THE PREDICTABILITY OF NONLEGALISTIC ADJUDICATION

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A number of writers have observed that legalism is a social phenomenon which is found only in certain kinds of legal systems and then only in certain historical periods. Perhaps it was Weber who first gave the concept a theoretical importance by associating a legalistic or "formally rational" legal system with the development of capitalism.[1] Later writers such as Selznick have seen legalism as a complex ideal embracing certain kinds of standards to which legal systems might aspire. (Selznick, 1961). Most recently, Friedman has commented on the decline of legalism (Friedman, 1966). While the contributions of these writers are useful in elaborating the meaning of the concept of legalism, the phenomenon itself has received virtually no empirical analysis. It is the purpose of this paper to show that one possible component of legalism, viz., predictability, is by no means unique to legalism and that a nonlegalistic adjudicatory system can be as predictable if not more predictable than a legalistic system would be.

Following Weber, a formally rational legal system is one in which legal propositions are united in such a manner as to constitute a presumptively gapless system of rules so that particular cases can be analyzed and decided in terms of their legally relevant facts (Weber, 1966: 62). Friedman extends this formulation to advance the claim that legalism can be expected to occur where there are decision makers who (a) cannot avoid making decisions, (b) are expected to give reasons for their decisions, and (c) are confined to a more or less closed system of rules or concepts for the source of their "reasons" (Friedman, 1966: 151). Both views imply a highly ordered type of decision-making process. One might go on to infer from this that the decisions rendered in such a system would be well ordered and hence highly predictable. According to Weber's

general thesis, it is only a predictable, consistent legal system, especially in the area of commercial affairs, that permits capitalistic development in its fullest sense (Weber, 1966: 1). Friedman, too, is led to argue that "substantive predictability" in the form of certain hard and fast rules is highly valued as well as necessary in business and property law even if it is on the decline in other areas of the law (Friedman, 1966: 166).

At the same time that scholars such as Weber and Friedman have emphasized the importance of formally rational or legalistic systems of law, others have called attention to the development of alternative systems of law and adjudication in the area of commercial law. Even Weber himself writes that some business dealings such as commodity exchange are not readily amenable to assessment by external, rational criteria since they depend upon personal trust and confidence. In fact, he goes on to argue in this vein that commercial law must often accept the standard of the average party rather than the ideal and that parties to commercial cases are often "disappointed by the results of a strictly professional legal logic" (Weber, 1966: Chapter 11). Other writers such as Ehrlich and, most recently, Evan would call attention to private legal systems or systems of law, which have their locus in a formal organization "relatively independent of the state" and a jurisdiction which extends only to the organization's members (Evan, 1962). Private legal systems enjoy an enormous diversity with respect to form and function. Evan, for example, distinguishes democratic from undemocratic private legal systems (Evan, 1962: 169-171), while Selznick pictures an order in which private legal systems will eventully be expected to assume at least the procedural norms of public legal systems (Selznick, 1963-64).

One type of private legal system widely used in commercial affairs is commercial arbitration. It is private in that most systems of commercial arbitration are administered by nongovernmental trade associations (Mentschikoff, 1952 and 1961)[2] or by arbitration associations such as the American Arbitration Association which is a private, nonprofit organization specializing in arbitration.[3] Furthermore, arbitration associations enjoy a limited jurisdiction in that they can only handle those disputes which parties have agreed to submit to arbitration under their auspices.[4] Commercial arbitration differs from the formal court system in a number of important respects. To begin with, it is a system in which parties (a) voluntarily agree to refer a

dispute to an impartial third person and (b) agree in advance to be bound by the decision of that person (Domke, 1965:2). Moreover, commercial arbitrators are nonprofessionals who have expertise in regard to the subject matter in dispute. Most decide only one or two cases per year. They have no formal connection with the legal system and are bound neither by the customary courtroom rules of evidence nor by legal precedent. For the most part, they do not even write opinions to support the decisions they make. Rather they are left formally free from the kinds of constraints normally associated with adjudication in the legal system and decide particular disputes according to their understanding of the norms of fair commercial practice.[5]

Given the relative absence of formality and particularly the freedom of arbitrators from the kinds of constraints normally placed on judges and juries in the courtroom, a system such as commercial arbitration would appear to be the polar opposite of formally rational or legalistic adjudication. At a minimum, it fails to meet two of Friedman's three criteria, viz., the obligation for the decision maker to give reasons for his decisions and the restriction to a closed system of rules as the source of these reasons.[6] In Weber's scheme, commercial arbitration would be classified as "substantively irrational" since arbitrators react to particular cases rather than attempt to develop general rules on the basis of past and future cases. In terms of its actual functioning one might well be led to ask how it could achieve any degree of substantive predictability, much less the degree thought to be necessary to the conduct of business in an advanced capitalistic society. If, for example, 100 different cases are decided by 100 different men acting without reference to an explicit set of rules and not bound by each other's decisions, how consistent with one another could their decisions be? It is with the intention of answering this question that the outcomes of disputes arbitrated in the textile industry through the American Arbitration Association for the years 1967 and 1968 were examined as part of a study of the commercial arbitration process.[7]

Commercial Arbitration in the Textile Industry: Background

The American textile industry consists of literally thousands of independent firms, each of which is specialized by function, by type of material handled, and by end-product usage. Given this specialization, each firm is obliged to coordinate its input and output activities with a large number of other

firms if it is to remain in business. By the same token, any one item eventually purchased by the consumer must pass through a large number of hands. For example, the material in a cotton dress or suit may be woven by a mill from cotton it has purchased from a cotton farmer, sold to a converter who typically commissions a finishing mill to dye, bleach, or print the material to its specifications, whereupon it is resold to a manufacturer who cuts the material and sews it into a garment. It is finally shipped to the retailer to be sold to the consumer.[8] Morever, most of the firms handling textile products are small, since both the textile mill products and the apparel and related product industry groups consist almost entirely of small firms.[9]

It is during the course of the exchanges made necessary by the industry's organizational division of labor that disputes occur. There are three specific types of disputes: (a) timing of delivery, (b) quality of material delivered, and (c) amount and timing of payment. While all would be important in any business, each assumes a critical importance in light of the unique situation of the textile industry. Timing of delivery becomes critical because of the instability of the market for textile end products. This is especially true of the consumer apparel market where the dress or scarf so popular in a given season may have virtually no buyers one year or even a few months later. Quality of material is problematic because no textile material is ever perfect and the standards used to judge the extent of the imperfections may vary markedly depending on the particular individual who happens to be judging. Amount and timing of payment also represent a problem since many of the industry's firms, especially the manufacturers and converters who are the net buyers of textile products, are economically weak or undercapitalized. In a typical dispute, buyers will delay or refuse to pay for goods ordered and received charging that sellers were either late in delivery or delivered material of inferior quality.

The industry handles these disputes arising between buyers and sellers of textile products through the mechanism of commercial arbitration. As mentioned previously, arbitration is used under contracts often contained in the "future disputes" clause of a contractual exchange between two parties. In any given dispute, one party may initiate arbitration proceedings by filing a "demand" for arbitration to the American Arbitration Association calling upon it to handle the administrative aspects of arbitration, viz., the selection of arbitrators, a hearing date, and

the place for the arbitration proceedings. In most textile cases three arbitrators will be selected through a process of sending lists of possible arbitrators to the two parties to the dispute and letting them strike out those arbitrators whom they deem unacceptable. Where there is no agreement, arbitrators are administratively selected by the Association. The hearing is then held and the arbitrators have ten business days in which to hand down their award which stipulates in terms of dollar value the extent to which the original party's demand was upheld, who is to pay the fees of the proceeding, and, where appropriate, whether the goods in question should go to the buyer or the seller. To complete the process, the winning party upon receipt of the award may convert it into a court decree simply by applying to the court which has jurisdiction.[10]

Outcome Pattern of Cases Arbitrated

With the intention of exploring the issue of predictability of case outcomes, a study was made of commerical textile cases arbitrated through the American Arbitration Association for the years 1967 and 1968. There were a total of 91 cases in 1967 and 100 in 1968 in which an arbitral award was rendered. The diversity of parties and arbitrators involved in these cases was considerable. For the 1967 cases, for example, there were 157 different firms among the 182 parties to the cases and the cases were heard by 231 different arbitrators, only 20 of whom heard two cases and only two of whom heard three cases.[11] In addition, as mentioned in the preceding section, the arbitration process places relatively few constraints upon arbitrators either in regard to the formality of the hearings or formulating their decisions. Given the diversity of parties plus the absence of constraints upon arbitrators, one might be led to expect a random, unsystematic pattern of case outcomes. What, then, is the case outcome pattern?

The most striking pattern is that case outcomes are highly structured with respect to a limited number of variables. First of all, the initiant or "claimant" of an arbitration proceeding tends to fare better than does the respondent. Thus, claimants recovered 60% of the total dollar value of their claims in 1967 and 68% in 1968. Moreover, they recovered their full claim in 46% of the 1967 cases and in 43% of the 1968 cases while their full claim was denied in only 11 and 10% of the cases of the respective years.

TABLE I: CLAIMS AND RECOVERIES IN COMMERCIAL TEXTILE ARBITRATION ACCORDING TO SAMPLE YEARS AND BUYER-SELLER ROLE

	Claims		Percent of Claims Recovered			
	Number	Amount	Number			Amount
			In Full	In Part	Denied	
Sellers						
1967	81	$903,332.23	53%	41%	6%	75%
1968	88	$979,414.84	48%	46%	6%	77%
Buyers						
1967	10	$251,380.12	0%	50%	50%	7%
1968	12	$162,279.63	8%	50%	42%	13%

The claimant's advantage in the arbitration process is even more pronounced for parties who were sellers in the exchange agreement out of which the dispute arose. As Table I shows, many more arbitration proceedings were initiated by sellers than by buyers, the rate running 81 to 10 in 1967 and 88 to 12 in 1968, with the total dollar claim of each group representing a similar if somewhat less pronounced imbalance of 3.5 to 1 and 6 to 1. More critical for case outcome is the fact that sellers recovered no less than 75 and 77% of the dollar value of the claims they advanced in each of the years while buyers recovered only 7 and 13% of their initiated claims. This pattern is also duplicated when the numbers of claims won and lost are considered. Sellers were able to recover the full amount of their claims in 53 and 48% of the cases they initiated in each year while buyers only once in the two-year period (i.e., in 8% of the 1968 cases) were able to recover the full amount of their claims. If one also considers the percent of cases in which either full or part of the claims were recovered, a similar imbalance emerges. Sellers recovered all or part of their claims in fully 94% of the cases they initiated in both years while buyers recovered part of their claims in 50% of the 1967 and 58% of the 1968 cases.

The high predictability of outcomes in favor of seller-claimants is also reflected in the pattern of counterclaims in the 1967 and 1968 cases. Although all cases which go to arbitration involve counterclaims, at least in the form of a general denial of the original claim, the Association allows parties responding to arbitration demands to file their own formalized demands in the form of a counterclaim. A computation of counterclaims for the sample years showed that they were filed in approximately 25% of the sample cases, their dollar value totalling $299,154.59 in 1967 and $181,317.34 in 1968. By way of comparison, their total value was 26% of the total value of claims in 1967 and 16% of the total 1968 claims. In terms of the number of cases, 31 of the 91 cases of 1967 had

formal counterclaims whereas 20 of the 100 cases of 1968 had such claims.

How do buyers compare to sellers in the counterclaiming process? To begin with, buyers advanced counterclaims in 23 of the 81 cases initiated by sellers in 1967 and 19 of the 88 seller-initiated cases of 1968 (See Table II, below.) When buyer counterclaims are examined as claims in their own right, the records indicate that they were denied completely in 10 of the 23 cases in which they were filed during 1967 and 16 of the 19 cases of 1968 in which they were filed; in other words buyer counterclaims filed in the seller-claim cases were denied completely in 44% of the 1967 cases and 84% of the 1968 cases. Moreover, the buyer's filing of a formal counterclaim in the seller-claim cases produced a less than clear-cut result in terms of influencing arbitration outcomes. As Table II indicates, for both the '67 and '68 samples, the seller's total claim was denied only four to six percent of the time regardless of whether or not the buyer files a formal counterclaim. However, the 1967 figures do show that buyers' filing of counterclaims reduced the percentage of cases in which sellers were able to recover all of their original demand. In fact, the reduction from 61 to 26% is a rather marked one. Regrettably, this same relationship does not hold for 1968 where the filing of a counterclaim had the reverse effect, viz., it increased the number of cases in which the seller recovered the full amount of his claim. In short, the fact that buyer counterclaims are often denied in their entirety, combined with the mixed effects of buyer counterclaims upon the outcome of seller-claim cases, leads one to conclude that filing of counterclaims on the part of buyers in seller-initiated cases has little demonstrable effect upon arbitration outcomes.

TABLE II: Outcome of Seller Claimant Cases According to Buyer's Filing of a Counterclaim and Sample Years

1967 Cases	**Buyer: Files Counterclaim**		**Does Not File Counterclaim**	
Seller Recovers:				
Full Claim	26%		61%	
Part Claim	70%		36%	
Seller Loses claim	4%		3%	
	100%	(N = 23)	100%	(N = 58)
1968 Cases				
Seller Recovers:				
Full Claim	58%		45%	
Part Claim	37%		49%	
Seller Loses Claim	5%		6%	
	100%	(N = 19)	100%	(N = 69)

TABLE III: BUYERS/SELLERS; CLAIMANTS/RESPONDENTS; USE OF LEGAL COUNSEL AND RECOVERY OF ALL OR PART OF CLAIM IN ARBITRATION

Seller/Buyer and Use of Legal Counsel	Percent of Claims Recovered (All or Part)	Percentage Base
Sellers		
Using Legal Counsel	92%	78
Not Using Legal Counsel	69%	13
Buyers		
Using Legal Counsel	14%	65
Not Using Legal Counsel	4%	26
		182
Seller-Claimants		
Using Legal Counsel	94%	71
Not Using Legal Counsel	90%	10
Buyer-Claimants		
Using Legal Counsel	50%	10
Not Using Legal Counsel	0%	0
		91

One very important variable influencing case outcomes is the use of legal counsel. The use of counsel by parties to textile arbitration is advised although by no means required by the American Arbitration Association. In actual practice 79% of the 182 parties to the 1967 cases used legal counsel, although here too there were important differences between buyers and sellers as well as claimants and respondents. Thus, 86% of the sellers used counsel while only 71% of the buyers did so and 89% of the claimants used their services as compared to 68% of the respondents. In addition, there is a discernible effect upon case outcomes as may be seen in Table III, above. If one considers the percent of claims in which some, i.e., full or partial, recovery was made, it can be seen that sellers not only improved their already good chances of recovering claims when they used legal counsel but improved them more than buyers. Thus, the percentage difference of claims recovered between sellers who do and do not use legal counsel is 23% whereas the comparable difference for buyers is only 10%. The effect of the two variables combined is little short of tremendous: sellers using legal counsel recover part or all of their claims in 92% of the cases whereas buyers who do not use their services recover claims in only 4% of the cases. Furthermore, when one considers cases which are seller-initiated and buyer-initiated, the high degree of predictability of outcomes becomes even greater. Seller-claimants who use legal counsel achieve recoveries 94% of the time although here the effect of using legal counsel is far less pronounced since seller-claimants who do not use legal counsel still win 90% of their cases. In any case, both groups of seller-claimants fare better

than buyer-claimants who do not even initiate arbitration proceedings without legal services and who win only 50% of their initiated cases even when they use legal counsel.

The Predictability of Case Outcomes

The system of commercial arbitration used by so many diverse parties and employing so many different decision makers, none of whom are subject to a leglistic system of rules in formulating particular decisions, enjoys a considerable degree of predictability. Moreover, the predictability of case outcomes is in accordance with variables that might at first sight appear to have little to do with the merits of particular cases, viz., whether the party was a claimant or respondent in the dispute, whether the party was a buyer or seller in the transaction out of which the dispute arose, and whether or not he employed legal counsel to handle the dispute. Furthermore, the effect of these variables is cumulative so that parties who are both sellers and claimants and use legal counsel are virtually certain to recover claims whereas parties who are buyers are far less likely to be claimants to begin with and most likely to lose a case if they are respondents and fail to employ legal counsel.

As it turns out, the predictability of arbitral outcomes is also a very important consideration to lawyers who serve as counsel to parties who arbitrate. A great deal of textile arbitration is handled by relatively few corporate lawyers who specialize either in commercial arbitration, in textile law, or both. In fact, only five lawyers were counsel to 43 of the 182 parties who arbitrated during 1967, one playing the role of counsel to fourteen litigants, another to ten, two to seven each and one to five litigants. All remaining counsel to textile industry litigants paricipated in less than five arbitrations during 1967, most often only in one arbitration. When asked to compare the predictability of an arbitrator's decision to that of a judge or the verdict of a jury, each of the five lawyers replied without hesitation that the decision of an arbitrator was by far the "most predictable," that a judge's decision was "predictable at some but not all times," and a jury's decision was "virtually one of pure chance."

The statement that lawyers view arbitration as "predictable" or as a system which is "more predictable" than the courts is, of course, the generalized opinion of a relatively small group of lawyers. It should be noted, however, that these lawyers are the ones who handled the greatest volume of textile industry arbitration and men who are most often in a

position to advise clients whether to arbitrate or litigate in court. Moreover, these same lawyers reported a number of steps in case preparation which no doubt served to increase the predictability of case outcomes in their favor. Most common was the attempt to influence the choice of arbitrators by active participation in the process of arbitrator selection. This was accomplished by reliance upon personal acquaintances to discover "negative" or undersirable characteristics of arbitrators on the AAA lists and then rejecting those arbitrators who did not appear to be amenable to one's case. Another practice was to reject out of hand all arbitrators who did not represent the same branch of industry as the client in the particular case under the theory that an arbitrator representing a different branch of the industry would not perceive the case in the proper manner.[12] Finally, the lawyers often presented their cases in terms of trade practice knowing that arbitrators tend to rely upon trade custom rather than legal precedent when rendering decisions.[13]

When questioned further regarding their role in the dispute resolution process, the lawyers also reported taking actions which would have the effect of keeping cases out of arbitration. More generally, each of the five lawyers stated that in the course of day-to-day business more than 95% of the disputes brought to them were resolved informally. Informal resolution might at some times mean rewriting the contractual agreement between the parties while at others the lawyer might serve as a mediator between the parties at a meeting in his offices. In still other cases, informal resolution could mean a series of phone calls between the lawyer and his party's adversary.

The net effect of the lawyer's actions prior to arbitrating cases is to structure the situation so that the client has a good chance of winning his claim in arbitration. On the one hand, lawyers are able to influence certain aspects of the arbitral process, especially the selection of arbitrators. On the other hand, it can also be argued that the informal resolution of disputes prior to arbitration had the effect of keeping weaker or unwinnable cases out of arbitration. Indeed, several of the lawyers interviewed observed that it did not make sense to go into arbitration unless one had a good case against the adversary and one took precautions such as those mentioned in the above paragraph. Given these considerations, it is no wonder that the parties represented by legal counsel were more likely to recover their claim in arbitration regardless of whether they were sellers or buyers or even claimants or respondents.

Subsequent interviews with the parties to the 91 cases arbitrated during 1967 revealed that the process of keeping weaker or unwinnable cases out of arbitration is by no means restricted to the action of legal counsel. Even before counsel are called upon to handle a given dispute, parties will attempt a large variety of informal measures to resolve the particular dispute in which they are involved. Of 100 parties contacted concerning their dispute resolution practices in the 91 sample cases, the following actions were taken:

92% Contacted the opposing party via letter, telephone, or meeting prior to the filing of the case for arbitration.

71% Attempted to settle the case with the other party.

67% Offered to negotiate a settlement at any time.

74% Would have been willing to negotiate a settlement if the other party had agreed to it at any time.

According to the parties, the rationale behind the widespread use of informal dispute resolution procedures was that one does not arbitrate against a good present customer or a customer who represents a good prospect for future business since pressing claims against opponents in arbitration is not regarded as an an amicable way of conducting business. As one textile converter put it, "If you win the arbitration, you lose the customer . . . you only arbitrate where you can afford the loss."

The mill and converting firms, typically the sellers within the industry, who were interviewed spoke of rather lengthy and elaborate informal attempts to resolve disputes, some of which could go on for a period of up to two years. Informal dispute resolution often began, shortly after the sixty- or ninety-day "grace" or allowance period, with the credit manager's reminder to the customer of his outstanding obligation. If the customer countered that there were defects in the quality of merchandise, the quality control manager or other responsible official in the seller's firm might well be called upon to weigh the validity of the customer's allegation. If the customer remained adamant in his refusal to pay and if the seller firm remained convinced that its delivery had been in accordance with contract specifications, other executives in the seller's firm, such as vice president, branch manager or even the president, as well as corresponding executives in the buyer's firm, might also become knowledgeable in the case and lend their support to the firm's position. The final action would be to confer with corporate counsel or outside counsel with regard to the most effective means of pressing the claim against the other party.

Discussions with representatives of selling firms showed that an important factor in the seller's decision to initiate arbitration proceedings was how good a present or prospective customer the buyer happened to be. In light of their feeling that it was not good "business sense" to pursue arbitration against good customers or customers with good future business prospects, sellers would attempt to make some informal accommodations in instances where the particular dispute happened to involve customers of good standing. By the same token, arbitration would be more readily considered with the buyer who happened to be a "marginal" customer or one with whom the seller expected to do little future business. Although the textile businessmen interviewed did report a few instances of disputes between firms involving real, legitimate quality claims, many expressed the view that much, if not most, arbitral action is pursued by sellers against marginal buyers, i.e., buyers who were very small firms or buyers with whom the seller enjoyed or expected to enjoy only a very marginal business relationship.

The use of arbitration on the part of sellers against buyers who are marginal firms or who have weak or specious claims has important consequences for the outcome of the arbitration process. The effect is one of preselection or screening of the cases which go into arbitration, a preselection which may operate either with respect to the particular issues in the dispute or with respect to the present or prospective business relationship with the other firm. As it turns out, sellers tend to pursue arbitral action mainly with the intent of collecting a debt from a buyer which they feel has gone "bad" or remained unpaid for too long a time. In contrast, where the buyer has a strong case, say one based on a legitimate quality claim, and is a good prospective source of future business, the seller will handle the matter in dispute by means of compromise or some informal arrangement with the buyer.

Thus, a number of sellers interviewed were able to claim that they had "never lost a case in arbitration," a claim which was a source of pride to the particular man who happened to make it. However, it must be seen in light of the practice of engaging in arbitration mainly against marginal buyers in cases which were clearly in their favor. In addition, there is the dispute resolution planning process mentioned above. In selling firms it is especially thorough and at times borders on the meticulous. To begin with, there is much discussion on various levels of the seller's firm as to whether or not to pur-

sue arbitral action. The seller is also likely to engage the services of legal counsel. Beyond this, sellers using the aid of their counsel prepare quite thoroughly the cases which are to go into arbitration even to the extent of engaging in mock sessions during which their counsel test them at length on their factual knowledge of the case and the arguments to be presented.

In short, the reasons for the high rate of initiation of claims by sellers as well as their high recovery rate lie in the process of buyer/seller exchange within the textile industry. Due to the nature of the exchange process, the buyer at the time of a "dispute" will hold both the merchandise and the payments for it so that the seller is obliged to take the initiative in the dispute resolution process whether he chooses formal or informal means. He will pursue formal arbitral action mainly against marginal firms with whom he enjoys only a marginal business relationship and with whom he entertains poor prospects of future business relationships. He will plan the overall dispute resolution process more adequately than the buyer in that he will employ legal counsel more often than the buyer and in that the decision to pursue the matter through formal arbitral action will be reached only after considerable deliberation. In view of these factors, the imbalance of outcomes in favor of seller-claimants becomes plausible. One could hardly expect a random case outcome pattern when cases which go into arbitration are carefully screened and prepared by the sellers who initiate the formal action.

Looking at arbitration as a device by which sellers can recover monies owed by marginal buyers leads one to the view that arbitration as practiced in the textile industry is as much a "collection tool" as it is a type of legal or quasi-legal system. As a collection tool it becomes a measure of last resort by which sellers can recover accounts rather than a court in which two parties "battle out" an important factual or even legal issue. Such a view is not entirely new and has been expressed previously in a paper by Coulson directed to the members of the Commercial Law League of America. He writes:

> What does this mean to the attorney who is charged with the duty of collecting a just debt? It means that he finds the Arbitration Association to be an **ally** in pressing forward to a prompt hearing. It means that he tries his case before an arbitrator who is impatient with needless delay. (Coulson, 1967).

In this sense arbitration is a most useful collection tool to the sellers of the industry, especially in light of the degree of predictability of outcomes as evidenced above.

At the same time that textile businessmen and textile lawyers think of arbitration as a collection tool, they feel that the courts and the law are rather undependable and unpredictable. Many businessmen patently see judges, and for that matter lawyers, too, as ignorant in the area of business disputes and incapable of being fair minded (Taeusch, 1934-35). They know that a judge might well be guided in making his decision by criteria other than those encompassed in the particular case itself, perhaps procedural points of law or a unique situational argument raised by the other party for which the law would make certain allowances.[14] Another major source of uncertainty is the finality of the decision rendered. The concept of appeal to a higher tribunal, so well established in Anglo-Saxon law, represents to most businessmen a major source of uncertainty in the dispute resolution process because it means that the decision rendered by a particular court is by no means final.[15] From their point of view, an appeal means further costs and uncertainties, keeping the particular item "open" rather than getting it "closed." It is with these kinds of considerations in mind that many businessmen, and a growing number of lawyers, prefer arbitration to law even where its use means a suspension of their legal rights.[16]

Implications for Legalistic Reasoning

At first sight, arbitration would appear to be a type of legal system which is antithetical to business interests and to capitalistic development. In the scholarly analysis of legal systems it is Max Weber who was among the first to argue that a formally rational legal system with its unique limitations on decision makers is necessary for the fullest development of capitalism. More recently, Friedman has argued that business and property law somehow need hard and fast rules even if other areas of law do not. Against this kind of argument, arbitration appears to be an anomaly since it fails to meet the requirements of formally rational legal systems. In fact, arbitrators are nonprofessionals, different arbitrators are used for different cases, and arbitrators are neither obliged to follow a rule or precedent nor even to present written opinions when giving case decisions.

Upon further analysis, however, the Weber/Friedman argument is supported in an entirely different manner. This is due to the fact that in its actual ongoing operation the nonlegalistic system of commercial arbitration shows a great deal of substantive predictability with respect to case outcomes. Breaking

a series of cases down into buyer/seller disputes shows that far more cases are initiated by sellers than by buyers and, more critically, a greater percentage of cases are won by sellers than buyers. The seller's likelihood of recovering his claim in arbitration is further increased when he employs legal counsel. Although a number of reasons for this predictability can be given and have been presented above, the key point is that predictability occurs in spite of rather than because of the formal system of arbitration. The predictability of case outcomes is most likely the result of a preselection process by which sellers, who typically are in the position of desiring to press claims, do not arbitrate cases which are weak or cases against buyers with whom they enjoy good business relations. The actions of sellers serve to make arbitral outcomes highly predictable and in the opinion of many observers more predictable than the courts. The marked degree of predictability has led some to characterize arbitration as a "collection process." From this viewpoint it can be concluded that the predictability evidenced in the arbitral case outcome pattern is more a function of the use of arbitration made by the selling firms of the textile industry than of the formal structure of the arbitration system.

FOOTNOTES

[1] As Rheinstein notes in his comments on Weber, this relationship is central to Weber's sociology of law (Weber, 1966: Introduction).

[2] Mentschikoff's estimate is that arbitration accounts for 70% of our total litigation, a figure which in her opinion tends to be increasing (1952).

[3] On institutional arbitration, see Domke (1965: Chapters 6 and 7).

[4] Arbitration agreements may be either "voluntary submission" agreements made between two parties after a dispute has arisen between them or "future disputes" agreements which commit the parties to a contractual agreement to use arbitration in the event a dispute arises between them (Domke, 1965: Chapter 8).

[5] For a comparison of arbitration and the courts, see Mentschikoff (1952).

[6] One of the few constraints placed on arbitrators is that they are required by law to dispose of all of the issues raised in the formal claim and counterclaim in a particular case. See Domke (1968: Chapter 28).

[7] The data presented in the following section were gathered in a study of arbitration conducted through the American Arbitration Association. For a more complete presentation, see Bonn (1970: Chapter 3).

[8] This rough model tends to understate the complexity of the situation. Specialized items may be handled by additional organizations when there are manufacturers who specialize in only one phase of the manufacturing operation or converters who send material to be both dyed and printed. There are also instances where goods are bought and sold from one converter to another or from one mill to another although this is not the normal practice.

[9] In 1963, the last year for which figures showing the size of firms are available, 56% of the establishments in the textile mill products industry employed 1 to 49 employees whereas only 10% of the establishments employed more than 2,500 employees. The related apparel products industries show an even greater tendency toward small firm organization since firms employing 1 to 49 employees constitute 76% of the establishments active in the industry and firms of more than 2,500 employees constitute only 2% of the establishments.

[10] For a discussion of the possible legal complexities of enforcing arbitral awards, see Domke (1968: Chapters 36-38).

[11] Most but not all cases were heard by three arbitrators, ideally one chosen from the claimant's branch of the industry, one from the respondent's branch, and one familiar with both but identified with neither. On the other hand, cases involving less than $1,000 were sometimes heard by only one arbitrator and a few cases were heard by two arbitrators because the third was unavailable to serve and the parties agreed to proceed anyway.

[12] In many cases this practice served to make it impossible for the parties to agree on arbitrators. After two sets of listings failed to produce agreement on arbitrators to be selected, the Association operating under its rules made an administrative appointment of the arbitrator or arbitrators required for the panel.

[13] One study conducted by the Harvard Law Review (1948) drew the following conclusions regarding how arbitrators formulate decisions:

> The controlling factor in arbitration awards seems to be the seriousness of the deviation from the contract terms, judged in the light of the general business atmosphere in which the transaction occurred, and to this extent departs from the strict compliance rule of the sales act. . . . When it was clear that the goods were not up to sample, that more goods were shipped than ordered, that the seller insisted on better terms than the contract specified, the seller's claim has been disallowed by arbitrators. But if it appears that the real reason for the buyer's refusal to accept or pay for the goods delivered was a drop in the market price making the contract unprofitable for the buyer, defects in the seller's performance are not likely to be considered substantial.

[14] One of the lawyers interviewed ventured the opinion that some judges were not above the use of outside influence on the part of parties to cases in court.

[15] On the basis of a considerable degree of precedent, it is virtually impossible to overturn an award rendered in arbitration unless one can prove fraud or misconduct on the part of one or more of the arbitrators (Domke, 1968: Chapters 33 and 34).

[16] See Domke (1965: Chapters 3 and 4) on weighing the factors in the decision to arbitrate. On lawyers' attitudes toward arbitration as compared to litigation in court, see Lazarus, et al. (1965: 100-124).

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