expert quality of the arbitrator may also influence the type of hearing. There is something to be said for showing an expert how a piece of machinery or a particular operation actually runs. There may even sometimes be some justification for using that showing in lieu of testimony and for limiting the hearing to argument.<sup>6</sup> There clearly is no such justification in the case of a non-expert tribunal, be it judge, jury, or arbitrator.

On the question of explicit criteria for decision, the fact that the arbitrator need not be a member of any craft connected with the formal legal institution is of peculiar importance. Who would think of arguing to a lay arbitrator in a commercial case the rules of formal law alone? Obviously he is as much if not more interested, and explicitly so, in the conflict of interest which exists, the practices which are normal, the allocation of risks which parties in the business normally make, and any factor which makes the particular case materially different from the normal.

The question of criteria for decision is intimately linked with the value and use of precedent and of course conditions that use. The doctrine of precedent is not an institution peculiar to our common law. It is in essence a response to the human need in any group for reckonability and predictability of result. Who has not heard a small child say "But one time you let me," and been thereby forced into meticulous and careful distinction (if that is possible) of the prior case? It is strange to me, therefore, to hear the drums beat for arbitration on the ground that it is an "ad hoc" process without precedent value. What is really meant is that formal legal precedent formally used is not the only controlling criterion for decision. But this is no real point of departure from the formal legal system. The decided law itself has never, even in the short wooden period from about 1880 to 1910, been applied as by a slot machine.<sup>7</sup> The felt drive for the just result, even when hidden below the manipulation of prior cases and statutes, has always been present. The trouble has been that too many of the bar have been fooled by their law school educations into believing that rules, especially as built out of the narrow holdings, are necessarily definitive of the outcome of cases<sup>8</sup> and that argument of

<sup>6</sup> I, personally, would never, as a matter of tactics, permit the proof to rest on any such survey. Unless matters which a party believes are significant are specifically called to the attention of the arbitrator, he may overlook them. The opening statement in arbitration may supply this lack, but undirected view of anything can seldom, if ever, be counted on to yield an adequate factual base on which to rest the burden of persuasion. This is twice as true if the decider is a layman, and the process or machine to be observed has the slightest technical implications.

<sup>7</sup> See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW—THE LAW MAKERS 193-194* (1950).

<sup>8</sup> I am not saying by this that there is no certainty in our law or that courts are constantly shifting decisions. What I am saying is that there is constant growth by expansion or limitation and that the fundamental drive of the courts is to achieve justice. One safeguard against constant shift is that

the policy involved is somehow non-respectable and must be done in an undercover or even underhanded manner. No really successful appellate lawyer has ever labored under this illusion and no court sitting as a bench has ever really believed it. The proponents of "ad hoc" arbitration are only urging that in arbitration the policy factors can be brought out into the open and made the explicit bases for decision, *and that arbitration knows no convention against that being done*; and, further, that the error of a prior decision should not control the determination of future cases. They do not mean that an interpretation of a clause in a contract used nationally or covering many departments in a single plant should be (or is) totally disregarded except for the particular case or department involved in the case which led to the interpretation. Such a result would really lead to the chaos which the bar keeps unsuccessfully but direly predicting whenever the courts of the formal legal system adapt prior decisions by open shift or overruling to present need.

But here again in trying to give a definitive picture we are faced with a dearth of information. We do not really know what the precedent value of arbitrators' awards is, still less how that precedent value may differ as among different areas of industry or problem. All we know is that there is some precedent value; that there must be more than is recognized since a precedent system is an inherent part of the nature of man living in a group; and that in the labor field dramatic new patterns of relation have been set in particular cases and followed thereafter in other cases.<sup>9</sup> Hence one of the things the University of Chicago Law School project would hope to discover are the answers to the following questions: Is there a significant correlation between the use of a professional arbitrator (a phenomenon of the labor field) and the extent of precedent value? Is precedent of greater importance in arbitrations held within an industry or within a commodity or other exchange than in those held under the auspices of the American Arbitration Association? Are there variations in precedent value based on personnel similar to those which we find in the formal legal system to be based on particular lower court judges or particular appellate benches? We would expect the answers to these questions to be yes. We would further expect to find that in the industry and exchange type of arbitration there is a fairly close interaction between rules or practices and awards; that this interaction more closely approximates the ideal of interrelation of legislature and judiciary than has ever been existent in our formal machinery of government and judiciary. Finally, we hope to find out definitively how formal legal precedent is used in arbitrations.

In the labor arbitration, there is little, if any, formal legal precedent for many of the issues involved. I have seen, however, that to the extent that precedent

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in much larger areas than is commonly recognized, the law does approximate justice for long stretches of time. Another is that slow small shifts to meet need are of the essence of true stability. It is only the *absence* of such shifting that comes to any person's notice.

<sup>9</sup>The setting of the maintenance of membership standard by the War Labor Board, not itself an arbitration tribunal in the true sense, was immediately followed in arbitration. The precedent value of a decision of a semi-formal tribunal was felt to be controlling, even though appeal on that issue was not possible when the issue went to arbitration.

exists, as for example, in the field of contract interpretation, the rules are argued; but they are not argued as controlling factors. As in the case of procedure, the argument has gone rather to the fundamental sense of the rule sought to be enforced. Citations have been used casually, if at all. In the commercial field citations are more authoritatively used. As Professor Corbin once pointed out, the judgment of many men of diverse background about similar controversies does constitute a body of experience which is entitled to weight in a search for the "just" result. This suggests that in arbitration there may be a retesting of the rules of law in terms of their inherent soundness rather than by the weight of citation. In a sense such a process could result in a more thoroughgoing (though specialized) revision of our law than can be hoped for from any appellate review process or from any attempt at recodification. Perhaps, in some areas, *e.g.*, buyer-seller relations, it has already occurred. Again this is a matter on which the Chicago study may produce significant data on a large enough scale to make predictions. Today we do not know the answers, we can only guess.

Let us now examine some of the arguments which are advanced in favor of arbitration and test their validity. It is said to be a speedier process than that of the courts on two counts, one, that there is no like delay in going to trial or hearing and two, that there is no appeal. In most arbitrations, this statement is true. But the law governing arbitration is not such as to make it necessarily true. For example, preliminary to any hearing there may be a legal test of the validity of the agreement to arbitrate and an appeal all the way on that issue; there may be a legal test of whether the issue is arbitrable and appeal all the way upon that one; there may be a legal test on the qualification of the arbitrator or arbitrators and appeal all the way upon that one, as well. Subsequent to hearing and award there may be an appeal for fraud or mistake apparent on the face of the award or, even for error of law apparent on the face of the award or simply for error of law, or for lack of fairness in the procedure. The point to be made in favor of arbitration is that typically such legal testing or appeal is not indulged in by the parties. There are non-legal pressures to accept the process and the award.

One of the fascinating questions in the Chicago Law School project is the question of what these pressures are. What makes men accept this process to a degree wholly beyond that of acceptance of the legal trial court? In the labor field, the answer can be thought to be simple. The economic sanction of strike or lockout is always present to enforce good faith action under an arbitration clause. In the commercial field, there is some doubt that economic pressure alone answers the question. If all commercial issues went to trial before a jury and faced the delays and uncertainties of the trial calendar and procedure, the combination of time and expense might be a sufficient answer, and where the issue is one of fact alone, it probably is. But commercial issues are not all issues of fact. To the extent that they are not, they can be disposed of speedily and at low relative cost by summary judgment, declaratory judgment, judgment on the pleadings, and the like. Nor is

appeal from such judgments a necessary part of our legal process. The matter can and frequently does end right there. Nonetheless, we suspect that more of this type of issue goes to arbitration than goes to the courts. It may be that the third attribute of arbitration with all that it connotes for the criteria of decision is enough to swing the balance in favor of arbitration: A judge whom you can choose for yourself, bearing in mind the nature of your case, is humanly a more satisfying decider than one produced, especially in our lower courts, by a political process which has not always been geared to select the best possible man or even a fairly respectable and able man.

Tied intimately into the argument of speed is the argument of cost. This would be more persuasive if the dollar amount involved in arbitration cases were consistently smaller than that involved in court cases and considerations of expense could therefore be thought to be of the essence. My own experience, which may be completely atypical but which I believe to be typical of the large city type of case, is that as much as two or three million dollars can ride on a single arbitration and that issues involving over fifty thousand dollars are probably more frequently in arbitration than in the Southern District Court of New York or in the Supreme Court of New York County.

There is one factor of expense which is important for lawyers to note, however. There is a view abroad in the land that lawyers are not necessary to the satisfactory handling of an arbitration, and more significantly, that that is a most desirable thing.<sup>10</sup>

Tied to the feeling of non-necessity of lawyers in arbitration is the proposition that rules of evidence and procedure are not used in arbitration. In analyzing this proposition, it is first necessary to examine the nature of controversy and its resolution. This has been done so admirably by Michael and Adler in their "Trial of an Issue of Fact,"<sup>11</sup> that it would be sheer nonsense to re-do it. I suggest instead that the reader either read or re-read that article. It will then become quite obvious that to the extent that rules of procedure or evidence are adapted to the rational process of disputation, they are as much a part of the arbitration process as they are a part of the legal process. The difference lies in their mechanics of application and in the nature of the deflecting factors. The basic question is not whether rules of procedure or evidence are used in arbitration, for they clearly must be; the question is whether the ones used in arbitration are geared to the production of a better, in the sense of more just, result, than those used in the court process.

Before any controversy can be resolved, it is obvious that the controversy itself must be delimited and issue joined on what is really in dispute. In the formal legal

<sup>10</sup> This antipathy to lawyers is not, in my opinion, justified. The difficulty is that laymen tend to think of lawyers as a single group and that a bad experience with an over-formal, wooden-thinking attorney is enough to damn the entire group. As indicated *infra*, p. 710, there are probably deficiencies in our training of lawyers, but these do not affect the really competent ones. As has been said before, the *A* man will be one no matter what is done to him in the schools. The school problem is with the mediocre man, who by training can become either a menace or a competent practitioner.

<sup>11</sup> 34 Col. L. Rev. 1224, 1462 (1934).

system that matter is sought to be handled by our rules of pleading. Their inadequacy from the point of view of precise pinpointing of the area of dispute is well known. Even the "advanced" federal rules are of doubtful help on this point. Procedures such as the pre-trial conference are our most recent attempts to improve the process. The difficulty with a pre-trial conference is that it is only as useful as the attorneys for both sides will allow it to be, and as the judge handling it is both strong and intelligent. There are no formal rules of pleading in arbitration but there are attempts to create a joinder of issue none the less and there is a curious parallel to the pre-trial conference. In arbitration there is always a formal submission of the dispute, but this is likely to be in such terms as "Should John Jones be reinstated?" or "Is the Smooch Corporation entitled to refuse to deliver the goods?" or "Is the Brown Corporation liable in damages for breach of warranty and, if so, how much should the damages be?" or the like. The significant thing about these submissions is that typically, one cannot tell by looking at them whether the dispute is one of fact or of law, much less what the precise issues are. The reason for this probably lies in the fact that the submission is not intended to be a substitute for a pleading but is supposed to confer power on the arbitrator, that is, outline the scope of his jurisdiction, and therefore broadness is desirable. The consequence is that the parties happily prepare for the hearing of their case without any more knowledge of what the other side intends to dispute than was had in the early days of oral common law pleading. This happy state can continue even after the exchange of written statements of position. It takes real skill to formulate issues. Necessarily, therefore, there is some confusion at the opening of the hearing. A good arbitrator will do what the good pre-trial judge does. He will force the parties to agree on what the disputed issues are. The difficulty, as in court, is that frequently the issues agreed upon remain too broad. For example the issue may be framed and agreed to as "Was John Jones guilty of insubordination" whereas in truth the issue may turn out to be either "Did John Jones say and do the things the foreman testifies he did" or, quite differently, "Did the things John Jones said and did constitute insubordination." The importance of knowing which issue it actually is lies of course in the nature of the proof which will be submitted and the nature of the arguments which will be made.

So far as framing issues is concerned, therefore, the arbitration process carries with it fewer safeguards than does the formal legal system. To the extent that the issues being arbitrated are simple, this produces not too serious a handicap. Before the hearing is over, the issues do get ironed out. But if any of the significance of the proof depends on an understanding of the issues, the parties had better beware. Even a skilled arbitrator can miss the vital testimony and this becomes of peculiar importance where no written transcript of the hearing is made. Counsel or party representative has one safeguard. His opening statement can be full enough and precise enough to delimit every issue which can arise and to focus the arbitrator's attention on the crucial ones. In other words, to the extent that

issue-posing is an aid to and a factor in better decision, it is more within the power of the parties and the arbitrator to aid or hinder the process of decision than is the case between parties and judges. If capable persons are employed in the arbitration process, the result on this phase will be good; if they are not, it can be chaotic beyond words and the decision reached can, as a result, have little or nothing to do with the justice of the dispute.<sup>12</sup> Theoretically, the law-trained men acquire as a skill the ability to frame issues, but as we have seen, no one of the parties to an arbitration need be law-trained. More, the law-trained are in many cases deliberately kept out of the hearings on the ground that they are a hindrance rather than an aid. Finally, the theoretical competence of the law-trained is by no means of universal incidence in fact. All of this suggests two things, one, that common-sense logic and understanding of the nature of disputes is not a monopoly of the law-trained and second, that there may be something in our legal training which unfits a man for the kind of analytical free swinging which is involved in arbitration. This is a point to which I shall recur later.

The next thing to be considered is the nature of the process of submitting proof and argument. Here, of course, the kind of issue involved will make a great difference. Let us clear away the matter of evidence first. It is commonly said and believed that rules of evidence do not apply in arbitration. If what is meant is that there is no compulsion to present testimony and documents or other exhibits in the manner we are accustomed to in our courts, that is correct. If, however, what is meant is that in so far as the rules of evidence embody some of the aspects of logical proof those aspects are not observed, the statement is patent nonsense. The difference lies in the fact that each time a rule of exclusion is urged, it must make its own way as a matter of logic and persuasion, rather than as an absolute dictate of the system. For example, I have yet to meet the arbitrator who, when the case is one of what happened at a certain time to a certain worker, will take the testimony of a shop steward who was not present over an objection that obviously the worker himself ought to be present so that he might be subjected to cross-examination. You will note that this is the hearsay objection but that it is not made in those terms. The ruling is in terms of sense and is always in favor of the objection, whether the arbitrator is law-trained or not. Rules against self-incrimination likewise are observed. More frequently the doubtful testimony or exhibit is taken for what weight it has, but the intrinsically irrelevant or only mildly probative evidence is practically never made the basis of decision. And the explicit ground for its admission is that it will make the other party feel better to have had his full say.<sup>13</sup>

<sup>12</sup> Any law professor can test this statement by allowing students, at a stage where they are either relatively untrained in issue-posing or unaware of its importance, to try an arbitration. Even before a competent arbitrator, the amount of mis-joinder and non-joinder of issue has to be seen to be believed. Unfortunately, some of these students graduate and become members of the bar without ever discovering the ways and necessity of joinder. Their subsequent appearance in arbitration hearings does nothing to simplify the process or make the lay public feel that lawyers are a helpful part of the arbitration process.

<sup>13</sup> This factor is probably one of the strong arguments in favor of the arbitration process. The law consumer does not like and fears a process in which he is not allowed to mention the things which seem to him to be of importance in a determination of the controversy. A system of decision which invokes fear obviously has within it the seeds of its own destruction.

The only times I have seen this factor disregarded are when the line it opened would have prolonged the hearing unduly.

Another important element on the evidential side lies in the use of expert testimony. In arbitration, because of the free selection of the arbitrator, it is not only possible but frequently occurs that the kind of testimony viewed as expert in our formal system becomes unnecessary or is greatly limited. For example, if the arbitrator is a dealer in grey goods, it is not necessary to explain the nature of such goods to him or to elaborate on the meaning of the contract term as to quality. Put another way, the scope of "judicial notice" expands, as was said above, in direct ratio to the expertness of the arbitrator. Incidentally, this phenomenon is not unknown in our formal administrative agency process and in fact is urged as one of the major reasons for departing from the formal legal to the formal administrative. Perhaps, some such thinking is also at work in making arbitration an attractive method of dispute settlement when the issues involved call for expertness.

The form or manner in which proof is presented is also commonly believed to be significantly different in arbitration than it is in the formal legal system. Matters in arbitration are frequently disposed of on the statements, sworn or not, of the parties or their attorneys. Query, however, whether this in fact occurs in cases where the dominant issue is one of fact, an attempt to answer the question "What happened?" To the extent that the issue is not one of fact, the use of statements alone is paralleled by the formal legal summary judgment, declaratory judgment, and occasional types of final motions based on affidavits.

In sum, on the procedural side, as the illustrations above indicate, arbitration is more informal than the legal process, but intrinsically it parallels the horse-sense aspects of the formal legal rules in every phase except that of framing issues. It can be said, therefore, that the arbitration process is more humanly satisfying because of its procedures but that it carries inherent in it the risk of poorer decision because of its poorer issue-framing.

The next question to be posed is whether even in the complex case this problem of issue-posing is not offset by the advantages inherent in the system of decision and the criteria openly used in arbitration. We have mentioned before that in arbitration there is no convention against the argument of sense factors as controlling factors. There is a further point of distinction between arbitration criteria and our legal decision criteria which needs recognition.

The result of analytical jurisprudence in the past has been the creation of fields of law—contracts, torts, trusts, property, etc.—and we have come to see that the placing of facts into one of these categories or one of their subdivisions can frequently determine the outcome of the result in our formal legal system. This categorization by fields of law, however, overlooks the fact that situations can fall between categories or across several categories. We tend to act and think as though the criteria are and ought to be the same in an accident case turning on "negligence" and in an involved letter of credit transaction turning likewise on "negligence."

We then add to our field madness the convention that cases are determined by the use of past authority alone.

This combination does not blind the better judge or lawyer, but its impact on the layman or inferior law-trained man is catastrophic, and as an obscuring of the actual criteria for decision or of a determination of what those criteria ought to be, it is unmatched by anything in any other discipline.

The significant difference in arbitration is that the criteria of decency, whether based on economic, sociological, psychological or business practices, have been much more explicitly in the picture both as a matter of argument to the arbitrator and as a matter of statement in the opinions accompanying their awards. One immediate effect of this is to focus attention on what kind of person is best qualified to give a better decision in the particular case. For it is in this focus that the most valid argument for arbitration can be made, but the focus also means that sometimes a judge is a better person.

If, for example, the issue involved is the working of a bonus system based on the Bedeaux method of time study, the following factors can be relevant:

(1) Technical information of how the individual jobs are clocked, the method of setting allowances, the value judgments inherent in selecting the average time for the average worker;

(2) the quality of the workers in the plant and the relations existent between them and shop management and the time study men;

(3) the economic theory that only increased productivity justifies an increase in earnings, absent spiralling cost of living or despite spiralling cost of living;

(4) the welfare theory that minimum should be set in terms of a wage which permits recreational living, as opposed to bare existence or slightly above minimum existence levels; and

(5) the competitive picture in the industry in terms of both availability of labor and possibility of sales despite increased prices (note that this is both factual and dependent upon economic theory).

To the extent that the material is technical in the industrial engineering sense, an industrial engineer will be most likely to understand it and appraise it properly. To the extent that the material involves prediction or assumption based on economic theory, an economist will be most likely to understand and appraise it. To the extent that the material deals with human reactions and the prediction of human behavior, a psychologist will be most likely to understand and appraise it. To the extent that the material involves a determination of the future of labor relations and intelligent interchange and understanding between management, union, foremen, and men, a labor relations expert is apt to be the best. The ideal is therefore a person who embodies all of the best features of these four specialists. Our present methods of selecting judges are not geared thus far to the production of such a person. There is a better chance, *today*, to find him through the arbitration process.

Let us take a different type of case. This involves the sale of someone else's

stock by a broker on an exchange for the account of a wrongdoer who has taken the proceeds and skipped. The complaining party is the owner of the stock. The following factors can be relevant:

(1) Technical information on how the exchange functions and what the typical broker does in obtaining and executing an order for the sale of stock;

(2) the practices of brokers generally in examining into the ownership of stock offered to them for sale;

(3) the economic and sociological justifications for a theory of putting risk on the person best able to insure against it;

(4) what the particular owner did or contributed to the conversion of her stock;

(5) what the owner's economic status is with consequent argument on whether individual conditions dehors the alleged wrong should be material to the outcome; and

(6) the frequency of such cases and their outcome in the past.

Note again that various expertnesses are necessary to a best solution of the problem, but one further thing is present in this case. If this is an insurable risk (and it is), there must be some guidance as to how all such cases will be determined. Even more than in the prior case where the result will be reflected in our economy only as a minor factor adding to or holding down inflation, the outcome of this case, *if it has precedent value*, will be immediate on at least insurance rates and possibly on brokerage practices as a whole. It has been said that arbitrator's awards have no precedent value, but this is a case where precedent value is desirable. If what has been said about awards is true, then this case should certainly be disposed of by the formal legal system by as high a court as one can reach. It is "better" for our entire polity that there be a certain rule, however otherwise unjust, than that there be no rule at all. You may disagree with the particular example selected. The fact remains that there are a vast group of matters on which we need rules for the guidance of future conduct on as broad and authoritative a basis as possible. You cannot today say that there need not be consideration moving from the beneficiary of a letter of credit to the issuer and tomorrow say that there need be. You cannot say today that a check need not contain an unconditional promise or order to pay to be negotiable and tomorrow that it must. You cannot say today that F.O.B. means free on board and tomorrow that it means only that the seller must get the goods as far as his shipping room. And so on. Mankind needs an irreducible minimum of certainty in order to operate efficiently. That irreducible minimum would seem to be better handled by the courts than by arbitration even though in the particular case the result would have been better decided in arbitration. The curious fact is that cases such as these do go to arbitration and more significantly that inside the group providing for such arbitration, the award is given this guidance value and is reflected on the conduct of the group. To the extent that an award has such group value for an association or exchange, the thrust towards the formal legal diminishes. One danger occurs, however. The arbitrator may be one of the group and is therefore inevitably conditioned to believe that

the needs of the group are and should be the dominant criteria for decision. He may, indeed, be blind to the needs of the rest of us. That is inherently less likely to occur in our formal legal system.

We can summarize, therefore, on the level of substantive decision by saying that the flexibility of the selection of an arbitrator, when coupled with the lack of distortion of vision which is encouraged by our formal legal system's legends, can frequently lead to more just decisions, but that in cases which involve the necessity for certainty of future outcome the avowed precedent values of the formal legal system are attractive enough to out-balance considerable in the way of poorer decision, and that when that precedent value is supplied to the arbitration award by the rules or practices of trade associations or exchanges, we run the risk that the "law" thus made is law in which the needs of the total polity have been inadequately considered. The important point for inquiry is the extent to which awards have such precedent values in industries which either maintain or encourage arbitration.

This much can be said. There appears to be much more of good than of evil in the arbitration process, unless it be thought that the ability to resolve disputes without the use of lawyers is an evil outweighing the values of better decisions. But arbitration is only the judicial aspect of a fundamental change in our system of government. There is also the legislative aspect implicit in the actions of trade associations and exchanges and their formulation of their own rules, practices, and customs. I do not believe that the relation which seems to exist between the organization of business and labor into groups and the growth of arbitration is coincidental. I think that self-government of such groups has necessitated a system of dispute resolution among its members and that arbitration has been chosen in preference to the courts, just as trade-rule or custom formulation was chosen in preference to formal legislative action. The implications to our society of this growing group of organizations which in fact control by rule and decision the activities not only of their members but also those with whom their members deal require much detailed study. It may be that the shift is a desirable one. Certainly, there is much to recommend it on the judicial side, but then we ought to re-orient our thinking, our study, and our practice to deal with the body of law which is in fact in operation and not limit our observation and judgment to the dribbles that find their way into the formal legal system. Viewed in the general context of our legal institutions, the growth of arbitration may presage a fundamental change in our way of legislating and deciding on matters of private law. To the extent that this represents a flight not only from our law courts and formal legislative processes but also from our law men (and that it does, at least, in part, is clear) we of the teaching profession have a new and heavy burden of re-evaluation of our training methods. The problem is not only one of bar relations, the manner in which it has been viewed by the American Bar Association, but of freeing our students of the attitudes and habits of mind which preclude their seeing and being able to use analytical tools functionally rather than by rote.