Contract Interpretation Propositions

Outline of Topics

Language and the Law (Part I)

1. [Q. Skinner, HP Grice] Challenge any categorical distinction between texts and contexts. But distinguish between motives and intentions. The recovery of motives is irrelevant to the activity of interpreting the meanings of texts. A drafter has **intentions** regarding what she wants her words to do in the minds of others, and there is where a sentence's true meaning should be sought.

2. [Hoffmann, L., *Mannai/ICS/Chartbrook*] (i) It is not necessary to find 'ambiguity' before having regard to background; (ii) Evidence of pre-contractual negotiations is excluded for the the purpose of drawing inferences about what the contract meant.

3. The US: Schwartz & Scott v. Steven Burton: textualist v. contextualist. Is NY really different from England? Is California really different from NY? No.

Language and the Law (Part II)

4. [Valcke, French law] 'The literal versus contextual interpretation debate has not touched contractual interpretation in France for the simple reason that the French never doubted that contextual interpretation was to be preferred …: literalism naturally is antithetical to contractual intention conceived subjectively.' [This approach, however, mixes motives and intentions.]

5. ICC 'Trade Usage' and the Recovery of Intentions.

6. Capturing Common Intentions in a Multi-Lingual Context: The Further Dangers of Textualism or 'Plain Meaning'

7. Conclusion: Arbitral Decision-Making and the Law

New York Law: Cross-Examination of Expert Witness

- Q: ‘Your opinion is that a mass balance is the most obvious way of insuring that the parties have captured the stated contract values, is that right?’
- A: ‘Yes.’
- Q: ‘But this contract does not contain the words ‘mass balance’, correct, and the parties did not agree to use it?’
- A: ‘They agreed: it’s basic physics. I think most everybody agrees that mass is conservative.’

‘This Is Spinal Tap’

- St. Hubbins: ‘We say, ‘Love Your Brother.’ We don’t say it really, but …
- Tufnel: ‘We don’t literally say it.’
- St. Hubbins: ‘No, we don’t say it.’
- Tufnel: ‘We don’t really, literally mean it.’
- St. Hubbins: ‘No, we don’t believe it, either, but …’
- Tufnel: ‘But we’re not racists.’
- St. Hubbins: ‘But that message should be clear anyway.’
- Tufnel: ‘We’re anything but racists.’

Proposition 1: What Philosophy of Language Teaches

1. Quentin Skinner:

(a) 'Motives, intentions and interpretation,' Chapter 5; and

(b) 'Interpretation ad the Understanding of Speech Acts,' Chapter 6; in

- Visions of Politics; 'Vol. 1, Regarding Method,' CUP, 2002.

2. Rebecca Newberger Goldstein, 'What Philosophers Really Know,' The NYRB, 8 October 2015.

Proposition 2: English Contract Law and Interpreting 'Common Intention'

- *Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd*. [1997] A.C. 749;
- *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 W.L.R. 896;
- *Chartbrook Ltd. v Persimmon Homes Ltd*. [2009] 1 A.C. 1101.
- *Wood v. Capita Insurance Services Ltd*. [2017] UKSC 24 [I am indebted to Professor Giuditta Cordero-Moss for this reference].

Proposition 3: USA, Part I – The Law Professors

- A. Schwartz & R.E. Scott, 'Contract Interpretation Redux,' 119 Yale L.J. 926 (2010).

-- Versus --

- Steven J. Burton, 'A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation,' 88 Indiana Law Journal 339 (2013).

Proposition 3: USA, Part II: New York Cases

1. Aron v. Gillman, 309 N.Y. 157 (1955).

- 'It is well settled that in construing the provisions of a contract we should give due consideration to the circumstances surrounding its execution, to the purpose of the parties in making the contract, and, if possible, we should give to the agreement a fair and reasonable interpretation' [citing Corbin on *Contracts* and Williston on *Contracts*].

2. Becker v. Peter Frasse & Co., Inc., 255 N.Y. 10 (1930) (Cardozo).

- 'The rule has often been declared that a contract is to be read in the light of the circumstances existing at its making, and that these may avail to stamp upon a word or phrase a loose or secondary meaning as distinguished from the strict or primary meaning to be gathered from the instrument unenlightened by extrinsic aids' [citing, for example, *Atwater & Co. v. Panama R. R. Co*.].

Proposition 3, New York Cases, Continued

3. *Atwater & Co., Inc. v. Panama Railroad Co.*, 246 N.Y. 519 (1927) (Pound). 'The court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and the intention of the parties as manifested thereby.'

4. *Empire Properties Corp. v. Manufacturers Trust Co.*, 288 N.Y. (1942). 'We read the writing as a whole. We seek to give each clause its intended purpose in the promotion of the primary and dominant purpose of the contract.' [emphasis added]

Second Circuit, seeking to interpret New York case law:

5. *Scholastic, Inc. v. Harris*, 259 F.3d 73 (2d Cir. 2001). 'Whether a writing is ambiguous is a question of law for a court, . . . While the meaning of an ambiguous contract is a question of fact for a factfinder,… .'

Proposition 4: French Law as Counterpoint

C. Valcke, JCL 4:1, 69, 72 (2009) –

‘… any evidence of what the parties actually individually intended, explicitly or implicitly, at the time of forming the contract, even such evidence as may never have been shared with the other, is considered legally significant.’

Proposition 5: Trade Usage and Contract Interpretation

1. [Fry, Greenberg, Mazza] The Secretariat's Guide to ICC Arbitration:

   'A trade usage is a custom or understanding in a given trade or industry. Alternatively, it may be a custom specific to the disputing parties. In both senses, a trade usage arguably constitutes part of the essential context underlying a contract or certain of its terms.'

2. Q. Skinner: 'We need to focus not merely on the particular text … but on the prevailing conventions governing the treatment of the issues or themes with which the text is concerned.'

3. S. Burton: 'Objective contextual interpretation': 'consider the whole contract document together with the contract's purposes(s), the objective circumstances when the contract was made, any relevant trade usages, and any practical construction (course of performance). . . . Exclude evidence of the parties' course of dealing the contract's negotiating history, statements of intention during the negotiations, and a party's testimony about its own intention [subjective].

Proposition 6: Translation and Further Dangers of Textualism

- S. Wilske, 'Linguistic and Language Issues in International Arbitration – Problems, Pitfalls and Paranoia,' 9(2) Contemp. Asia Arb. J. 159 (2016).

  'Arbitrators should be extremely cautious in multilingual arbitrations and not simply rely on getting it right pursuant to what they consider to be the 'right' language, whether Oxford English, Shakespearian English, 'Global English' or any other language (and, indeed, there are many other languages which might or might not be relevant).'

CONCLUSIONS
Arbitral Decision-making: Contract Intepretation

1. Attention should be paid to philosophy of language.
2. Text should be read as context, in order to recover intention.
3. Objective intentions are recoverable, and should be recovered. Subjective intention (or motive) is also recoverable, but is irrelevant to common law, though relevant to French law.
4. Convergence: Lord Hoffmann, Prof. Burton, Justice Cardozo.
5. English law converges with New York law (converges with California law).
6. Trade usage is context.
7. International commercial multi-lingualism casts further doubt on the efficacy of textualism or 'plain meaning.'
8. Contract interpretation in International commercial arbitration is not 'tennis without the net.' The net is there. It is known as the applicable law.