

A COMMENT ON COLLA AND GULATI, *CHEEKY CONTRACTING*

TESS WILKINSON-RYAN*

I

INTRODUCTION

Colla and Gulati have identified a moment of disequilibrium in contract law and practice that tests the comfortable assumptions and taxonomies of contracts scholars. The dispute seems to pit the parties' "real deal" against the paper deal, with attorneys for the creditors bewildered at Argentina's novel and aggressive reading of its obligations. The focus of this commentary is, basically: How cheeky is cheeky?

II

COMMENT

In 1969, the Hawaiian paving contractor Nanakuli Paving & Rock contracted with Shell Oil for the purchase of the crude oil required for asphaltic pavement.¹ The agreement was a purchase requirements contract, meaning that Nanakuli had promised to buy, and Shell promised to deliver, whatever tar Nanakuli required for their business operations. Nanakuli did almost all of its work for the state of Hawaii, which was at the time rapidly developing. Its pavement contracts with the government would often run over several years, but the government's policy was that the cost could not be renegotiated to reflect rising materials costs.

In the meantime, the contract specified that Nanakuli would pay Shell according to "Shell's Posted Price at time of delivery."² The posted price at delivery would naturally fluctuate, so the contract would appear to leave Nanakuli vulnerable to being obligated to complete work for the government at a low price while obligated to pay Shell a high price for tar. By the time Nanakuli and Shell were in litigation, however, they had been doing business for a decade under a different regime. Shell would extend price protection, letting Nanakuli purchase under the old price for either more time or a specified amount of tonnage. In 1974, Shell raised the price from \$44 to \$76 a barrel. A new

Copyright © 2022 by Tess Wilkinson-Ryan.

This Article is also available online at <http://lcp.law.duke.edu/>.

* Professor Tess Wilkinson-Ryan is a Professor of Law and Psychology at the University of Pennsylvania Carey Law School. Her research addresses the role of moral judgment in legal decision making, with a particular focus on private contracts and negotiations.

1. See *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 785 (9th Cir. 1981) (discussing the 1969 contract).

2. *Id.* at 778.

management team at Shell declined to price protect the tar in the wake of the oil crisis, and Nanakuli sued them for breach of contract, on the theory that price protection was incorporated into the deal by practice. The courts sided with Nanakuli, ruling the court could interpret the language—”posted price at time of delivery”—to encompass an exception for price protection.³

My question for Colla and Gulati is this: as between the attorneys for Shell and Nanakuli in this dispute, which one was being cheeky? I think, under their formulation, that Shell’s argument is the cheekier. The parties seemed to have a “real” deal that included price protection, or at least that was the shared expectations for ten years. But is it right to think of Shell’s argument as “Harry Houdini trying to get out of a box”?⁴ Under traditional contract law doctrine, the more off-the-wall argument is surely Shell’s. The contract specifies that the price is the price at the time of delivery, not the price at the time the contract is renewed or the bid is accepted. Traditional doctrines of interpretation would prohibit extrinsic evidence to prove a meaning to which the language is not “reasonably susceptible.”⁵ And the UCC in section 1–303 specifies that in the event of an interpretive dispute, the express language controls over course of performance, course of dealing, and trade usage.

One reason to favor the Nanakuli comparison with the Argentinian debt restructuring context is that both lie uneasily in the taxonomy of contracting. The parties are using form contracts, carrying language over from one iteration to the next without interrogating or reconsidering. And the humans involved will change, sometimes unpredictably, so that the parties cannot rely on relationships or *personal* reputation to hold the deal together over time. But at the same time, the parties are at some level known and knowable to each other. There are institutional relationships among some of the players, and they last over a long time.

On the one hand, it seems clear to me that many of the creditors Colla and Gulati study had an expectation of what normal debtor behavior would look like, and they were taken aback by Argentina’s behavior. On the other hand, though, it is not totally obvious what their expectation should have been in this context—as in, is it right that all things considered, they should not have expected Argentina’s reading of the deal?

In consumer contracting, it would be strange to argue that a firm has an aggressive reading of a term, because we do not think the parties have any “real” agreement in the handshake sense. No matter how the parties behave toward one another over time, their relationship is defined by the writing. One can imagine the attorneys at Shell making the argument that it is not fair to accuse *them* of aggressive reading of the deal—maybe the account team or the sales team has been unfair, but surely lawyers are allowed to read “posted price at delivery” to

3. *Id.* at 805.

4. See Paola Colla and Mitu Gulati, *The Price of Cheeky Contracting*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 99.

5. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968).

mean just that.

In theory, the problem that Colla and Gulati identify is one that contract law has solved. What they might call “aggressive” interpretation of contract terms should only be possible where the language clearly favors that interpretation, or where there is evidence that the parties subjectively preferred the interpretation. If the party resisting the aggressive stance has evidence that it is *not* what the parties agreed to, cases like *Nanakuli* should give them hope that a court will reject it. Of course, where there is hope, there is a zone of uncertainty. Argentinian bond restructuring brings disintegrating norms to a contract doctrine that feels deeply ambivalent about the interpretive task.

There is a phenomenon in moral psychology called the “self-serving bias,” and it has been used to explain certain kinds of acrimonious negotiating relationships.⁶ The plaintiff in a case wants to win as much in damages as possible, of course, but can also identify a wide range of outcomes that would be objectively fair. The defendant wants to pay as little as possible, but also makes a good faith effort to determine the scope of reasonable outcomes. The solution should be in the overlap—but it turns out there is none. The self-serving biases research says that even people trying to be impartial will have difficulty distinguishing between unreasonable demands and adversarial but fair positions. This difficulty can create a total bargaining impasse because once parties think the other is being unreasonable, they get really mad, and maybe throw up their hands altogether.

This is especially challenging in the cheeky lawyering contexts. Imagine that everyone is trying to choose their best argument from among the good faith positions they could take on a particular term. One party argues: the position I favor is clearly what we all had in mind at some point, irrespective of the text. The law does and should care about the shared subjective meaning of this deal. The other argues: the position I favor is clearly what the contract permits, by its text. The law does and should care about the express language, language we all saw and signed off on. Both positions appear reasonable, and, for what it is worth, the law clearly favors the latter view, unless, and until, it is so exploitative as to be a violation of the duty of good faith and fair dealing. In fact, it seems telling to me that in neither *Nanakuli* nor in the CAC context are the plaintiffs making the claim that the other party has breached the duty of good faith and fair dealing. It is not the case that oil companies have to offer price protection to be good faith actors, and I take it from the authors’ account that making it easier to modify the payment terms on Macri bonds is not clearly a bad faith reading of the term. The parties are bargaining in the shadow of the law here. Creditors may feel truly aggrieved by Argentina’s position—but you can be sincere and reasonable yet still self-serving.

6. See generally Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997) (reviewing experimental and field studies of self-serving biases in fairness judgments).