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### Commercial Arbitration

Soia Mentschikoff

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# COMMERCIAL ARBITRATION

SOIA MENTSCHIKOFF\*

## I. INTRODUCTION

### A. *Possible Methods of Settling Disputes*

Dispute-settling mechanisms in any given society range from the informal to the formal and even ritualistic. They differ as to the consequences of nonacceptance of the solutions devised and as to whether they utilize "third parties" as deciders or purposes of solutions. One major classification is third party machinery that is binding on the disputants, but such dispute-settling machinery is not all of the same type, either in our formal legal system or in our commercial groups. We can take three basic models as being representative of the variety of structure that has been found. These are the umpire, the adversary, and the investigatory models.

1. *The umpire model.* This model in which typically a single person is normally entrusted to render a decision without the participation of the parties but usually at the instigation of one or both parties, is typified by four characteristics: (1) the dispute itself must be of relatively small dimension with a relatively limited impact on either the parties or the rest of the group; (2) the standards or norms that are brought to bear by the umpire in making his decision have to be articulated with relative clarity and have to reflect with relative accuracy the group's feelings about the appropriate standards; (3) a desire for speedy settlement must be present; and (4) the relevant facts must be capable of personal ascertainment by the umpire. In the formal legal system such decisions are made every day by traffic cops, and in commercial groups such decisions are made daily by inspectors of quality or certifiers of weight. Characteristically, this type of dispute settlement disclaims all rule-making power in the umpire and the disclaimer is typically accurate in the commercial groups. The chief value embodied in this system is speed and economy in the cost of decision. Of the trade associations surveyed, eighty-five per cent, or 145 associations, of those reporting an inspection machinery for quality disputes also reported that they had evolved a high degree of standardization of quality. Ninety-six associations with high degrees of standardization of quality had not yet developed an inspection machinery embodying an umpire model, but many of these had different adversary machineries for quality as opposed to other types of dispute. The area of quality disputes in trade associations is, therefore, not a central focus of arbitration in the adversary full hearing sense.

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\* Professor of Law, University of Chicago Law School. This paper is based on the introductory chapters of a volume on decision making and decision consensus being prepared as a part of the law and behavioral science study at the University of Chicago Law School.

2. *The adversary model.* This model is typified by party control over (1) whether the procedure should be utilized at all (this is shared by the umpire model), (2) what the issues presented for decision are, (3) what data should be presented, and (4) what arguments should be presented. The burden of investigation and preparation is thus on the immediate parties, and typically full hearings are permitted to the parties. In the formal legal structure the courts, and in commercial groups arbitration, are the prototypes of this kind of system. It can be seen that there are certain presuppositions and values embedded in the adversary system. First is the value implicit in giving freedom to an individual to do what he likes with respect to the bringing of a dispute before a third party for decision. This freedom, like other freedoms, has its limitations and can not be tolerated by a group when the impact of non-bringing has important consequences for the group as a whole. Second is the presupposition or value of the system that the parties are equal in competence or in ability to procure advocates who are equal in competence. Third, that the issue involved is of such relative indifference to the whole society that the inadequacies of the parties are relatively insignificant. Finally, the adversary model presupposes that the system of selecting deciders produces men who are capable of understanding the nature of the issues, data, and arguments to be presented, and who have, as a result of the system of selection, or can obtain from the parties the knowledge necessary to wise decision. To the extent that any of these presuppositions fails in a material aspect, the adversary system becomes inadequate as a tool of dispensing justice. It is interesting to note the extent to which the formal legal system has recognized, over the years, increasing areas in which one or more of these presuppositions is materially nonexistent. Another strange and interesting thing is the extent to which, when the formal legal system has made this recognition, it has departed rather regularly from the adversary model towards an investigatory model of justice.<sup>1</sup>

3. *The investigatory model.* This type of adjudicatory machinery is characterized by *decider* control rather than party control over whether a

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1. Before moving to the prevailing models of investigatory systems, it is useful to point out some of the ways in which our court system itself departs from the adversary system model. It will be remembered that the adversary system model emphasizes *party* control. Yet we all know that courts can and do decide cases on the basis of issues other than those presented by the parties, that courts can and do supplement the data presented by the parties, not only by resort to the concept of "judicial notice," but also by resort to economic, sociological, legal, or psychological texts, and that the courts can and do supplement or disregard the arguments that have been made by the parties. In fact, some courts have even been known to supplement data presented by the parties by personal inquiries into the subject matter directed at persons wholly outside the formal proceedings. The fact is that when the value of wise decision, a term that I will refer to again later in more detail, is set against the value of party control of the data bearing on decision, our courts have fairly regularly preferred the value of wise decision. The one aspect of an adversary system from which our courts have seldom, if ever, departed is party control over the bringing of the dispute to the court for decision.

dispute should be brought forward for decision, what issues should be presented for decision, and what data and arguments should be advanced or utilized as a basis for the decision. The burden of initial investigation and preparation is on the deciders. The investigatory type of machinery is a response to one or more of the following situations: (a) the non-bringing of the dispute for third party adjudication has resulted in some undesirable consequence to the total group; (b) the inequalities of the parties and their counsel are of such regular and large dimensions as to produce highly undesirable decisions in areas of significance to the total group; or (c) the range of knowledge appropriate to wise decision is not readily available in the normal course of the adversary procedure to the persons who would normally be selected as the deciders. Although in the formal legal system all three factors come into operation as factors deflecting the machinery from the adversary model, in the commercial groups only (c) seems to bear on the utilization of investigatory as against adversary systems.

The investigatory type of system in our formal legal structure is exemplified by many of our administrative agencies and, in our commercial groups, predominantly in exchange groups, by specialist committees such as the Odd Lots Committee of the New York Stock Exchange.

There is an important sub-type of investigation model that is based on either an explicit or implicit idea of the high value of reassimilating an offender to the group. This type of system, which Professor Llewellyn has called parental, has interesting by-products since it typically presupposes that the group is more important than the individual and that the individual, as a consequence, is the holder of an inferior status. Typically, also, since the decider makes the decision, after *ex parte* investigation, as to when to haul the offender before him for reassimilation into the group, it is reasonably clear that the guilt of the offender has been assumed, and that the normal presumption of our criminal law that a man is innocent until proved guilty is reversed. These investigatory-parental procedures appear with a relatively high degree of frequency among the ethics and business practices committees of our commercial groups and, of course, are operative in our juvenile courts.

### B. *Setting for Arbitration*

We now come to the role of the adversary system as typified by commercial arbitration in dispute settlement in commercial matters.

The first thing to be noted is that although commonly thought of as a single type phenomenon, both the structure and the process of commercial arbitration are determined by the different institutional contexts in which it arises. There are three major institutional settings in which commercial arbitration appears as a mechanism for the settlement of disputes.

The simplest is when two persons in a contract delineating a business relationship agree to settle any disputes that may arise under the contract by resort to arbitration before named arbitrators or persons to be named at the time of the dispute. In this, which can be called individuated arbitration, the making of all arrangements, including the procedures for arbitration, rests entirely with the parties concerned. Although we do not know, we believe that the chief moving factors here are: (1) a desire for privacy as, for example, in certain crude oil situations where such arrangements exist; (2) the availability of expert deciders; (3) the avoidance of possible legal difficulties with the nature of the transaction itself; and (4) the random acceptance by many businessmen of the idea that arbitration is faster and less expensive than court action.

A second type of arbitration arises within the context of a particular trade association or exchange. The group establishes its own arbitration machinery for the settlement of disputes among its members, either on a voluntary or compulsory basis, and sometimes makes it available to nonmembers doing business in the particular trade. A particular association may also have specialist committees, which are investigatory in character, with the arbitration machinery handling only the private disputes involving nonspecialist categories of cases. Occasionally, when the volume of arbitration in a particular trade association is not large enough to warrant the maintenance of its own machinery, or when the relevant trade association consists only of one segment of an entire industry, the association joins with other related associations in the organization of a confederated trade association system under which a single machinery for compulsory or voluntary use by persons in the related industries or trades is provided.

The third setting for commercial arbitration is found in administrative groups, such as the American Arbitration Association, the International Chamber of Commerce, and various local chambers of commerce, which provide rules, facilities, and arbitrators for any persons desiring to settle disputes by arbitration. Many trade associations with insufficient business to warrant separate organizations make special arrangements with one of these groups to process disputes that arise among their members.

In a survey of trade associations in which we received 547 relevant responses,<sup>2</sup> 34 per cent of the associations indicated that their members made individual arrangements for arbitration; 29 per cent indicated that they used some type of organized machinery, including the American Arbitration Association; and 26 per cent reported that their members never arbitrate. These differential responses from trade associations as to the utilization

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2. Another 150 or so of the responses indicated that the trade associations were mere clearing houses of information.

of arbitration was not on a random basis, but indicated instead that there were rational reasons for the existence of these differences.

### C. *Factors Determining the Need for Arbitration*

At this point it is useful to distinguish between those factors that can be said to produce a *need* for arbitration machinery in commercial groups and those factors that merely make it desirable. The reasons commonly given for arbitration—speed, lower expense, more expert decision, greater privacy—are appealing to all businessmen, and yet not all utilize arbitration. It seems reasonably clear, therefore, that for some trades these factors are of greater importance than for others, and that for some trades there must be countervailing values in not resorting to arbitration. We postulated three factors as being theoretically important in determining whether or not a particular trade needed institutionalized use of arbitration, and incorporated questions relating to these factors in our trade association questionnaire.

The first factor was the nature of the economic function being performed in relation to the movement of the goods by the members of the association. We postulated that persons primarily buying for resale, that is merchants in the original sense of the term, were much more likely to be interested in speed of adjudication, and that since price allowance would be a central remedy for defects in quality or, indeed, for nondelivery, the speed and low cost characteristics of arbitration would be particularly attractive to them, thus leading to the creation of institutionalized machinery. The trade associations in which such merchants constitute all or part of the membership reported as follows: 48 per cent use institutionalized machinery, 34 per cent make individual arrangements for arbitration, and only 18 per cent never arbitrate. These figures are to be contrasted with the reports from those trade associations that stated that their memberships did not include any merchants. In those groups 23 per cent reported the existence of institutionalized arbitration, 44 per cent reported individual arrangements, and 33 per cent reported no arbitration whatever.

The second major factor that we thought would be important in determining the need for arbitration was the participation of the members of the association in foreign trade. Apart from the enhanced possibility of delay inherent in transnational law suits, when the parties to a transaction are governed by different substantive rules of law, resort to the formal legal system poses uncertainty and relative unpredictability of result for at least one of the parties. This uncertainty and unpredictability is increased by the fact that the very rules governing the choice of the applicable law are themselves relatively uncertain and are not uniform among the nations of the world. Faced with such an uncertain formal legal situation, any affected trade group is apt to develop its own set of substantive rules or standards

of behavior as the controlling rules for its members. Obviously, when a trade group develops its own rules of law, it requires as deciders of its disputes persons who are acquainted with the standards it has developed. Since this knowledgeable ability does not reside in the judges of any formal legal system, the drive toward institutionalized private machinery is reinforced.

So far as American foreign trade associations are concerned, it is necessary to distinguish between associations whose members are primarily importers, and associations whose members are primarily exporters. The important thing to be noticed about this distinction is that in all cases of dispute other than those involving pure nondelivery, the documents or goods will be in the buyer's country when the dispute arises. Although the existence of an operative private law governing trade in particular commodities, with consequent administration by private adjudicatory machinery, means that such machinery can exist either in the buyer's or the seller's country, we postulated that in view of the normal location in the buyer's country of the documents or goods at the time of the dispute, a rule of convenience of forum would tend to place the situs of arbitration in the buyer's country.<sup>3</sup> It seemed reasonable to expect, therefore, that trade associations whose members included importers would show a higher incidence of organized arbitration than those that did not. Of the groups reporting an import relationship to foreign trade, 67 per cent did have organized machinery, 25 per cent made individual arrangements, and only 8 per cent reported they never arbitrated. Of groups that had both an import and export connection, 37 per cent reported that they had organized machinery, 45 per cent made individual arrangements, and 18 per cent never arbitrated. Of the groups which reported that the members dealt only in domestic trade or only in export, 25 per cent reported their own organized machinery, 40 per cent reported individual arrangements, and 35 per cent reported no arbitration.

The third factor that we thought would bear on the need for arbitration machinery relates to the kind of goods dealt with by the members of the association. One of the major areas of dispute among businessmen centers on the quality of the goods involved.<sup>4</sup> If, therefore, the goods are such as not to be readily susceptible of quality determination by third persons, arbitration or, indeed, inspection, is an unlikely method of settling disputes. If goods are divided into raws, softs, and hards, the differences in their suitability for third party adjudication becomes relatively clear. On the whole, raws are a fungible commodity, one bushel of #1 wheat being very much

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3. The situs might be in the seller's country if the sellers in the trade were in a heavily superior bargaining position or if the transaction were one governed by certain English trade associations that have traditionally decided all disputes in the particular trade without regard to nationality of the parties, place of making of the contract, or the place or places of performance.

4. At the American Arbitration Association, for example, quality disputes accounted for approximately 40% of the sales cases.

like another bushel of #1 wheat. On the other hand, hards, which consist of items like refrigerators and automobiles, are not viewed by their producers as essentially fungible, however they may appear to the layman. We did not believe that Ford would like to have General Motors sitting on disputes involving the quality of Ford cars, or vice versa. Moreover, quality differentials in raws can normally be reflected by price differentials, but defects in hard goods frequently affect their usefulness and therefore price differential compensation is not feasible. Thus, the normal sales remedy for raws has come to be price allowance, whereas the normal sales remedy for hard goods has come to be repair or replacement. Raw, involving fungibility and ease of finding an appropriate remedy, are therefore highly susceptible to third party adjudication,<sup>5</sup> whereas hard goods tend to move away from such adjudication. Soft goods, which are the intermediate category and range from textiles to small hardware, we thought would constitute a neutral category.

In our survey of exchanges dealing in grain and livestock, 100 per cent of those responding<sup>6</sup> reported the use of institutionalized arbitration. There are, of course, other reasons for such a unanimous response by the exchanges, but the nature of the goods involved is a very important one. The trade association survey showed that of all the reporting associations dealing in raws, 46 per cent had machinery, 29 per cent made individual arrangements, and only 25 per cent never arbitrated. On the other hand, only 4 per cent of those reporting hards as their basic goods had machinery, 46 per cent made individual arrangements, and 50 per cent never arbitrated. Of the soft goods associations reporting, 33 per cent had machinery, 41 per cent made individual arrangements, and 26 per cent never arbitrated.

To the extent that the factors leading to institutionalized machinery reinforce each other, as, for example, in the case of an association reporting that its members have an import relationship to foreign trade, deal in raws, and consist of merchants, the existence of arbitration machinery rises to approximately 100 per cent. When the contrary report is made, that is, that the membership consists of manufacturers of hard goods engaged only in domestic business, the percentage drops off to about 8 per cent.<sup>7</sup>

#### D. *Relation of Arbitration to Other Formalized Procedures*

Since commercial arbitration normally arises out of contracts between the parties to the dispute, and since the major issue is usually one of either

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5. The government has recognized the necessity for speed of decision with respect to perishable raws. See Perishable Agriculture Commodities Act of 1930, 46 Stat. 531 (1930), as amended, 7 U.S.C. §§ 499-99s (1958).

6. 61 responded.

7. The figures involved in these combinations, however, are too small to warrant significant statistical treatment.

interpretation of the contract or the measurement of performance, it is obvious that one of the factors enhancing predictability of result is the extent to which the arbitrator is aware of the trade meaning of the contract terms and the significance of the various aspects of performance under it. One would therefore expect that trades in which arbitration was a normal institutional way of life would realize rather early the prophylactic importance of generally understood and agreed upon standard contract clauses and quality specifications. Of the 117 groups reporting institutionalized arbitration, 68 per cent reported that standard form contracts were used. This 68 per cent constituted 48 per cent of the total group reporting the use of standard form contracts. On the other hand, of the 114 groups reporting that they never used arbitration only 36 per cent reported that they used standard form contracts. In other words, trade groups having institutionalized adjudicatory machinery do tend to develop standardization of contract terms. They also move towards standardization of quality and specialized provisions for adjudicating questions of quality. Seventy-six per cent of the 121 associations reporting institutionalized arbitration have such standardization on at least some of the goods they trade in, while the comparable figure for 113 never-arbitrate groups is 63 per cent. Sixty per cent of 120 institutionalized arbitration groups also provide special inspection machinery for quality adjudications, thus moving that area of dispute from the adversary to the umpire systems. Only 34 per cent of 113 never-arbitrate groups provide such umpire machinery. Examined in detail, we find that 52 per cent of institutionalized arbitration groups studied have both quality standardization and special inspection machinery, whereas only 25 per cent of the never-arbitrate groups have that combination. Furthermore, only 15 per cent of the institutionalized arbitration groups lack both quality standardization and inspection machinery, whereas 30 per cent of the never-arbitrate groups lack both.

Finally, groups having institutionalized arbitration also show a tendency to have other important self-regulation committees, such as those on ethics and disciplinary proceedings, rules, form contracts, and the like. Sixty per cent of these groups report the existence of such committees, while only 26 per cent of the never-arbitrate group report the existence of such committees. If we put together the existence of form contracts and special committees, we find that 46 per cent of the institutionalized arbitration groups have both, while only 14 per cent have neither. However, in the never-arbitrate groups the percentages are virtually reversed; 49 per cent have neither and only 11 per cent have both.

We can thus say that the presence of institutionalized arbitration is a strong index of the existence of a generally self-contained trade association having its own self-regulation machinery and that the forces leading to

institutionalized arbitration also, therefore, tend to lead to the creation of self-contained, self-governing trade groups.<sup>8</sup>

In addition to the institutionalized arbitration that takes place in the context of the trade associations, a great deal also occurs inside commodity and stock exchanges. The exchanges, of course, are much more tightly organized than are the trade associations and, in addition to an arbitration committee, frequently maintain various specialist committees<sup>9</sup> among whose functions are the deciding of disputes arising out of contracts for commodities traded in the exchange under specific trade rules. For example, in the New York Produce Exchange, there is an arbitration committee with residual jurisdiction, but the trade committees that sit in arbitration most frequently are Animal Oils and Fats Committee, Cottonseed Products Committee, Flour Committee, Grain Committee, Pepper Committee, Soybean Oil Committee, Steamship Committee, and Vegetable Oils, Waxes, and Fats Committee. In exchange groups, not only is resort to arbitration on the whole compulsory for members, but failure to abide by an award is frequently considered grounds for disciplinary proceedings against the recalcitrant party. In addition, the particular norms or standards by which such disputes are judged are frequently spelled out by special committees with a degree of particularity that is rarely matched by our statutes and only occasionally by regulations of administrative agencies.<sup>10</sup>

## II. HISTORY OF ARBITRATION

Self-contained trade group arbitration is, therefore, an extremely important method of settling buyer-seller disputes. However, a study of the history of commercial arbitration indicates that it is not a recent phenomenon.<sup>11</sup> Mercantile disputes have been decided by merchants in the Anglo-American world since at least the thirteenth century. In the early period the decision of mercantile cases was assigned to courts staffed by merchants such as the piepowder courts or the staple courts, and the town courts, or merchant juries were utilized; the guilds and trading companies had their own tribunals. In the Tudor period, the Privy Council, a major forum for

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8. The trade associations were also asked to indicate the percentage of the industry by dollar volume and establishment that their membership represented. Many refused to answer these questions. Of the 128 associations having institutionalized arbitration, 97 answered the questions as to dollar volume of the industry, and 103 responded as to establishments represented. 82% reported that the association represented over 70% of the dollar volume of the industry, and 51% claimed membership over that percentage of total establishments in the industry. The relative percentages for the never-arbitrate groups were 69% (n-89) and 48% (n-94). We do not believe, therefore, that the creation of self-contained trade groups rests in important part on the percentage of dollar volume or establishments represented by the association.

9. These committees may use either adversary or investigatory procedures.

10. See for example the New York Stock Exchange rules on good delivery.

11. Most of what follows is based on research by W. C. Jones as reported in an unpublished dissertation on mercantile dispute settlement.

commercial matters, solved its mercantile cases by reference to merchant arbitrators. Admiralty handled only a few mercantile matters. Chancery referred its mercantile cases to arbitration, while the common law courts seemed to be using merchant juries. The Mayor's Court of London and, perhaps, similar courts in other cities handled mercantile cases. The guilds continued, but the staple and piepowder courts were disappearing. The trading companies emerged and had as a common feature provisions for resolution of disputes between members by the organization itself. Following the Restoration, the prerogative courts lost jurisdiction, but the common law courts seem not to have been used extensively by merchants. The guilds and trading companies continued, as did the city and borough courts. In 1697 an arbitration statute was enacted to render the awards of arbitrators "the more effectual in all cases."<sup>12</sup> Forms for arbitration bonds and awards became readily available and legal textbooks on arbitrators were published. Clearly, it was the accepted method of resolving disputes arising out of accounts.

In the colonies, arbitration existed as a form of dispute settlement from the earliest period.<sup>13</sup> In 1768 the New York Chamber of Commerce was founded with one of its purposes being the arbitration of disputes among its members. It was the sole civil tribunal to operate during the British occupation at the time of the revolution. In the nineteenth century, as trade became more specialized, exchanges were organized with arbitration provisions for their members.<sup>14</sup> Later, trade associations come into the picture.<sup>15</sup> Side-by-side with these self-contained trade group arbitrations were individual arrangements and court references of matters to arbitration which was sometimes conducted with the aid of local chambers of commerce. Always, however, merchants were involved as deciders, and always there were the two basic institutions—the self-contained trade groups and the forums open to everyone.

The development of arbitration in England and the United States was not completely parallel. The law of arbitration in the United States took a significantly different turn from the one it took in England. In England, the Common Law Procedure Act of 1854<sup>16</sup> specifically permitted arbitrators to refer matters for decision on the law to the courts by stating the arbitration as a special case. The Arbitration Act of 1889<sup>17</sup> permitted such submission of a special case to the court whenever the arbitrators were empowered to

12. 9 & 10 Will. 3, c. 15.

13. See Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Summary*, 1956 WASH. U.L.Q. 193.

14. The New York Stock Exchange was organized as early as 1792.

15. 76% of the trade associations with arbitration machinery were organized prior to 1930; 54% before 1920.

16. 17 & 18 Vict., c. 125, § 5.

17. 52 & 53 Vict., c. 49, § 7.

do so by the parties in their original submissions, or whenever the arbitrators felt it desirable. To this day English arbitrators can and do submit awards in the form of a special case to the courts for final adjudication as to the substantive rules of law. In the United States, however, if we take the law of New York as the most "progressive" example, it is clear that there was no similar development. The New York Legislature never provided a method by which arbitrators could have the aid of the courts in the disposition of a case on a substantive rule of law.<sup>18</sup> In fact, the first of the so-called modern arbitration statutes, the New York Arbitration Act of 1920,<sup>19</sup> made it clear that errors of law were not grounds for setting aside an arbitration award. This general position that the courts are not available for final determination of the legal issues in an arbitration was reemphasized by the Federal Arbitration Act of 1925 and is supported today by the Uniform Arbitration Act.<sup>20</sup> The effect of this difference in law was that in England it was virtually impossible to develop the process that is known as "*ad hoc*" arbitration, that is to say, arbitration without any precedential value. On the other hand, in the United States, except for the self-governing trade groups, the formal legal machinery made it difficult for anything other than *ad hoc* arbitration to develop.<sup>21</sup>

The most pressing legal questions concerning the enforceability of an arbitration award in the United States thus became questions of procedure. If the procedure followed by the arbitrators was correct, the award would be enforced. In England both the procedure and the substance were subject to review.

### III. THE AMERICAN ARBITRATION ASSOCIATION

The American Arbitration Association was the American response to the delays and difficulties that could result from procedural defects in the arbitration process in situations where the economic sanctions of some of the trade groups were not available. This organization from its beginning held itself out as an expert in matters that went to the enforceability of an award and set up its rules and regulations with the primary aim of rendering awards that would not be set aside by the courts. It has succeeded greatly in the accomplishment of this goal, and as a result, it is now one of the most important forums for the determination of commercial disputes by arbitration.

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18. Earlier New York statutes dealing with arbitration were concerned with long accounts between the parties, see 4 COLONIAL LAWS OF NEW YORK 1040 (1894 ed.), which was reenacted after the Revolution, see New York Sess. Laws 1781, ch. 26, and a subsequent statute modeled on the English act of 1697, see New York Sess. Laws 1791, ch. 20.

19. N.Y. Sess. Laws 1920, ch. 275, § 2.

20. Ch. 213, §§ 10-11, 43 Stat. 885 (1925) (now 9 U.S.C. §§ 10-11 (1958)).

21. In addition, many of the most active proponents of arbitration in the United States urged the values of an *ad hoc* system. See generally Rosenthal, *Arbitration in the Settlement of International Trade Disputes*, 11 LAW & CONTEMP. PROB. 808 (1946).

Of the 128 trade associations reporting existence of institutionalized arbitration machinery, 73 per cent indicated that the machinery was organized and serviced either by the trade association itself or by one of the four federated associations.<sup>22</sup> The other 27 per cent indicated that they had made special arrangements with the American Arbitration Association; some allowed members a choice between their own and AAA machinery; and others used only the AAA. The American Arbitration Association thus handles up to 27 per cent of the institutionalized arbitration of trade associations as well as a large variety of individual arrangements for arbitration.<sup>23</sup>

#### A. *Comparison with the Self-Contained Trade Group Arbitration*

Arbitration at the Association differs substantially from arbitration at the self-contained trade groups. The first and most significant difference between the two systems lies in the use of precedent. The decisions that are rendered by the arbitration committees of self-contained trade associations do have precedential value. This is achieved in two ways: in some associations opinions are written and circulated to the membership; in others awards can be appealed or referred to other committees for the establishment of general standards. Most important, however, in all of these associations there is a continuity in the membership of the deciders, which means that the system of precedent operates automatically, for a question decided in one case on the basis of consideration of competing norms is unlikely to be decided differently in the next case by the same people. However, the casual system of arbitration used by the American Arbitration Association, is designed to discourage the use of precedent. The Association puts enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts. It also tries very hard and very successfully not to have any one person sit as an arbitrator more than once or twice a year.<sup>24</sup>

The second significant difference is that of the self-contained trade association groups, 40 per cent explicitly discourage or forbid the use of attorneys, and in the remaining 60 per cent attorneys very rarely appear. The American Arbitration Association, on the other hand, encourages the parties to use attorneys. This difference reflects the basic proposition that in the self-contained trade groups the norms and standards of the group itself are being brought to bear by the arbitrators, and the incursion of lawyers with their potential emphasis on general legal norms and standards is viewed as a factor deflecting expeditious hearing and wise decision. At the Asso-

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22. These are the General Arbitration Council, The National Federation of Textiles, Association of Food Distributors of New York, and the Uniform Plan of the National Cannery Association.

23. The number of commercial cases it has administered during the last four years is 1957—677; 1958—711; 1959—707; and 1960—820.

24. Obviously the individuated type of arbitration is basically *ad hoc* in character. Its exact extent is not capable of ascertainment.

ciation, theoretically, substantive legal rules are welcome as norms for decision, and therefore attorneys are welcome. In fact, however, relatively few arbitrators or counsel feel bound by the substantive rules of law, although most feel it should be "considered."

The third difference between self-contained trade association systems and the casual arbitration at the Association lies in the methods by which awards are enforced. The ultimate sanction in many of the self-contained associations and in almost all of the exchanges is a disciplinary proceeding and thus, potential legal problems with respect to procedure are not seriously considered in these groups. The ultimate sanction at the Association is the rendering of judgment on the award by a court of competent jurisdiction, and therefore problems of procedure are always uppermost in the minds of the tribunal clerks, who are charged with the duty of policing the arbitrators sufficiently, so that the award rendered will be legally enforceable.

### B. *Workload*

During the years 1947-1950 the period of which we made an intensive study of the Association, a total of 1883 commercial cases were filed and 1740 cases were disposed of at the Association. The cases were disposed of as follows: 626 were settled or withdrawn before hearing; 82 were settled after hearing; and 1032 went to award. Taking an average for the four years, the Association received 471 cases per year and held hearings on 279. Considering only the cases filed in New York City, the Association received about 420 cases each year and held hearings on 238. This number of arbitrations is somewhat greater than the number of cases of a comparable nature filed in the United States District Court for the Southern District of New York.<sup>25</sup> In any study of commercial arbitration as an alternative to court action, therefore, its proceedings and the way arbitrations are decided by its arbitrators become extremely important. In addition, its institutional traditions as to how to try and decide a case approximate many of the institutional traditions and mores of the law courts.

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25. In this court in the fiscal years 1948-1950, an average of 339 diversity cases involving contracts dealing with matters other than insurance were commenced each year. See 1950 UNITED STATES JUDICIAL CONFERENCE REP. 145. Since in the 86 district courts reported by the Judicial Conference as a group only 25% of such contract cases go as far as trial, including default judgments, it is probable that in the southern district only about 85 contract cases went as far as trial annually. This annual rate of 85 cases is about one third of the Association rate of 238 cases going to hearing each year in New York City. The Association, moreover, handled more cases than the district court, even if only those cases involving more than the federal jurisdictional amount are considered. Making the comparison only for cases meeting the jurisdictional test the District Court for the Southern District of New York tried 85 cases while the Association "tried" 96 cases each year in New York City. Since our study was made the jurisdictional amount has been changed to \$10,000. The cases filed at the Association have increased to an average of 700 per year over the past five years.

C. *Personnel*

1. *Use of lawyers.* The presence and participation of lawyers and law-trained judges in the trial of a case is one major characteristic of court action, especially of courts other than small claims courts. In almost all self-contained trade associations and exchanges, on the other hand, lawyer participation in the arbitration proceedings is either forbidden or discouraged, and very few of the arbitrators are lawyers or law-trained. The emphasis in these groups is on the utilization of norms and standards of the trade for deciding without regard to their similarity to or difference from the norms or standards that would be imposed by substantive rules of law. We frequently heard, both orally and in writing, that lawyer participation was not desired for two reasons: (1) lawyers did not understand the business usages and practices that were typically involved in adjudicating the dispute and were therefore not helpful; and (2) lawyers made the proceedings unduly technical and tended to create unnecessary delays. This second complaint about lawyers has some support in our analysis of the Association records. Both delays in the selection of arbitrators and postponements between hearings occur more frequently in cases in which the parties are represented by attorneys. When both parties were represented by attorneys, 43 per cent of the cases were decided in less than 90 days and 21 per cent in less than 60 days. When neither party brought an attorney, 78 per cent of the cases were decided in less than 90 days and 49 per cent in less than 60 days. Of course, the figures also showed that attorneys were more likely to be employed as the amount involved in the case became larger.<sup>26</sup> Personal observation at the Association leads me to the reluctant conclusion that in the great majority of the cases observed, lawyer participation not only failed to facilitate decision but was so inadequate as to materially lengthen and complicate the presentation of the cases. Nonetheless, the Association encourages lawyer participation. Lawyers represent one or more of the parties in 80 per cent of the cases, and serve as arbitrators in about 30 per cent. The availability of legal norms or standards for utilization in the disposition of particular arbitrations at the Association is therefore theoretically present.

2. *Use of expert deciders.* Court actions are typified by the absence of expertise as to the particular business or trade involved, on the part of

26. Representation by Attorneys According to the Amount Claimed

<i>Amount Claimed</i>	<i>Total No. of Cases</i>	<i>Claimant Represented</i>		<i>Defendant Represented</i>	
		<i>No. of Cases</i>	<i>Per Cent</i>	<i>No. of Cases</i>	<i>Per Cent</i>
Less than \$500	52	23	44	22	42
\$501 - \$3000	132	95	72	78	59
\$3001 - \$20,000	121	102	84	90	74
Over \$20,000	37	37	100	37	100

both the judge and the jury, but in the self-contained trade group arbitration mechanisms, the arbitrators all have this expertise. Although in 45 per cent of the cases at the Association, at least one of the arbitrators was a person from the trade or business in which the dispute arose, the use of such an expert varied from a high of 73 per cent for sales cases involving quality determination to a low of 25 per cent for cases involving employment or agency contracts, royalties, leases, and the like.<sup>27</sup> In many of the cases at the Association, therefore, the arbitrators, like judges or jurors in the formal legal system, have no peculiar expertise in the particular trade or business involved in the dispute that is before them for decision. If lawyers be viewed as "expert" in knowledge of the rules of law, some utilization of this expert quality is made at the Association. As the cases move from sales to employment, agency contracts, royalties, leases, and the like, the use of lawyer arbitrators increases.<sup>28</sup>

3. *Role attitudes.* The most important similarity of Association arbitration to the formal legal system, however, is found in the attitudes with which the arbitrators come to the proceedings. First and perhaps most significant, the Association explicitly urges its arbitrators to adopt a judicial attitude that will lead to decision on the merits rather than to a compromise award. "Compromise" is used here in its invidious sense of arriving at decision by, as one arbitrator expressed it, "giving a little and taking a little." It does not mean that legitimate clashes of interest are not resolved in a way

27. Expert (Arbitrator From the Same Trade)			
	<i>No. of Cases</i>	<i>Expert Present (per cent)</i>	<i>No Expert Present (per cent)</i>
Type of Contract:			
Sales Total	232	61	39
Quality (buyer & seller initiated)	88	73	27
Other refusal to pay	96	61	39
Failure to deliver	34	47	53
Construction	37	46	54
Partnership, etc.	36	31	69
Employment, agency & royalty	126	25	75
28. At Least One Lawyer as Arbitrator			
	<i>No. of Cases</i>	<i>Lawyer Present (per cent)</i>	<i>No Lawyer Present (per cent)</i>
Type of Contract:			
Sales Total	232	20	80
Quality (buyer & seller initiated)	88	11	89
Other refusal to pay	96	21	79
Failure to deliver	34	38	62
Construction	37	24	76
Partnership, etc.	36	36	64
Employment, agency & royalty	126	38	62

that seems fairest to both sides, a process that lies at the foundation of any attempt to evolve a rule of law.

The efforts of the Association in propagating a judicial attitude on the part of its arbitrators are apparently highly successful. In the first place, in 50 per cent of the cases decided, the award was in full either for the plaintiff or for the defendant. Obviously such awards can not be the result of compromise. Secondly, our field study of 36 cases observed at random indicates that many of the partial awards are arrived at in a judicial manner since they result from the striking of particular items of damage that the arbitrators believe are not justified under the facts or law of the particular case. Finally, when the 180 arbitrators selected from the Association Panel for use in our experimental study of the process of decision were asked to agree or disagree with the proposition that "arbitrators are expected to find a way of satisfying both parties in a dispute by finding compromise solutions," more than two-thirds disagreed with the statement. In addition, over half accepted the following proposition: "An arbitrator should try to decide for one party or the other and not try to look for ways of compromising."

Another aspect of the judicial attitude inculcated in the arbitrators by the Association is exemplified by the responses of the arbitrators used in the experimental study to questions about the utilization of substantive rules of law, the placing of the burden of proof, and the desirability of relying on the evidence presented by the parties as against supplementing it by *ex parte* investigation. These were all issues that we found to be operative in the field study. Eighty per cent of the experimental arbitrators thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing. In other words, what they were saying is that rules of law were entitled to very heavy respect but could be reexamined in the interests of justice. This result is curiously parallel to the attitudes that seem to be implicit in our appellate courts.<sup>29</sup>

Although almost 100 per cent of the arbitrators polled thought that both parties should share the burden of proof to some extent, 75 per cent of them believed that in the ultimate analysis the burden should rest on the claimant. Again, the parallel to the formal legal structure is striking. This view of

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29. As Professor Llewellyn has demonstrated, the precedential techniques available to our courts are of such a nature that in almost any case worth appealing, a technically perfect argument on the precedents can be made for either the appellant or the respondent. The appellate judges, therefore, while believing that they ought to operate within the context of the substantive rules of law, actually move in terms of the felt reason and justice of the situation before them and even on occasion explicitly depart from precedent when they believe that such departure is necessary to achieve justice. See generally LEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

allocation of burden of proof is not an empty one; some cases in our field study were ultimately decided on this basis.

Finally, almost 70 per cent of the experimental arbitrators believed that they should decide the case "on the basis of the evidence available to them and not try to supplement the evidence by their own efforts." This attitude, of course, does not mean that the arbitrators believe that they may not request the parties to provide any additional information necessary to clear up ambiguous points. As to this, over 90 per cent believed that they were justified in making such a request.

4. *Prior knowledge of case.* At the Association the arbitrators, with rare exceptions, know no more about the dispute than can be told by an examination of the written claim of the petitioner and the answer of the respondent. Frequently, these are read immediately prior to the commencement of the arbitration. The elaborate pretrial techniques of the formal legal system are of doubtful availability in arbitration and are not in fact used. The equivalent of the pretrial conference that can be found in the sifting operations of many of the trade associations is not present, except as the arbitrators, after the commencement of hearings, may attempt to get the parties to agree on which issues are to be arbitrated. But this is not a material variation from court action so far as prior knowledge of the case by the decider is concerned since pretrial seems to be used primarily to force the parties into settlements, and very few jurisdictions assign cases so that the same judge operates both at its pretrial and its trial levels.

#### D. *Proceedings Prior to Hearings*

Proceedings at the American Arbitration Association have three phases. The first deals with the filing of the case, the selection of arbitrators, and the setting of the hearing date. The second phase consists of the hearings themselves. The third phase consists of the deliberations among the arbitrators.

1. *Selection of arbitrators.* The standard method of appointing arbitrators is for the Association to provide the parties with lists of names chosen from its panel of commercial arbitrators. The original lists reflect any wishes the parties may have concerning particular occupations or kinds of persons. The parties then indicate the names to which they object on the list and express an order of preference for the others. The Association then selects the arbitrators from the names not objected to and, when possible, follows the preference of the parties. The parties are permitted to exhaust three lists in this way. If they do, the Association then appoints the arbitrators without further consultation with the parties. However, there is considerable flexibility, and, although the standard method of selection is used in 53 per cent of the cases, sometimes the Association is used only to appoint

a third arbitrator or is asked to make the appointment without submission of lists.<sup>30</sup>

The vital thing about the methods of selecting arbitrators that are used by the Association is the degree of party control possible both as to specification of the general qualifications that the arbitrators are to possess and as to the personal characteristics of the ones suggested by the Association. In view of the findings of our study that the prior experience of the arbitrators is an important factor in decision-making and decision consensus, this right to participate in and, in large measure, to control the selection of arbitrators affords persons using the arbitral procedure an enormous advantage over those using the courts, since in the courts, within narrow limits of tactical maneuvering, the parties have no say in the selection of the judge who will try the case.

Once the arbitrators have been selected, the case is normally set for hearing. On the day of hearing, the arbitrators, who usually have not met before, are assembled by themselves in a small room and are introduced to each other by the clerk, who is the tribunal officer designated by the Association to take care of all technical requirements of the particular case. The arbitrators are then requested by the clerk to select a chairman. Normally the chairman selected is the person who differs in some material respect from the other two arbitrators. If, for example, two of them are from the trade and the third is not, the third will be the chairman; if two of them are young and one of them is old, the older man will be the chairman; or if two of them are bankers and one of them is a lawyer, the lawyer will be the chairman. In other words, the selection of chairman seems to reflect an implicit attitude toward maintaining a relative equality of status among the arbitrators, although there is some preference for the selection of lawyers, who are viewed as experts in procedure by their lay colleagues. The arbitrators are then sworn in by the clerk and make a cursory examination of

30.	Method of Selecting the Arbitrators					
	Total		Cases with One		Cases with Three	
	Cases	Per cent	Cases	Per cent	Cases	Per cent
Standard method: from lists	180	53	101	74	75	38
By the Association	66	19	32	23	34	17
Free choice of parties	8	2	4	3	3	1
Two by free choice, third from lists or by Association	30	9	...	..	29	15
Two from lists, third by Association	24	7	...	..	23	12
Third by Association, no other information	34	10	...	..	33	17
	<u>342</u>	<u>100</u>	<u>137</u>	<u>100</u>	<u>197</u>	<u>100</u>

the claim and answer, which have been previously filed by the parties. The arbitrators are then led into the hearing room by the clerk and are introduced to the parties and their counsel and to the potential witnesses in the case.

2. *The hearings.* The physical format of the hearing room is designed to create an atmosphere of relative coziness. In the room there is a T-shaped table; the arbitrators sit across the arm of the T and the claimant and defendant groups respectively occupy each side of the stem. Any audience is ranged in chairs around the walls. On either side of the arm of the T there is placed a chair; one is occupied by the tribunal clerk, and the other is available for witnesses. Occasionally a stenotypist will be present to take a transcript of the proceedings, although this is not a typical practice. The disadvantage of this arrangement is that in moments of stress the claimant and its representatives tend to get into cross-conversation and argument with their opposite numbers, thus creating chaos until the arbitrators restore order.

Once the chairman of the arbitrators calls the meeting to order, the parties or their counsel are requested to make opening statements. Some arbitrators then attempt to examine the parties or their representatives for the purpose of discovering what the issues in the case are. Although lawyers are supposed to be skilled in presentation of cases and in the delineating of issues, our observation disclosed that on the whole they were not significantly better at this stage of the proceedings than ordinary laymen. In fact, the extent to which issues in the case failed to be delineated at an early stage in the proceedings was utterly extraordinary.

Following the opening statements, the claimant calls his witnesses. Each witness is sworn in by the clerk unless the parties waive the necessity for swearing in. Any written evidence is marked as an exhibit by the clerk, who also compiles a witness list. In the absence of a transcript, the arbitrators assume the task of making their own notes on what is said or of seeking to remember without notes. In the absence of an early delineation of issues, testimony that is deemed important and relevant for one side can be and is overlooked by one or more of the arbitrators. This can have serious consequences if such evidence is not noted by some other arbitrator, for the overlooked evidence can not then enter into the decision-making process. Cross-examination of witnesses is permitted and is almost always utilized. Although some arbitrators believe that they should participate very little in the proceedings, most arbitrators frequently ask questions, particularly of the parties. Lawyer arbitrators tend to participate most actively and to treat the proceedings as highly informal, while lay arbitrators have a tendency to treat the proceedings as relatively formal.<sup>31</sup>

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31. One of the most interesting differences in attitude which we observed was

Once the evidence is in, the parties or their counsel are permitted to sum up, and sometimes the arbitrators ask for additional data or for permission to send the disputed article to some outside source for testing or examination. Any attempt by the arbitrators to seek conciliation or mediation is immediately stopped by the tribunal clerk, who carefully explains to them that the arbitrator's function is to decide the dispute on the merits and not to seek a settlement. This attitude of the Association toward settlement, of course, differs significantly from the attitude of the courts, for judges have frequently been known to call the parties into chambers for the purpose of seeing whether a settlement can be effected.

3. *Deliberations.* After the hearings are declared closed, the arbitrators, possibly on the same day, meet to reach a decision. Briefs are sometimes requested, but this is not the usual practice. The tribunal clerk, who has sat through the hearings and who frequently is consulted by the arbitrators as to appropriate procedure, sometimes sits with the arbitrators during deliberations, but more commonly, he is simply available to answer questions. His major task at this point is to draft the award in a legally perfect manner and to prevent the arbitrators from issuing an opinion.<sup>32</sup>

#### E. *The Decision-Making Process*

1. *Nature of disputes.* The nature of the disputes presented for adjudication at the Association is very similar to the nature of disputes settled in the courts. In commercial arbitration, unlike labor arbitration, the issue in controversy is practically never what the terms of the contract should be, a question that is not justiciable. Commercial cases involve justiciable issues since they normally arise out of a contract or transaction

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that for the parties arbitration was an extremely formal matter and obviously viewed as an alternative to negotiated settlement, while for the lawyers arbitration was viewed as a conciliatory informal procedure, which was an alternative to formal court procedure. In fact, in one case a lawyer was so imbued with this attitude that in a case that turned entirely on a technical issue of the quality of a particular product, he failed to introduce any evidence, expert or otherwise, but merely introduced the article involved. When we asked him on the completion of the hearings why he had done this, he carefully explained that there was an expert sitting among the arbitrators and that therefore his particular technical contentions did not need to be made. Since, as we happened to know, the article was one as to which there had not as yet developed any articulated and accepted standards, this was indeed a surprising remark. The error of this procedure became immediately apparent in the deliberations and the ensuing award, which was in full against his client; in the absence of evidence, the arbitrators assumed the other side's statements regarding quality were not contested.

32. In one case the arbitrators were extremely anxious to write an opinion because their award might be misinterpreted by other people in the trade as construing a provision in a standard charter form in a way other than the one in which they had actually construed it. They had reached their decision on the facts against the party whose theories of law they had accepted. The clerk protested so vigorously against the issuance of an opinion that the two arbitrators then decided that they would privately circulate an opinion to the trade because they did not wish to embarrass the procedures of the Association. They themselves were very certain that it was vital to circulate the opinion because of the precedential value it would have in the trade.

that has occurred in the past and involve either the question of what the contract means, or what has occurred, or both.<sup>33</sup>

2. *The arbitrators' job.* The basic task of arbitrators at the Association is to decide with fairness to the parties the merits of a controversy that arose in the past and is presented to them for the first time by the parties or their counsel. They do not have the two further tasks that are present both in the judicial organs of the self-contained trade groups and in the courts: because their decision is not intended to have precedential value, they are not compelled to either ascertain or judge the generalized situation that is typified by the particular case or to issue a rule that will have guiding value for parties in similar situations. The institutional drive by the Association against the addition of these tasks, which is exemplified by the pressure put on the arbitrators not to write opinions, simplifies the arbitrator's job and in one important sense makes that job somewhat parallel to the job allotted to the jury by our formal legal system. For both the jury and Association arbitrators, institutional pressure converge toward the production of a simple final product. In the case of the jury the product is the verdict; in arbitration it is called the award. Typically the product is limited in form to a "yes" or "no" answer or to a dollar amount. This, of course, makes it possible for both jurors in a court and commercial arbitrators at the Association to reach an agreed upon decision without reaching agreement on the reasons for the decision.

Any decision of the question of who is right in a dispute situation, however, requires the use by the deciders of a set of norms or standards against which the conduct involved in the dispute, as it is perceived by the deciders, is to be measured, because wrongness or rightness can never be a question of fact but is always a matter of judgment as to values. In both the formal legal and the arbitration systems the parties and their counsel can and frequently do suggest particular norms or rules of law as being *the* most relevant to the dispute involved, but the deciders are free to accept or reject the suggested norms. In the legal system, however, the instructions of the judge to the jury are a second source of norms. The norms provided by this source are theoretically not subject to rejection by the jury. If the

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<i>Nature of Issue</i>	<i>Number</i>	<i>Per Cent</i>
Fact alone	187	35
Contract interpretation alone	28	5
Law alone	2	—
Fact and contract interpretation	268	51
Fact and law	15	3
Contract interpretation and law	1	—
All three	26	5

theory is to really work in practice, obviously the jurors should be instructed in advance of the trial (the implications of this on pre-trial procedures are too lengthy to be discussed here).

For commercial arbitrators at the Association there is, of course, no judge or other person to instruct them as to which substantive norms should be accepted, and in the end they must make their own selection of the most appropriate norms for the particular dispute. This task of selecting the most relevant or appropriate norm, which is peculiarly the task of the judge in the formal legal system, is therefore a part of the total job of the commercial arbitrator.

It can thus be seen that although the arbitrator's task is curiously similar to that of a jury when it comes to reaching a decision-consensus, it much more closely approximates the task of a judge sitting without a jury when it comes to decision-making. As we are using the terms, decision-consensus means the process by which the arbitrators agree among themselves on the end product, the award; this phase of the matter occurs during deliberations. Decision-making as we use the term refers to the process by which an individual arbitrator determines which party is in the wrong and which is in the right. This typically occurs, at least in tentative form, during the hearings. Obviously, as the hearings progress, the arbitrators will talk to each other about the case, especially at luncheon, and have thus started the interaction process that will lead to decision-consensus. Obviously also, the more tentative the decision reached by a particular arbitrator during hearing, the more likely it is to be affected by deliberations.

One other task which is part of a judge's function in the formal legal system is allotted to the arbitrators but is actually performed by the clerks whenever there is doubt or dispute among the arbitrators. In the formal legal system the control and regulation of the trial or presentation of the case lies within the control of the judge. At the Association the arbitrators have the assistance of the tribunal clerks for the performance of this task and in fact do consult the clerks as to what the appropriate procedure is, but the clerks always make clear that the ultimate responsibility is that of the arbitrators. However, we have yet to see an arbitrator disregard a clerk's opinion when it has been expressed.

#### IV. CONCLUSION

Are decisions at the Association better or worse than those reached in the courts in similar cases? No definitive answer can be given. A better or wiser decision, for this purpose, can be said to be one that in a rational way selects the standards that are best and most relevant to the issues in the case and applies them to facts that have been assessed as to their probability

by the use of the most informed inherent probability norms.<sup>34</sup> Fact-finding norms of an informed nature in commercial matters are more likely to reside in arbitrators than in a jury or even in a judge. In that sense, the system of arbitration has advantages over the court system although competent counsel can supply such norms for the judge or jury.

Under any adversary system, the perception and selection of *the* central issue, which in turn conditions and is conditioned by the selection of substantive norms, lies in first instance with the presenters. Both in arbitration and in the courts, the competence of the presenters varies tremendously and in commercial cases tends to be of a somewhat low order. The formal legal system has machinery of a pretrial nature aimed at facilitating this process, but, again its effectiveness turns on the competence of the parties utilizing it. In this sense, the two systems seem equal.

This leaves as the final question, whether wiser substantive norms would be selected in the ordinary course of events in the courts or in arbitration. This turns in part on what commercial law norms are available in the formal legal system and how competent are the deciders to make a wise selection. Wisdom of selection, here, is used to mean the selection of a rule that makes sense for the body of persons in positions similar to those of the particular parties. It requires in the first instance a knowledge of what the situation is. It must be said that arbitrators are more likely than judges to have such knowledge. Yet, if the commercial law contains rules embodying such knowledge, this advantage of arbitration is not too important.<sup>35</sup> In addition, the selection of a wise rule requires some feel for the general values of a legal system, such as predictability and regularity of result, clarity of articulation, and consonance with related norms. No pressure toward these ends is present at the Association and, therefore, the "personal equities" as opposed to the "situational equities" take on added weight there. I have doubts that this is a desirable tendency, but given our arbitration law and the institutional function of the Association this tendency seems to be built into the process of arbitration at the Association. Trade group arbitration, of course, does not suffer from this disadvantage.

The process of decision at the Association is as rational as the court process in terms of the logic of the decision. Arbitrators as a class act according to logical reasoning in terms of issue, fact, and norm. When they

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34. By "inherent probability" norms is meant those that are used by the arbitrators to determine whether the transaction or conduct as reported to them by one or both of the parties is, in the nature of things, likely to have occurred in the manner reported. Obviously an arbitrator who knows nothing about the business situation in which the transaction or conduct is involved will be unable to utilize this type of norm unless it is supplied to him by one of the parties or counsel and is both understood and accepted. These norms are to be sharply distinguished from personal credibility norms, which do not require such specialized knowledge.

35. To the extent that Article 2 of the Uniform Commercial Code does embody such rules, the advantage will continue to diminish.

disagree with the award, they disagree for as logical reasons as dissenting judges. The difficulties in arbitration are the same as those in the courts—how to provide the deciders with the norms and standards that are best suited to wise decision. Some of these difficulties arise out of the use of an adversary system of adjudication with its emphasis on party control. That system has values of importance for a democratic society but, whether exemplified by court cases or Association arbitration, it also has the obvious disadvantage of being no better than the calibre of the presenters and the deciders and the knowledge that is or becomes available to the deciders by virtue of prior experience or the procedures of the trial. Whether we have yet evolved the best procedures for providing such knowledge either in arbitration or in the courts without sacrificing the other real values of an adversary system seems open to question.