LET'S MAKE A DEAL

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"Interest arbitration has the face of Solomon, but the heart of Monty Hall."

> - Dissenting opinion of City Panel Member Dennis Aftergut in arbitration between the City of San Francisco and the Municipal Attorneys Association (April 1995).

Imagine the biggest purchase you've ever made in your life – a house, for example. Imagine that there's a hang up with the seller on price, and there's a fundamental rift between you and the seller about the condition of the house, whether interest rates are really at an "all time low," and whether the neighborhood is really "coming up." Now imagine that under the law, no matter how unreasonable either or both offers may be, the price you end up paying will be determined by an arbitrator who is unlikely to have real estate, financial, or mechanical expertise, much less knowledge of what you can afford. Moreover, the arbitrator's determination is binding – you can't back out, even if the price turns out to be more than you think you can afford. The arbitrator tells you there are other expenses in your life that can be curtailed, such as your children's extracurricular activities.

This simple scenario seems entirely unrealistic. But translate it to the public sector, where a dwindling economy has created intense competition for increasingly scarce public dollars. In a small but increasing number of California's cities, counties and local agencies, as well as over half of the states in the United States, our scenario is the way that salaries and benefits are set for firefighters and police officers. It's called "interest arbitration."

What Is Interest Arbitration?

In a democratic society, elected officials are normally held directly accountable to voters for their decisions about how public funds are spent. By law, they oversee negotiations and decide whether or not to adopt the contractual agreement. But under an interest arbitration system, once the case goes to arbitration, the elected body is no longer responsible. The decision, for example, about whether wage increases demanded by firefighter or police officers are more or less deserving than the other pressing public needs that require

governmental funding is no longer theirs to make. Instead, the decision is made by a professional arbitrator, paid equally by the union and management. The arbitrator normally does not reside within the area governed by the agency and is not required to have any degree or expertise in finances, governmental budgeting, public policy or public administration. Deviating from the Solomonic tradition of history's first recognized arbitrator, modern day arbitrators are primarily trained in the art of compromise, referred to generically as "baby splitting."

Good for Lawyers; Bad for the Public

Handling interest arbitrations requires knowledge and expertise in the following areas: labor law principles and traditions; statistics and the statistical methods and models for comparing the wages and benefits paid by different agencies in the appropriate labor market; organizational dynamics, leadership, teamwork, and organizational psychology (both for management and unions); negotiations strategy and tactics; public economics and financing; actuarial practices and principles with respect to health and retirement benefits; staffing and deployment practices for firefighters and police officers; police and fire employment practices and working conditions; and, last but not least, politics. Considered abstractly, interest arbitration can be seen as a highly complex, complete and compelling art form because it combines virtually all of the disciplines within labor law, public financing and organizational psychology. Although it may be a boon to lawyers, as a mechanism for deciding important issues of public policy, interest arbitration leaves much to be desired.

First, the core feature of interest arbitration is that it calls for decisions about how millions of public dollars are spent to be made privately, away from public scrutiny. In many cities, for example, the cost of police and fire wages and benefits can be half the general fund budget. In public agencies where the electorate has adopted interest arbitration, the agency's ability to fund ongoing operations such as libraries will be effectively determined by an arbitrator, if police and fire unions reach an impasse in negotiations. And, even when no impasse is reached, police and fire wages will be driven by the fear of turning these important decisions over to an arbitrator.

For example, spending more money than necessary for safety employees' wages, benefits and retirement means less money to fund:

- ongoing programmatic activity supporting the poor and the disabled;
- needed improvements in government infrastructure – buildings, roads, parks, libraries, buses, senior centers;
- new and better police and fire stations and communications equipment;

- enhanced staffing levels to complement larger populaces;
- better and more frequent training for safety employees; and
- appropriate levels of salaries and benefits for less privileged workers – public health workers, for example.

Yet, in most cases, the public neither participates in, provides input to, nor even sees what goes on behind the scenes.

Second, most interest arbitration statutes do not expressly or adequately protect the public interest in prudently dividing the budget pie or in protecting the employer's reserves or long-term fiscal condition. [1] Local interest arbitration statutes generally provide [2] in very general terms that the arbitrator should assess the employer's "financial condition and ability to meet the costs" of an arbitration award. Unions, their attorneys and PR consultants argue that this general language amply protects the public interest. This, however, is tantamount to the fox giving assurances that the henhouse has a good security system. By failing to include language squarely and expressly preserving the public interest in economic stability and the elected body's central role in deciding how to address competing fiscal priorities, charters leave the decision about how much protection the public needs in a given case to arbitrators to decide agency by agency and case by case. In practice, unions invariably argue that such language does not even apply unless the agency lacks "the ability to pay," which public agencies rarely lack as long as they are willing to lay off other workers, defer capital projects, and slash services. In short, interest arbitration operates like Robin Hood with his signals crossed: it takes services from the poor and gives the money that would have funded those services to employees who generally are permitted to retire at 50 and get 90% of their $100,000 salaries in pension payments for the rest of their lives.

Third, too many interest arbitrators focus more on the acceptability of their track records for purposes of being chosen by unions and management in future cases. Most interest arbitration systems require the arbitrator to choose the "last best offer" of the agency or the union on each issue remaining in dispute. As a result, if there are two big issues, you can count on one of them going to the union and one to the agency. This means the size of a union's award is dictated as much by its appetite as by fiscal constraints. If a union asks for a 10% raise and an outrageous pension, assuming finances are tight, count on the union getting the outrageous pension – because its cost is spread over 30 years.

Legal Status of Interest Arbitration

The constitutionality of California interest arbitration must be examined on two levels. First, during the term of Governor Davis, the Legislature implemented SB 402 (interest arbitration for public safety officers [police and firefighters statewide]). The California League of Cities pressed for a determination of the constitutionality of the measure, and after various challenges in different judicial districts, the Fourth District Court of Appeal determined the statute to be unconstitutional. (*See County of Riverside v. Superior Court* (2002) 118 Cal.Rptr.2d 854, 861-62; *previously published at* 97 Cal.App.4th 1103.) On review, the California Supreme Court affirmed the Court of Appeal's decision, holding that SB 402 violated California Constitution, Art. XI, section 1(b) providing that a county's "governing body shall provide for the . . . compensation . . . of employees," and section 11(a) prohibiting the Legislature from delegating "to a private person or body power to . . . interfere with county or municipal corporation . . . money . . . or perform municipal functions." (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285-300.)

In his final days, Governor Davis signed SB 440, which sought to amend SB 402 to cure the defects identified by the Supreme Court. SB 440 contained a provision indicating that the arbitration process would not be "final and binding" if the elected board *unanimously* rejects the arbitration award within five days of issuance. Labor and management lawyers generally agree that this cynical legislation was "DOA," and as of this writing, no public safety union in the state has successfully invoked SB 440. [3]

The constitutional problems with these statewide initiatives – which derive from California's "home rule" doctrine – do not address or affect the constitutionality of local interest arbitration initiatives. Despite the passage of over 30 years since Vallejo became the first to have interest arbitration imposed by initiative, no court has yet addressed definitively the legality of the interest arbitration provisions in local charters. (*See Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 n.13 [declining to consider constitutionality issue because not raised]; *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 26 (noting that interest arbitration unavailable in general law cities and counties); *County of Riverside*, *supra*, 30 Cal.4th at p. 289 (invalidating SB 402 on constitutional grounds but indicating that "[w]hether the county may delegate its own authority is irrelevant here. This county has chosen not to delegate its authority over employee salaries. As noted, the issue involves the distribution of authority between the county and state, not what the county itself may do"].) This leaves public agencies and voters free to impose interest arbitration on themselves, and many have.

At first blush, voters tend to think that interest arbitration sounds fair. What could be wrong with settling differences with unions through arbitration? Isn't arbitration of workers' rights what unions are all about?

For understandable reasons, the public does not recognize the difference between traditional "rights" arbitration, which generally interprets or applies the provisions of an *agreement* between the parties, and interest arbitration, in which the arbitrator actually *creates* the agreement itself. To return to the earlier analogy, it is one thing to agree that an arbitrator can decide whether the parties have complied with the terms of the sale agreement, and another to let the arbitrator decide if it's a house you can afford, and proceed to sign the agreement for you.

There are strong legal bases for challenging local interest arbitration measures. First, delegating to a private person [4] the power and responsibility vested in elected officials to make policy decisions is improper. (*See Kugler v. Yocum* (1968) 69 Cal.2d 371, 376-77 (1968); *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 24 (1976).) The California Supreme Court's legendary pro-union Chief Justice, Rose Bird, tacitly recognized this point when she attempted to square *Bagley*, holding interest arbitration in general law cities an impermissible delegation of legislative authority, and *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, holding that a city agency's charter power to make rules governing the conduct of fire fighters could not be assigned to an arbitrator, with her holding that *grievance* arbitration involved a permissible delegation: Both [*Bagley* and *S.F. Fire Fighters*] involved the submission to arbitration of a general policymaking power to determine the terms and conditions of employment. The power to set the terms and conditions of public employment is broader and more intrusive upon the functions of city government that the arbitrator's authority in this case to resolve an individual grievance. Grievance arbitration does not involve the making of general public policy. Instead, the arbitrator's role is confined to interpreting and applying terms which the employer itself has created or agreed to and which it is capable of making more or less precise.

(*Taylor*, *supra*, 24 Cal.3d at p. 453.) Plainly, interest arbitration involves the very delegation of policymaking power that Justice Bird recognized cannot be delegated. Second, interest arbitration is inconsistent with the negotiations process adopted by the Legislature pursuant to the Meyers-Milias-Brown Act (Government Code § 3500 *et seq*.). (*See Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 781-84; *Bagley*, *supra*, 18 Cal.3d at p. 25 [noting that the MMBA reflects "the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others"].)

Third, interest arbitration is a process outside the scope of authority delegated by the Constitution to charter cities (*Fire Fighters Union*, *supra*, 12 Cal.3d at p. 622 n.13) and certainly to charter counties (*Voters for Responsible Retirement*, *supra*, 8 Cal.4th at pp. 771-80) and other governmental agencies.

Finally, depending on the facts in a given case, interest arbitration may deprive the people and municipalities of their due process rights. [5]

Interest arbitration has been determined to be lawful in most states where it has been tested. (*See Fire Fighters Union*, *supra*, 12 Cal.3d at p. 608.) However, few of the courts that have ruled on the issue have come to grips with the enormity of the legislative delegation inherent in interest arbitration, as well as the loose and unenforceable nature of the standards that generally govern the exercise of arbitrators' discretion. Moreover, California's statutory and constitutional provisions are unique, and the decisions that have grown out of them historically have discouraged the delegation of policymaking authority.

Modest Proposal

In the 1960's, the Legislature created a broad-based commission to study public sector collective bargaining alternatives and empowered the commission to recommend legislative changes. Adopting the name of its Chairperson, Benjamin Aaron, UCLA Professor of Labor Law, the Aaron Commission issued a report recommending legislation that would create one law covering all public workers in California and place labor relations under the jurisdiction of an agency with authority similar to that of the National Labor Relations Board. Former Assemblyman George Moscone authored legislation which would have implemented these recommendations. The Legislature enacted the legislation, but Governor Reagan vetoed it.

We hope that within this decade, unions, management, neutrals and the Legislature will give comprehensive and non-partisan consideration to labor law reform, focused on the goals of optimizing the efficacy of public sector bargaining processes and making these processes more receptive to the *public's* demand for economical, productive government services. Appropriate processes statewide for addressing impasses between management and safety unions would be an integral part of such a study.

Meanwhile, when considering the issue of interest arbitration for public safety employees, bear in mind that *the public* is the ultimate buyer. Does it really make sense to shield the budgeting process – perhaps the ultimate expression of legislative priorities – from public input and view?

Caveat emptor.

Footnote 1. Unions typically are the drafters of interest arbitration initiatives at the local level and, so far, in the California Legislature. For example, SB 402 and SB 440 were created by one side of the House in Sacramento at the behest of labor unions, with no management involvement and no opportunity even for public input. The only interest arbitration statute in a California local agency which contains significant criteria protective of the public interest is that of San Francisco. (San Francisco Charter § A8.409.)

Footnote 2. With one exception, San Francisco, the approximately 24 California jurisdictions whose electorates have adopted interest arbitration have modeled their charter provisions on the original interest arbitration language in the Charter of the City of Vallejo, the first California city to adopt interest arbitration. Section 810 of the Vallejo City Charter originally provided:

> Consistent with applicable law, the ordinance adopted by the Council under Section 809 shall in addition include a requirement that if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration. . . . The arbitrators shall consider all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition. To the extent permitted by law, the decision of a majority of the Board of Arbitrators shall be final and binding upon the parties. The cost of arbitration shall be borne equally by the parties.

The Vallejo language was later amended to include mandatory timelines for each phase of negotiations, mediation and arbitration, to assure that the decision of the arbitrator would be received before the first fiscal year in issue in the arbitration process.

Footnote 3. In San Louis Obispo County, the deputy sheriffs invoked SB 440 and initiated suit when the County declined to submit the impasse to arbitration. However, after an initial vigorous defense by the County (represented by Meyers Nave partner Art Hartinger), the DSA dropped its case, at least for now.

Footnote 4. Most interest arbitrators are selected from a list of seven names provided by the State Mediation and Conciliation Service (SMCS). SMCS is responsible for maintaining records of qualified interest arbitrators. However, SMCS does not independently verify the backgrounds or experience of the interest arbitrators on its lists; does not have a system for receiving, indexing and retaining all interest arbitration awards; and does not require arbitrators to make their decisions or references available to the public. Accordingly, arbitrators are far less accountable than members of the judiciary or other public officials responsible for exercising discretion.

Footnote 5. Many interest arbitration provisions in California require or contemplate that the arbitrator serve as both arbitrator and mediator, allowing for *ex parte* communication which could easily prejudice the process; no interest arbitration provisions in California prescribe the procedure to be followed by the arbitrator and parties, often resulting in unregulated, chaotic and unfair proceedings. While a line of cases holds that public agencies

have no due process rights (*see Santa Monica Community College Dist. v. Pub. Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 690; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6), these holdings are not persuasive given the direct impact that interest arbitration has on the citizenry.