Chapter 7

DEBATING CONTROVERSIAL ISSUES

In this debate format session, the speakers debated the pros and cons of four propositions: (1) whether final offer interest arbitration is antithetical to constructive labor relations; (2) whether arbitrators should apply external law; (3) do parties and arbitrators have a duty to permit and foster the publication of awards; and (4) is a later arbitrator required to follow the ruling of an earlier arbitrator on the same issue under the same contract provision, even though the second arbitrator would have reached a different result. Two arbitrators and two advocates took turns presenting the opposing positions, after which the audience decided each question.

Moderator: **Fredric R. Dichter,** National Academy of Arbitrators, Milwaukee, WI

Panelists: **Union: Gary Bailey,** Fraternal Order of Police, Western Springs, IL

Arbitrator: Mario F. Bognanno, National Academy of Arbitrators, Tucson, AZ

Arbitrator: Andrew C.L. Sims, National Academy of Arbitrators, Edmonton, AB

Management: Carolyn Trevis, Negotiator, State of Minnesota, St. Paul, MN

Fredric Dichter: This session is presented in a debate format with each speaker making an initial presentation with brief responses from other panelists. Panelists also make final comments.

Let me introduce our panelists. Andy Sims is a member of the Academy, who was made Queens Counsel in 1990. Carolyn Trevis is the Assistant State Negotiator with the Minnesota Management and Budget. Gary Bailey is the in-house counsel for the Fraternal Order of Police in the State of Illinois. And Mario Bognanno, from Minnesota, is also a member of the Academy.

Issue 1: Whether Final Offer Interest Arbitration Is Antithetical to Constructive Labor Relations

Fredric Dichter: Be it resolved that the final offer arbitration is antithetical to constructive union-management relations.

Andy Sims is going to speak in favor of that proposal.

Andy Sims: First I'll explain what a Queen's Counsel is. Anyone who's watched *Rumpole of the Bailey* will know that it means a queer character. It is an ancient honor given to lawyers who have managed to reach a certain age—I call it "the age where knowledge gives way to wisdom" and where Her Majesty tries to give you something other than money in reward for your service.

I'm from Canada. You may have gathered that. It's often been said of Canada's relationship with the United States that it is like sleeping with an elephant. We've become accustomed to it. We're used to the thump, thump, thump as you go to the bathroom in the night. But we are finding the current Wisconsin indigestion and the consequences thereof difficult. Some winds are blowing north that we're not entirely happy about.

After this morning's "gargling razor blade" debate on the public sector,[1] I wanted to start off by saying that my proposition to you that final offer arbitration is antithetical to constructive union-management relations is not restricted to the public sector, although that tends to be where it is used. It applies to the use of this technique in the private sector as well. This is very topical for us from Canada, because our federal government has very recently resorted to not only mandatory, back-to-work legislation with arbitration in a couple of private sector disputes, they also have included within it the requirement for total package final selection. It is not a system, even though I have sat in that capacity, with which I'm particularly comfortable.

In Canada, the public sector extends to the health care industry. I come from a jurisdiction, Alberta, where we have had prohibitions on strikes and a mandatory issue-by-issue arbitration system, just regular arbitration, for many years. Something I think you should not lose track of is that arbitration is an inducement to unions not to use the *power* to strike; it is not simply the voluntary extension of a right to arbitrate. In my jurisdiction, I have adjudicated any number of disputes that arise out of illegal strikes, and I wonder whether perhaps we've lost touch with history.

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[1]See Chapter 12, "Public Sector Collective Bargaining" this volume.

I have two objections to final offer selection, one internal and one external. Internally, I think final offer selection on a package basis is inherently the wrong way to encourage parties to negotiate. It ends up being a bet on who the arbitrator is and what his or her peccadilloes are. It does not become an exercise in problem solving between two parties who must live together. I think it is an unfortunate carryover from the view that, "Oh, well, shotgun buy-sells work in corporate affairs, why don't we use it in labor relations?" Bargaining is not just "you take my price or I will have to take yours." I believe bargaining actually requires discussion, understanding, and compromise in the broad sense, not just the specific.

Second, I think it encourages people to sabotage proposals, with little bits of expensive language that can be to the employer or the union's advantage, hidden under an otherwise reasonable offer.

I believe, more particularly, that final offer selection is antithetical to the institution of collective bargaining because it is being presented as, and seen as, a magic bullet. In the public eye, people are saying, "Why should we put up with disruption? Why should we tolerate the inconvenience of strikes? There is this other system that works so well. You just go in front of a wise person and let them pick." I don't think that's a good method of collective bargaining. I don't think it's the magic bullet. But, I think it is creating a public attitude that is contrary to an acceptance of the realities of labor relations.

Underlying it, of course, is the question of who picks the wise person? What we have seen is Ministers of the Crown or perhaps even Governors who are starting to pick people who are not labor relations neutrals, but who are instead seen as politically acceptable.

Mario Bognanno: My comments are going to be somewhat structured and a bit academic. Bargaining theory teaches that the greater the cost of disagreeing with the other party's position, the greater the incentive to concede. The credible threat of a strike is a powerful incentive to seek compromise and settlement at the bargaining table. However, in the public sector, the strike is generally prohibited because of the essential nature of public service. Thus, over the past 50 years policy makers have substituted interest arbitration for the strike, hoping that the former, like the latter, would cause compromise and settlement at the public sector's bargaining tables across the country. We often lose sight of the

fact that interest arbitration is a substitute for the strike and not a substitute for negotiated settlements.

I propose that negotiated settlements (i.e., freely bargained labor contracts)—as opposed to interest arbitrated settlements—incorporate the parties' labor relations preferences; give workers a "voice" in determining the terms of their employment; and advance stable, equitable, and peaceful labor-management relations. For these reasons, negotiated settlements are the outcomes that public sector collective bargaining policies aspire to achieve, not interest arbitrated settlements, and, therefore, the interest arbitration regime that is associated with the highest rate of negotiated settlements is the preferred regime.

Theory suggests that the "chilling effect" is greater under conventional interest arbitration—what Andy was referring to as issue-by-issue interest arbitration—than it is under final offer arbitration, whatever its manifestation, namely: final offer by package; final offer by issue; and final offer by issue plus the fact finder's recommendation per issue, as in Iowa's public sector. Under conventional interest arbitration, the arbitrator can split the difference between the parties' final positions. Contemplating this arbitral outcome, neither party is inclined to bargain hard, to concede and compromise, to reach a negotiated settlement: the incentive to bargain is "chilled." However, under all forms of final offer interest arbitration, the arbitrator's ability to issue compromise awards is much more limited and, therefore, the parties have an incentive to bargain hard and thus they are more likely to reach negotiated settlements.

This analysis suggests two metrics that can be used to evaluate whether final offer arbitration is antithetical to constructive labor-management relations. The first of these measures is the settlement rate. Is it higher under final offer or conventional interest arbitration? The second metric is the number of issues that remain on the bargaining table when negotiations break down. Do fewer issues remain on the bargaining table under final offer or conventional interest arbitration? The answer to these empirical questions can be found in the empirical literature. Let's quickly review some of this literature:

- At the 1974 annual meeting of the Industrial Relations Research Association, Charles Rehmus reported that Canadian federal bargaining units that chose to resolve negotiating impasses with the strike had a 92 percent settlement rate,

whereas units that chose to resolve impasses through interest arbitration had an 82 percent settlement rate.[2] Similarly, in a *Journal of Labor Research* study published in 1985, Fredrick Champlin and I reported that between 1973 and 1980 the settlement rate was 91 percent among Minnesota-based public sector bargaining units that could elect to break bargaining impasses with the strike; in contrast, it was 70 percent for units whose impasses were resolved by conventional interest arbitration.[3] Still again, in an *American Economic Review* article published in 1996, Morley Gunderson et al. reported on the impasse resolution experiences of nearly 4,000 public sector bargaining units from 15 different occupational groups across Canada.[4] The negotiated settlement rate was 90 percent for units that resolved impasses through striking, but units that resolved bargaining impasses through interest arbitration had a settlement rate of only 69 percent.

- In an *Industrial Relations* article published in 1975, Peter Feuille concluded that negotiated settlement rates were higher under final offer interest arbitration regimes than under conventional interest arbitration regimes.[5]
- Robert Hebdon authored chapter three in a 1996 book entitled *Public Sector Employment in a Time of Transition*, published by the Industrial Relations Research Association. In this chapter, Professor Hebdon summarized, by regime, the settlement rates reported in 17 different U.S. studies.[6] At the high end of the settlement rate continuum were public sector units that were permitted to strike, at a rate of 94.7 percent. At the low end were units that resolved negotiating impasses via conventional interest arbitration, at a rate of 75.7 percent. The settlement rates for all three forms of final offer interest arbitration fell between these two extremes: final offer by issue plus the fact finder's recommendation at a rate of 89.5 percent; final

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[2]Charles Rehmus, *Legislated Interest Arbitration,* in Proceedings of the Twenty-Seventh Annual Winter Meeting, Industrial Relations Research Association 310 (1975).

[3]Frederic C. Champlin & Mario F. Bognanno, *"Chilling" Under Arbitration and Mixed Strike-Arbitration Regimes,* VI J. Lab. Res. 383 (1985).

[4]Morley Gunderson, Robert Hebdon, & Douglas Hyatt, *Collective Bargaining in the Public Sector: Comment,* American Econ. Rev. 320 (Mar. 1996).

[5]Peter Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 Indus. Rel. 309 (Oct. 1975).

[6]Robert Hebdon, *Public Sector Dispute Resolution in Transition,* in Industrial Relations Research Center, Public Sector Employment in a Time of Transition 111 (Dale Belman, Morley Gunderson, & Douglas Hyatt, eds., 1996).

offer by issue at a rate of 87 percent; and final offer package at a rate of 84.1 percent.

- At the National Academy of Arbitrators 2009 annual meeting, Ron Hoh reported that, between fiscal years 2001 and 2007, almost all of Iowa's public sector bargaining units reached negotiated settlements.[7] Iowa's public sector collective bargaining law does not permit public sector strikes; rather, it provides that negotiating impasses are to be resolved through mediation, followed by fact finding, and finally by final offer interest arbitration plus the fact finder's recommendation *per* issue. Why such a high settlement rate? Since the set of final offers *per* issue from which Iowa's interest arbitrators must make a determination includes the parties' final positions along with the neutral fact finder's recommendation, the parties (correctly) foresee that the fact finder's recommendation would most likely be the arbitrator's choice *per* issue. Hence, the parties settle, forgoing final offer arbitration.

Based on these empirical studies, it would seem that the theory I sketched above has it right. Evaluated against the settlement rate metrics, we can reasonably conclude that final offer interest arbitration settlement rates are higher than conventional interest arbitration settlement rates and for this reason final offer arbitration is not antithetical to constructive union-management relations.

Similarly, with respect to our second metric, Professor Feuille's study showed that more unsettled issues were left to be resolved by interest arbitrators under conventional than under final offer interest arbitration. Regarding this point, at the National Academy of Arbitrators 2009 annual meeting, colleague Ed Krinsky reported that under Wisconsin's final offer by package regime the parties minimize their risk of losing an issue in interest arbitration by negotiating settlements on as many issues as they can.[8] Thus, to paraphrase Ed, the parties usually present fewer than five issues, with a median of two issues, to be resolved by the final offer arbitrator.

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[7]Ronald Hoh, *Interest Arbitration: III. The Interest Arbitration Voluntary Settlement Success Story in the Iowa Public Sector and Its Applicability to the Employee Free Choice Act*, in ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE, PROCEEDINGS OF THE 62ND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 172 (Paul D. Staudohar, ed., 2010).

[8]Edward B. Krinsky, *Interest Arbitration: II. Interest Arbitration in Wisconsin: Winner Take All*, in ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE, PROCEEDINGS OF THE 62ND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 160 (Paul D. Staudohar, ed., 2010).

In closing, final offer arbitration has limitations. But, it is not antithetical to constructive labor-management relations. Thank you.

Andy Sims: I still believe it is antithetical to constructive labor relations. One of the factors that was emphasized this morning in talking about public sector bargaining[9] is what I think is the reality behind the problems in public sector settlements. And that is what we call the "ghost at the table." Increasingly, both north and south of the border, funders have been ducking their responsibility for funding public institutions with statutory responsibilities. The trick is to say, "You're only going to get 0 percent over the next year. Make it work. Take your issues to arbitration if you need to." And what we are being paid for now, and what our credibility is being used up for, is our broad shoulders. We have to decide, as arbitrators, on a particular economic increase and then the municipal institutions have to go back to their states or provinces to collect the money. We as arbitrators take the blame. I don't think that's helpful in labor relations.

Techniques like final offer selection are also being increasingly associated with the other legislative paraphernalia used as part of anti-union legislative campaigns. If we are identified with those techniques, if arbitration is just one more way of saying, "we really don't want a union," we are going to lose our credibility. And that too is antithetical to collective bargaining.

Mario Bognanno: You know, Andy makes a good point when arguing that the final offer package is not a magic bullet. I agree! In fact, for most public sector bargaining units, my preferred policy prescription is to replace interest arbitration with the right to strike. Minnesota grants the strike option to most of its public employees, to its "non-essential" employees, and with positive results. Minnesota's remaining covered employees, its "essential" employees, are in bargaining units where impasses are resolved through conventional, final offer by package and final offer by issue interest arbitration processes. We have it all.

In preparation for these meetings, I researched Minnesota's 2007–2011 strike and interest arbitration experiences. The new settlement data that I have compiled are limited to bargaining units that used the mediation services of Minnesota's labor relations agency, the Bureau of Mediation Services, to resolve their impasses. Accordingly, my settlement rates data represent *lower*

[9]See Chapter 12, "Public Sector Collective Bargaining," this volume.

bounds since the bargaining units that did not use Bureau services reached unassisted negotiated settlements.

- 937 non-essential bargaining units used mediation between 2007 and 2011. Their settlement rate was 99.4 percent. One unit exercised its right to strike. Another unit mutually agreed to final offer by package interest arbitration.
- 23 essential firefighter bargaining units used mediation between 2007 and 2010. (The impasse resolution procedure then in place sunset at the end of 2010.) The settlement rate was 91.4 percent. One unit went to final offer by package interest arbitration, the default option. Another unit mutually agreed to conventional interest arbitration.
- 24 essential principal and assistant principal units used mediation between 2007 and 2011. The settlement rate was 95.8 percent. One unit went to mandated final offer by issue interest arbitration.
- 560 "other" essential bargaining units used the Bureau's mediation services between 2007 and 2011. The settlement rate was 86.1 percent. Seventy-six units went to conventional interest arbitration, the default option. One unit mutually agreed to final offer by package interest arbitration and another unit mutually agreed to final offer by issue interest arbitration.

A rank ordering of these settlement rates tend to follow those reported in Professor Hebdon's 1996 study.[10] The highest settlement rate prevailed among units that permitted the strike and the lowest was among units where conventional interest arbitration was the default impasse resolution option. Between 2007 and 2011, only 86 of Minnesota's public sector bargaining units used interest arbitration of any form and only one unit exercised its right to strike.

If interest arbitration is a must, stay away from conventional arbitration. Final offer arbitration is the way to go.

Fredric Dichter: From my Wisconsin experience, that there were times when final offers worked out really well, and there were times when literally—and I can you tell you there are many arbitrators who would agree—that we had to hold our noses and pick a proposal, because it was least worst offer being picked as opposed to the last best.

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[10] *See* Hebdon, *supra* note 6.

Issue 2: Whether an Arbitrator Should Confine the Decision to the Four Corners of the Agreement and Not Apply External Law

Fredric Dichter: Be it resolved that an arbitrator must confine his or her decision to the four corners of the agreement and not apply external law in rendering a decision regardless of what the result might be if the matter were before a court or administrative agency.

There has been constant debate among arbitrators and parties as to how much consideration of outside law should be given.

Carolyn Trevis: I agree with this proposition. External law includes many federal and state laws—for example, the FMLA, ADA, ADEA, MHRA, HIPAA, OSHA, and FLSA. Simply, arbitration is a private process with a private resolution of private rights and duties. Arbitration is consensual in nature, and only the language and the terms of the agreement should be interpreted by the arbitrator. The question is for the arbitrator to determine whether the parties' negotiated agreement, its four corners, was violated. The only task for the arbitrator is to carry out the intent of the parties, not to interpret the law.

The grievance process is also restricted to disputes over the interpretation and application of the terms of the agreement. It's not designed for, nor is it meant to cover, disputes over external law. The arbitral form exists as an alternative to the courts, not as a substitute. It was agreed to by the parties as an alternative forum meant to be more efficient and less expensive.

I hesitate to say that it resolves disputes more quickly because sometimes it doesn't. I know at the State of Minnesota we have grievances that don't get resolved for more than one year, although sometimes we have arbitration hearings that last four to five days. But those are the exception and not the rule.

There are other forums where employees can seek a remedy. That is in the courts or in regulatory agencies, like the Department of Labor, the Department of Human Rights, or the Equal Employment Opportunity Commission. Those agencies have the expertise. Although many arbitrators and many advocates have legal training, we all know that many do not. They are not in command of all the laws and the regulations. How many of us in this room could say that we are experts in the Family and Medical Leave Act (FMLA)? It has many complications. And I defy any of us to try to wade through that Act and say that we are experts. Many

arbitrators and advocates are not trained in external laws. In some cases, this is a disadvantage to the union. I'm a management advocate. I think it can result in an unfair advantage to the employer, because, theoretically, the employer has more resources.

The finality of arbitration awards is also generally respected by the courts. Thus, the arbitrator's interpretation of the law is not subject to any strict judicial review for error in its interpretation. Generally, unless the arbitrator has manifestly disregarded the law, the arbitration award is binding.

To conclude, if the parties want the arbitrator to consider external law, they may agree to that as part of the four corners of the agreement. Otherwise, without that power being specifically delegated to the arbitrator, consideration of external law is not within his or her authority, nor should it be.

Gary Bailey: I believe that the debate about external law really has two sections to it. One of them is the concept of direct situations. If you negotiate into the contract something that says, "We'll follow the FMLA," then it naturally assumes that you're going to have to resolve the FMLA issue. I believe you can't stand there and say "No, I'm not an expert." I don't expect you to be an expert in FMLA law. I certainly don't expect the person who caused the grievance to begin with, which is the junior human resource person, to be an expert, either, because he or she went to a seminar somewhere and heard that this is how it's applied. Rarely is that person acting that way because the lawyer had told them. It does not matter whether human resources made the FMLA error because their lawyer was wrong or whether their training was imperfect. In short, it's true that there are management employees who are not experts in external laws like FMLA, but they are nevertheless responsible for applying such a law. When they make mistakes, a grievance is a less expensive and less time-consuming way to resolve the problem.

I do negotiate in a lot of my police contracts language that says that the employer will follow all state and federal laws and executive orders having to do with military leave. I'm not a military leave expert, but I'm also a coward. I cannot look at one of my members who just got back from two rounds in Iraq, who has been physically unscathed, and say, "I'm not sure about your military leave issue, but I can't help you. It's not in the contract." I don't have the guts to do that. I would rather say, "Let's file the grievance, and I'll find somebody who is an expert." I'll go out and look. The burden is going to be on us. I don't mind that burden. I'll go find

an arbitrator who is an expert in it, or I'll go find a litigator, or I'll go find someone who is. In my opinion, it's up to me to do that from the union's perspective. I don't mind that bit of a burden.

But getting away from the settlement part of that, let's go to the indirect situation, where the question is: Do you apply external law in pure contract situations? A good example I can give you is the classic that you have to because of labor board decisions with the NLRB. I do public sector work, so I have state labor boards that say, "We're going to *Collyer*.[11] We're going to do *Spielberg*.[12] We're going to bring that statutory stuff back to you anyway, and we're going to let the arbitrators make the first initial decisions on the facts." I think that's a strong presumption.

Three things: First, parties should be aware of external law when they negotiate a contract. Second, I think it's a pretty strong presumption to believe that we intend, as negotiators, to interpret our contract in conjunction with external law. And third, that we don't—I'd like to think we don't—sign contracts that are repugnant to external law.

But there are some instances where lawyers sign contracts knowing that the contents are repugnant to external law. For example, in Illinois I do public sector work, and most of my employers want to put a zipper clause in the contract. But the Illinois Labor Relations Board has said that general zipper clauses do not act as a waiver. The Illinois Supreme Court has said that when you have a waiver, it has to be clear and unequivocal. So if I have a zipper clause that says "for the life of this contract we will not bargain over scheduling," then I'm barred from it. But if it says I'm barred from bargaining at all, then likely the Illinois Supreme Court will say that that's not a waiver. Now, I know that, and I negotiate into a contract language that says we will waive our right to bargaining. I have basically agreed to nothing under Illinois law. I've agreed to waive absolutely nothing, because my knowledge of external law is that such language does not constitute a waiver of bargaining.

I expect that my management counterpart will run back to his or her client and say, "Look at what I've got for you." And I'll go, "Yeah, look at what we gave you." But I would expect that when that grievance is presented to an arbitrator, he or she will want to know what the bargaining history is. In that particular case, it's only right, it's only fair to ask those advocates, "What did you

[11]Collyer Insulated Wire, 192 NLRB 837 (1971).
[12]Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955).

intend to do when you bargained that?" And the answer to this is going to be pretty clear. It's either going to be "I was the only one who knew what external law was and your idiot management lawyer didn't know," or it's going to be, "Well, that's a pretty close call as to what the law is." I'm not going to write something that's antithetical to the Illinois Supreme Court's decision.

Carolyn Trevis: I just want to follow up something that I think is of concern to us as advocates on both the labor and management sides. The trend that I'm seeing, and I've been in this business for 25 plus years, is that we're moving more and more to a litigation model in arbitration. There is more and more of a tendency to make it more formal, which makes it more expensive, which makes it less efficient, and which makes it more costly. I don't think that's the direction that we in labor and management want it to move. It is contrary to the purpose of labor arbitration to ask arbitrators to consider external law rather than the four corners of the agreement. We are moving more and more in that direction, and that's a direction that I think is antithetical to the collective bargaining process and to labor relations, generally.

Gary Bailey: Actually, Carolyn, I agree that the process is becoming more technical. I would love it if the labor boards gave us a more streamlined process and managed to keep their cases separate from those under grievance arbitration. I wish I could go to the labor board and deal with unfair labor practices and keep them away from more technical contract interpretations matters. These cases are going to come back, and there's going to be litigation because of that. I wish I could go to the labor board. I will choose to go to someone with the experience of the people in this room rather than my administrative law judge who just got hired out of law school, who has had actually no experience whatsoever. My hope is that an experienced decision will be less costly, have less chance of appeal, and the decision will be over.

Andy Sims: I would just like to add a Canadian perspective to this debate. I know that our law is quite different, but we just received a Supreme Court of Canada decision (the *Nor-Man* case)[13] that says, "Yes, we do apply external common law principles as well as statutory law."[14] But we're not in any strict sense bound by those common law rules. We use analogous principles, and the prin-

[13]Nor-Man Reg'l Health Auth. & Manitoba Ass'n of Health Care Prof'ls [2011] SCC 59.
[14]Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157, 2003 SCC 42.

ciples are related to our objective of achieving industrial peace. That's a nice compromise.

Fredric Dichter: We're going to move on to our third issue back to the arbitrators, an issue that's near and dear to Ken May's heart here: publication of awards.

Issue 3: Whether Arbitration Decisions Should Be Published

Fredric Dichter: Be it resolved that arbitrators and parties have an obligation to the labor community to permit publication of arbitration decisions to better assist parties and advocates in understanding and resolving issues.

I will tell you that this is a hot topic among arbitrators themselves. Some will do it; some say, "No way in hell am I ever doing it." So it will be an interesting debate.

Mario Bognanno: Should we permit the publication of arbitration decisions? The answer is yes, absolutely, because everybody involved in labor-management relations benefits from published arbitration awards. We have a responsibility, an obligation, to publish. Think about it for a second. The arbitration decision is the final product of the arbitration process. This is the source of information that enables us to identify the issues causing workplace dispute, as well as how they are being analyzed and decided by arbitrators. Yet, arbitration decisions, particularly in the private sector, are *private property*, and the parties need not consent to their publication. In fact, Part 2, Section C, of the Code[15] reminds us that it is a violation of professional responsibility for the arbitrator to make his or her award public (i.e., to publish) without the parties' consent.

Absent the publication of awards, how are we to learn about the substance of arbitration outcomes? I submit that arbitrators, the parties, labor lawyers, labor relations professionals, regulatory agencies, and the courts want to know about the issues that are being arbitrated, and how and why arbitrators decide these issues the way they do. Describing the evolving nature of "industrial justice" and the "common law of the shop" would be nearly impossible without the benefit of arbitration awards made public.

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[15]National Academy of Arbitrators, American Arbitration Association, & Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (as amended and in effect Sept. 2007), *available at* http://www.naarb.org/code.html.

Arbitrators read published awards for guidance. Labor and management organizations read published awards for guidance in drafting language and maintaining their relationships going forward. Published awards can result in the resolution of employee grievances. We, including the NLRB and the courts, learn and understand about the ever-changing composition of industrial relations from reading the analysis and outcomes of awards that the parties have consented to have published.

The impetus for publishing awards must come from the arbitrator. We're in the best position to seek publication consent and to submit awards for publication. But many of us are reluctant to seek consent. I'm reluctant. I particularly don't want to ask the parties for their consent after I have issued an award. Why? Well, because in all likelihood the losing party will not grant consent for obvious reasons. Fortunately, the Code allows us raise the publication question at the hearing, before the award is issued. Yet, a problem remains. Specifically, to raise the question at the hearing may cause one or both parties to feel inferentially coerced into granting publication approval. I don't want my hearings tainted for this reason.

To overcome this concern, I build the consent question into my pre-record arbitration procedure. Here's how I do it. Before going on record, I circulate an appearance sheet, requesting the signatures of all in attendance at the hearing. Next, I confirm the case's caption. After that, I usually introduce myself to the hearing's assembly and then I ask the advocates if they wish to have witnesses sworn and sequestered. Then I call for joint exhibits. Nested among these questions, I'll raise the publication question. As a procedural matter, I simply ask the parties if they have given any consideration to having their award published. I remind them that the choice is theirs. This casual nudge usually provides me with all the information I need to dispose of the consent issue. If one party refers to an organizational no-publication policy, then I drop the discussion. Similarly, if one party says, "No, let's wait until after the award is issued to discuss the matter," then I drop the subject. Or, if either party indicates that it does not want the award published, without giving a reason, then I drop the subject. I then go back to my series of procedural questions. Have you agreed to a submission issue? Does the agreement require an award by a certain time? And so forth. In sum, I nest publication consent in the midst of pre-hearing procedural inquiries. The consent question, in so many words, is raised and answered.

In closing, I should note that the parties disallow publication most of the time. Further, the parties have never been reluctant to tell me that they do not wish to have their awards published. Also, neither party has ever told me that it felt coerced. Why should it? The suggestion of publication consent is raised as a procedural matter in advance of the hearing's commencement.

Ultimately, however, the publication of awards yields social dividends. We have an obligation to the labor-management community to permit publication of awards, but it is up to us, the arbitrators, to open the dialogue.

Andy Sims: Let me begin by saying that I come from a jurisdiction where the law is quite different. We have to publish our awards, or at least submit them to the Department of Labour, which gives them to the electronic publishers. So, we don't have any question of private property, either by the arbitrator or the parties.

But not knowing what I'm talking about has never stopped me from talking in the past, and I don't propose to limit myself now. I believe free choice is the hallmark of arbitration. It was the quid pro quo for abandoning the right to strike or lockout, on the one hand, and the right to court-based contract adjudication, on the other. Parties have a free choice of arbitrator. They can choose one of us or they can choose a complete bonehead, and many do. Parties have a choice, a free choice over process.

I chaired a commission in Canada when we considered instituting expedited arbitration. And some said "that's a great idea," until we got to the docks in Vancouver. And they said, "Here's our system. We give Joe Weiler one of these cell phones, and if we have a wobble on the waterfront, he's down here in 20 minutes, and we have a decision before the ship has to sail. Don't you go messing around giving us expedited arbitration; that's going to quadruple the time."

I believe parties have a responsibility to craft arbitration systems to suit their needs, and I believe that includes their choice over the form of the awards. I believe it should include a choice over whether they wish those awards to be published.

Now, why would parties to an arbitration not want publication? My friend has given all sorts of marvelous social advantages. One of them that is becoming increasingly significant is the use of data mining. We've had experiences in our jurisdictions of employer organizations mining grievance data and labor board proceeding data to determine which employees are union supporters and

which are not. They cannot get direct evidence of card support or vote support, but nonetheless they can get a great deal of information from awards.

There is also an assault on privacy. Increasingly, we deal with issues of people's mental and physical disabilities or with issues of their culpability on things that will haunt them into their future careers. Frequently, employers now Google potential employees, and that gives at least one reason that convinces some parties that they should not have their awards published. My point is not that publication is a bad thing, but that there are reasons why union and employers should be free to say, "Thanks, but no thanks."

As to the argument that publication is needed to better assist us and the parties in understanding and resolving issues—enough already. There was a debate in 1974, when the president of the Academy at this meeting bemoaned the lack of our published awards compared to court awards. Frankly, nowadays, we are swamped. There are so many awards out there debating "how many angels on the head of a pin" that the process has become bogged down in its own swamp of decided decisions. Awards are no longer enabling, they are becoming disabling. They have generated an industry in seminars, in publishing, in selling what we write back to us and to the parties at great expense—it goes on forever. Anyway. Free choice. Enough already. Too many awards. We know what the issues are and so do the parties. And we're adding more heat than light and there are good reasons why one might say "No."

Mario Bognanno: Yes, it is true that employers data mine published awards. But so can unions. Yes, it is true that the privacy issue is a concern. But why not redact names? In discharge or discipline cases, I usually refer to the grievant by initials; I seldom identify the grievant by name. Look, in my practice, if I nudge the parties toward publication consent and they don't protest, I'll phrase, in so many words, the consent question found in the Code. The Code reads, "Do you consent to the submission of the award in this matter for publication?" If both nod affirmatively, that's it. I'll note their consent when we go on the record. But, I mean, that is it. I don't recite the Code's consent question in writing. I don't hand them a ballot with a "yes" or "no" as the Code suggests. Maybe I'm in Code violation. I'm on the CPRG (Committee on Professional Responsibility and Grievances). I might get written up for this.

There's one more thing I want to add to the argument favoring the publication of awards. Before the meetings, I called the Thompson-Reuters, Bloomberg BNA, and CCH managers who are responsible for publishing arbitration awards. Among other questions, I asked them about arbitration awards submission trends. You may find their written answers interesting.

Thompson-Reuters' editor manager, Brian Gallagher, reported "The trend has been fairly consistent over the past several years. However, we recently made a strong push to request more submissions and have had favorable response, so we hope to see an increase in the number of submissions going forward."[16]

Bloomberg BNA's manager Sarah Stevens wrote, "The amount of awards may have decreased slightly over the past 6 years, but it has definitely increased from 10 years ago. We always like to receive more awards."[17]

CCH Wolters-Kluwer's managing editor Dave Stephanides stated, "Over the last year, we have seen a substantial decrease in the number of awards sent to CCH/WK."[18] To the following question, "Would you like to see more?" he answered, "Yes, and in February of 2012, we reached out to many arbitrators with a goal of increasing our volume. This has been met with some success."[19]

Ladies and gentlemen, based on extended communications with these individuals, my sense is that increased submission levels would be greeted with open arms. The work of labor arbitrators should not be kept under wraps. Arbitral contributions to the grievance process and to industrial peace are significant. The courts and the public ought to be able to read our awards. Again, I submit that the publication of arbitration awards is a social good. Thank you very much.

Andy Sims: As I flew into Minneapolis, the flight attendant said, "And remember, there's a time change in Minneapolis." I didn't realize that minutes became hours. You have to realize that my opponent is a man who has spent a 30-year career on the principle "publish or perish." So, he has a fear of not publishing. That has colored his whole argument.

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[16]E-mail from Brian Gallagher, Thompson-Reuters, to author (May 24, 2012) (on file with author).

[17]E-mail from Sarah Stevens, Bloomberg BNA, to author (May 18, 2012) (on file with the author).

[18]E-mail from Dave Stephanides, CCH Wolters-Kluwer, to author (May 17, 2012) (on file with the author).

[19]*Id.*

I have written any number of decisions, and I'm not well known for being terse. But, I must admit, I wish some of my decisions could achieve the obscurity they so rightly deserve. I am fully in favor of having clearly articulated arbitral principles. I laud those authors who distill our ramblings down to those coherent principles. What the publishing firms my friend has referred to are now doing, is selling a raw product without editing, without giving us the guiding principles, in the hope that every poor business agent in the basement of the Holiday Inn in Hinton, Alberta, will be able to analyze this mass, and explain it to me coherently. That is unrealistic. We publish too much now in contrast to 1974. And the time has come to say, "Enough already."

Fredric Dichter: I would say the majority have it against publication. I will tell you that Bloomberg BNA and CCH really crave getting more awards from some of the arbitrators in this room who are considered the cream of the crop.

Issue 4: Whether Arbitrators Should Follow the Rulings of Predecessors in Resolving Contract Interpretation Issues

Fredric Dichter: Be it resolved that the need for stability and consistency in contract interpretation requires an arbitrator to adhere to the rulings of his or her predecessors that involve the same contract revisions and issues even if the arbitrator disagrees with previous interpretations.

Gary Bailey: This one is very easy if you're an advocate. If you won the first case, yes. If you lost, no. Only a labor attorney would be against the need for stability and in favor of inconsistency. Correct? I mean, those are two words that inspire us: "No, no, no we need inconsistency and instability, people!"

Two other words that I'll talk about: faith and responsibility. Faith, not a secular use of the word, but maybe use of the word in a personal sense of duty. I have faith that when I try the case the first time I will win it. I believe that every case I try I will win. And the reason for that is very simple. Marty Malin was my labor law professor. He taught me everything I know, and ruling against me is like ruling against Marty. So, you know, what have you got against Marty? All right? Just rule in my favor. So, I've had cases before when Marty's—like the question is, well, is that a conflict having Marty, my labor law professor? And I've had a few say, "I don't know, that could be a conflict." Employers said you don't know what Marty graded me as. I was there. But I think that's the

big concept to me. It's faith that you're going to win it the first time. Win it and be done with it.

Despite the fact that I'm a labor union attorney, I don't believe in the Hatfield and McCoy's blood feud concept. How long can you keep this fight going? I think it's got to be over and done with. I think that's the beauty about labor law, to a certain extent, is that when you have a fight, get it done with, and be over it. The fights that last longer are not usually in arbitration. As we heard this morning,[20] it's legislative issues that hang on forever. Have your fight. Go 10 rounds. Get it over with and fight the next day. I think it's that simple.

That leads me to responsibility. Take responsibility for it. As an advocate, if you lose, you do have an out. And that is, you come back to the bargaining table when the contract is over and say, "Look at the problem we have with this language. We've got to put in new language. Did you see what the arbitrator said last time?" So, you come in, you write language. And I guess it goes back to faith. I have the faith that I rewrite good language. And the reason is that Marty Malin was my labor law prof—so to me, it's an easy thing. You tried the case. It's over. Move on. If you win, have a party. If you lose—if I lose, I blame Marty. If I lose, I just go back to the table and rewrite the language. So certainly it is a substantial precedent, and be done with it.

Carolyn Trevis: You notice how the advocates are less windy than the arbitrators? Gary and I are taking great pride in that. I do not agree with this proposition. A negotiated labor agreement is, in my view, a living document, kind of like the U.S. Constitution. Differing facts and differing times may lead to differing interpretation.

The parties change over time. Their economic positions may have changed. The history of their past relationship may have changed. Their objective in the current stance may be different. What is important at one point in time for a party might not be as important later on.

Since the prior award, the parties may also have applied the agreement in a way that is contrary to the predecessor's award without objection or challenge. That's happened at the State of Minnesota. And this has created some possible past practice or even waiver arguments. The predecessor may not have intended his or award to have precedential effect. Rather, that predecessor

[20]See Chapter 12, "Public Sector Collective Bargaining," this volume.

arbitrator may have intended it to apply to certain unique facts. It's not always apparent from the award or from the explanation.

Over time, other circumstances may have changed. For example, one party to the agreement may have proposed certain language relating to the contract provision during a later negotiations process. This happened at the state. We had a prior ruling from an arbitrator 29 years before. The state believed the ruling was wrong. Management either ignored the ruling or, in the cases it was challenged, settled the case. And, eventually, the State went to an arbitration and showed an arbitrator that over the 29 years since the prior award, the union had proposed language in six different rounds of bargaining to get what the union said it had. This factor was critically important to the arbitrator and he reversed the prior arbitration award; same party, same language, same contract.

Advocates change. And one advocate may argue a different theory, which could change the thinking or the rationale of the arbitrator. Or, the advocate may find additional facts that are important and support the change and change the outcome.

Arbitrators must be independent thinkers. We don't want a robot. Although, at the fees some of you charge for your cases, it might be cheaper. One arbitrator, to his credit, has said, "Reasonable and experienced arbitrators do disagree." And frankly, some arbitrators, despite their best intentions, do not always interpret contract language correctly.

There must be an opportunity for the party who has been on losing side to seek and obtain the correct interpretation. The issuance of one bad award should not lead to more bad awards. Arbitration awards, unlike judicial decisions, are final and binding in most cases. There's no appeal right and thus there's no right to get an unfound award reversed.

To conclude, the search for consistency should not interfere with what is right or what is just. Thank you.

Gary Bailey: Along those lines, I recently had a case where I lost a grievance arbitration with regard to discipline. The question was, is it an arbitrable case or does it have to go to the Civil Service Commission. And the arbitrator ruled against me, despite the fact that my testimony, I thought, was clear; that's how the parties had bargained over it. But at the same time, it's final and binding.

I had a number of other police officers whose suspensions occurred after and behind that case who said, "We can't arbitrate our suspensions?" No, he already said that. So, either we try

another 10 cases or we just go to interest arbitration and get a retroactive decision on the arbitrability of discipline, which is what we got. But instead of trying it 10 times, we tried it once.

I think you have to honor the concept of final and binding. It's not easy. As lawyers, we like to play with words, but final and binding, to me, outside of when I visit a few of my friends in Vegas, what those words really mean is final and binding. It has to be. Thank you.

Carolyn Trevis: The only other point I wanted to address was this: Gary said earlier that if you lose, just go to the table and get new language. Well, as a management advocate and as a negotiator, that's not always so easy. If the union believes that the language is in their favor, and they've got a favorable arbitration award, then in order to get that language changed, I have to give them something. It might be money. It might be a new benefit. It might be some other language they're seeking. And so, there has to be another way for the losing party to try to get what they consider a bad decision, a wrong decision, reversed.

Fredric Dichter: It is an issue that we arbitrators have had to deal with from time to time.

I want to thank our panel, who did a marvelous job. They had tremendous time constraints on them and an annoying timekeeper, so they did really well.