Arbitration and Judicial Review

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A quarter century ago, in a presentation at the Academy’s annual meeting, I used the phrase “contract reader” to characterize the role an arbitrator plays in construing a collective bargaining agreement. That two-word phrase may be the only thing I ever said before this body that has been remembered. Unfortunately, it is almost invariably misunderstood. Time and again members have reproached me: “What’s the big deal about contract reading, anyway? Isn’t it just the same as contract interpretation?” Or, more substantively scathing: “Do you really think, Ted, that all you have to do to interpret a labor agreement is to read it?!”
interpretation, Arthur Corbin and Carlton Snow, know that context is nearly everything in extracting meaning from a set of words. When I spoke of the “contract reader” years ago, it was in the context of a paper dealing with judicial review of an arbitrator’s award. The process of contract interpretation as such was not my concern. I had a simple, but I like to think important point to make. When a court has before it an arbitrator’s award applying a collective bargaining agreement, it is just as if the employer and the union had signed a stipulation stating: “What the arbitrator says this contract means is exactly what we meant it to say. That is what we intended by agreeing the award would be ‘final and binding.’” In this sense, an “erroneous interpretation” of the contract by the arbitrator is a contradiction in terms.

Now, my Law School colleague Yale Kamisar, who has had more of his books and articles cited by the U.S. Supreme Court than any other contemporary scholar, advises us legal scrivellers that it is not enough to have a sound idea. “To make a lasting impression,” says Yale, “you must couch your ideas in memorable language.” So, way back in 1977, I tried my best to come up with a catchy phrase to convey my notion about the relationship between arbitrators and the contracts they are asked to interpret. What could be more apt than to get a court to think of the arbitrator as simply picking up the parties’ agreement and “reading it off” as easily and straightforwardly as A-B-C? Yale didn’t tell us, however, that sometimes you can succeed too well. The audience may remember your catchy phrase — and entirely forget your point!

Today, I am going to take two quite different tacks. First, I shall update the thesis I thought I was communicating to you nearly 25 years ago. The emphasis will be on what may be the hottest issue in judicial review, namely, when may a court set aside an arbitration award on the grounds it violates public policy. Second, in response to your overwhelming demand, I’d like to talk a little about what many of you thought I was trying to say all along, namely, how should an arbitrator go about “reading,” or interpreting, a contract.

Judicial review of arbitration awards

The story begins, of course, with David Feller’s great triumph in the Steelworkers Trilogy (Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)). There, the Supreme Court made arbitration the linchpin in the federal scheme for the implementation of collective bargaining agreements. More specifically, for our purposes, the Court in one of the three cases, Enterprise Wheel, imposed tight constraints on judicial review of arbitration awards. So long as the award is not the product of fraud or corruption, does not exceed the arbitrator’s authority under the parties’ submission, and “draws its essence” from the labor contract, a court is to enforce the award without any attempt to “review the merits.” Despite these strictures, the itch of the judiciary to right seeming wrongs has compelled the Court to revisit the subject, most notably in Paperworkers v. Missco Inc., 484 U.S. 29 (1987).

Missco presented the public policy question in dramatic fashion. The Fifth Circuit had refused to enforce an arbitrator’s reinstatement of an employee whose job was operating a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed, declaring that “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” The Court naturally recognized the general common law doctrine that no contract in contravention of law or public policy will be enforced. But it cautioned that “a court’s refusal to enforce an arbitrator’s interpretation of [labor] contracts is limited to situations where the contract as interpreted would violate ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”

Many lower courts have still not got the message. Judges have been so offended by the reinstatement of deviant postal workers, sexual harassers, and alcoholic airline pilots that they have disregarded the directives of Enterpise and Missco. Unfortunately and unaccountably, the Supreme Court has not seen fit to step in and insist that its dictates be followed. Thus, the First and Fifth Circuits have taken it upon themselves to find an award at odds with their notions of public policy, even though the action ordered, such as a reinstatement, would not have violated any positive law or established public policy if it had been taken by the employer on its own initiative. The Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have been far more faithful to the Missco mandate. The Second, Third, Eighth, and Eleventh Circuits have vacillated on the issue, but the most recent decisions seem more in line with Missco.

Because I consider it one of the easier issues in arbitration, however much misunderstood by a number of courts, I shall deal brusquely with the rejection of otherwise legitimate awards on the basis of a nebulous public policy. That usually comes down to the highly subjective feelings of particular judges. For me, three estimable critics have correctly assessed the problem and arrived at the right solution. In various formulations, Judge Frank Easterbrook and Professors Charles Craver and David Feller have concluded that if the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the
action directed by the arbitrator, such as reinstatement of a wrongdoer employee, the arbitral award should be upheld against public policy claims. If the airline did not have violated the regulations of the Federal Aviation Administration by putting the rehabilitated, re-licensed alcoholic pilot back in the cockpit, the arbitrator’s award to that effect is valid and enforceable.

That approach is entirely in keeping with the underlying notion that the arbitrator is the parties’ surrogate, their designated spokesperson in reading and applying the contract. What the parties are entitled to say or do on their own, the arbitrator is entitled to say or order. That simple principle seems so self-evident, and so implicit in the Supreme Court’s rulings to date, that it should become the accepted norm in the future. This would merely confirm arbitration as the “final and binding” dispute resolution procedure that the parties’ contracts almost invariably denominate it.

We may shortly have further enlightenment from the Supreme Court on this long-running debate. In March 2000 certiorari was granted in Eastern Associated Coal Corp. v. Mine Workers. This was another instance of marijuana ingestion by a worker in a hazardous occupation, here, a mobile equipment operator. In sustaining the arbitrator’s reinstatement, the lower courts acknowledged that Department of Transportation (DOT) regulations expressed a “well defined and dominant public policy” against drug use by “those in safety-sensitive positions.” But the court of appeals went on to say: “[T]here is no such policy against the reinstatement of employees who have used illegal drugs in the past.”

In short, the key is whether the remedial action ordered by the arbitrator, not the triggering conduct of the employee, is contrary to public policy. Of course, the drug-taking employee acted contrary to public policy. But the award-issuing arbitrator did not and his decision should stand. Indeed, recognizing the possibility of the rehabilitation of

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wrongdoers is a hallmark of a humane and caring society. Despite the ominous implications of a grant of certiorari when the court of appeals did not even deign to publish its opinion, that is the way the Supreme Court should rule in this case. In addition to overturning awards on public policy grounds, judges will not uphold an arbitrator’s decision if it stretches beyond some line of rationality. Courts that proclaim their allegiance to the Enterprise and Misco principles will balk at enforcing an award they find has “no rational basis” because, for example, it ignores the “plain meaning” of the contract. Regrettably, I cannot say that vacating an arbitral award on grounds of irrationality is contrary to the contract reader thesis. In the parties’ final and binding arbitration agreement, they presumably took it for granted not only the arbitrators would be untainted by fraud or corruption, but also that they would not be insane and their decisions not totally without reason. In any event, it is probably impossible to keep courts from intervening, on one theory or another, when an arbitration award is deemed so distorted as to reflect utter irrationality, if not temporary insanity. One can only hope that the careful, artful crafting of arbitral opinions will keep this judicial exception to the finality doctrine to the barest minimum.

arbitrators go about divining the parties’ “intent” when the reality is they never contemplated the particular issue that has now arisen? What do we do when a “plain meaning” conflicts with bargaining history or established practice?

Two splendid articles by our colleagues Carlton Snow and Richard Mittenhal — do I dare apply that over-used term “definitive” to them? — have said nearly all that needs to be said about plain meaning and past practice. Carlton is, for him, uncharacteristically blunt: “Arbitrators’ continued invocation of the plain meaning rule is anomalous in light of the trend to reject the rule by the courts, the U.C.C. [Uniform Commercial Code], the Restatement [of Contracts], and treatise writers.” Dick was prepared to declare, almost 40 years ago, that past practice “may be used to clarify what is ambiguous, to give substance to what is general, and perhaps even to modify or amend what is seemingly unambiguous.” The rest of my remarks will mostly be embroidery upon the lessons of these masters.

Despite the teachings of Snow and Mittenhal, numerous arbitrators of high repute have accepted or at least paid lip service to the plain meaning rule and its benefitted first cousin, the parol evidence rule. In most cases this may cause little harm, at least as to the result. After all, we properly begin our interpretation of a collective bargaining agreement with the language of the contract, and often we can end there. But one of the great modern state supreme court justices, Roger Traynor of California, put his finger on the problem when he said:

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"A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."

Put differently, if fidelity to the parties’ intent (or their putative intent about a problem they never anticipated) is the touchstone of sound contract interpretation, the a priori rejection of any evidence reasonably probative of that intent cannot be justified. In collective bargaining, what I would call “contextual interpretation” is likely to be grounded in evidence concerning negotiating history and past practice.

In recent decisions, arbitrators have frequently been prepared to look behind what might appear the plain meaning of the written instrument to discern intent from bargaining history and other parol evidence. Of course, arbitrators sometimes play it safe by finding an ambiguity in the language as written, which makes their resort to extrinsic evidence quite conventional. But the arbitrators’ ambiguity is often the parties’ clear and unambiguous provision, sustaining the latter’s respective opposing positions.

Logically, there seems no reason not to take a final step. If the parties, for reasons sufficient unto themselves — for example, concealing trade secrets from an employer’s competitors — decided to cloak certain provisions of the collective agreement in a private code, an arbitrator should entertain evidence to that effect, however clear and unambiguous the language might otherwise appear. Professor Corbin is in accord. Needless to say, in any case where one party alleges and the other denies the use of such a private code, the arbitrator is going to be skeptical that ordinary English has been thus stood on its head, and demand pretty convincing proof of the claim.

That brings us to consider the most practical argument in favor of the plain meaning rule — the time and cost of trying to prove that what seems on its face clear and unambiguous is not. Yet here, as in so many other instances, I believe the solution has to be the sound discretion of the arbitrator. I would not reject out of hand an offer to prove that the apparently clear and unambiguous was in fact intended to mean something totally different. But I would refuse proffered evidence that merely reflected one party’s internal, uncommunicated understandings of contract terms, and I would give short shrift to testimony or exhibits that were

Contract “reading” as contract interpretation

From what I have said, judges should have an easy time enforcing most arbitral awards. Instead, they make it hard on themselves. If they would just take our word for what a contract means, they would have far fewer problems. We are the ones with the tough job. How should
Today's major issue concerning past practice is whether it can modify or override clear contractual language to the contrary. My sense is that a long-standing and well-accepted practice may prevail even over a "clear" and "express" provision in the agreement. All these past practice cases are highly fact-specific. Generalizations are hazardous. But in my view two fundamental principles are apposite. First, any contract, including a collective bargaining agreement, is subject to amendment by the parties to it. Second, for a practice to become sufficiently well established to be binding on the parties, it must meet the usual criteria of (1) clarity, (2) consistency, (3) longevity, and (4) mutual acceptability. Mutual acceptability is especially crucial if the practice is claimed to have superseded a clear, express contract provision to the contrary. If all the conditions are properly met, however, the practice should prevail. The parties are in control of their agreement and, absent statutory or contractual restrictions, they can fashion it or amend it just as well by deeds as by words. Arbitrators are simply following the parties' lead in acting accordingly.

"Defensive" treatment of external law and public policy

Let me append a few words about the treatment of arbitration cases presenting issues of public policy or external law generally. Once a great debate raged within the Academy over what an arbitrator should do when confronted with a conflict between the terms of a collective bargaining agreement and the requirements of external law. I still believe that, theoretically, in the very rare case where there is an irreconcilable clash between the contract and law (or "dominant public policy"), and the parties have not authorized the arbitrator, expressly or impliedly, to take external law into account, the arbitrator should follow the contract and ignore the law. That is the parties' commission and the limit of the arbitrator's authority.

Nonetheless, as a practical matter, external law and public policy are now daily grist for the arbitration mills. This is especially true of civil rights statutes and the vital protections they provide against discrimination in employment on the grounds of race, sex, religion, age, disability, and the like. In the collective bargaining context, arbitrators are constantly applying anti-discrimination clauses covering such categories. An arbitral award in these situations, where statutory rights are implicated, is of course not entitled to the same final and binding effect that is customary in pure contract arbitrations. But under the now-famous footnote 21 in Alexander v. Gardner-Denver, 415 U.S. 36 (1974), an arbitration decision in discrimination cases may be admitted in any subsequent court proceedings, and accorded "great weight" if certain conditions are met. Those include contractual provisions that "conform substantially with [the applicable statute]," "procedural fairness," "adequacy of the record," and the "special competence of particular arbitrators." All of us, advocates and arbitrators alike, have a professional responsibility to ensure compliance with these Supreme Court standards in mixed contractual-statutory arbitrations. Employers, unions, and employees should not have to spend time and money wastefully. To the extent
the law allows, arbitral awards ought to constitute a final disposition of the discrimination claims. In practice, much will depend on the losing party’s assessment of its chance of securing a more favorable result in the courts. To promote finality, advocates in preparing their arguments and arbitrators in making their decisions must keep the Gardner-Denver factors in mind. I am going to take “procedural fairness” for granted. The others require deliberate attention. The anti-discrimination provisions of the contract may closely track the corresponding statute, but there are now extensive judicial glosses on all this legislation. The advocates should educate the arbitrator on the nuances of their particular case. In turn, the arbitrators should demonstrate their awareness of the applicable law and pertinent court interpretations. That will also serve to establish their “special competence.” This could often require more than the two or three pages often specified for expedited arbitrations.

Thus, in all the steps of a discrimination case, right through to the writing of any briefs and the decision, the advocates and the arbitrator should act “defensively.” They ought to envisage a federal judge looking over their shoulder, scrutinizing their every move and testing it against the Gardner-Denver criteria. That should be enough to sharpen up everybody’s skill at contract (or statute) reading!

An analogous approach should be followed in the “public policy” cases. If a sexual harasser or a drug offender in a safety-sensitive job is involved, the advocates and in particular the arbitrator ought not turn a blind eye to the policy implications. Judicial review is a distinct possibility. The arbitrator would enhance the likelihood of the award’s being sustained by forthrightly confronting the policy issues and explaining convincingly why the result reached is compatible with the public good. This is a long way from the almost totally autonomous, private domain of labor arbitration we once knew, but I think it accurately reflects the demands of the new age in which we find ourselves.

Conclusion

In interpreting and enforcing a labor agreement, the roles of arbitrators and courts are very different. The arbitrator is the parties’ formally designated contract reader. Absent such abnormal circumstances as fraud, corruption, or an exceeding of authority, the arbitrator’s award should be accepted by a reviewing court as if it were the parties’ own stipulated and definitive interpretation of the agreement. The award of course is subject to the same kind of challenge on the grounds of illegality or violation of public policy as would have been the contract itself, had it come to the court directly without the intervention of arbitration. But that should also be the limit of judicial review. If the parties themselves could lawfully have done what the arbitrator has ordered, the award should be affirmed and enforced.

In construing and applying the collective agreement, the arbitrator will naturally employ a variety of traditional interpretive tools. I have focused on two controversial areas. First, I would reject the broad reach of the plain meaning rule. Regardless of whether contract language appears clear and unambiguous on its face, I would admit all credible evidence, within the constraints of procedural feasibility at a hearing, which goes to show the actual intent of the parties. Second, in spite of seemingly clear, unambiguous contract terms, I would accept proofs of well-established, mutually accepted practices that indicate a modification or amendment of those provisions. In so doing, I am most emphatically not trying to elevate the arbitrator over the parties. My aim is to be faithful to the parties’ manifest intent in the deepest, truest sense.

Finally, as a person who treasures both tradition and autonomy, I can understand and sympathize with all those who lament the passing of a time when unions, employers, and arbitrators inhabited a self-made world of labor relations, for the most part untouched by public law and regulation. That day is gone. Yet we arbitrators have always operated within certain confines, namely, the parties’ own contractual and bargaining frameworks. The difference is that the parties generally had no resort from our “final and binding” pronouncements, except to dismiss us from their panels. Today a federal judge can bring us up short with a one-line order.

We can adapt to this new order either grudgingly or gracefully. My hope is that we meet it as a challenge to the best that is within us. I am confident no member of this Academy lacks the capacity to handle most of the applicable statutes and other law and policy. Take, for example, the concept of “discrimination” under federal law. It is subtle and elusive. But it is not the Internal Revenue Code. We have been dealing with “discrimination” under union-employer contracts for decades. We can deal with it under public law, too. Thus, we should not flinch from having to change some of our customary ways. Change, after all, is the law of growth and survival, and we ignore that truth at our peril.

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