CHAPTER 7

ARBITRATION FORUMS REVISITED

I. INTEREST ARBITRATION

A. SCOTT BUCHHEIT*

Our session is titled "Current Problems in the Arbitration of Interest Disputes." It may be helpful if I first define how I will approach this topic. Although our focus is on the "current," I do not believe the matters I will address are necessarily new or unique. For many years the Academy has had sessions at the Annual Meeting on interest arbitration. However, as time goes by and we get more experience as interest arbitrators, I believe that we can develop new and current perspectives on old issues. The "problems" I will discuss are limited to those of practicing interest arbitrators. I am not talking about problems for society in general or for advocates. Finally, when discussing the "arbitration of interest disputes," with one exception I refer to the obvious: a binding process whereby contract rights are determined within the context of a labor relations system. The one exception concerns a nonbinding system, which I will discuss shortly.

It is my belief that problems for arbitrators in interest disputes, current or otherwise, cannot be meaningfully discussed in a vacuum. Interest arbitrators act within either a statutory or a contractual context. The more typical context is where a state has passed a statute dictating how interest arbitration is to work for certain specified public employees within the state, most typically police officers and firefighters. Arbitrators are bound to work within that system. Where no statute mandates interest arbitration, but rather the parties to a collective bargaining relationship voluntarily agree to resolve a dispute through interest arbitration, we operate within the limits set by the contractual agreement to submit a dispute to interest arbitration.

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In addition to the statutory or contractual framework we are bound to follow, there is another context that is very important for arbitrators to be aware of and to honor, that is, the expectations and experiences of the advocates and the parties they represent. Unless the advocates and parties are not experienced in using the interest arbitration process in effect for a particular dispute, we do not operate in a vacuum with regard to expectations. The parties have certain expectations as to what arbitrators will do or will not do. It is critical to understand those expectations so that we can operate effectively within the system.

I am going to talk about four different interest arbitration systems, as illustrations of different types and the problems that can arise within each. The first three systems are those set by statute for police and firefighters in Pennsylvania, New Jersey, and Delaware. The fourth is that set by private contractual agreement between Major League Baseball and the Players Association. Much of what I will be saying is experiential, since I have worked within Pennsylvania, New Jersey, and Delaware. I have not, however, worked as an interest arbitrator in baseball. My comments on that system will be based on what I have read as well as discussed with those who have served as baseball interest arbitrators. I will give a quick overview of each system and note what I perceive to be the problems, or opportunities, for arbitrators in each.

In Pennsylvania interest arbitration for police and firefighters is governed by Act 111. The statute provides for tripartite conventional arbitration. There is a panel of three arbitrators: one is designated by the public employer, one by the union or association, and the third is the neutral arbitrator. The panel may choose from a range of positions set forth by the parties. The selection of the neutral arbitrator is administered by statute through the American Arbitration Association (AAA). Once the arbitrator is selected, however, AAA has no further involvement in the process. There are no statutory criteria to guide the panel in deciding cases. There customarily is no opinion attached to the panel's award. The cost of the neutral arbitrator is borne exclusively by the public employer. The association or the union does not split the cost.

Concerning actual practice in Pennsylvania, the parties have very little, if any, expectations of mediation prior to or during the course of the arbitration hearing. Rather, their expectation is that the arbitrator conduct a hearing and then close the record.

There is very little feedback between the parties and the arbitrator during the course of the hearing. Because it is conventional arbitration, the parties frequently take what I perceive to be unreasonable positions. Their rationale for this apparently is a belief that extreme positions are to their advantage when the panel looks for a middle ground to set the award. Any mediation by the arbitrator takes place within the panel executive session. The parties therefore try to give the arbitrators they have appointed room to bargain within the executive session. The net result is that there is a low rate of settlement at the arbitration hearing and to the extent that compromise occurs, it is among the arbitrators. Generally, even after a compromise has been reached, an award is issued by the panel.

The New Jersey system for interest arbitration of police and firefighter disputes is governed by Chapter 85 of the Public Laws of 1977. The statute provides for a single neutral arbitrator. It allows the parties to choose virtually any system they want, including conventional arbitration. If they cannot agree, the statute imposes a final offer system, whereby the arbitrator chooses between the last positions of the parties on the economic items as a package and on the noneconomic items individually. The statute is administered by the New Jersey Public Employment Relations Commission (PERC), which provides regular feedback to arbitrators concerning how the system is working and how it wants them to function within that system. The statute sets forth eight criteria to guide the arbitrator in choosing a final offer. The State Supreme Court has emphasized that the arbitrator must consider each and every criterion. An opinion must accompany the award, and the court has ruled that one ground for overturning an arbitrator's award is the failure to consider even one of the statutory criteria. The neutral's fee is split between the parties.

As to expectations in New Jersey, the experience is quite different from that in Pennsylvania. The parties and PERC expect the arbitrator to engage in frequent, continuous, and persistent mediation during the arbitration hearing. Extensive feedback takes place between the arbitrator and the parties. Arbitrators are generally not shy in sharing with parties a belief that a position is unreasonable. Because it is final offer arbitration, parties listen seriously to what the arbitrator has to say. As a result, if a party comes to the arbitration hearing with an unreasonable position, it will almost always alter that position prior to

the close of the hearing out of fear that if it does not, the other party's offer will be selected and it will be the "loser" in the proceeding. As a result, a high percentage of settlement is achieved through the arbitration process.

In Delaware, the statute regulating resolution of police and firefighter disputes is 19 Delaware Code, Section 16.15. The statute provides for a single neutral, sets statutory criteria, and requires that the arbitrator must select in its entirety the final offer of either the public employer or the association. It is not interest arbitration, however. It is fact finding, because the neutral's determination is not binding. Either side has the right to reject the decision of the neutral. I am including Delaware in this presentation on interest arbitration because the statute does not specify any follow-up procedure after fact finding. As a practical matter, the fact finder is in the role of what would be an interest arbitrator if binding arbitration existed.

As to experience and expectations of the parties in Delaware, the statute has been used very little. Only about five jurisdictions in Delaware are eligible to use the procedure, so that the parties have very little expectation as to how it will operate. In this state more than any other I have discussed, the arbitrator has the opportunity to craft expectations for the parties as to how the procedure will operate.

The final system to be discussed involves Major League Baseball and certain eligible players in the bargaining unit represented by the Players Association. As I noted, I have no personal experience in this arena. It is my understanding, however, that it is final offer arbitration. The club and player each submit a contract to the arbitrator containing a salary figure. The arbitrator must sign one contract or the other. Thus, the system is final offer. The parties have a very brief amount of time to present their case, and even less time to present rebuttal testimony. No opinion is issued with the award of the arbitrator, and the arbitrator is encouraged to give the decision the day of the hearing, but in any event within 48 hours of the close of the hearing.

As to the expectations of the parties, they do not expect the arbitrator to be active at the hearing insofar as mediating or encouraging the parties to achieve a settlement. Once the matter goes to arbitration, the expectation is that the arbitrator will hear the evidence and make a determination.

Having set forth four different systems of interest arbitration, the question now is: What are the problems and opportunities for arbitrators in each system? I believe a number are worth noting.

1. Are there factors present in interest arbitration which make it a more demanding process for arbitrators than grievance arbitration? I think so. We should always be aware of the difference between interest arbitration and grievance arbitration to the parties involved. My experience is that the parties are far more emotional, far more involved in an interest arbitration proceeding than in a typical grievance arbitration proceeding. By the parties I mean not only the public employer and the union but also the professional advocates. The outcome of an interest arbitration case has important ramifications for all concerned, and they act accordingly. It is therefore not surprising that when some of the preeminent arbitrators have decided to scale back their practice, they have eliminated interest arbitration assignments. They simply do not need the problems that come in that area.

2. Involvement of the administrative agency or lack thereof is a very significant issue to the practicing interest arbitrator. For example, there is a sharp contrast between Pennsylvania and New Jersey. In Pennsylvania there is no agency to provide coordination of the process or give feedback to the arbitrators. In New Jersey there is. Advantage—New Jersey. When I practice as an interest arbitrator in New Jersey, I am aware through PERC of what is expected of me with regard to the process. The parties understand how PERC wants interest arbitrators to conduct the process, and they are not inclined to pressure the arbitrator to operate in a contrary fashion. This creates a better climate for the interest arbitrator in New Jersey than in Pennsylvania. There are problems in a system where arbitrators do not get information as to what is occurring throughout the state. In New Jersey PERC provides arbitrators with data on other settlements and awards. In Pennsylvania there is no system for getting such information to the arbitrators.

3. When working in a state with no statutory criteria for guiding the arbitrator, is there a problem in making an award? I think not. Statutory criteria typically contain the same factors that experienced arbitrators are normally guided by. This is my experience and is the conclusion reached in a recent report on

how interest arbitrators decide cases.[1] The author of that study interviewed arbitrators in Wisconsin. Two thirds of the arbitrators interviewed said that it would not make any difference in their awards whether there were or were not statutory criteria.

4. What are the problems and advantages of working under a system providing for a single arbitrator versus a panel of arbitrators? I do not think it makes a difference as long as the system allows for feedback between the parties and arbitrator(s). In Pennsylvania that feedback comes to the neutral arbitrator through the panel executive sessions. In New Jersey the feedback comes to the arbitrator directly from the advocates at the hearing. Either way, the feedback is helpful, important, and effective. I would not want to see a system of conventional arbitration with a single arbitrator. I fear that there would be no opportunity for the parties to be realistic with the arbitrator about their positions prior to the issuance of the award.

5. What are the ethical and practical problems of issuing an award that has been agreed to by the parties but is given the appearance of a contested award? In a study of practice under the New Jersey interest arbitration statute, Richard Lester "guesstimates" that one half to two thirds of conventional arbitrations in New Jersey in the year 1987 were in effect agreed-upon awards disguised as contested awards, and that one fifth to one eighth of final offer arbitration awards fell in this category.[2] If his guesstimate is correct, many awards are in reality settlements between the parties, but for which the arbitrator is asked to bear responsibility. This creates concerns of which we must be aware. One problem is how to react in a situation where the parties in good faith believe that a certain award is appropriate but we see the situation differently. What is our obligation to issue an award that we believe is more appropriate versus our responsibility to issue one that (we are told in confidence) the parties believe is a more appropriate result? This creates an unusual situation for arbitrators. We are normally in a position where we make the judgment call and take full responsibility for the award. Where the award requested by the parties falls out-

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[1]Dell'omo, *Wage Disputes in Interest Arbitration: Arbitrators Weigh the Criteria*, 44 Arb. J. 4 (1989).

[2]Lester, *Analysis of Experience Under New Jersey's Flexible Arbitration System*, 44 Arb. J. 14 (1989).

side the scope of our judgment, however, it becomes uncomfortable to justify to ourselves and others the basis for that award.

6. Is there a problem having the same person serve as mediator and arbitrator? In New Jersey the neutral is called an interest arbitrator, but you are first a mediator and then an arbitrator if mediation does not result in a settlement. Some who have studied alternative dispute resolution (ADR) have difficulty with this concept. They believe that it is inappropriate to have the mediator with whom parties have shared confidences serve as the arbitrator. In practice, however, I do not think it is a problem for either the arbitrator or the advocates, because the parties understand the rules under which the system operates. They know how information they share with the arbitrator will be used in the future, if at all.

7. Is there a problem with a system such as in Pennsylvania, where the arbitrator's entire fee is borne by the public employer? I think not. As long as each party has equal responsibility for choosing the arbitrator, there is no appearance that arbitrators favor the party that pays the bill. Everyone understands that, regardless of who pays the bill, both parties have picked the arbitrator in that case and will do so in future cases. As long as that understanding is clear and explicit, how we get paid in any individual case should not create a problem.

8. If the parties take unreasonable positions, is it a problem for arbitrators? In Pennsylvania it can be a problem because the parties frequently do not get reasonable until the panel meeting after the conclusion of the hearing. In public session, when members of the bargaining unit and the governing body are present, and the advocates are very forcefully arguing what are unreasonable positions, some people come to believe the arguments, however unreasonable. Ultimately, of course, the award can never meet their expectations. This often causes dissatisfaction among those who have become wedded to the unreasonable positions taken by their advocates in the public hearing. In the New Jersey system, where mediation takes place at the hearing, because it is final offer arbitration and there is no panel of arbitrators to meet in executive session, members of the bargaining unit and governing body are frequently forced to come to reasonable positions. If an award ultimately becomes necessary, the parties have gone through the process of amending their positions, usually to a point where there is very little difference

between them. In that situation, no matter which position is ultimately chosen by the arbitrator, it is not far from the expectations of the parties when they left the hearing.

9. What are the problems inherent in working under a system where the award is not binding? Here I am referring to Delaware. Aside from the fact that the award may not end the dispute, a problem is created for arbitrators in a final offer system. A party "wins" and a party "loses." In a state where the award is not binding and the loser refuses to accept the award, arbitrators must be sensitive to some uncomfortable realities of the situation. Do we adopt the most equitable final offer regardless of the acceptability of that award to the loser? How much do we take into account the acceptability of the award to the most powerful party in the process?

10. It appears to me that while the system in Major League Baseball may work for the parties, a number of features make it difficult for arbitrators. Arbitrators are put in a situation where there is much at stake. There is very little time to get information from the parties, very little time thereafter to make a decision, and no opportunity to explain the rationale for that decision. This system creates tremendous pressure on arbitrators during the hearing and thereafter. If that is what the parties want, that is what they get. I suggest, however, that the reason arbitrators enjoy work in baseball has little to do with how the system is structured.

11. Is interest arbitration itself a problem for arbitrators? I have often thought that the title "interest arbitrator" is a misnomer. Under some systems we are more mediators than arbitrators or we are a combination of both. Those of us who come to interest arbitration through a grievance arbitration background are asked to use skills and abilities that are not necessarily familiar to those with a grievance arbitration background. Aside from normal mediation skills, there are a number of technical abilities which do not come into play in grievance arbitration but are critically important to interest arbitrators. Here I am talking about analyzing budgets and costing proposals. I am talking about rollovers, splits, compounding. To the extent that we are not familiar with such skills, this creates a problem for how effectively we function.

In sum, each system creates its own unique set of problems and opportunities. If we act within the system as designed, and consistent with the reasonable and proper expectations of the

parties, we will serve ourselves as well as the parties. As interest arbitrators we are placed in a special position of trust and responsibility. We in the Academy have a responsibility to abide by that trust and do as good a job in interest arbitration as we do in grievance arbitration. The Academy has recognized that by placing this session on the program.

B. ROBERT M. ACKERMAN*

I am most flattered (and a little perplexed) by your kind invitation to speak at the Annual Meeting of the National Academy of Arbitrators. When Helen Witt first asked me to speak, I suggested that I could think of roughly 700 people far more qualified than I to hold forth on the subject of interest arbitration. After all, I am an academician who has performed a fair amount of mediation, but very little arbitration, and, to date, no interest arbitration. Helen was most gracious and most persistent, however, and reminded me that the conference would be held at the Hotel Del Coronado in sunny San Diego. Falling for the bait, I threw caution to the wind and accepted her invitation.

That was several months ago. Last week, as crunch time approached, I began to ask myself, "What can I possibly say to this distinguished group of professionals, all of whom know far more about interest arbitration than I?" So I thought it best to start with this disclaimer: If you disagree with anything I say, you can chalk it up as the rantings of an ivory tower academic and touchy-feely mediator who came to San Diego in pursuit of the leisure of the theory class.

As an academic, I would like to discuss standards. As a mediator, I would like to discuss process. In either capacity, I am far more inclined to ask questions than to provide answers, so please receive my remarks in that spirit.

Standards

Two Major Problems

1. *The problem of justiciability.* I see two major problems in the arbitration of interest disputes. The first stems from the very

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nature of interest arbitration. In rights arbitration (and I use the term broadly, to cover situations both inside and outside the context of labor relations), there exists a clear frame of legal reference. This is true whether we are dealing with grievance arbitration under a collective bargaining agreement, commercial arbitration under a contract, or even arbitration of a personal injury claim under the law of torts. In all these cases there is a body of law—usually, but not always, a contract—on which to draw and to apply to the dispute at hand.

No such body of law exists in interest arbitration; rather, the arbitrator must create the contract; the arbitrator must fashion the body of law under which future disputes will be settled. Granted, the standards set forth in most interest arbitration statutes provide greater guidance than is furnished in some rights disputes. For example, neither judge, jury, nor arbitrator is given much guidance with which to arrive at a figure for general damages (e.g., damages for pain and suffering or loss of ability to enjoy life) in a personal injury claim. Still, at least theoretically, there exists a basis for decision in rights disputes that is missing from interest disputes, an area in which we had, until relatively recently, recognized either freedom of contract or legislative fiat as the only principled bases for decision making.

Twenty-eight years ago at this conference, Lon Fuller, drawing upon principles of international law, remarked:

> [T]he concept of justiciability is largely associated with the presence or absence of available standards of decision. A judge is one who applies some principle to the decision of the case; if there are no principles, then the decider cannot be a judge—the case is not justiciable.[1]

Fuller went on to suggest that in interest arbitration the problem is not so much a lack of standards as a multiplicity of standards.[2] The problem becomes one of polycentricity; that is, there exists "no single solution, or simple set of solutions, toward which the parties, meeting in open court, could address themselves."[3]

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[1]Fuller, *Collective Bargaining and the Arbitrator*, 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, 34–35.

[2]*Id.* at 36.

[3]*Id.* at 39. Fuller credits Michael Polanyi with authorship of the term "polycentric," or "many-centered." *See* Polanyi, The Logic of Liberty (1951), 170–84.

James Henderson has suggested that linear decisions, such as "Was the light red when the defendant passed through the intersection?," are more conducive to adjudication than are polycentric decisions, such as "What should my family do for its next vacation?"[4] I would suggest that the types of questions posed in rights arbitration, for example, "Was the employee late for work last Thursday?," tend to resemble linear decisions, whereas the questions raised in interest arbitration, for example, "What would be a fair contract between these parties?," tend to resemble polycentric decisions.

Henderson hastens to add that just because polycentric problems do not lend themselves to resolution through adjudication does not mean that they are incapable of intelligent solution. However, problem solving in such cases tends to be not adjudicative, but managerial.[5] This observation has natural process implications. Interest arbitration might be properly viewed as a variation of the contracting process rather than as a true adjudication. This might help explain the temptation on the part of the interest arbitrator to abandon a pure "judging" role for that of mediator, or to become what Fuller has described as a "labor relations physician."[6]

2. *The problem of markets.* The second major problem in interest arbitration involves the artificiality of bargaining in the public sector, where most arbitration of interest disputes occurs. The management side consists not of direct players in a market economy, but of government actors. Insofar as the employer's ability to pay is considered relevant, it is based not on profitability, but on the legal and practical limits on the employer's taxing power. On the labor side, salary scales and other contract terms in comparable localities may provide standards of comparison, but the terms provided by other municipalities are relevant in a real market sense only if the work force is mobile. In Pennsylvania, for example, where neighboring police forces may be located only five or ten miles apart, the ability to work in another locality may have a real effect on the market for labor. In Wyoming, by contrast, the closest "competing" municipality may be fifty miles distant, and the work force's options may be significantly reduced. Perhaps considerations of fairness suggest

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[4] *See* Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 Ind. L.J. 467, 471 (1976).

[5] *Id.* at 471–72.

[6] *Supra* note 1, at 9.

that police in Casper be paid roughly the same as those in Cheyenne, but the market probably does not demand it.

Scott Buchheit has alluded to the interest arbitrator's need for sufficient data to make reliable comparisons. To the extent reliable contract data are unavailable (leaving the arbitrator to fall back on the results of earlier arbitrations), or to the extent interest arbitration becomes the principal means of contract formation in the public sector, there exists the possibility that other interest arbitration awards will replace the market as the primary basis of comparison. This presents a danger of bootstrapping, of basing awards on an artificial market created entirely by interest arbitration.

I suspect that this situation already exists in baseball arbitration. Indeed, it is the very existence of interest arbitration that drives the market for ballplayers with between two and six years of experience. These players, ineligible for free agency, are allowed to sign only with their original ballclubs which, prior to the advent of arbitration, imposed upon the players' predecessors salaries that were only a fraction of those now enjoyed by players of comparable value. A baseball arbitrator in search of comparisons can look to contracts signed by clubs and players of roughly equal ability, but these very contracts are fueled by the availability of arbitration. (Do you think Will Clark would be getting over $3 million per year in the absence of arbitration?)[7]

A baseball arbitrator might look to the free agent market for a ballpark comparison (no pun intended), but players eligible for arbitration operate in a different market from that reserved for free agents. Should baseball arbitrators use the free agent market as a yardstick and base their awards on what players would have received if they were free agents? In the public sector, should interest arbitrators base their awards on the terms for which employees would be able to bargain if they had the right to strike? In both these instances the absence of our usual market standards for comparison make the arbitrator's task a most difficult one.

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[7]There is some economic sense to all this. The final offers made by the parties to baseball arbitration set the boundaries; these offers should be shaped at least in part by factors such as player performance, management's ability to pay, and the availability of replacements. While arbitrators may look to contractual agreements and contracting parties may look to arbitration awards as frames of reference, the circularity of this process does not mean that a true market has not been created.

Statutory Standards

In light of the artificiality of the market in which interest arbitration usually takes place, statutory standards (where they exist) are as interesting for what they do not say as for what they do say. Connecticut provides a typical example of statutory criteria, including the history of negotiations between the parties, conditions of similar groups of employees, prevailing wages, the employer's ability to pay, changes in the cost of living, and the interests and welfare of the employees.[8] Neither the Connecticut statute nor those of most other states mention factors such as practical political constraints on the employer, loyalty of employees to the employer or union (and the ability to sustain a strike if one were allowed), the mobility of the work force, or the availability of replacements. All these items would be relevant in the world of private sector contract formation. Adam Smith tells us that the price of goods and services is properly based on what a willing buyer would pay a willing seller.[9] Indeed, even Marxist economies have looked to the black market when setting prices.[10] To what extent can interest awards reflect this philosophy, and to what extent do they (perhaps out of necessity) simply represent the arbitrators' gut sense of fairness, that is, arbitrators at their most arbitrary?

The Ratchet Effect

In a period of recession, private sector labor relations occasionally experiences givebacks, that is, concessions placing the labor force in a worse economic position than under the previous contract. In times of fiscal constraint, limitations on taxing power, and in some instances, a diminished need for services (e.g., school districts facing declining enrollments), how many interest arbitration awards incorporate givebacks?[11] Does interest arbitration inevitably provide a ratchet effect, with economic terms escalating, perhaps slowing, but never turning down? If so, to what extent is this a product of the interest arbitration

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[8]Conn. Gen. Stat. Ann. §5-276a(e)(5) (West Supp. 1987).

[9]*See generally* Smith, Wealth of Nations.

[10]I will not hazard a guess whether the artificiality of a centrally managed economy has played a significant role in the decomposition of communist rule in Eastern Europe during the past year.

[11]I do not include here situations in which there have been trade-offs, i.e., a reduction in one benefit in exchange for an increase in another, unless the overall compensation provided to employees has decreased.

process, and to what extent is ratcheting inherent in public sector labor relations?

Process

Why Process Is Relevant

By and large, mediators tend to be process-oriented, whereas arbitrators tend to be substance-oriented. That is probably the way it ought to be. Mediators hope to control the process so that the parties to a dispute are able to reach a substantive result, whereas arbitrators are themselves responsible for the substantive result. Indeed, in what little arbitration I have done, I have noticed a natural shift in my own focus from process toward facts.

But this does not mean that arbitrators should be entirely unconcerned about process. Process concerns are particularly justified in light of (1) the limited grounds for appeal common to much arbitration, (2) problems in interest arbitration regarding standards of adjudication (discussed *supra*), and (3) the compromise of principles of freedom of contract and representative democracy inherent in interest arbitration. The fact that case law has almost universally found interest arbitration statutes to be constitutionally permissible notwithstanding the above considerations does not give arbitrators license to run roughshod over legitimate process concerns.[12]

As a practical matter, attention to process on the part of the arbitrator is likely to result in greater acceptance of the award, even if the parties are not disposed to turn cartwheels over the decision. For example, the parties are more likely to feel that the arbitrator has given full consideration to all arguments in the award if the arbitrator has given the parties full opportunity to be heard, and if the arbitrator has at least appeared to listen to what has been said.

Problems Posed by Med-Arb

Special concerns are posed by the process known as med-arb. Med-arb is explicitly called for under some statutes;[13] even

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[12]For a summary of constitutional challenges to interest arbitration statutes, *see* Anderson and Krause, *Interest Arbitration: The Alternative to the Strike*, 56 Fordham L. Rev. 153, 169–72 (1987).

[13]*E.g.*, 43 Pa. Cons. Stat. Ann. §1101.801 (Purdon Supp. 1989).

where it is not statutorily invoked, little or nothing prevents the parties from using this hybrid process. As a general matter, med-arb should be regarded as a healthy thing: the parties first have the opportunity to reach their own agreement with the assistance of a neutral facilitator; then, to the extent mediation fails to produce an agreement, a neutral renders a decision to resolve all outstanding matters. The process would therefore appear to represent an optimal blend of consensual contracting and recourse to a neutral decision maker.

Problems arise, however, when the same person attempts to play the roles of both mediator and arbitrator. Lon Fuller has suggested that such activity compromises arbitration, because "[i]n seeking a settlement the arbitrator turned mediator quite properly learns things that should have no bearing on his decision as an arbitrator."[14] Scott Buchheit has suggested that this is not really a problem, because interest arbitration invariably involves sophisticated parties who fully understand what is happening and will therefore be circumspect about what they disclose. I see this as precisely the problem. Central to the mediation process is the parties' ability to deal candidly with the mediator and with each other, with the understanding that nothing that is said or done during mediation will come back to haunt them in a later proceeding. When the same individual acts as both mediator and arbitrator, this condition is impossible to fulfill. The parties' willingness to speak frankly and candidly is chilled by the possibility—indeed, the likelihood—that the neutral will be called upon to enter a binding decision. In other words, when the same person attempts to fulfill the roles of both mediator and arbitrator, it compromises mediation.

Several interest arbitration systems provide for a mediation stage before arbitration. Under these schemes, when the parties enter into arbitration, they will have mediated and failed to reach agreement and will now be ready for an adjudication. Should arbitrators first attempt to revive the mediation process? What makes arbitrators think that they can do any better at mediation than the mediators who have tried and failed? Only one thing: the threat of a "bad" decision. Unlike the mediator, the arbitrator has the power to render the ultimate decision. That can be a very powerful stick which, while discouraging the parties from making full disclosure, may encourage them to

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[14] *Supra* note 1, at 32.

reach agreement. For obvious reasons, this may not be entirely bad. I would simply like you to realize that when you coerce agreement in this manner, you should not fool yourself into thinking that through your unique genius you have gotten the parties to reach a truly voluntary agreement. That is what the mediator has tried, and failed, to do. What you have essentially done is bludgeon the parties into agreement.

This may not be entirely bad, but it makes purists shudder. If the "rigged" award (the bane of arbitration purists) is an agreement masquerading as an adjudication, then an "agreement" obtained through arbitral coercion is an adjudication masquerading as agreement. True mediators may be reluctant to describe the neutral's activity as mediation at all.[15]

Of course, you are not doing your job to please the purists, but to obtain results. I simply ask that you think long and hard about the process you use to achieve these results, lest it be viewed as unfair or unjust due to the absence of appropriate constraints on the neutral's behavior. I return again to Lon Fuller, who said:

> [T]here is something slightly morbid about the thought that an agreement coerced by the threat of decision is somehow more wholesome than an outright decision. . . . After having had his day in court, a man may with dignity bend his will to a judgment of which he disapproves. That dignity is lost if he is compelled to pretend that he agreed to it.[16]

At the time Fuller was talking primarily about rights arbitration. Perhaps some of the problems of interest arbitration that we have discussed, such as adjudicability and the compromise of freedom of contract and representative democracy, justify a different approach, in which the arbitrator acts more like a labor relations physician than a true judge. Certainly those of us in the alternative dispute resolution movement should not allow stub-

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[15]It has been suggested that when an interest arbitrator attempts to mediate the dispute, the process that ensues is not pure mediation followed by pure arbitration, but an entirely different animal called "med-arb." The give-and-take of this process sometimes produces settlements having elements of both the coerced agreement and the rigged award, as only the finest line can differentiate between those terms urged upon the parties by the arbitrator and those the parties have asked to be incorporated into the award. Perhaps the euphemism "informed award" is the most appropriate term for this product. Such a process may produce worthwhile results, but as a mediator who believes that mediation has attributes apart from expediting agreement, I think it would be more sound if the parties could make an informed decision to enter into genuine mediation *before embarking upon* this process. I fear that some participants think that they are participating in real mediation when they engage in med-arb, because of lack of exposure to the real thing.

[16]*Supra* note 1, at 47–48 (1963 Wis. L. Rev. at 40).

born adherence to orthodoxy to hinder exploration of hybrid methods of resolving disputes. I think it is important, however, that we be mindful of just what we are doing before we proceed to break the rules.

Final Offer Arbitration: The Beauty and the Bear Grease

The international arena suffers (sometimes horribly) from the absence of a leviathan; that is, an authority who can impose a decision on disputing parties and make that decision stick. As a consequence, we have war, terrorism, and other forms of international violence, and life is "nasty, brutish and short."[17] In contrast, interest arbitration provides a leviathan. As a consequence, we have little or no "war" or disruption in those areas in which interest arbitration is employed; we tend to avoid strikes, lockouts, and labor violence.

Just knowing that there is a leviathan often produces settlement without resort to the leviathan. Interest arbitration may be seen as the engine that drives settlement. Others would say that it is the grease that allows the wheels of collective bargaining to turn.

Ed Pereles has suggested that interest arbitration is really bear grease: it's so bad, you don't want to touch it, so you do anything to avoid it. I would suggest that if interest arbitration is the grease, *final offer* interest arbitration is the bear grease. Scott Buchheit has already told us that as compared with Pennsylvania, New Jersey, with its final offer system, obtains more settlements. This should come as no surprise. With final offer arbitration the parties do not need an arbitrator/mediator to pound into their heads the possibility that the arbitrator will come up with something awful; it is abundantly clear to all parties that precisely that may happen. That is the beauty and the bear grease of final offer arbitration.[18]

Iowa: An Interesting Variation Upon a Theme

Scott Buchheit has described the statutory schemes for interest arbitration in Pennsylvania, New Jersey, and Delaware. Scott

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[17]Apologies to Thomas Hobbes.

[18]Baseball arbitrators can recount all the cancellations they have endured because players and clubs have settled on a mutually agreeable position (or even reached overlapping positions) rather than allow an impartial umpire to impose the other party's position on them.

has had the benefit of experience in these jurisdictions; without claiming the benefit of experience anywhere, I shall add Iowa to the mix. Iowa employs a three-step impasse system for public sector labor disputes.[19] The first involves mediation; I am told that most disputes settle at this stage. Disputes that are not resolved by mediation go to fact finding. Most of the remaining disputes settle here, for reasons that will shortly become apparent.

The final step in the Iowa process is final offer arbitration. The interesting wrinkle is that with respect to each issue, the arbitrator can accept either party's final offer or the recommendation of the fact finder.[20] Not surprisingly, few cases reach the arbitration stage. Instead, parties that have failed to reach agreement through mediation tend to accept the fact finder's recommendations, knowing full well that the arbitrator is likely to do likewise, if given the opportunity. Parties resort to arbitration only (1) when necessary to avoid the political heat of accepting recommendations that are unpopular with their respective constituencies, or (2) to "appeal" a fact finder's recommendations that appear totally out of line.

While I cannot claim the benefit of experience, the Iowa approach appeals to me. The process gives the parties every opportunity to reach agreement and take responsibility for the outcome, with ultimate resort to a leviathan if it proves necessary. Of course, the Iowa system could be criticized as a variation of the coercive approach in that the parties might accept the fact finder's recommendations, not so much out of voluntary agreement, but because they know it will ultimately be imposed upon them by the arbitrator. Perhaps it is the clear delineation of roles—mediator, fact finder, arbitrator—that is so attractive about the Iowa process.[21] All the players enter the system with a clear expectation of not only what each of them is supposed to do, but what others are supposed to do, and the arbitrators are free to do what they do best: hear the case and render a decision.

Conclusion

Notwithstanding my ivory tower criticisms, interest arbitration seems to work. Despite problems of adjudicability, the

[19]Iowa Code Ann. §§20.20–20.22 (West 1989).
[20]Iowa Code Ann. §20.22(11) (West 1989).
[21]I am told that some Iowa fact finders attempt to act as mediators. However, arbitrators, who are the final decision makers under Iowa procedures, are statutorily prohibited from engaging in mediation efforts. Iowa Code Ann. §20.22(7) (West 1989).

absence of guideposts, and the potential for role confusion, it works because the most critical role—that of labor relations leviathan—is filled by a group of competent, scrupulous professionals. Your willingness to think about these problems, while sun, sand, and surf beckon, is testament to the conscientiousness with which you assume this responsibility. I thank you for the honor of having been invited to share my thoughts with you and welcome your comments.

II. EMPLOYER-PROMULGATED ARBITRATION

A. ALAN WALT*

In recent years various systems have been devised by employers to provide hearings before impartial arbitrators on grievances submitted by employees who do not have union representation. In some systems for nonunion employees, the employer alone selects either a permanent arbitrator or a neutral hearing officer. Other systems allow the grievant to choose the arbitrator from a list either preselected by the employer or obtained from an appointing agency. Under the latter system the employee may select any name on the list or may be required, together with the employer, to follow the selection procedure mandated by the rules of the appointing agency.

For use in nonunion arbitration cases, the American Arbitration Association (AAA) has adopted Model Employment Arbitration Procedures, under which the AAA is authorized to appoint a single "neutral arbitrator from its panel of arbitrators, with expertise in the employment field, who shall hear and determine the case promptly." In the Detroit office, for example, all nonunion arbitrator appointments have been made from supplied lists and have not resulted from AAA unilateral appointment. Nationally, the AAA administered 513 nonunion employment cases in 1989, most of which arose under individual agreements to arbitrate or were part of executive employment contracts.

The Federal Mediation and Conciliation Service (FMCS) supplies panels of arbitrators in cases where "the request arises outside a collective bargaining agreement" only when the five following questions are answered in the affirmative:

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