

## CHAPTER 5

### THE LAW OF CONTRACTS—A CHANGING LEGAL ENVIRONMENT

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The subject of our panel as printed in the program is “The Law of Contracts—A Changing Legal Environment.” Three additions to that title are needed to make our subject (1) manageable, (2) of more than idle interest to those of you who are not lawyers, and (3) properly focused on the extent to which arbitrators ought to be influenced, if not controlled, by what are loosely referred to as contract principles. Those additions are the words “Role of the Common” before “Law,” the words “in the Interpretation and Application of Collective Bargaining Agreements” after “Contracts,” and a question mark at the end of the title. What that gives us is “The Role of the Common Law of Contracts in the Interpretation and Application of Collective Bargaining Agreements—A Changing Legal Environment?”

With the title thus tidied up, we can eliminate a good many topics as not germane. And a good thing, too, for these topics have been discussed in what to me—a newcomer to the Academy arena—has been a remarkable number of papers delivered at your previous annual meetings.<sup>1</sup> Thus, neither I nor my col-

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<sup>1</sup>Nathan P. Feinsinger, Arthur M. Ross, William E. Simkin, and Russell A. Smith, *The Role of the Law in Arbitration: A Panel Discussion*, in *Arbitration and the Law*, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 68; Lon L. Fuller, *Collective Bargaining and the Arbitrator* (with following *Discussion* by Nathan P. Feinsinger), in *Collective Bargaining and the Arbitrator's Role*, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), 8, 54; Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration* (with following *Discussion* by John T. Dunlop), in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1, 20; Richard Mittenenthal, *The Role of Law in Arbitration* (with following *Rejoinder* by Bernard Meltzer, *Reprise* by Robert G. Howlett, and *Discussion* by Theodore St. Antoine), in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 42, 58, 64, 75; Michael I. Sovern, *When Should Arbitrators Follow Federal Law?* (with following *Comment* by Thomas S. Adair), in *Arbitration and the*

leagues on this panel will concern ourselves with such matters as, for example, the extent to which an arbitrator ought to be controlled by federal or state statutory law, or the extent to which published arbitral opinions should be looked to for decision-determining precedents. This is not to say that our topic, even as narrowed, has not also been amply and ably covered both in papers before the Academy and in the law reviews.<sup>2</sup> In fact, if much of what you are about to hear causes you to begin to worry about paramnesia, stop worrying. You are not suffering from *déjà vu*; you simply have excellent memories. But if we also eliminated common-law contract principles from our presentation because of previous coverage, we would obviously eliminate ourselves from the program, and *that* we can't do even if we would like to. So let's see what, if anything, we can—in the best traditions of scholarship—at least put in new enough bottles to give a different look, if not a new taste, to our subject.

There is, as we could expect, an abundance of opposing learned views on the proper place of contract principles in the handling of disputes arising under collective bargaining agreements. This has been well documented by Clyde Summers in his excellent article in 78 Yale,<sup>3</sup> from which I have liberally borrowed throughout this paper. At one extreme is the view best expressed by Harry Shulman in his 1955 article in 68 Harvard<sup>4</sup> that collective bargaining agreements are pacts adopted in various complex industrial societies to set up systems for their governance. Although these pacts are usually called contracts, they have so little relation to the law of contracts that contract law is largely irrelevant as a guide to their interpretation and application. The relevant law is the common law of a particular shop governed by a particular agreement.

At the other extreme is what may be called the never-say-die

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Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 29, 47; Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards* (with following *Comments* by Walter L. Adams and Harold Katz), in *Arbitration—1977*, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1977), 29, 52, 61.

<sup>2</sup>Papers cited *supra* note 1; Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 Colum. L. Rev. 829 (1948); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Fleming, *Some Observations on Contract Grievances Before Courts and Arbitrators*, 15 Stan. L. Rev. 595 (1963); Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955); Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L. J. 525 (1969).

<sup>3</sup>Summers, *supra* note 2.

<sup>4</sup>Shulman, *supra* note 2.

Willistonian view that a contract is a contract is a contract, and that although some contract rules are too narrow to qualify as full-fledged principles, the general principles (sometimes called with almost religious fervor the *fundamental* principles) of contract law are always applicable.<sup>5</sup>

The majority view, as is usually the case, is somewhere in between, namely, that collective bargaining agreements are very special types of contracts with respect to which the principles of “ordinary” contract law, though not strictly applicable, are nonetheless helpful to arbitrators because they summarize the wisdom and experience of the past.<sup>6</sup>

I am comfortable enough with that middle view to adopt it as mine. That is because when I examine it, I realize that it is sufficiently vague to leave me totally unfettered when I serve as an arbitrator. But its adoption only complicates the task of meeting my charge in this presentation. For now—in addition to identifying specific principles that are relevant to arbitrators in making their decisions, specifying how and why they are relevant, and finally indicating how they are a part of a changing legal environment (if, indeed, they are)—I must distinguish at the outset between “ordinary” contract law and “extraordinary” contract law. That is indeed quite an order, and I warn you now not to expect me to deliver a product that fully meets the specifications. Let me speak, however, to at least some of this larger order.

### Ordinary Contract Law

I concluded a long time ago that there is no real-life “ordinary” contract law. What we like to think of in this way is what is taught in the course labeled “Contracts” in the first year of law school. Most of us who engage in that exercise dearly love

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<sup>5</sup>*See, e.g.*, Justice Frankfurter (Dissenting) in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 475, 4 L.Ed. 2d 442, 452, 80 S.Ct. 489, 498, 45 LRRM 2719 (1960): “Underlying the Court’s view is the assumption that . . . collective bargaining agreements are a very special class of voluntary agreements to which the general law pertaining to the construction and enforcement of contracts is not relevant. . . . There is no reason for jettisoning principles of fairness and justice that are as relevant to the law’s attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements.”

<sup>6</sup>Elkouri and Elkouri, *How Arbitration Works*, 3d ed. (Washington: BNA Books, 1973), 328.

it, as well we should. But too often our infatuation with its wonderful philosophical ramifications, its neat logical progressions, and its struggle for structural symmetry causes us to lose sight of the fact that what we are teaching is a body of law that has limited application beyond settling disputes between a nonexistent A and a nonexistent B dealing in a vacuum. We worry extraordinarily about such textbook exercises as whether Uncle John's promise to pay \$5000 to little nephew Willy on his 21st birthday if Willy doesn't smoke until then is an enforceable contract or an unenforceable gift-promise—depending, of course, on whether Willy's nonsmoking (which is supposed to be good for him) compensates Uncle John enough to make the transaction a bargain instead of a gift!<sup>7</sup> What we are teaching, in short, is vocabulary and legal method and a body of doctrine that is, by and large, "pure" contract law. It is wonderful fun and a great pedagogical tool, but it should not be taken seriously as solving any but the simplest problems. And sooner or later, at least some students come to realize that the broad generalizations that we turn to (or at least pretend to) as guidelines for the solution of complicated problems are of very little help in reaching such solutions. In short, what contracts teachers irritatingly refer to as the large area of gray between the clear (because uncomplicated) cases at the extremes—that gray area where important real-life problems reside—remains as unmapped at the end of the course as it was on the first day out.

### Special Contract Law

It was in the handling of simple problems, after all, that the law of contracts had its beginnings, for those were simple times. And that is why, despite the best efforts of judges and scholars to pull and haul at that simple ("ordinary") contract law so as to accommodate problems of increasing complexity under its single umbrella, more and more problems having *some* of the characteristics of contract kept sticking out from under the umbrella and getting wet. And so, to bring about sensible solutions to very practical and important problems without fully admitting the extent to which we were warping—even ignoring—long-

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<sup>7</sup>The classic casebook entry involving these facts is *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891).

accepted “essential” principles, we developed separate bodies of law to cover insurance contracts, and government contracts, and collective bargaining contracts, and, most recently, consumer-goods contracts. But in the process we have grimly clung to the notion that *most* of the law governing these various special types of arrangements is still made up of the same basic principles—those rules of “ordinary” contract law—with which we wrestled as first-year law students. When we test all transactions by the yardstick of those rules, however, a surprisingly large number fail the test. I submit that the common elements that are supposed to bind all of these various types of special and complicated arrangements into more than the illusion of a whole are far fewer than is generally believed. And the type that is farthest from that basic core is the collective bargaining agreement.

But there is another, and I submit a deeper, reason why labor law is contract law only by misplaced courtesy. That reason is that most basic contract law—“ordinary” contract law, if you will—achieved its major growth in the late eighteenth and nineteenth centuries as commercial law, and the emphasis was, therefore, on the freely bargained exchange. That remains the core of modern contract law, and it is still expressed in the consideration principle: that no one should be held to a promised performance if he does not receive his requested price for it. Usually, today, the initially requested price is for a return promise, but it may be for an immediate performance, or for a combination of the two. The whole law of formation of contract—what we know as offer and acceptance—is bottomed on this idea. What else is the cardinal rule that an acceptance must be in terms of the offer than a statement that unless the offeror gets his stated price, no contract is created? And what else is the core of the doctrine of material breach—no matter how confused by such concepts as promissory condition as opposed to pure condition—than that a significant failure of consideration constitutes a breach that terminates the contractual relationship? And what else has excluded gift-promises from enforcement and bestowed legal respectability on fussing with the nice line between a big red apple as consideration on the one hand and as a mere condition of a gift on the other? Back to little Willy and his generous Uncle John! This line, in the teeth of the oft-repeated slogan (fundamental principle, if you will) that the law will not question the adequacy of consideration, delights contracts teachers and drives students up the wall.

It need not concern us here, and we can all be thankful for that!

What does concern us here is that collective bargaining agreements are not entered into for the same purposes for which contracts for the purchase and sale of loads of hay are made, and paying lip-service to the ordinary rules of contract formation when dealing with the former is a meaningless exercise. Consideration is built into a collective bargaining agreement by definition, and once the agreement is signed, that settles it. As for the multitude of other rules on offer and acceptance which make up such a large part of “ordinary” contract law, they too have no impact on labor law for the simple reason that collective bargaining agreements are not made—and hence their validity is not tested—in ways that those rules were intended to cover. And as for the complicated business of distinguishing between material and immaterial breach, show me the case where anything short of outright total abandonment of the union-company relationship by one of the signatories—and who needs contract law to determine that such repudiation is a material breach—qualifies as a breach serious enough to permit the other party to say, “So that’s that—now we start over.”

Here let me inject something from an article by Professor Archibald Cox, wherein he finds more clout in the importance of consideration (that is, the exchange idea) in collective bargaining than I just have. He had this to say:

“Some contract rules stand up well in the new environment. . . . They appear to be those which derive from functional aspects of commercial contracts that are also important characteristics of collective bargaining agreements. The doctrine of failure of consideration and the element of ‘bargain’ or ‘exchange’ furnish a prime illustration.

“Since a collective bargaining agreement has a strong element of exchange, there would seem to be no a priori reasons not to follow these doctrines whenever there is a breach. Surely the notion that it is unjust to require a person to perform his promise when he will not receive the agreed exchange is as applicable to management and labor as it is to commercial enterprises. . . .”<sup>8</sup>

That last sentence in the above excerpt disturbs me, because it rather strongly suggests that the rules of material breach regu-

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<sup>8</sup>Cox, *supra* note 2.

larly applied to commercial contracts are equally applicable to collective bargaining agreements. As one who has struggled with too many cases in which judges have attempted to mark the line that separates a breach serious enough to justify termination of the contractual relationship by the injured party from one not sufficiently serious, I shudder at the thought of importing that distinction into the labor-contract field. Every contracts student knows how potent a sanction is the termination power carried by a material breach, how difficult it is to make the material-immaterial determination, and how frequently the point is raised. Since everything we know—or think we know—about the function of collective bargaining operates in favor of keeping the relationship alive, I strongly believe that there is no place in labor law for an escape-hatch doctrine that—whatever sense it may make in the law of sales—can only be counterproductive in the context of collective bargaining agreements.

### **Rules of Interpretation and the Parol-Evidence Rule**

I could now weary you with a catalog of clear mismatches between contract doctrine and the nature and terms of collective bargaining agreements, but I won't. It has already been said over and over that the fact that collective bargaining agreements differ from other types of contracts doesn't mean that they aren't contracts.<sup>9</sup> I agree. The important point is that where they "are" contracts, and thus contract principles appear to be most clearly applicable, they provide little help to the thoughtful arbitrator. Even in the vast area of contract interpretation—the area in which it is generally felt that contract principles can play the most influential role—those principles will usually be found on examination to offer little more than convenient ways to state a conclusion after it has been reached.

Here we can most easily begin with that familiar clause, "The Arbitrator shall have no power to alter, amend, change, add to or subtract from any of the terms of this Agreement, but shall determine only whether or not there has been a violation of it in the respect alleged in the grievance." This clause is as common in collective bargaining agreements as is "Very truly yours" at the end of a letter. The equally common judicial counterpart

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<sup>9</sup>See, e.g., Summers, *supra* note 2, at 527.

of this language is the maxim, "The judicial function of a court of law is not to alter a contract as made but to enforce the contract as written."<sup>10</sup>

Inextricably tangled with the philosophy behind that clause and that judicial dogma is the so-called parol evidence rule. It is a potent rule because courts have made it so, in part because of misunderstanding of its function and proper application and in part because of its utility as an issue-simplifier and trial-shortener.

The rule is a narrow one and is really nothing but a rule of relevance. It provides that when parties purport to have incorporated all of the terms of their understanding in a written document, evidence as to prior or contemporaneous understandings that vary or contradict those terms will not be admissible into evidence.<sup>11</sup>

Despite the apparent dissimilarity between the idea here and the "don't make a contract for the parties" restriction just discussed, both require the same essential determination, namely, to what did the parties agree? As Arthur Corbin has explained:

"No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined. The 'parol evidence rule' is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted and all those factors that are of assistance in this process may be proved by oral testimony."<sup>12</sup>

At any rate, here, at least, we have an area where contract rules and collective bargaining agreements speak the same language. We are, therefore, in an area where contract rules ought to be applied to keep the arbitrator—as they are supposed to keep the judge—from straying off the reservation. So what do we find? The usual scant help. This is not because the principle is not clear. It is because the application of the principle is not clear, and that is because contract terms are necessarily expressed in words, and words are imprecise tools. Hence, the boundaries of

<sup>10</sup>See, e.g., *Kupfersmith v. Delaware Insurance Co.*, 84 N.J.L. 271, 275, 86 A. 399, 401 (1913).

<sup>11</sup>For a modern statutory statement of the rule, see Uniform Commercial Code, Section 2-202.

<sup>12</sup>Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603, 622 (1944).



the reservation off which the arbitrator must not stray depend not on precise measuring instruments, but on the variable vision of a human surveyor. In short, the decision of an arbitrator depends on what that arbitrator thinks the crucial language means. Whether the agreement is written or oral matters not; the only difference is that the words in a written agreement are more easily established than those in an oral agreement where what was said must be found as a fact. But determining the meaning of those words as used by the parties raises the same critical questions once the words themselves are established—questions that go to the heart of most contract disputes.

The answer to these questions is begged by the fundamental contract principle that it is the intent of the parties when they made the contract that governs. Of course, that is what governs. But how do judges determine that intent? Two levels of difficulty immediately become apparent. The first is the difficulty just mentioned above: ambiguity in the words themselves. It is almost always possible to find an obscurity in the meaning of the most common phrase. Sometimes the variant meanings will seem farfetched. In many cases, however, the uncertainty will be real. The parties are interested in doing business and are unlikely to have examined and negotiated each word as diplomats are supposed to do when drafting a treaty. Moreover, most contracts do not bother to state assumptions that “everybody knows” or provide a dictionary defining each of the terms used. These cause gaps in the expression which somehow must be filled.

Some of the better reading in the law reports are opinions dealing with this “meaning of the words” problem. Try Judge Friendly in *Frigaliment Importing v. B.N.S.*,<sup>13</sup> dealing with the meaning of “chicken,” or Judge Rossman in *Hurst v. W.J. Lake and Co.*<sup>14</sup> on the meaning of “50%,” or Judge Wigg’s successful struggle in *Garrison v. Warner Brothers*<sup>15</sup> to interpret (to the hilt) Warner’s offer to pay \$1 million to anyone who could prove that Burt Lancaster did not perform all the daring stunts he was shown doing in the picture “The Flame and the Arrow.” (His interpretation: that the offer excluded (1) stunts that only seemed to be daring but were in

<sup>13</sup> 190 F.Supp. 116 (S.D.N.Y. 1960).

<sup>14</sup> 141 Or. 306, 16 P.2d 627 (1932).

<sup>15</sup> 226 F.2d 354 (9th Cir. 1955).

fact fakes, and (2) stunts done not by Lancaster but by a stunt man made up to look like him!) Wonderful reading, and instructive, too, but containing principles leading an arbitrator unerringly to a proper solution when faced with the need to interpret a word, a clause, a paragraph in a collective bargaining agreement? Hardly.

In addition to the problem created by words of ambiguous reference, there may well be gaps caused by the fact that the parties never reached full agreement on a key point, or their understandings may have been fuzzy or conflicting, or the matter may never have crossed their minds.<sup>16</sup>

In an extreme case, the resulting agreement may be so vague and indefinite as to cast doubt on whether it can be enforced at all. But in most cases it is clear that the parties intended to do business together and a court will try to give effect to that large intention by interpreting the agreement in such a way as to fill it with the meaning the court thinks that the parties wanted, or would have wanted had they thought about it. Should an arbitrator do less?

In this connection, we should probably consider those impressively worded rules of interpretation such as "*eiusdem generis*": where no intention to the contrary appears, general words after specific terms are to be confined to things of the same kind or class; and "*expressio unius est exclusio alteris*": everything not specifically mentioned is excluded; and "*contra proferentem*": language is to be construed against the party responsible for its inclusion in the agreement.

All fine, except that they are as honored by the courts in the breach as in the observance.<sup>17</sup> So *you* decide whether they are principles or mere rules of convenience to be used or ignored at your option—as they are by the courts. I submit that they are handy helps in supporting an interpretation decided upon by you; they are of scant help in making that determination, espe-

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<sup>16</sup>David Mellinkoff realistically adds other reasons for contractual omission in the following excerpt from his *Language of the Law* (Boston: Little, Brown & Co., 1963), at 398: "In a more immediate controllable sense, complete precision is sometimes also incompatible with some of the other desirables of law language—durability, intelligibility, brevity, for instance. And it cannot be accepted as axiom that all else must always be sacrificed for the sake of precision. There are times when precision may kill a deal that should not be killed, or confuse an issue that should be immediately clear, times when precision is *undesirable* even if possible. There are other considerations of policy and expediency which can influence a lawyer's choice of language."

<sup>17</sup>See Fuller, *Collective Bargaining and the Arbitrator*, *supra* note 1, at 11.

cially in labor arbitration, because they do not reflect what actually goes on in the give-and-take leading to a collective bargaining agreement. To say that such rules furnish clues to the intention of the parties who sat around a bargaining table is just not realistic. As Judge Charles Clark said in *Parev Products v. I. Ro-keach & Sons*, “‘Intention of the parties’ is a good formula by which to square doctrine with result. That this is true has long been an open secret.”<sup>18</sup>

To summarize, then, the restriction that the arbitrator’s power to operate be confined within the four corners of the written agreement—whether based on express provision therein or on the common-law rule demanding judicial restraint, or on the parol-evidence rule—has meaning only in a limited sense that neither requires nor commends resort to contract principles or extensive knowledge of contract law to mark its boundaries. Russell Smith put it as well as it can be put when he said in *Superior Products*:

“Arbitrators are constantly required and expected to give meaning to contract provisions which are unclear, in situations which were not specifically foreseen by the contract negotiators. So long as this is done by application of principles reasonably drawn from the provisions of the Agreement, and not by treating of a subject not covered at all by the Agreement, arbitral authority is not being improperly assumed.”<sup>19</sup>

Giving sensible meaning to language within the four corners of a collective bargaining agreement, supplying gaps that must be filled to give the agreement required coherence, defining terms like “just cause” and “management rights” and “appropriate discipline” are essential facets of an arbitrator’s obligation to decide the case before him. For though in the strict sense, all of these activities by judge or arbitrator “make a contract for the parties” or “vary the terms of the Agreement,” they are essential to his job in making sensible use of an agreement which, by its nature, is full of ambiguities, omissions, and conflicts that demand resolution at his hands. If one agrees with David Feller’s enthusiastic approval of the fact that Justice Douglas based his opinion in *Lincoln Mills* on the central concept that grievance arbitration is not a substitute for litigation but a substitute for a

<sup>18</sup>124 F.2d 147, 149 (2d Cir. 1941).

<sup>19</sup>*Superior Products Co.*, 42 LA 517, 523 (1964).

strike<sup>20</sup>—and I do agree—the concern must be with an excess of arbitral caution rather than with overzealousness. If the arbitrator is overpersuaded by the appearance of certainty created by such principles as “not making a contract” and the parol-evidence rule, and thus overreacts for fear that he will be overstepping the bounds of his power, he emasculates the arbitral power and cripples his vital function as a dispute-settler.

### A Changing Legal Environment?

All of this finally brings me to that question mark at the end of our revised title: A Changing Legal Environment? And here I must use the late Saul Wallen’s wonderful opening story in his presentation to you at your 15th Annual Meeting in 1962.<sup>21</sup> A asked B, “How’s your wife?” and B responded, “As compared to what?” A more precise form in which to put that question here, of course, is to ask “Since when?” instead of “As compared to what?” For though the law of contract normally changes with such glacial speed that contracts teachers are the envy of their colleagues because most of them are able to use their original lecture notes, with only minor changes, for life, it has changed some since it was decided in *Slade’s Case* in 1604<sup>22</sup> that Assumpsit could be brought instead of an action in Debt because a promise to pay was conclusively presumed in any debt situation. In fact, it has been changing rather significantly in the last 25 years in the area of manufacturers’ and sellers’ warranties and the effect of disclaimers on them, especially in the consumer-goods field where freedom of contract has had to respond to the reality that freedom of contract requires reasonably equal bargaining power to be meaningful.

The trouble is that I cannot detect any significant changes in those areas in which labor arbitrators should have the slightest interest or to which they should pay attention. As I have already indicated, most contract rules have, in my opinion, no more

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<sup>20</sup>Feller, *Discussion*, in *Arbitration and the Law*, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), at 22.

<sup>21</sup>Wallen, *The Silent Contract vs. Express Conditions: The Arbitration of Local Working Conditions*, in *Collective Bargaining and the Arbitrator’s Role*, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), at 117.

<sup>22</sup>4 Coke 92 (b).

place now in a grievance hearing than they ever should have had. And in those areas where it can be argued that contract rules give appropriate guidelines, the changes have been less than rule shaking. The parol-evidence rule, for example, has not really changed in the past 50 years; whatever legal scholars and some appellate courts have been saying about it, it continues to be misunderstood and misapplied at the trial level pretty much as always.

### Conclusion

As one whose father in the law was Arthur Corbin and whose uncles were such legal realists as Jerome Frank and Charles Clark and Underhill Moore and Thurman Arnold, I could not have been expected to give three rousing cheers for those who believe that the law can be neatly ordered according to Langdell's distillation theories or the theories of those who believe that cases can and should be decided by computers properly programmed with the right rules. Obviously I have not given even one such cheer, not even for "traditional" views far more moderate than those. For I am too aware of the fact that only after a rule has become so general as to be of no help in solving a specific case can it be safely called a fundamental principle.

This does not mean that such principles as the following do not state great truths:

A contract must be so interpreted as to give effect to the lawful intention of the parties.

A contract must be so definite in its terms that the performances to be rendered by each party are reasonably certain.

An illegal contract will not be enforced, and it is illegal if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy.

These are indeed unquestioned truths. In fact, in legal opinions, they are almost always preceded by the words, "It is too well established to require citation that. . ."<sup>23</sup> Nor does it mean that they do not add structure and dignity to an arbitrator's opinion when stated therein as foundation stones,<sup>24</sup> just as the

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<sup>23</sup>Which is, of course, why I do not supply citations for any of them here.

<sup>24</sup>As Elkouri and Elkouri state, *supra* note 6, at 388, arbitrators also frequently "preface the assertion of an established rule or principle with some statement such as 'it has become a well-accepted principle,' or 'it is a general rule that,' or 'the consensus is,' or

language to be found in judicial opinions—and here I am not being cynical—often can express a point with an elegance and an aura of respectability that an arbitrator's own words would lack. Thus one need not be law trained to appreciate and make good use of such words as Judge Scott's "instinct with obligation" in *McCall v. Wright*<sup>25</sup> (preserved for posterity by Justice Cardozo's use of them in *Wood v. Lucy, Lady Duff Gordon*<sup>26</sup>); or Cardozo again in *Outlet Embroidery v. Derwent*: "If literalness is sheer absurdity, we are to seek some other meaning whereby reason will be instilled and absurdity avoided."<sup>27</sup> And there is no need for an arbitrator to be law trained to understand, appreciate, and utilize the processes involved in judicial analyses of various kinds of ongoing relationships other than those covered by collective bargaining agreements in his task of dealing with such agreements. Many judicial opinions are written well enough to be considered fine literature, and much can be learned from them, as from any fine literature, by non-law-trained readers who read them for pleasure and profit. But such use of principles and "legal precedents" is not essential and should, in any event, be a relaxed use.

In short, nonlawyer arbitrators should refuse to be snowed by lawyers thundering out what they will insist are inviolable principles of contract law. Lawyer arbitrators should reevaluate those principles to which they were exposed in law school and have unquestioningly accepted since. I submit that the correct applicable principles in any given case are those that an intelligent arbitrator can and will arrive at—and arrive at more surely—by the thoughtful application of everyday standards of relevance, by consideration of the purpose and function of collective bargaining agreements, by careful attention to the total environment in which the dispute with which he is faced arose, and, forgive me, by the use of common sense.

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'the weight of authority is.' In doing this arbitrators frequently . . . cite few or no specific cases to support their assertion that the principle does in fact exist."

<sup>25</sup>117 N.Y.S. 775, 779 (1909).

<sup>26</sup>222 N.Y. 88, 91, 118 N.E. 214, 214 (1917).

<sup>27</sup>254 N.Y. 179, 183, 172 N.E. 462, 463 (1930).

**Comment—**

RAYMOND GOETZ\*

I find little to quarrel with in Professor Mueller's thoughtful survey of the areas of contract law that are, and are not, applicable to collective bargaining agreements. As he points out, the areas having the greatest potential relevance to labor arbitration clearly are those governing contract interpretation and application. I will therefore confine my remarks to those aspects of contract law. With all respect, I must disagree with his opinion about the uselessness to arbitrators of legal principles in these areas and the lack of significant change.

**Collective Bargaining Agreements as Contracts**

I start from the premise that, despite certain unique features, collective bargaining agreements nevertheless do create the legal relationship we have classified as "contract."<sup>1</sup> That is how these agreements are referred to by the plain-talking people in the shop who work under them, and under the law they can properly be so treated.<sup>2</sup> A contract after all is nothing more than a promise (or set of promises) for the breach of which the law provides a remedy, or the performance of which the law in some way recognizes as a duty.<sup>3</sup>

Certainly a collective bargaining agreement fits that definition. At least since the enactment of Section 301 of the Labor Management Relations Act of 1947<sup>4</sup> and Supreme Court decisions in *Textile Workers Union v. Lincoln Mills*,<sup>5</sup> *Atkinson v. Sinclair*

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<sup>1</sup>A. Corbin, *Contracts* §1420 (1962).

<sup>2</sup>This basic point is no longer seriously debated. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 3 (1958), states that a collective bargaining agreement "is a contract within any acceptable definition." Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 773 (1973), states that a collective bargaining agreement "is a judicially enforceable contract between the union and the employer." Although he would not consider it a contract between the employer and the employee, he observed that a collective bargaining agreement "is negotiated as a contract, is called a contract, and is made enforceable as a contract." *Id.*, at 792.

<sup>3</sup>Restatement Second of the Law of Contracts §1 (1973) [hereinafter cited as Restatement 2d].

<sup>4</sup>29 U.S.C. §185 (1964).

<sup>5</sup>353 U.S. 448, 40 LRRM 2113 (1957).

*Refining Co.*,<sup>6</sup> and *Boys Markets, Inc. v. Retail Clerks*,<sup>7</sup> we have known that the law *does* provide a remedy for breach of promises in collective bargaining agreements, either directly in the courts or indirectly through enforcement of the agreement's arbitration provisions. Of course, we also know from *Lincoln Mills* that federal courts are authorized to fashion their own body of federal common law of collective bargaining agreements. And on successorship problems, for example, the Supreme Court has expressly rejected principles of contract law governing "ordinary contracts."<sup>8</sup> Nevertheless, the traditional common law of contracts is one of the sources to which courts turn to find the rules to best effectuate federal policy.<sup>9</sup>

That being the case, I see no reason why arbitrators should not also consult basic principles of contract law on the problems of interpretation which constantly beset them. In this regard, Mr. Justice Frankfurter has warned against the danger of assuming that collective bargaining agreements constitute a special class of agreements to which the general law pertaining to construction and enforcement of contracts is not relevant.<sup>10</sup> He endorsed Professor Archibald Cox's observation about the value of familiar principles of contract law in this context:

"[T]he doctrines themselves represent an accumulation of tested wisdom, they are bottomed upon notions of fairness and sound public policy, and it would be a foolish waste to climb the ladder all over again just because the suggested principles were developed in other contexts."<sup>11</sup>

To be sure, a collective bargaining agreement has important differences from an insurance contract, just as an insurance contract differs from a building-construction contract or a lease.<sup>12</sup> Yet questions of interpretation are common to all types

<sup>6</sup>370 U.S. 238, 50 LRRM 2433 (1962).

<sup>7</sup>398 U.S. 235, 74 LRRM 2257 (1970).

<sup>8</sup>*John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 500, 55 LRRM 2769 (1964).

<sup>9</sup>*Textile Workers Union v. Lincoln Mills of Alabama*, *supra* note 5, at 457.

<sup>10</sup>*Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 475, 45 LRRM 2719 (1960).

<sup>11</sup>*Id.*, at 476, quoting Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 14-15 (1958).

<sup>12</sup>While scholarly commentary tends to dwell on the unique features of collective bargaining agreements, these features do not detract from their status as bona fide contracts. Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L. J. 525, 534 (1969) states: "There is no need to identify and describe further distinguishing characteristics of the collective agreement here. It should already be plain that although collective agreements differ from 'ordinary bargains of commerce,' they are full members of the contract family. Many other contractual relationships also differ greatly from



of contracts—whether we consider them “special” or “ordinary.” The basic problem always is how to divine the intention of the parties. What actually was their bargain, and what should be its legal effect? Therefore, it seems to me that principles of interpretation and construction developed by the courts over the years ought to be one sensible place for arbitrators to seek guidance. Some of these rules can be made to look absurdly out of place by referring to their Latin names—“*expressio unius*,” “*ejusdem generis*,” and “*contra proferentem*,” for example—but if one is careful to use plain English and consider the underlying reasons for the rules being applied, they should contribute to well-reasoned and mutually acceptable arbitration awards. I would like to briefly run down five principles of “ordinary” contract law that seem illustrative.

### The “Plain-Meaning” Rule

We might begin with the frequently raised objection that the arbitrator should not consider evidence on bargaining history of a disputed provision or a practice under it because the language on its face is completely clear and susceptible of only one possible meaning. Although not always identified as such, this objection in effect invokes what is sometimes referred to as “the plain-meaning rule”—one aspect of the parol-evidence rule. It simply holds that extrinsic evidence is inadmissible to alter the “plain meaning” of the words used in a written agreement.<sup>13</sup> In other words, since arbitrators (like judges) are precluded from remaking the agreement for the parties, they are bound by the wording found there and should look no further.

What are arbitrators to do when faced with this objection? If they follow the usual liberality on admission of evidence, may they properly give it any effect in reaching their ultimate decision? I suppose an arbitrator with training in linguistics might be able to cite persuasive authority from that branch of learning to the effect that words have no absolute and constant referents. Or perhaps it is common knowledge that there is no such thing as a word or phrase susceptible of only one possible meaning.

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‘ordinary bargains of commerce’ and share one or more of the marked characteristics of collective agreements. The uniqueness of collective agreements is matched by the uniqueness of many other contracts, and none should be disowned as club-footed cousins simply because they are in some sense not ‘ordinary contracts.’”

<sup>13</sup>Murray on Contracts §110 (1974).

Still some arbitrators might feel more confident after looking into the current status in the law of contracts of the rule being asserted. A leading case in point is a 1968 California Supreme Court decision included in Professor Mueller's Contracts case-book.<sup>14</sup> In that case, Judge Traynor—a former law teacher and one of our leading jurists—proceeded to obliterate the plain-meaning rule as it had been applied by the trial court, stating:

“The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”<sup>15</sup>

From this case, we learn that a court may properly consider all credible evidence to show the intention of the parties. Once it has been demonstrated that language that originally seemed plain is in fact susceptible of more than one meaning, extrinsic evidence may then be considered further to arrive at the intended meaning. Conceivably, common sense would lead to the same result, but if nothing else, resort to principles of contract law could provide valuable assurance and convincing justification for the approach taken.

This California decision also illustrates the changing legal environment. Although there still seems to be some support in other court decisions for the plain-meaning rule, this case must be viewed as a new development. In his casebook, Professor Mueller has followed it with a note referring to Judge Traynor's “far reaching statements about the parol evidence rule.”<sup>16</sup> The case has been cited in a leading text as evidence of “the progress made in rejecting the so-called ‘plain meaning rule.’”<sup>17</sup> The *Restatement of Contracts Second* is to the same effect,<sup>18</sup> and the Uniform Commercial Code expressly rejects the plain-meaning rule.<sup>19</sup>

From all this, I can't help but conclude that a change has taken place in the principles of contract law applicable to cases where the words used on their face seem to have only one possible

<sup>14</sup>*Pacific Gas & Electric Co. v. G. W. Thomas Drayage Co.*, 69 Cal 561, 442 P.2d 641 (1968).

<sup>15</sup>*Id.*, at 442 P.2d 644.

<sup>16</sup>Mueller and Rossett, *Contract Law and Its Application* 192 (1977).

<sup>17</sup>Murray on Contracts §110 (1974).

<sup>18</sup>Restatement 2d §227, comments a and b, §240, comment b.

<sup>19</sup>U.C.C. §2-203, Comment 1(b).

meaning. To my mind, this coup de grâce to the plain-meaning rule represents a development in the law of which arbitrators ought to be aware.

### Collateral Agreements

Unfortunately, there is another aspect of the parol-evidence rule with which arbitrators may have to be concerned. As Professor Mueller has stated the rule, it simply holds that where the parties have incorporated all the terms of their understanding in a written document, evidence of prior or contemporaneous understandings that would vary or contradict those terms will not be admissible. I agree that, as so paraphrased, the rule does little more than restate the admonition found in most collective bargaining agreements to the effect that the arbitrator shall have no power to alter, add to, or subtract from the terms of the agreement. The practical impact of both the rule and this restriction on arbitrators is blunted by the necessity of first determining the meaning of the words used; for this purpose, extrinsic evidence may always be considered. This leaves arbitrators considerable flexibility.

It also is probably true that no arbitrator of sound mind needs such a rule or contractual limitation to keep from giving effect to evidence of a claimed oral agreement or understanding that would contradict the writing. Obviously, the later written expression should supersede earlier contradictory expressions on the same subject—whether oral or written. In the absence of mistake or something of that sort, few responsible unions or employers would even suggest such contradiction of the written agreement.

But I think Professor Mueller has sidestepped one of the most common problems in application of the parol-evidence rule. This problem arises when extrinsic evidence is offered not to show the meaning of the writing or to contradict it, but rather to *supplement* it with some *consistent* understanding—the so-called “collateral agreement.” This is an area of great confusion on which contract law has been in a state of flux. Cases of this kind pose the crucial threshold question whether the parties *have* in fact incorporated all the terms of their bargain in the writing. This in turn presents the vexing question of how a court or an arbitrator should determine the parties’ intention on this key point.

To demonstrate that this problem is of more than academic

interest, I might refer to the award of Archibald Cox in *United Drill & Tool Corp.*<sup>20</sup> There the parties in the latter part of 1955 had executed a document amending their existing pension agreement. This amendment and the pension agreement to which it related were completely separate from the basic collective bargaining agreement. The amendment made no mention of employees who had already retired and were receiving benefits under the predecessor plan in effect before the union became the bargaining agent. Yet, two months earlier the parties had executed a supplement to their existing collective bargaining agreement which in Appendix C recited the amendments to be made in the pension agreement to reflect negotiated changes in benefits. That document included a provision that pensioners retired between 1941 and 1955 were to receive the new benefits. The company, however, took the position that the pension agreement was a final and complete statement of the parties' agreement on pension benefits, and therefore the earlier Appendix C was inoperative to add benefits for existing pensioners.

Cox held that Appendix C was effective and binding on the company because the parties had *not* intended the pension agreement to be a final and complete expression of their agreement on pensions; instead, it represented only *part* of their agreement. In reaching this conclusion, he considered the wording of the pension agreement, the surrounding circumstances, the prior negotiations, and the conduct of the parties. This approach probably is in accord with the *Restatement of Contracts Second*<sup>21</sup> and a recent California decision that has attracted wide attention,<sup>22</sup> but it would have been subject to severe criticism under the earlier approach laid down by Williston and the *Restatement First*, which restricted the court's inquiry in such cases to determining whether in the judgment of the court the collateral agreement was of the type that would naturally have been made separately.<sup>23</sup>

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<sup>20</sup>28 LA 677 (1957). Further evidence of the significance of the parol-evidence rule for labor arbitration can be found in the reports of the four Regional Tripartite Committees at the 1966 annual meeting. Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1966), at 173-180, 254-256, 300-301.

<sup>21</sup>Restatement 2d §240(b), comment a.

<sup>22</sup>*Masterson v. Sine*, 68 Cal.2d 222, 436 P.2d 561 (1968).

<sup>23</sup>Restatement of Contracts §240 (1932) [hereinafter cited as Restatement].

Without going into all the technical differences, it can be seen that the law of contracts has moved in the direction of allowing a court to consider all credible evidence that a later writing was not intended to be complete, or was not meant to discharge earlier understandings. Paradoxically, one piece of evidence on this point is the disputed collateral agreement itself, and there usually is a question of fact as to whether such an agreement was ever assented to. Thus, in cases of this kind, it is always necessary for the arbitrator to at least give conditional consideration to parol evidence of the collateral agreement or understanding, the admissibility of which is in question. Cox's pension award was simplified by the fact that the prior agreement was reduced to writing and clearly had been assented to. Once that fact is established, it is rather difficult to conclude that the later writing is complete.

Here again it may be that common sense would lead to the same result, but it is difficult to imagine how Cox could have satisfactorily disposed of company arguments in the *United Drill & Tool* case without resort to ordinary contract law. It should be heartening to arbitrators to know that in taking such an unrestricted approach to evidence of intent about collateral agreements, they cannot be criticized for violating any current tenet of contract law.

In fact, the *Restatement Second* now goes so far as to suggest that even if the writing contains a "merger clause"—expressly stating that it constitutes the entire agreement between the parties—that may not be conclusive on the question of whether evidence of collateral agreements should be ignored.<sup>24</sup> That clause itself may be subject to question on the ground of mistake or misrepresentation.

### Mistake

Having touched on mistake, we might note that this is an area of contract law that has definitely been influential, if not controlling, in arbitration of collective bargaining agreements. For years, the rule in contract law has been that courts will provide relief for *mutual* mistake, but not for *unilateral* mistake (unless the other party had reason to know of the mistake or caused

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<sup>24</sup>Restatement 2d §242, comment e, §235, comment b.

it).<sup>25</sup> Although the distinction between unilateral and mutual mistakes is somewhat difficult to apply,<sup>26</sup> it is based on the objective theory of contracts and the importance of fulfilling reasonable expectations based on the other party's outward manifestation of assent.

Arbitrators generally have followed this time-honored approach. While the number of mistake cases is not large, it is not unusual to find mistakes in written expression. Notwithstanding the contractual admonition against varying the terms of the agreements, arbitrators generally give the agreement a reading in accord with the parties' actual intention; in effect, they award the contractual remedy of reformation.<sup>27</sup> Of course, the parol-evidence rule does not foreclose evidence of mistake.<sup>28</sup>

In the *United Drill* case mentioned earlier, Cox refused to grant the rescission requested by the company because he found the mistake only unilateral. It consisted of the company's assumption it had a legal duty to bargain with respect to pensioners. And even if the mistake had been mutual, he would still have denied the requested relief because the claimed mistake would not destroy the very foundation of the bargain.

### Misunderstanding

Closely related to mistake is the problem of misunderstanding—hardly uncommon in labor negotiations. The problem arises in arbitration when, after considering all evidence of bargaining history and other relevant extrinsic evidence as an aid to interpretation of the agreement, it becomes apparent not only that the words used are ambiguous, but also that there was no mutual manifestation of intention as to one particular meaning. What then is the arbitrator to do?

Let me give an example of how principles of contract law might be helpful. In a recent case involving the Internal Revenue Service and the National Treasury Employees Union, the issue was the meaning of the term "Office of the District Direc-

<sup>25</sup>Restatement §§502-505.

<sup>26</sup>A. Corbin, *Contracts* §608 (1960).

<sup>27</sup>Elkouri and Elkouri, *How Arbitration Works* (Washington: BNA Books, 1973), at 346-348.

<sup>28</sup>Restatement 2d §240(d).

tor," as used in the last step of the grievance procedure to designate the managerial participant at that step.<sup>29</sup> During the negotiations, the union was under the impression that this meant the individual holding the office of district director or assistant director. The agency, on the other hand, intended it to include any person clothed with the authority of the office of the district director, and assumed that the district director or assistant director did not have to be present personally. When the agency presented this language in writing as a compromise proposal, it offered no explanation or illustration of what was meant, and the union asked for none. Evidence of bargaining history was fairly convincing that in the negotiations each side subjectively had the intention argued for in the arbitration, but neither one had clearly manifested that intention outwardly to the other. The words themselves seemed reasonably susceptible to either interpretation.

In search of a way out of this predicament, I turned to the rule on misunderstanding in the *Restatement of Contracts Second*. In essence, it provides that in such a case, the term is to be interpreted in accordance with the meaning attached by one of them if that party had no reason to know of any different meaning attached by the other, and the other did have reason to know the meaning attached by the first party.<sup>30</sup> This represents a change from, or at least a clarification of, corresponding provisions of the *Restatement* of 1933.

Applying this rule, I concluded that the agency's interpretation should prevail. Even though the union probably did not *actually* know of the interpretation attached by the agency and was acting on the basis of a reasonable assumption of its own as to the meaning, there were a number of facts from which it could be inferred that the union *should have* realized that the agency did not intend the restricted meaning attached by the union.

The point is not that this was necessarily correct because of the principle of contract law involved. Obviously, such principles do not provide computerized answers. But for me at least, they provide an orderly thought process that can be articulated. In order for a contract interpretation to have

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<sup>29</sup>Unpublished arbitration award, June 15, 1976 (Arbitrator Goetz).

<sup>30</sup>*Restatement* 2d §227.

lasting value and mutual acceptability, it seems particularly important that the losing party be able to understand how the result was arrived at.

### Duty of Good Faith and Fair Dealing

Finally, pertinent evolution in the legal environment can be detected in a *Restatement Second* provision that had no predecessor in the original *Restatement*. It provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."<sup>31</sup> (Note that we are talking here about good faith in the *performance* rather than in the negotiation of the contract.) This provision was taken over, almost verbatim, from Section 1-203 of the Uniform Commercial Code, but it is not limited to contracts for the sale of goods. By its terms, the *Restatement* provision applies to *every* contract.

The intriguing question is what influence, if any, this will have on labor arbitration. I am not aware of any arbitration awards that have recognized a duty of good faith and fair dealing in this broad general form. Yet a number of decisions have implied a limitation of good faith on the exercise of particular management functions, such as contracting out work. A leading example is the opinion of Russell Smith in the frequently cited *Allis-Chalmers* case to the effect that:

"... this standard [of good faith] is implicit in the union-management relationship represented by the parties' Agreement, in view of the quite legitimate interests and expectations which the employees and the Union have in protecting the fruits of their negotiations with the Company."<sup>32</sup>

It would not be surprising to find this new *Restatement* provision being urged as the basis for expanding an implied duty of good faith into other areas of management discretion. Just how arbitrators might respond remains to be seen, but one obvious difficulty would be the vagueness of the term "good faith." It really has no separate meaning of its own, but is usually explained by contrasting it with examples of conduct that would be considered bad faith.<sup>33</sup> The *Restatement* defines bad faith as

<sup>31</sup>Restatement 2d §231.

<sup>32</sup>*Allis-Chalmers Mfg. Co.*, 39 LA 1213, 1218 (1962).

<sup>33</sup>See Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 199-207 (1968).



“evasion of the spirit of the bargain.”<sup>34</sup> This obviously would be broad enough to encompass not just subterfuge, evasion, or dishonesty, but almost any abuse of discretion.

While this controversial *Restatement* provision has its roots in fundamental notions of justice and was advocated in Corbin’s treatise,<sup>35</sup> it had not previously gained general acceptance as a principle applicable to all contracts. Certainly it represents a recent development of potential significance for labor arbitrators.

### Conclusion

In the interest of stimulating discussion, I have concentrated on a few differences with Professor Mueller. Perhaps I should acknowledge that part of our disagreement may be about what constitutes change. Much of what I have identified as *change* could be viewed simply as *affirmation* of Corbin’s practical wisdom from some years back.

But however static or dynamic one may consider the principles of contract law, it seems to me that both lawyer and nonlawyer arbitrators would be well advised to have some feel for those relating to contract interpretation and construction. This does not require a law-school course on contracts. Occasional reference to Volume 3 of *Corbin on Contracts* and Chapter 9 of the *Restatement of Contracts Second* should be enough to appraise the tonal quality of the thundering of lawyer advocates, to which Professor Mueller refers.

In conclusion, I have to take issue with his closing suggestion that all we need are “everyday standards of relevance” and “common sense.” If that were enough, there would be little need for arbitrators. By definition, such “everyday” and “common” qualities must be possessed by union and company representatives as well. What arbitrators really need on tough questions of contract interpretation is exceptionally good judgment. To exercise that kind of judgment, an arbitrator needs something to go on besides just the wording of the agreement, a few jumbled facts, and personal intuition. As Cox has suggested, one needs some basic principles to use as analytical tools that will provide consistency and predictability in results. Since the

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<sup>34</sup>Restatement 2d §231, comment a.

<sup>35</sup>A. Corbin, *Contracts* §541 (1960).

rules of contract interpretation under the law were developed to provide such principles, why not use them? If some of these principles now seem like simple common sense, it may be only because arbitrators who preceded us have already adapted them into the common law of collective bargaining agreements,<sup>36</sup> and we now take them for granted.

**Comment—**

ROBERT G. MEINERS\*

When Phil Linn graciously asked me to participate on this panel, I thought that it would be best to reexamine my thinking on this subject. I thought, somewhat immodestly, that if there were any interrelation between the law of contracts and labor arbitration, I should be aware of it, since I teach the three courses that converge at this point, that is, contracts, labor law, and arbitration.

I thought at first that this conclusion of mine might possibly be based upon the different approach that I take to each of these courses in law school. Contracts is a first-year course. In the first year of law school, we play Socratic games with our students, and we become very theoretical. Labor law is a second-year course. By the second year the students are not interested in playing Socratic games anymore, so one must be more practical and down to earth. Arbitration is a third-year course. By the time a student is in the third year, his approach is basically, "I dare you to try to teach me anything." Thus, my approach in that course must be entirely different from what it is in the other two. But my conclusion again was that there is more to my belief that there is no interrelationship than the mere mechanics of the method used in approaching the teaching of these subjects. I will not add undue bulk to the body of this article by repeating all of the philosophical reasons that I have found for my belief.

Basically, I agree with all the things that Ad has said in his

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<sup>36</sup>One chapter of a leading text on labor arbitration consists for the most part of principles of interpretation borrowed by arbitrators from the common law of contracts. Elkouri and Elkouri, *supra* note 27, Ch. 9. Whether they know it or not, those who urge that a collective bargaining agreement should be interpreted and applied in the light of its basic purpose and all the surrounding circumstances are advocating a fundamental principle of contract law. A. Corbin, *Contracts* §536 (1960); *Restatement 2d* §228(1), comments b and c.

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paper. I believe that there is one overriding reason why we arbitrators should not attempt to use the law of contracts in the resolution of labor arbitration cases. That reason, I submit, is based upon the expectations of the parties. When that is examined in some detail, the obvious arises: (1) In many cases counsel for the parties are not lawyers. How then could it be said that their expectations would be that the arbitrator would use contract principles unknown to them and unargued by them in the resolution of their case? (2) In many cases, the arbitrator is not an attorney. How then could it be the expectations of the parties that a nonlawyer arbitrator would be applying principles of the law of contracts in the resolution of their dispute? (3) Assuming both counsel are attorneys and the arbitrator is an attorney, and assuming even further that they all remember the principles of contract law that they learned in the first year of law school, when, if ever, will their expectations be that the arbitrator will use contract principles? Think back in your own cases. When is the last time you recall counsel asking the arbitrator to apply a particular principle of contract law to that case? I would submit to you that the answer is practically never. Thus again I repeat, I believe the expectations of the parties to be the best reason why an arbitrator should not apply contract principles to the resolution of a labor arbitration.

Assuming for the sake of argument that counsel would expect an arbitrator to apply some principle from the law of contracts to the resolution of that case, the question then becomes, what principles from the law of contracts shall the arbitrator apply? Shall he apply any that come to mind? Shall he apply only those which are argued by counsel? If he does, should he identify, in his award, the particular principle of contract law that he is applying?

I ran into a recent case decided by a good friend of mine and a distinguished member of the Academy in which an arbitrator did apply a principle of contract law without identifying it as such. I suspect that this may happen from time to time without the knowledge of the parties. I am not suggesting that it is wrong; I am merely suggesting that arbitrators should give serious thought to the identification of contract principles if they are going to use them to resolve their disputes.

In this case the contract said, "[F]ailure of the company to give its answer in writing within five working days will constitute granting the grievance, unless it has been mutually agreed to

extend the time limits to a later date.” The company had mailed its answer on the fifth day, but the union had not received it until the sixth day. The question was, was this timely? This is what my friend said in that case: “The deposit in the mail in the ordinary course of business is the crucial act of compliance. This is so even if the mail were delivered at a date beyond the five day limit.” Then my friend gave an interesting dictum. “Indeed, so long as the proof were credible of the date of the mailing, it would still amount to compliance if the answer were never received by the union because it had gotten lost in the mail.” As I read that award, my “contracts professor” bell began ringing. What my friend was saying sounded exactly like what the Court of King’s Bench said in 1818 in a famous case called *Adams v. Lindsell*. Today we refer to that case as the “mailbox rule,” and it is a leading principle of contract law. I spend about two weeks playing different games with it in my contracts class. Knowing that my friend was a lawyer, I went and asked him what his thought process was when he wrote the above-quoted statement in his award. He said, “Why Bob, that’s *Adams v. Lindsell*.” Thus, it appears that an arbitrator was cognizant of a contract rule and applied it even though the parties did not identify it as such when they argued the case before him, nor did he identify it as such in his award. How often this takes place in labor arbitration is an unknown quantity.

I differ with my friend Ray partly over semantics. I do not regard the parol-evidence rule as being a principle of contract law. It is not even a principle of the rules of evidence. It is a rule of substantive law. I have no idea what rules of substantive law arbitrators should select and what rules they should not select. I also disagree with him on the question of using some of the principles or rules of interpretation. I have come to regard these as sweeping generalities used by courts when they wish to use them and totally ignored by courts when they wish to ignore them. I would think that it would be dangerous for an arbitrator to step into so loaded a minefield.

My conclusion, then, is that the expectations of the parties would be violated if we as arbitrators were to apply principles of the law of contracts to the resolution of labor arbitration disputes.