Chapter 13

HELP WANTED: DETECTING THE RATIONALE IN SIGNIFICANT CONTRACT INTERPRETATION DISPUTES

I. Help Wanted: Detecting the Rationale in Significant Contract Interpretation Disputes

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Opinion writing has been the subject of major presentations at the Academy. At the 18th Annual Meeting, a panel of arbitrators (Garrett, Aaron, Barrett, T. Kennedy, and H. Sherman) discussed "Problems of Opinion Writing." At the 35th Annual Meeting, papers by Stu Bernstein (Management attorney), Sam Camens (Union representative), and I addressed "The Art of Opinion Writing." All of that material is as relevant today as it was when originally delivered. There was one area, however, that was touched upon only briefly—namely, the choice of an appropriate rationale for our decision. That is the subject I wish to explore today.

My comments largely concern significant contract interpretation disputes—those likely to affect the day-to-day operation of an enterprise and likely to constitute important precedents to the parties affected. Assume for the moment that we have heard and decided a case and that there are several rationales available to support the decision.

In choosing among them, there are a variety of questions. Do we favor a broad rationale over a narrow one? If the broad rationale could have an adverse impact on one or both parties, should we rely on the narrow rationale instead? Indeed, are we capable of divining with a high degree of confidence what the impact of the broad rationale might be? Should "impact" be a consideration at all where the parties have not really addressed that point as is usually the case? If so, how might we obtain the kind of information

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we need to better choose the rationale likely to cause the least possible damage? Are such inquiries, such initiatives, justifiable in any event? Should the persuasiveness of a given rationale be a decisive factor in choosing the appropriate rationale? And if we decide the dispute on the basis of the facts alone, should we simply avoid the interpretative issue?

My suspicion is that, apart from selecting the rationale that best supports our conclusion, arbitrators do not spend much time with these questions. Perhaps an umpire after some years of experience with a set of parties might be able to intuit the likely impact of a given rationale, but that certainly would not be true of an ad hoc arbitrator. This paper attempts to explore these questions from the standpoint of theory and practice and to propose a few modest initiatives, for both the parties and the arbitrator, in dealing with this murky subject.

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In preparing an opinion, arbitrators simply seek to *explain* the basis for their ruling.[1] Equally important, we seek to *persuade*, to convince the losing party that it ought to have lost. Winners seldom have to be persuaded. We choose the strongest argument available to us, provided that it appears to be sound and sensible. That usually means the *broader* rationale. By doing so, we improve our chances of satisfying the parties, setting their dispute to rest, and enhancing the possibility of the parties selecting us to hear one of their future cases. These are powerful incentives. To expect us to ignore the broader rationale, the stronger argument, because of the possibility that it might have an adverse impact on the parties' relationship or operating efficiency is unrealistic. That is especially true because arbitrators seldom have any hard evidence as to what the impact of our award might be.

Consider, on the other hand, the undeniable appeal of the *narrow* rationale. When we follow such a course, we typically say less, produce a more limited award, and minimize the possibility of doing unintended damage. To accomplish all of that and still arrive at the correct result is a potent argument for moderation. Furthermore, by minimizing the impact of the award, we take into account the ever-present possibility that our written opinion may be in error or unwise in tone or scope. The cost of such self-

[1]We explain so that the parties will fully appreciate the nature of the issue and the reasoning process that brought us to our conclusion.

restraint is that a stronger argument, a broader rationale, is sacrificed and we end up being less persuasive than we would have liked. That is a small price to pay for the protection we thereby afford the parties. I plead guilty to not following such advice on several occasions, seduced by the wish to be as convincing as I could possibly be.

Comparing these approaches, one would think the narrow rationale would ordinarily prevail. Yet my reading of countless awards over the years leads me to believe that arbitrators, more often than not, opt for the broad rationale. The desire to *maximize* the *persuasiveness* of our opinion is more compelling than any felt need to *minimize* any adverse *impact* from our award. There is a real tension between these forces. I suggest that "persuasiveness" prevails because we ordinarily do not know enough to make a ruling that relies, explicitly or not, on "impact." And I suspect that if we truly knew about "impact," we would more often embrace a narrower rationale.

The parties' occasional unhappiness with a sound, well-reasoned award in an important case is almost surely because the arbitrator's rationale is unnecessarily broad and hence unnecessarily disruptive.

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An example may prove helpful. Assume that janitors have been responsible for in-plant cleaning for many years, that management nevertheless has engaged a contractor to perform such work, that its only reason for doing so was to reduce its cleaning costs, and that all of the janitors were then laid off. Assume also that the collective bargaining agreement nowhere mentions the subject of contracting out and nowhere restricts the arbitrator's authority to draw implications from the language of the agreement. A grievance is filed. An arbitrator, after studying the case, decides that the grievance has merit. He or she recognizes that management has a broad right to contract out work but that this right is not unlimited and is subject to certain restrictions that can be reasonably *implied* from specific provisions of the agreement or perhaps from the agreement as a whole.

That implication can be expressed in different ways. Some arbitrators have said that such contracting out ignores management's "implied obligation of good faith and fair dealing." Such a rationale, apparently drawn from the agreement as a whole, is far *too broad*. It speaks to management's attitude and intent, subjects

ordinarily dealt with by the National Labor Relations Board rather than an arbitrator. It suggests a broad basis on which any management action with a large impact on employees might be attacked. It draws the arbitrator's attention away from the specifics of the agreement and into the uncharted waters of "good faith."

Other arbitrators have said, relying on the "recognition" clause in the agreement, that such contracting out served to "arbitrarily or unreasonably reduce the scope of the bargaining unit." This rationale seems *broader* than necessary. True, the elimination of all janitors from the bargaining unit, on the basis of wage cost alone, seems to conflict with management's recognition of the union as the bargaining agent for janitorial work. But the existence of an agreed-to bargaining unit certainly does not freeze all jobs in place for the life of the agreement. Arbitrator Garrett forcefully made this point in a U.S. Steel-Steelworkers award (Case No. N-159):

> . . . The group of jobs which constitute a bargaining unit is not static and cannot be. Certain expansions, contractions, and modifications of the total number of jobs within the defined bargaining unit are normal, expectable and essential to the proper conduct of the enterprise.

Still other arbitrators have said, emphasizing the "wage" provisions of the agreement, that such contracting out "effectively frustrates the basic purposes of the agreement." This *narrow* rationale rests on the negotiated wage promises to janitors. If management were free to escape the burdens of the agreement on the basis of labor cost savings alone, then its wage bargain would be meaningless. By prohibiting such contracting out, an arbitrator is in a real sense preserving the parties' bargain.

The narrow rationale is bound to have a lesser impact upon the parties and is therefore preferable. Indeed, whenever the broad and narrow rationales are equally persuasive, the latter should be preferred. The determination of the appropriate rationale in a complex case deserves some kind of analysis similar to what I have just attempted.

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In order to choose wisely among available rationales, arbitrators ought to know what the "impact" of our choice is likely to be. The parties, as I noted earlier, rarely provide this kind of information. Nor can we expect them, absent an invitation, to enter this thicket. Neither management nor labor is going to tell us, in the course of an arbitration, that it would prefer a narrow rationale in the event of an adverse ruling. Each fears that such a statement

might be construed by the arbitrator as uncertainty with respect to the merits of its case. Hence, arbitrators are simply left to our own devices. We may speculate about the likely "impact" of a given rationale, but our decisions should not turn on mere speculation.

How then can arbitrators acquire useful "impact" information? There are several possibilities.

The most direct approach is for the arbitrator, following his or her tentative decision in the case, to contact the party representatives. He or she would explain what the ruling will be and seek their help for the limited purpose of gaining a better understanding of the "impact" of the rationale(s) that he or she is considering. It would not be out of line to have made such a request at the arbitration hearing, but at such a late stage of the proceeding, the request would be most unusual. It is unlikely that most arbitrators would take such an initiative, absent some earlier indication that the parties might be sympathetic.[2]

However, where there is a tripartite board of arbitration, the neutral could (and should) raise the "impact" question with the other party arbitrators. Often, such boards meet to review and discuss the neutral's proposed draft opinion before it is issued. It would be perfectly natural, in such a setting, for the neutral to explain that his or her choice of a rationale might well depend on its probable "impact" and request such information. Of course, this might well trigger still another disagreement between the parties, but the benefit of the "impact" knowledge might well outweigh the risk.

Perhaps the best solution is to encourage the parties to signal the arbitrator in their collective bargaining agreement that this kind of limited initiative would be permissible. They might, for instance, include the following clause in their agreement:

> During the period after the arbitrator has made his/her decision but before its issuance to the parties, the arbitrator may, upon request, be permitted to consult with certain named party representatives about the rationale(s) he/she has chosen to support the decision. This action is meant to protect the parties' interests, not to invite further argument on the merits of the dispute.

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[2]These observations would be particularly true of ad hoc arbitrators working without benefit of a tripartite board. I have not described this "direct approach" as "mediation" because the arbitrator has already arrived at an answer to the dispute and is not asking the parties to resolve the matter on their own. He or she is just asking for additional information so that "impact" information can be factored into the choice of a rationale.

There is always an element of anxiety in decision making because of the arbitrator's lack of information as to what the "impact" of the ruling might be. We do not want our awards to cause unnecessary damage to the parties. But, to repeat my theme, that kind of self-restraint demands information that we do not normally possess. Some examples of how some our most revered arbitrators handled the problem in the 1940s and 1950s are revealing.

Harry Shulman, the first Ford-UAW umpire, served the parties from 1943 to 1955. He believed that it would be mischievous or counterproductive to issue an award in certain cases he had heard. Perhaps, in his view, an award was likely to cause unnecessary damage to plant operations or the parties' relationship. Or perhaps, in his view, the underlying issue in the case was likely to be resolved by the parties in time or would simply disappear. Thus, when he died, there were some 50 to 100 cases heard but undecided. Shulman was, in other words, determining when to protect the parties from themselves, from the unhappy consequences of their own unresolved disputes. No arbitrator in today's labor relations world could behave in such a way. But his situation was unique—a new, complex, contentious bargaining relationship faced with countless matters of first impression, in an environment that called for quick development of a rational, effective dispute resolution system.

Syl Garrett was the U.S. Steel-Steelworker umpire for a much longer period. But he too was confronted by unique circumstances. Industrywide bargaining in basic steel had produced essentially the same contract language for companies throughout the industry. Inasmuch as most of the major interpretive issues were then being determined through the U.S. Steel (or Bethlehem Steel) arbitration system, their arbitration awards took on a special significance. On a number of occasions when Garrett was faced with matters of first impression on such large issues as "local working conditions" or "equitable incentive compensation," he chose to decide the initial cases on their facts without dealing with the large interpretive questions. He waited until he gained a full view of the many ramifications of the issue and then finally offered his interpretation. His delay, no doubt with the parties' approval, was his way of both maximizing the persuasiveness of his interpretation and minimizing any damage to the parties.[3] Few, if

[3]The U.S. Steelworker system included a tripartite board of arbitration, which allowed for extensive review of proposed awards before they were formally issued to the parties.

any, arbitrators in today's labor relations world would be allowed to behave as he did.

What these examples demonstrate is that arbitrators have been acutely conscious of the need to avoid mischievous awards and the need to be as well-informed as possible before issuing an award. Such self-restraint, when carefully tailored to the parties' needs, can still be an acceptable initiative in the unusual and difficult interpretive dispute occasionally placed before us. This can be accomplished, however, only with the parties' knowledge and consent. And, absent any mention of this subject in the collective bargaining agreement, the arbitrator must assume the job of convincing the parties that this kind of initiative is in their best interest. Such an initiative, oddly enough, seems perfectly consistent with the arbitral instinct for self-restraint.

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One other matter is worth emphasizing. Even assuming arbitrators have most of the information they need, there will remain large areas of uncertainty. Both the *persuasiveness* of a given rationale and the practical *impact* of that rationale involve matters of judgment. What is most persuasive to me may be only marginally persuasive to another arbitrator. What appears to me to be a substantial "impact" on operations may seem only a marginal "impact" to another arbitrator. And, in any event, a determination of "impact" requires a speculative look into the future, probabilities rather than certainties. My point is that however helpful it may be to have access to greater information, the arbitrator must still weigh the relative strength of each factor, even the relative strength of one factor against another, in choosing the appropriate rationale.

These may seem unnecessary tasks given one's confidence in the ultimate conclusion, grievance granted or denied. But I have always believed that the choice of rationale deserves more attention, particularly in the significant contract interpretation dispute where that choice may be as important to the parties as the result itself.

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What I have said so far concerns opinion writing, that is, choosing the best rationale for a decision already made. A similar problem can arise with respect to the arbitrator's role in decision making.

Suppose, through a close reading of the collective bargaining agreement, that the arbitrator discovers a clause that, although nowhere mentioned by the parties, appears to provide a clear answer to the dispute. Suppose further that this clause seems to offer a more persuasive, a more correct, way of resolving the case than is available through either of the parties' arguments. What should we do?

Arbitrators, I believe, will ordinarily choose to ignore the newly discovered clause. There are good reasons for doing so. We do not know whether the parties' silence regarding this clause was deliberate or careless; we do not know what their positions would be if asked whether that clause was relevant to the disposition of the grievance. And, as a matter of good arbitral practice, a strong argument can be made for limiting our decision to the arguments made by the parties. But assume further that the clause in question is truly compelling and seems to call for a ruling contrary to the one we would otherwise have favored. At some point, such a new discovery can be as tantalizing as forbidden fruit.

Perhaps here too, it might be appropriate on rare occasion to contact the parties and seek their assistance. The problem is that the arbitrator's discovery in this hypothetical, unlike a "choice of rationale" in opinion writing, might well prompt a different decision. The party that loses because of the arbitrator's large curiosity would no doubt be extremely displeased by this kind of initiative. In the early days of arbitration when the arbitrator was more of a problem solver, and the collective bargaining agreement was often viewed more like a constitution than a contract, this kind of arbitral behavior might have been appropriate. But in today's arbitration world, peopled by sophisticated lawyers and negotiators, it is highly doubtful that such an activist approach would be welcome.

My point remains, however, that there are circumstances where the arbitrator should properly use his or her initiative to seek further information to enhance the likelihood of a wise decision. Arbitrators should consider a "Help Wanted" scenario where appropriate.