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Initiative 695 Ruled Unconstitutional

On March 14, 2000, Judge Robert Alsdorf of the King County Superior Court ruled that Washington State's Initiative 695 is unconstitutional in several respects.

Section 1 of the initiative would reduce (or has reduced) the motor vehicle excise tax on vehicles to $30, regardless of the value of the vehicle. Section 2 of the initiative legislation would have required a vote of the electorate every time a government entity proposed to increase taxes, fees or charges of virtually every kind. These were the two primary sections in controversy in the various consolidated cases.

As many of us municipal attorneys have argued since the initiative was first proposed, the court held that I-695 is a bill containing more than one subject in violation of the Washington State Constitution. The court accepted another argument, which we feel is even stronger than the first. The court found that the initiative also violates the constitutional prohibition on the amendment of previously enacted statutes without making appropriate reference to them in the new legislation. The court gave several examples of statutes that would have been amended or changed silently by the initiative.

One example of a statutory scheme that would have been greatly affected by the initiative's passage, but not mentioned by the court, is RCW 84.55.010 *et seq.* This series of statutes at one time was referred to the 106% lid law. For many years, this statute allowed property tax revenues of taxing districts to grow no more than six percent above the revenue from such taxes levied the previous year. (Actually, the legislation referred to the highest two previous years, but normally that is represented by the previous year.) However, the 106% lid law was changed by Referendum 47 just a few years ago. Concerned that local governments were increasing property tax revenues by as much as six percent annually, when inflation was typically running lower than that, the voters modified the lid law in Referendum 47. That legislation resulted in a scheme where generally property tax revenue growth was limited to a measure of inflation known as the implicit price deflator, but this figure could be exceeded by the governing body of the taxing district passing an appropriate resolution or ordinance announcing that they had a "substantial need" for increased revenues. In that event, the taxing district could levy taxes to allow revenue growth up to the old 106% growth limitation.

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In any event, I-695 would have changed all that, requiring a vote of the people for any such increase. In effect, we have argued that this new legislation "trumps" Referendum 47, drastically modifying RCW 84.55.010 *et seq.* without ever referring to it in the initiative.

Judge Alsdorf's ruling contained several other parts and some unexpected rulings. For example, we had not anticipated that the judge would rule that Section 2 of the initiative is actually a referendum in disguise and therefore improper. Essentially, a referendum is a negative act, a citizen veto of a legislative body's affirmative act of passing legislation. An initiative like I-695, by contrast, is supposed to be positive or affirmative legislation itself. Certainly Section 1 of the initiative was positive legislation. However, the court felt that Section 2 was essentially negative in character, allowing the public a veto over tax increases, and therefore a referendum in disguise.

While we express no opinion as to Judge Alsdorf's ruling about an improper referendum, we feel strongly that he is correct in ruling that the initiative was a bill containing more than a single subject expressed in the title, as required by Article I, Section 19 of the Constitution. The initiative seems to us to be a classic example of a practice known as "logrolling" where legislators or the public (as in an initiative) attach another piece of legislation to a very popular law that appears certain to pass. In this instance, the proponents of I-695 knew that the motor vehicle excise tax was very unpopular and added a second unrelated piece of legislation (Section 2) that did not receive nearly as much discussion, debate, or understanding among the electorate.

Also, we feel strongly that the court is correct in ruling that the initiative violated Article II, Section 37 of the Washington State Constitution, which prohibits an act from being revised or amended by "mere reference to its title", and requiring that any revised act or section amended shall be "set forth at full length". If they comprehensively reviewed the Revised Code of Washington, I am sure that knowledgeable municipal corporate lawyers could point to numerous sections or laws that I-695 amended or changed without making any reference thereto. We have simply provided one glaring example above (the property tax lid law in RCW 84.55) and the court provided other numerous examples.

On March 17, 2000, the Attorney General's Office filed a notice of appeal of the judge's March 14th ruling and asked that the matter be heard directly by the Supreme Court. Oral argument is expected in June 2000. We predict that the Supreme Court will affirm Judge Alsdorf's very thorough and well-reasoned decision. In the meantime, some legislative solution will probably be enacted to preserve the status quo concerning the reduction to $30 for vehicle registration.

Understanding the Arbitrability Defenses

A recent Massachusetts decision provides a vehicle for us to discuss and explain the defenses of procedural arbitrability and substantive arbitrability, often confused and misunderstood by management representatives.

In *Local Union No. 1710, IAFF v. City of Chicopee*, number FJC-07943 (1999), the Supreme Judicial Court of Massachusetts affirmed a lower court's decision on arbitrability.

Two Chicopee firefighters sustained injuries rendering them unable to work. Under the collective bargaining agreement

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between the union and the city, they asked the city for injured leave status for work-related injuries. The city denied their requests, disputing the work related nature of the injuries. Instead, the city charged their absences to accumulated sick leave and vacation leave. Finally, years later, the city granted both men work-related disability retirement.

In the collective bargaining agreement, there was a requirement that the city pay retired firefighters any accumulated unused sick leave. When these two firefighters retired, the city did not pay them for unused sick leave they would have accumulated had they been placed on injured leave status after their injuries. Now, after the disability retirement ruling, the union protested and asserted that they were owed compensation for sick leave they would have accumulated, had the city (properly) granted their request for injured leave status under the CBA.

The union grieved the matter and demanded arbitration but the city refused. The city claimed the grievances were untimely under the agreement's 75 day time limit for submission of grievances to arbitration. The city argued that the union should have filed grievances and sought arbitration years before, when the city first refused to grant the firefighters the injured leave status. The union filed suit to compel arbitration but the court ruled in favor of the city, finding the grievances were not arbitrable as untimely. The union appealed, arguing that the timeliness of the grievances was a procedural matter for the arbitrator to decide. The union argued that the court erred in deciding arbitrability based upon timeliness, rather than deciding arbitrability based upon the subject matter of the grievances. The Massachusetts Supreme Judicial Court disagreed, affirmed the lower court and held the grievances untimely.

This case points out the difference between procedural arbitrability defenses and substantive arbitrability defenses. Typically, a defense of lack of procedural arbitrability relates to an untimely filing of a grievance, or some other failure to meet one of the timelines included in the grievance/arbitration clause of the collective bargaining agreement. For approximately 20 years, we have been using the book by Elkouri and Elkouri, "How Arbitration Works" as our "bible" on grievance/arbitration issues. Chapter 6 of Elkouri, entitled "Determining Arbitrability", is one of the best sources of education and a handy reference on this subject. We recommend it highly to labor lawyers and other labor or management professionals involved in the grievance/ arbitration process.

Getting back to procedural arbitrability, we would note that this type of procedural defense is more appropriately presented in the arbitration tribunal, by presenting it to the arbitrator, not in the courtroom. Many labor-management professionals feel it is less expensive to present this issue to the professional arbitrator, as most accomplished labor arbitrators are quite familiar with the defense. The typical arbitration involves presentation of procedural arbitrability even though the merits of the substantive dispute are also presented to the arbitrator. Most arbitrators prefer to have all of the issues presented in one hearing.

Substantive arbitrability is something quite different. In effect, this is what lawyers would refer to as a jurisdictional argument. Substantive arbitrability defenses are arguments that the matter is simply not appropriate to be submitted to the arbitrator. Frequently, the substantive arbitrability defense is the result of what we might refer to as a narrow arbitration clause. It is

not unusual language at all for the arbitration clause in the CBA

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to state that the arbitrator is "confined to the interpretation or application of the terms and provisions of the collective bargaining agreement" and the arbitrator is not to make any other ruling. Therefore, if the subject matter in dispute is the exclusive province of some administrative agency or within the courts' jurisdiction only, an arbitrator may well rule that he or she lacks jurisdiction and therefore the matter is not substantively arbitrable. While not as common as procedural arbitrability defenses, substantive arbitrability arguments are not unusual. This defense may be raised to the arbitrator, buy is often brought before the courts in a refusal to arbitrate setting.

With respect to substantive arbitrability, the U.S. Supreme Court has rather clearly stated its views in the cases that have come to be known as the Steelworkers Trilogy. In effect, the Steelworkers Trilogy cases stand for the concept that arbitration is a matter of contract. A party cannot be required to submit to arbitrate any dispute which he has not agreed by contract to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. The corollary to this rule is that the question whether a collective bargaining agreement creates a duty to arbitrate is undeniably an issue for the courts. Unless the parties clearly and unmistakably provide otherwise the question of substantive arbitrability is to be decided by the court, not the arbitrator. The third principle derived from the cases is that, in deciding whether the parties have agreed to submit a grievance to arbitration, a court does not rule on the potential merits of the underlying claims. The decisions on the merits, if appropriate to be arbitrated, are to be made by arbitrators. Any doubts about arbitrability are resolved in favor of coverage and arbitration. Unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, the matter is presumptively arbitrable.

According to Elkouri, with procedural arbitrability, the Supreme Court has ruled that such questions are for arbitrators to decide and not for the courts. In *John Wiley and Sons v. Livingston*, the leading case, the court noted that a different ruling would produce frequent duplication of effort by court and arbitrator, and needless delay. Therefore, procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused, ordinarily cannot be answered without consideration of the merits of the dispute.

In summary, therefore, we conclude that procedural arbitrability is best presented to the arbitrator but substantive arbitrability is best presented to the courts. Therefore, it seems that Elkouri might take issue with the court's decision in the Chicopee case, as that procedural arbitrability case was decided in court, not arbitration.

On the Docket

For your information, there are some cases of interest to municipal corporations currently on the docket at the U.S. Supreme Court, where rulings may be expected this term.

First, in *Christensen v. Harris County, Texas*, Supreme Court No. 98-1167, on appeal from the Fifth Circuit Court of Appeals, the question is whether a public agency governed by the compensatory time provisions of the FLSA may, absent a

preexisting agreement, require its employees to use accrued compensatory time. The Court asked the U.S. Solicitor General for the government's position and in an amicus response, the Solicitor General sided with the employees, arguing that the Fifth Circuit's judgment should be

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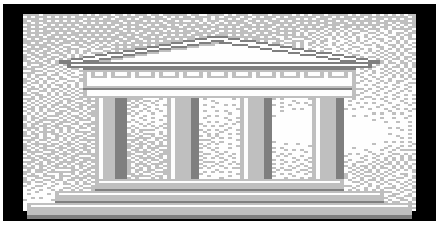
reversed. The Fifth Circuit had ruled that the employer could require use of compensatory time.

In *Reeves v. Sanderson Plumbing Products*, Supreme Court No. 99-0536, also on appeal from the Fifth Circuit Court of Appeals, the question is presented under the Age Discrimination in Employment Act (ADEA) whether direct evidence of discriminatory intent is required to avoid judgment as a matter of law for the employer. This case also involves interpretation of the Federal Rules of Civil Procedure concerning how to weigh the evidence on such a motion. Oral argument was had on this case on March 21st and so the opinion is not expected for some weeks. The ADEA makes it unlawful for an employer to discharge any individual because of their age. The employee must prove that the employer intentionally discriminated against him or her based on age. The employee based his claim on two age-related statements made by a reviewer. The employee claimed that this reviewer said he was so old he "must have come over on the Mayflower" and that he was "too damn old to do the job." Based on claims of age discrimination, the court found in favor of the employee and awarded him $70,000. However, the Court of Appeals reversed, finding insufficient evidence of age discrimination to support his claims. The court found that even if the age-related remarks were true, the company did not discriminate against the employee because the disparaging comments had no bearing on his termination. The Supreme Court's decision might well clarify the burdens and procedures in such cases for future reference.



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