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### Interest Arbitration in the New Economy

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# INTEREST ARBITRATION IN THE NEW ECONOMY

Matthew J. Bartmes

## INTRODUCTION

In late 2008, the US economy suffered a grievous blow. Some called it the worst economic crisis since the Great Depression. Not surprisingly, that economic collapse has had a significant impact on public sector collective bargaining. In the public sector, many employees with collective bargaining rights are prohibited from striking, and a variety of alternate impasse procedures exist throughout the states.<sup>1</sup> The focus here is on one form of alternate impasse procedure, interest arbitration, in which a neutral arbitrator or panel of arbitrators are charged with determining the terms of collective bargaining agreements as to issues the parties have not reached agreement on. The arbitrator or panel adjudicates the disputes based on statutorily designated factors.<sup>2</sup> Interest arbitration is regarded as part and parcel of the collective bargaining process in many jurisdictions, and an important tool for both public employers and unions. This paper explores the impact that the 2008 economic collapse has had on arbitrators' deliberative processes in awarding contracts.

The available data is simply too limited for a meaningful empirical study. The time frame under discussion, roughly November 2008 through October 2009, is too limited to allow for a large sample size. Not all states that provide for binding interest arbitration make interest arbitration awards publically available. The Labor Arbitration Reporter publishes very few interest arbitration awards, and there is naturally a delay between when the award is issued and when it is published. Moreover, among the jurisdictions that provide for binding arbitration, use of interest arbitration varies significantly, leading to a necessarily disparate award sample vis-à-

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<sup>1</sup> See generally JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT CASES AND MATERIALS 277-418 (2004).

<sup>2</sup> See generally ALAN MILES RUBEN, ED., ELKOURI & ELKOURI: HOW ARBITRATION WORKS 1365-91 (6th ed. 2003) (hereinafter ELKOURI).

vis different statutory schemes. Most importantly, a meaningful study of the impact that the recent economic climate has had on use of particular factors would have to control for the preferences of individual arbitrators and the form of interest arbitration available, undoubtedly the primary drivers involved. The available data falls particularly short in that regard.

Instead, this paper will explore the different arbitral responses to the recent economic climate, and to the extent permitted by award availability, examine the effect the economic climate has had on use of various statutory factors in awarding contract provisions. The paper will also engage in a normative evaluation of whether the economic climate should in fact have the effect it appears to. Underlying all of these examinations is the ever-present question of what exactly interest arbitration should and should not do for the parties and the public.

## BACKGROUND

### **A. The Nature of Interest Arbitration**

Interest arbitration is designed to prevent strikes by public employees. It is much more effective at preventing strikes than other legislative measures, such as fact-finding, mediation, or legal penalties for striking public employees.<sup>3</sup> There are two basic forms of interest arbitration, 1) final offer arbitration; and 2) traditional arbitration.<sup>4</sup> In final offer arbitration, the neutral must select one of the two parties' offers. Final offer arbitration may be either total package, or issue-by-issue. In total package final offer arbitration, the neutral must select all of the contract terms proposed by one of the two parties. In issue-by-issue final offer arbitration, the neutral can select one party's offer with respect to one issue, and the other party's offer with respect to a different

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<sup>3</sup> See Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REFORM 313, 330 (1993).

<sup>4</sup> See GRODIN ET AL., *supra* n. 1, at 339-40.

issue. In traditional interest arbitration, the neutral can award a contract term that falls anywhere between the parties' respective final offers on any issue in dispute.<sup>5</sup>

Interest arbitration has been criticized as an inherently conservative process that disfavors novel solutions.<sup>6</sup> It has also been criticized as having a chilling and narcotic effect on parties, meaning that parties learn to rely on the process alone and cease bargaining in earnest.<sup>7</sup> The availability of interest arbitration also to some extent increases the bargaining power of public sector unions, because unions have more to gain from the availability of interest arbitration than public employers do.<sup>8</sup> Public employers are less inclined to give up control to a third party, and when it comes to political power, constituents respond well to arguments of minimizing taxation. Unions, on the other hand, have more to gain. The worst that can happen to employees in interest arbitration is that the employer's offer is selected or approximated by the neutral.<sup>9</sup> The outcome will be based not on political power, but on the strength of the union's legal arguments.<sup>10</sup>

## **B. The Long Reign of External Comparability**

Historically, the most significant factor in public sector interest arbitration has been external comparables, meaning the wages, hours, and terms and conditions of employment of similar public employees in comparable units of government.<sup>11</sup> Every statutory scheme providing for binding interest arbitration contains external comparability as a factor in some

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<sup>5</sup> *Id.*

<sup>6</sup> See e.g. JOHN J. GALLAGHER ET AL., AMERICAN LAW INSTITUTE -AMERICAN BAR ASS'N CONTINUING LEGAL EDUC., INTERST ARBITRATION UNDER THE RAILWAYS LABOR ACT 477-78 (1996); Malin, *supra* n. 3, at 334-35.

<sup>7</sup> See e.g. Malin, *supra* n. 3, at 330-32; Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 407-08 (1999).

<sup>8</sup> See Richard W. Laner & Julia W. Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees*, 60 CHI.-KENT L. REV. 893, 853-54 (1984).

<sup>9</sup> See *id.*

<sup>10</sup> See Malin, *supra* n. 3, at 332.

<sup>11</sup> See ELKOURI, *supra* n. 2, at 1407; GRODIN ET AL., *supra* n.1, at 339.

form or another. A particularly common formulation is that contained in the Illinois, Michigan, and Wisconsin statutes covering binding interest arbitration for uniformed personnel:

Comparison of the wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

- i) In public employment in comparable communities.
- ii) In private employment in comparable communities.<sup>12</sup>

Other statutes contain similar language.<sup>13</sup> The historical primacy of external comparability is true despite the fact that some statutory schemes, such as those of Wisconsin and Oregon, contain a hierarchy of factors. The Wisconsin statute governing binding interest arbitration for non-uniformed personnel provides that the arbitrator must give “greatest weight” to state laws or directives limiting expenditures, and “greater weight” to “economic conditions” in the public employer’s jurisdiction.<sup>14</sup> Nevertheless, parties may argue, and an arbitrator is likely to agree, that neither the greatest nor greater weight factors apply to the contract at issue.<sup>15</sup> Similarly, Oregon’s interest arbitration statute requires the arbitrator to give first priority to the “interest and welfare of the public” and second priority to the remaining factors,<sup>16</sup> but as Arbitrator Nancy Brown has observed, the “interest and welfare of the public” language has been interpreted to have meaning primarily by reference to the other factors.<sup>17</sup>

The primacy of external comparability is attributable to the prevailing theory of the role interest arbitration should play, which is awarding contract terms the arbitrator believes the parties would have agreed to had the bargaining process not broken down and the threat of a

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<sup>12</sup> 5 ILCS 315/14(h)(4); MICH. COMP. LAWS § 423.239(d); WIS. STAT. § 111.77(6)(d).

<sup>13</sup> See ELKOURI, *supra* n. 2, at 1371-91.

<sup>14</sup> WIS. STAT. §§ 111.70(4)(cm)(7) and (7)(g).

<sup>15</sup> See e.g. Local 342, AFSCME, Council 40, AFL-CIO and Lincoln County, Dec. No. 32414-A, 4 (2008) (Yaeger, Arb.).

<sup>16</sup> OR. REV. STAT. § 243.746(4).

<sup>17</sup> Jefferson County Law Enforcement Ass’n and Jefferson County, Case No. IA-04-08, 7 (2008) (Brown, Arb.), available at <<http://www.oregon.gov/ERB/awards/IA-04-08.pdf>>.

strike were looming.<sup>18</sup> This is particularly apt in small to mid-size municipalities, where the bargaining units tend to be divided into public works, fire, police, and sometimes subcategories of white-collar personnel. These groups are quite disparate in nature and not properly comparable to one another. The statutory language noted above, which is similar to the language in most jurisdictions, calls first for a comparison of the unit's wages and conditions of employment to those of employees "performing similar services."

A similar but less common arbitral approach focuses on empirical fairness, and is well articulated by Arbitrator McAlpin: "In an interest arbitration, the Arbitrator must determine not what the Parties would have agreed to, but what they should have agreed to, and therefore, it falls to the Arbitrator to determine what is fair and equitable in the circumstances."<sup>19</sup> Under this approach, deals struck in comparable communities are just as relevant. What employees performing similar work in similar communities represents the best guide available to what is fair for the employees of the unit whose contract is being awarded.

There is one major exception to the general historical rule that external comparables predominate in public sector interest arbitration. That exception is Minnesota, where as a result of the Pay Equity Act,<sup>20</sup> the predominant factor is internal comparables, meaning the wages, hours, and terms and conditions of employment of other employees of the same public employer.<sup>21</sup> The Pay Equity Act seeks to eliminate wage disparities between female-dominated and male-dominated classes of employees. The Act provides that "[a] primary consideration in

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<sup>18</sup> See ELKOURI, *supra* n. 2, at 1358-59.

<sup>19</sup> City of Effingham and Ill. FOP Labor Council, Case No. S-MA-07-151, 19 (2009) (McAlpin, Arb.), available upon request from the Illinois Labor Relations Board ("ILRB").

<sup>20</sup> MINN. STAT. §§ 471.991-999.

<sup>21</sup> See Christine D. Ver Ploeg, *Pay Equity in Interest Arbitration*, 27 WM. MITCHELL L. REV. 811, 838 (2000).

negotiating, establishing, recommending, and approving compensation is comparable work value in relationship to other employee positions within the political subdivision.”<sup>22</sup>

Due to the importance of external comparability, parties to an interest arbitration proceeding typically devote a great deal of effort to establishing what the external comparables are. In final offer jurisdictions, the final offers of a party may well be based around the party’s proposed external comparables. The appropriateness of proposed external comparables is often hotly disputed, and an issue that interest arbitrators devote much attention to. In short, interest arbitration preparation has historically been largely if not predominantly an exercise of proving which external comparables are appropriate, and proving that those comparables support the offer.

## THE IMPACT OF THE 2008 ECONOMIC COLLAPSE

Awards issued between the period of November 2008 and the present reflect that the 2008 economic collapse has had noticeable impact on the deliberative processes of at least some public sector interest arbitrators. The amount of weight placed on the economy varies considerably. There are noticeable relationships between the amount of weight an award gives to the economic climate and the weight it gives to external and internal comparables. The awards also show a wide range of scrutiny and weight applied to employers’ inability to pay arguments.

### **A. Arbitral Responses and the Economy’s Role**

#### 1. Survey of Awards

Interest arbitrators’ response to the economic collapse of late 2008 varies widely. Generally, the state of the national and local economy is acknowledged in the award, but the role it plays and the extent of discussion concerning its applicability varies.

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<sup>22</sup> MINN. STAT. § 471.992 Subd. 1.

Arbitrator Edwin Benn has commented explicitly on the poor economy and placed great weight on its role in awarding contracts.<sup>23</sup> In *State of Ill., Dep't of Cent. Mgmt. Svcs. and Int'l Bhd. of Teamsters, Local 726* (involving the Illinois State Police), Arbitrator Benn selected the state's offer on the issue of rank differential for the Master Sergeants of the Illinois State Police, the sole economic issue in dispute, without ruling on what the appropriate external comparables were, stating that "even assuming those jurisdictions are valid comparables, those contracts were not negotiated under the economic circumstances that have existed since these proceedings began in August 2008."<sup>24</sup> Normally, given the importance of external comparables in interest arbitration, one would expect the award not only to determine what the appropriate external comparables are, but to engage in a lengthy discussion about why the arbitrator determined that contested comparables are or are not appropriate. The absence of such a discussion is one of the more striking characteristics of the award. The other striking characteristic is the extensive discussion about changes in the economic climate subsequent to the hearing in August 2008. The award devotes no less than seven pages to the economic state of affairs.<sup>25</sup> The award cites multiple authorities concerning the economy, including newspaper articles about mass job cuts,<sup>26</sup> federal unemployment data,<sup>27</sup> Illinois unemployment data,<sup>28</sup> rise in gasoline prices,<sup>29</sup> and Consumer Price Index ("CPI") data,<sup>30</sup> aptly summarizing the data as signifying that "during the pendency of these proceedings, the economy simply tanked."<sup>31</sup> The arbitrator acknowledged

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<sup>23</sup> See *State of Ill. Dep't of Cent. Mgmt. Svcs and Int'l Bhd. of Teamsters, Local 726*, Case No. S-MA-08-262 (2009) (Benn, Arb) (hereinafter, "ISP"), available upon request from the ILRB; *North Maine Fire Protection Dist. and North Maine Firefighters, Local 2224, IAFF* (2009) (Benn, Arb.), available upon request from the ILRB.

<sup>24</sup> *ISP* at 20.

<sup>25</sup> *Id.* at 7-13.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Id.* at 13.

that the unemployment rate, the economy as a generalized concept, and gasoline prices are not statutory factors.<sup>32</sup> Ultimately, the arbitrator concluded that these changes are reflected in the CPI,<sup>33</sup> which *is* a statutory factor.<sup>34</sup> In the award's discussion of the arbitrator's selection of final offer, Arbitrator Benn concluded that "given the extraordinary circumstances which presented in this case since August 2008, the comparability factor...must yield to the other factors cited above."<sup>35</sup>

At the other end of the spectrum, arbitrator Fred Dichter expressed the following opinion in *Oshkosh Prof'l Employees Union AFSCME, Local 796-C, AFL-CIO and City of Oshkosh*:

There must be more than a showing that nationally the economy is down. Instead, the key to determining whether this factor is applicable in a particular proceeding is to determine how this locality is faring when compared to other surrounding localities. Is its economy more depressed than others? If it is, this factor applies and this Arbitrator has so found in the past. On the other hand, if the economy in the locality involved is faring better than its comparable neighbors, then (sic) this factor cannot be used to justify an offer that would on balance be lower than what was given by its comparable neighbors.<sup>36</sup>

The *City of Oshkosh* award was issued in March of 2008, before the depressed economy was front-page news and a universally accepted fact of American life. However, Dichter's admonition against giving the economic scene weight without party-produced evidence has been invoked by Arbitrator Amedeo Greco as recently as August 2009.<sup>37</sup>

The majority of awards fall somewhere between Arbitrator Benn's willingness to allow the economic state to dominate the deliberative process and Arbitrator Dichter's refusal to consider the local economy except by comparison to nearby localities. In many awards, the economic scene plays a significant role, even if it is not extensively discussed. For example, in

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<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.* at 10-13.

<sup>34</sup> 5 ILCS 315/14(h)(5).

<sup>35</sup> *ISP, supra* n. 22, at 20.

<sup>36</sup> *Oshkosh Prof'l Employees Union AFSCME, Local 796-C, AFL-CIO and City of Oshkosh*, Dec. No. 32148-A, 5 (2008) (Dichter, Arb.), *available at* <[http://werc.wi.gov/interest\\_awards/int32148.pdf](http://werc.wi.gov/interest_awards/int32148.pdf)>.

<sup>37</sup> *AFSCME Local 734 and City of Menomonie*, Dec. No. 32631-A, 16 (2009) (Greco, Arb.), *available at* <[http://werc.wi.gov/interest\\_awards/int32631.pdf](http://werc.wi.gov/interest_awards/int32631.pdf)>.

*Minn. Teamsters Pub. & Law Enforcement Employees Union, Local No. 320 and Blue Earth County*, Arbitrator Christine Ver Ploeg selected the union’s final offer on across-the-board wage increases, but noted that “[i]f there had not already been agreement concerning the wages of 90% of the County’s employees...economic realities...may well have supported a smaller wage award.”<sup>38</sup> The arbitrator did not select the union’s offer for the economic issues of lead pay increases, shift differential, and employer contribution to health savings plan.<sup>39</sup> Arbitrator Ver Ploeg specifically noted that “current economic climate and budget realities preclude any economic improvements to this Agreement beyond the wage increases already awarded.”<sup>40</sup>

Similarly, in *Local 150 SEIU and La Crosse County*, the arbitrator supported accepting the county’s package offer in part by stating that “it challenges credulity to believe that future 2009 settlements in this type of environment will be unaffected by the significantly worsened economic situation since the collective bargaining that led to this proceeding.”<sup>41</sup> Significantly, this statement followed an explanation of how external comparables supported the union’s wage offer for 2008.<sup>42</sup>

In other awards, the economy as a generalized concept does not play a central role in the adjudicator’s reasoning, but seems to be a tipping point in some respects. In *Village of Beverly Hills and Police Officers Labor Council*, the sole issue before the arbitration panel was retroactivity of an agreed-upon wage increase.<sup>43</sup> The panel ultimately selected the village’s offer, citing the “the financial picture as presented, the time that has expired since the settlement

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<sup>38</sup> *Minn. Teamsters Pub. & Law Enforcement Employees Union, Local No. 320 and Blue Earth County*, Case No. 08-PN-0472, 4 (2009) (Ver Ploeg, Arb.), available at <<http://www.bms.state.mn.us/documents/awards/20090222-BlueEarth.pdf>>.

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Local 150 SEIU and La Crosse County*, Dec. No. 32563-A, 12 (2009) (Honeyman, Arb.), available at <[http://werc.wi.gov/interest\\_awards/int32563.pdf](http://werc.wi.gov/interest_awards/int32563.pdf)>.

<sup>42</sup> *Id.*

<sup>43</sup> *Village of Beverly Hills and Police Officers Labor Council*, Case No. D05 J-1063, 6 (2009) (Stevenson, Chairperson), available at <<http://turf.lib.msu.edu/awards/pdfs/awards/r2257.pdf>>.

of the other bargaining units, and the overall compensation of this bargaining group.”<sup>44</sup> The award also cited with approval one of the village’s arguments, noting that although other units of the village received retroactivity, “[c]urrently the national state economies have reached a crisis stage and property values are declining limiting revenues that can be assessed.”<sup>45</sup> Hence, the economic scene appears to have been a tipping point for the panel. Similarly, in *Teamsters Local No. 320 and Faribault County*, while the arbitrator selected the union’s final offer for across-the-board wage increases, he rejected the union’s proposal to add step increases to the wage matrix, stating simply that it was “very costly in light of the current economic climate.”<sup>46</sup>

Finally, in some awards, the depressed economy is mentioned but not at all relied on in the deliberative process. For example, in *AFSCME Local 734 and City of Menomonie*, the arbitrator conceded that “[o]ne need not be a graduate of the London School of Economics to realize that America has experienced the worst economic crisis since the Great Depression.”<sup>47</sup> Nevertheless, the factors that the arbitrator cited in reaching the decision were internal and external comparability together with CPI changes.<sup>48</sup> Similarly, in *Village of River Forest and Ill. FOP Labor Council*, the arbitrator noted that the “[c]ountry’s economic condition and the anticipated effect on Village Revenue do warrant a more conservative series of salary increases than the past three years.”<sup>49</sup> However, he selected the final across-the-board wage increase offer of the union based on external comparables and the CPI.<sup>50</sup>

## 2. Discussion

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<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.*

<sup>46</sup> *Teamsters Local No. 320 and Faribault County*, Case No. 08-PN-0677, 7 (2009) (Befort, Arb.), available at <<http://www.bms.state.mn.us/documents/awards/20090403-FaribaultInterest.pdf>>.

<sup>47</sup> *City of Menomonie*, *supra* n. 36, at 15.

<sup>48</sup> *Id.* at 18-19.

<sup>49</sup> *Village of River Forest and Ill. FOP Labor Council*, Case No. S-MS-07-106, 8 (2009) (Cox, Arb.), available upon request from the ILRB.

<sup>50</sup> *Id.* at 9.

Normatively, should the economic collapse play a role in interest arbitration? As a practical matter, it seems impossible to avoid. Even where arbitrators do not discuss the economy in awards, it is undoubtedly a shadow hovering over the entire proceeding. To what extent should the economy play a role? More specifically, should “the economy” be another discrete factor, independent of the statutorily enumerated factors, that has its own force?

Arbitrator Benn deserves a great deal of credit for being forthright in the importance that the economy has to his decisions, and in his meticulous documentation of the economic realities in his awards.<sup>51</sup> *ISP*, in its essence, seems to reflect the simple notion that something of tremendous significance, much larger than the interests of the parties, has overtaken the proceedings. How can one argue with such a proposition?

Yet it is easy to understand why some might be rather taken aback by *ISP*. The parties prepared a case based not only on overwhelmingly prevailing precedent, but on factors statutorily prescribed by the Illinois General Assembly. Yet the outcome of the proceeding had nothing to do with the cases the parties prepared. It is true that cost-of-living changes are a statutory factor, and that the economic collapse is to some extent reflected in the CPI, but it is apparent that the CPI in Benn’s award is really a proxy for overall economic catastrophe. The argument presented was not that the CPI has decreased, which argues in favor of a wage freeze. Rather, after discussing the economy without reference to the CPI for several pages, the award then provided that “[t]he economy and gasoline prices just discussed are reflected in the cost-of-living numbers.”<sup>52</sup> That the CPI represented more in the award than cost-of-living alone was moreover acknowledged explicitly in *North Main Fire Protection District*: “Instead of relying on comparables, in *ISP* and *Boone County*, I focused on what I considered the more relevant

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<sup>51</sup> I also credit Arbitrator Benn for not allowing the practical need of continued selection by parties to trump what he clearly felt was the appropriate method of resolving the dispute.

<sup>52</sup> *ISP*, *supra* n. 22, at 10.

considerations reflective of the present state of the economy as allowed by Section 14(h) of the Act – specifically, the cost of living...as shown by the [CPI].”<sup>53</sup> Hence, the CPI in *ISP* was, more than anything, the statutorily permissible route through which the overarching economic concerns were brought to bear on the award. The statutory factors, at least as they are traditionally understood, were therefore pushed aside. As a practical matter, the parties were helpless to shape the outcome of the proceeding.

An approach similar to that in *Village of Beverly Hills* or *Faribault County* is not as alarming, where the reality was acknowledged as unavoidably relevant, but the traditional factors still played a predominant role. However, I would advocate an approach less deferential to the economic plight of the employer than the approach in *Beverly Hills* or *Faribault County*. All factors weighing equally, it is arguably appropriate for predictions based on the widely understood economic circumstances to play some role, but *only as tied specifically to a statutory factor*. If the statutory factors weigh clearly in one party’s favor, that party’s offer should be adopted in a final offer jurisdiction or approximated closely in a traditional arbitration jurisdiction. Giving the economic climate the status of an independent factor, having its own force, and in some cases a force capable of trumping the statutorily designated factors, is neither what the statute calls for nor healthy for public sector collective bargaining. In fact, to do so is to make a significant policy choice. There is an implicit notion in taking such an approach that the system as it has existed heretofore is no longer appropriate or helpful given the economic conditions.<sup>54</sup>

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<sup>53</sup> *North Maine Fire Protection Dist.*, *supra* n. 22, at 13.

<sup>54</sup> The *ISP* award in fact acknowledges a belief that the interest arbitration system as it then existed, at least in Illinois, is ill-suited to harsh economic times. *ISP*, *supra* n. 22, at 21 (“The difficulty from my end as an interest arbitrator is that in these uncertain and volatile times, Section 14(g) of the Act ties my hands.”)

When one steps back and contemplates the fundamental purpose and inherent nature of interest arbitration, it is anything but obvious that the system of interest arbitration as it existed before the crash is somehow less relevant or useful now. Given what is now a long history in many jurisdictions of interest arbitration in public sector bargaining, it is easy to lose sight of the fact that interest arbitration is at its core nothing more or less than a strike substitute. It is not, and was never intended as, a system of distributive justice as between taxpayers and public employees. What is more, it is by far the most effective strike substitute that state legislatures have yet hit upon, or are likely to hit upon in future. As a strike substitute, interest arbitration is inevitably, in the words of Arbitrator Martin Malin, “an artificial method of setting terms and conditions of employment.”<sup>55</sup> Once we remind ourselves of these basic truths, the precise degree to which a reward reflects what parties would or should have reached on their own seems less important than the basic fact that the system seems to work for the public and its employees. Some state legislatures have made a policy decision that interest arbitration, with all of its flaws, better serves the public interest than strikes, whether legal or not, and dire economic conditions in no way undermine the validity of that basic policy choice.

Having reminded ourselves of the basic purpose of interest arbitration and its inherently artificial nature as a method of setting terms and conditions of employment, while at the same time respecting policy-makers’ fundamental choices, we should next ask how it should operate in order to best serve the public sector collective bargaining process. In so doing, we should bear in mind the interests of both the employer, viz., the public, and public employees, the public’s essential service providers. Legislatures have differed in this assessment, some deciding that final offer arbitration works best, others that traditional arbitration works best. Within the final offer framework, some states have opted for an issue-by-issue system, while others have opted

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<sup>55</sup> Malin, *supra* n. 3, at 335.

for a final package system. What is remarkable is that, despite differences in the basic framework, the adjudicatory criteria to be used is remarkably consistent. What is more remarkable is that even with different weights assigned to different factors throughout various jurisdictions, there is in practice a high degree of consistency in arbitral approach.<sup>56</sup> This remarkable fact should tell us that the system has some seemingly inevitable tendencies. Significantly, those tendencies have resulted in a system that, at the very least, is sufficiently unobjectionable to ward off any firm demand for change, and at best is a true success.

Only after reminding ourselves of this background does the central question of whether the reality of economic collapse should uproot the current system appear in its proper proportion. Assuming that an artificial impasse resolution process is still preferable to strikes for certain classes of employees, and assuming that experience means something, it should be readily apparent that however dire the economic picture is, the current system should not lightly be set aside as unhelpful or ill-suited to the needs of public sector collective bargaining.

Bearing that in mind, it is inescapable that the economic collapse has had and will continue to have a significant impact on public employers' ability to pay wages and benefit contributions. Government revenues are tied primarily to sales tax and property tax, both of which have declined in the wake of the economic crash. Fortunately, however, the current system of interest arbitration takes the employer's ability to pay into account. All statutory schemes providing for interest arbitration feature ability to pay as a factor.

The most striking feature of a bad recession from a labor market perspective is high unemployment rates. High unemployment rates can be expected to affect states in multiple ways. Unemployment compensation claims can be expected to rise, while sales tax revenue can be expected to fall. Fortunately, insofar as the unemployment rates directly bear on budgetary

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<sup>56</sup> See *supra* n. 11-17 and accompanying text.

constraints of public employers, that too is taken into account by virtue of the ability to pay factor.

To the extent that interest arbitration is an adjudicatory process, the parties must rely on the strength of their arguments rather than political or economic power in that process. Once the economy becomes a factor independent of the statutorily designated factors, and for that matter one of greater force, it is difficult to see what role adjudication really plays. Harsh economic circumstances can only favor one party, the employer. If the statutory factors are subordinated to “the economy,” the adjudication is effectively over before it started, and there simply is no role for the relative strength of the parties’ arguments to play. Carrying the notion to its logical extent over time, once such a modification to the system is established, the effects could be very harsh in final offer jurisdictions: employers will become increasingly militant in their final offers, knowing that an independent factor that is of greater force than the traditional factors will favor such an offer, ultimately leading to a situation in which wage freezes are likely possible for the first time since interest arbitration was implemented in that jurisdiction. As a matter of distributive equity, some might argue that circumstances could favor such a result. If workers in the private sector are suffering wage freezes, is it unreasonable to expect that public employees too should experience freezes? This line of thinking, however, is misguided: the fundamental purpose of interest arbitration is to be a strike substitute, not a system of distributive justice.<sup>57</sup>

To the extent that interest arbitration is a facilitative process and part of the overall collective bargaining system, its existence inflates the bargaining power of public sector unions,

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<sup>57</sup> This line of thought is misguided for a second reason. The reality is that unionized compensation in the overall labor economy tends to be higher than non-unionized compensation. A necessary corollary, then, is that to the extent that public sector workers are more highly unionized than private sector workers, public sector compensation therefore tends to be higher than private sector compensation.

as discussed *supra*.<sup>58</sup> Subordinating that process to economic concerns undoes some of that inflation. Removing the effectiveness of a legislative mechanism that increases the bargaining power of unions is an invitation for unions to seek bargaining power through other means. Deprived of any meaningful substitute, public sector unions will be increasingly tempted to engage in illegal strikes. Subordinating the process to economic concerns is therefore, to at least some extent, abrogating the legislative decision that interest arbitration, even though it increases union bargaining power more so than the public's, is better for the public in the end than the risk of strikes by public employees.

## **B. External and Internal Comparables**

### 1. Survey of Awards

Although there is insufficient data to draw broad empirical conclusions, there does appear to be a relationship between concerns about the economic climate and weight given to both internal and external comparables on the part of arbitrators.<sup>59</sup> Based on the information available, it seems that those awards that place some weight on the depressed economy generally tend to minimize focus on external comparables, and in some cases explicitly reject the importance of external comparables in current economic times. Conversely, the awards that focus heavily on external comparables are less likely to give significant attention to the economy. At the same time, those awards that give attention to the depressed economy are more likely to also give significant weight to internal comparables.

Arbitrator Benn's award in *North Maine Fire Protection District and North Maine Firefighters Local 2224*, provides the strongest suggestion that where economic turmoil is a

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<sup>58</sup> See *supra* n. 8-10 and accompanying text.

<sup>59</sup> For purposes of this subsection, Minnesota awards will be disregarded, given the dominant role internal comparables have played since passage of the Pay Equity Act. See *supra* n. 12 and accompanying text.

strong concern, external comparables diminish in relative importance. The relationship is in fact made explicit by Benn:

[I]t still just does not make sense at this time to make wage and benefit determinations in this economy by giving great weight to comparisons with collective bargaining agreements which were negotiated in other fire protection districts at a time when the economy was in much better condition than it is now. There is no doubt that comparability will regain its importance as other contracts are negotiated (or terms are imposed through the interest arbitration process) in the period after the drastic economic downturn again allowing for “apples to apples” comparisons. And it may well be that comparability will return with a vengeance as some public employers make it through this period with higher wage rates which push other employee groups further behind in the comparisons, leaving open the possibility of very high catch up wage and benefit increases down the line. But although the recovery will hopefully come sooner than later, that time has not yet arrived. Therefore, at present, I just cannot give comparability the kind of weight that it has received in past years.<sup>60</sup>

Although it does not draw as explicit a connection between external comparability and the general economy as *North Maine Fire Dist.* does, *La Crosse County* also suggests rather strongly that when giving weight to the economic climate, external comparability is less important. The term of the contract at issue in *La Crosse County* was January 2008 through December 2009.<sup>61</sup> Arbitrator Honeyman first addressed the 2008 wages of the nursing home employees in comparison to their counterparts in comparable communities, concluding that the union members’ wages were both lower than is average among the external comparables and that the wage increases in the external comparables were higher than what the county proposed.<sup>62</sup> Thus, external comparables weighed in favor of the union for 2008. For 2009, he noted that relatively few settlements had been reached in the comparable communities, but the few increases that had been negotiated were closer to the county’s offer than the union’s.<sup>63</sup> Arbitrator Honeyman next noted that “it challenges credulity to believe that future 2009

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<sup>60</sup> *North Maine Fire Dist.*, *supra* n. 22, at 12-13.

<sup>61</sup> *La Crosse County*, *supra* n. 40, at 3-4.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.*

settlements in this type of employment will be unaffected by the significantly worsened economic situation.”<sup>64</sup> He then concluded that the county’s wage offer “is more consistent with the external comparables.”<sup>65</sup> This conclusion seems at odds with the fact that the 2008 data, which was known, weighed in the union’s favor, while the 2009 comparison, which tips the scale, was based on incomplete data and partly on speculation as to how the economy would impact negotiations. Thus, the inference is that the probable effects of the depressed economy on 2009 wages are weightier than the known comparability of 2008 wages. Although the entire discussion is couched in terms of external comparability, it can be viewed as a weighing of concerns over the depressed economy with external comparability, and external comparability loses.

Conversely, it appears to be generally true that awards devoting significant attention to external comparability give very little weight to economic concerns. In stark contrast to *North Maine Fire Dist.* and *La Crosse County*, Arbitrator Thomas Yaeger did not find the county nursing home’s arguments about financial stresses compelling without a comparative context in *Local 342, AFSCME, Council 40, AFL-CIO and Lincoln County*:

[T]here is no record evidence establishing that Pinecrest’s experience in this regard differs from its external comparables or that the financial stresses that it has and is experiencing differ from its external comparables. A record would have to be made establishing what was occurring among the external comparables regarding reimbursement rates and financial stresses that differentiated Pinecrest to make a persuasive case that the interests and welfare of the public support adoption of its final offer.<sup>66</sup>

Thus, financial arguments are not even relevant for this arbitrator outside the context of external comparability.

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<sup>64</sup> *Id.* at 12.

<sup>65</sup> *Id.*

<sup>66</sup> *Lincoln County, supra* n. 15, at 14.

The relationship between the weight placed on external comparability and that placed on the general economy is not typically as explicit as in *Lincoln County*. In the award of *Village of River Forest and Ill. FOP Labor Council Lodge 46*, Arbitrator James Cox discussed external comparability extensively in deciding the matter of across-the-board wage increases, and ultimately based his decision on external comparability and CPI adjustments alone.<sup>67</sup> Throughout the discussion, there was no mention of the general economic scene.<sup>68</sup> Similarly, in the award of *City of Lockport and MAP Chapter 75*, Arbitrator Aaron Wolff engaged an extensive discussion about which communities were appropriate as external comparables and which party's offer concerning the wage matrix and contract duration was supported by the external comparables.<sup>69</sup> In the final paragraph of the discussion about his wage offer selection, the arbitrator noted that there was one other factor to consider, a "change in circumstances since this case was initiated."<sup>70</sup> He specified that "[t]he national economy has moved into a deep recession and the cost of living is not likely to increase by much over the life of the new contract."<sup>71</sup> No further mention of the economy was made in the discussion. The external comparables thus carried all of the weight in the arbitrator's reasoning.

As one might expect, there are exceptions to this apparent inverse relationship between weight given to the depressed economy and that given to external comparables. *Marion County Law Enforcement Ass'n and Marion County*, an Oregon interest arbitration award, does not fit the general pattern. Arbitrator Kenneth Fitzsimon devoted a fair amount of attention to external comparables, finding ultimately that the unit members' compensation was as much as 8.2 percent

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<sup>67</sup> *Village of River Forest*, *supra* n. 49, at 5-9.

<sup>68</sup> *Id.*

<sup>69</sup> *City of Lockport and MAP Chapter 75*, Case No. S-MA-08-277, 4-9 (2009) (Wolff, Arb.), available upon request from the ILRB.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> *Id.*

below their counterparts in comparable communities.<sup>72</sup> The external comparables, together with cost-of-living increases as measured by the CPI, formed the basis of the arbitrator's conclusion that the union's wage offer was more reasonable.<sup>73</sup> Later in the award, when discussing the county's ability to pay, the arbitrator noted that "[t]here is little dispute that there has been a serious and prolonged downturn in the economy of our nation and state."<sup>74</sup> Ultimately, the arbitrator selected the package offer of the county, finding ability to pay to be decisive.<sup>75</sup>

While there appears to generally be an inverse relationship between the weight an arbitrator gives to the economic scene and weight given to external comparables, there appears to be a positive relationship between attention given to the economic scene and that given to internal comparables. In *City of Southgate and POLC, Southgate Patrol Officers Ass'n*, the arbitration panel gave considerable attention to economic concerns. The panel noted that amidst the national recession, Michigan had the highest unemployment rate and was one of the leading states in home foreclosures.<sup>76</sup> The panel also noted the dependency of the local population on the ailing auto industry, and the adverse impact of the economic recession on taxable property values and state aid.<sup>77</sup> The contract terms ultimately awarded by the panel were based primarily on internal comparables. The panel noted that the health care and retirement benefits awarded were consistent across the city, and the wages were consistent with the non-uniformed bargaining units.<sup>78</sup> The panel acknowledged that the wages awarded were different from those agreed to by the city's fire unit, but noted that this was internally fair given that the fire unit

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<sup>72</sup> Marion County Law Enforcement Ass'n and Marion County, Case No. IA-14-08, 14 (2009) (Fitzsimon, Arb.), available at <<http://www.oregon.gov/ERB/awards/IA-14-08.pdf>>.

<sup>73</sup> *Id.* at 15.

<sup>74</sup> *Id.* at 20.

<sup>75</sup> *Id.* at 21.

<sup>76</sup> *City of Southgate and POLC, Southgate Patrol Officers Ass'n*, Case No. D08 B-0158, 6-7 (2009) (Roumell, Chair), available at <<http://turf.lib.msu.edu/awards/pdfs/awards/r2251.pdf>>.

<sup>77</sup> *Id.* at 7.

<sup>78</sup> *Id.* at 8.

agreed to an increase in pension contribution.<sup>79</sup> Ultimately, then, the panel gave great weight to both economic concerns and internal comparables.

Similarly, in *Washington County and Washington County Deputy Sheriff's Ass'n*, Arbitrator Honeyman gave some prominence in his award to economic conditions. The very first paragraph of the award's discussion section begins as follows:

One factor which is not normally discussed till later in the series of considerations in a case of this type should be noted first, under the current circumstances. The economy-wide changes during the pendency of this proceeding have been radical. Clearly prospects for a wide variety of indicators affecting general perceptions of different types of employment have changed dramatically for the worse since this proceeding was filed. This was hardly, however, something the parties could anticipate, and the Association's arguments concerning the desirability of employment as a deputy sheriff in Washington County deserve a thorough answer on all the other grounds even though, a few months after those arguments were made, a great number of qualified people might view the prospect of such a job with new appreciation.<sup>80</sup>

Although the arbitrator acknowledged that the union's arguments should be answered on all grounds, it is clear that the economic collapse played a role in the deliberative process.

Ultimately, the determining factor in the award was internal comparability. The arbitrator noted that the "often-cited importance of internal consistency greatly outweighs such evidence of better benefits among some of the external comparables as the Association has been able to muster."<sup>81</sup>

While we must avoid making any broad empirical conclusions, it is clear that there is at least a possibility of a gradual trend away from primary reliance on external comparables and towards reliance on internal comparables going forward. Any such trend will be largely party-driven, as articulated by Arbitrator Befort in *Faribault County*:

This case represents a reversal in the positions usually asserted in interest arbitration disputes. In the run of cases, employers generally have sought to maintain a pattern of internal consistency, while unions most often have argued for a somewhat higher

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<sup>79</sup> *Id.*

<sup>80</sup> *Washington County and Washington County Deputy Sheriff's Ass'n*, Dec. No. 32426-A, 6-7 (2009) (Honeyman, Arb.), available at <[http://werc.wi.gov/interest\\_awards/mia32426.pdf](http://werc.wi.gov/interest_awards/mia32426.pdf)>.

<sup>81</sup> *Id.* at 7.

outcome based on external comparisons and other factors. In this case, however, the Union proposes a wage outcome based on internal consistency, while the Employer argues for a downward departure. In effect, the Employer argues that the internal pattern should give way to the deteriorating economic climate.<sup>82</sup>

Undoubtedly, this role reversal will continue in the absence of meaningful economic recovery.<sup>83</sup>

## 2. Discussion

The relationships described above between weight given to the economy and that given to external or internal comparability are quite logical under the prevailing arbitral approach to awarding contracts. When it comes to the importance of external comparability in harsh economic times, the arbitral approach to awarding contracts makes a significant difference. Arbitrator Benn did not think that deals struck in comparable communities before the economic crash was probative of the deal the parties would strike afterwards.<sup>84</sup> On the other hand, if an arbitrator is trying to divine not what the parties would have agreed to, but what they should have agreed to as a matter of empirical fairness, deals struck in comparable communities before an economic crash remain just as useful a guidepost of what is fair as they would have had there been no economic crash.

Taking the prevailing approach then, it is quite logical that the larger a role the economy plays in the deliberative process, the less important external comparability would be. Is it accurate to conclude that deals struck before an economic crash are not probative of the deal parties would strike after the crash? It certainly must be the case that they are *less* probative of what parties would reach now than if there were no crash. Public employers can anticipate a decline in sales tax revenue, at the least, and probably a decline in property tax revenue since property values plummeting are a central feature of the current recession. Cities and townships

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<sup>82</sup> *Faribault County*, *supra* n. 45, at 4.

<sup>83</sup> Although many argue meaningful recovery has already occurred at the time of this writing, that is not the subject of this article and will not be discussed herein.

<sup>84</sup> See *supra* n. 55 and accompanying text.

are likely to conclude that funds from the state will decline in the absence of federal aid. There can be little doubt that public employers would harden their bargaining positions in response.

On the other hand, whether union demands would lessen is more questionable. Unions are likely to look at what resources the employer still has even with diminished revenue, and question whether it is their compensation that should take the hit. The more services the public employer cuts, the more likely it is that public employees will credit the budgetary constraints and moderate their bargaining positions. It is therefore probable that what deal the parties would strike will depend significantly on how long the recession has been impacting the employer, and how the employer has reacted in the interim. It thus becomes very difficult for an arbitrator to predict what kind of deal would otherwise be struck. What is already a fiction becomes even more wildly speculative in times of economic turmoil.

That something is *less* probative of what deal the parties would have struck on their own, however, is a different question from whether it is probative of the matter *at all*. We must assume that the comparables truly are comparable. The question of what communities are appropriate external comparables has already been determined. Given that, it seems to me that agreements reached pre-recession in comparable communities are still a relevant indication of what deal the parties would have struck on their own, even if it is not as helpful an indication as it would otherwise be. These are employees performing similar work in similar communities. There are new budgetary concerns, yes, but ability to pay will be assessed after it is determined what the appropriate basic benchmark is. As an affirmative defense, ability to pay can mitigate what would otherwise be appropriate. It seems to me that external comparability, as a preliminary matter, is still very appropriate as setting a benchmark of what the parties would

have done on their own. Hence, I strongly question whether shoving external comparability aside altogether is a desirable way to approach the problem.

Moreover, based on the fact that state legislatures have assigned criteria to use in awarding contracts, the next inevitable question is which of the criteria is more probative now if pre-recession deals are less valuable than they previously were. The obvious candidate is internal comparability. The deals that the employer has reached with its other bargaining units give a strong indication of what both parties would be willing to agree to if the bargaining process had continued and the threat of a strike were looming, even if those other settlements were reached pre-recession. Threatened with a looming strike, an employer is probably not going to maintain that it cannot give the bargaining unit the same deal it gave the other bargaining units because of unforeseen budgetary constraints. Once the public learns that the employer allowed a strike to commence because the employer would not relent to giving that unit what it gave its other employees, the public pressure would likely be directed at the employer rather than the union. Conversely, a bargaining unit is not likely to carry through with a strike if the employer is willing to treat it equitably and the bargaining unit knows that there are serious budgetary issues that have arisen since those other deals were made. The attitude is likely to be that what the employer is offering is fair, and it is not worth striking to try to get something better, especially in light of the political power such basic fairness arguments will likely have with the public. Thus, it is quite logical that those arbitrators who deem external comparability to be a poor indicator of the deals parties would strike on their own would be the same arbitrators who would give significant weight to internal comparability.

I am certain that internal comparables must carry more weight than in *Blue Earth County*,<sup>85</sup> in which Arbitrator Ver Ploeg selected the employer's offer on lead pay because of the "current economic climate and budget realities" despite conceding that internal comparables supported the union's offers and that the employer failed to prove an inability to pay.<sup>86</sup> Assuming *arguendo* that external comparability must give way in times of economic turmoil, a public employer should be held to internal consistency as the best indication of what the parties would agree to if there were no interest arbitration procedure and the threat of strike was looming. In the absence of utilizing external comparability, affording weight to internal comparability makes intuitive sense and is normatively desirable from the standpoint of promoting labor peace.

The question of whether external comparability should be supplanted by internal comparability in times of economic turmoil, however, is another matter. I am far from certain that it should, particularly in the case of small or mid-sized municipalities. The approach taken by Arbitrator Yaeger in *Lincoln County* makes a good deal of sense.<sup>87</sup> If economic conditions have hit the employer particularly hard, that should either be part of the comparability analysis itself, or it should be dealt with separately as an ability to pay argument militating against what is otherwise appropriate. If conditions are merely general, comparables are still comparable, even if those units of government may have negotiated certain agreements before the economy went sour.

### **C. Ability to Pay and the Public Interest**

#### **1. Survey of Awards**

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<sup>85</sup> *Blue Earth County*, *supra* n. 37, was not discussed in this particular subsection because it was a Minnesota award, but it is particularly relevant to the normative discussion.

<sup>86</sup> *Blue Earth County*, *supra* n. 37, at 4; 6-7.

<sup>87</sup> See *supra* n. 61 and accompanying text.

The criteria of ability to pay and the interests of the public are often explicitly linked in statutory language. In the Michigan, Illinois, and Wisconsin statutes governing interest arbitration of uniformed personnel, a single factor is designated as “the interests and welfare of the public and the financial ability of the unit of government to meet these costs.”<sup>88</sup> The Ohio and Iowa statutes similarly link the public interest with the ability of the government unit to pay, but also link these criteria to the effects of the award on the level of public services.<sup>89</sup> Historically, the employer bears the burden of demonstrating an inability to pay in interest arbitration, and it is treated as an affirmative defense once the basic benchmark has been set by other factors.<sup>90</sup> The union may raise counter-arguments, but the burden is not on the union to prove the employer’s ability to pay in the first instance. An obvious question raised by the economic crisis is whether its undeniable existence has or should alter the nature of the employer’s burden or the amount of probative weight ability to pay should be given. The most extreme possibility is that the burden would be placed on unions to prove the employer’s ability to pay in the first instance. A more probable consequence is that arbitrators, whether consciously or not, may begin exercising less scrutiny in assessing employers’ inability to pay arguments or may assign the factor more weight.

The available awards suggest that there is a broad range of arbitral responses to inability to pay arguments in the wake of the economic crisis. At one end of the spectrum is *ISP*. By relying exclusively on the economic downturn as reflected in the CPI, the arbitrator effectively alleviated the employer’s burden of proving any economic hardship. *ISP* was, however, a transition case, meaning that the hearing was held before the economic collapse, but the award

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<sup>88</sup> 5 ILCS 315/14(h)(3); MICH. COMP. LAWS § 423.239(c); WIS. STAT. § 111.77(6)(c).

<sup>89</sup> IOWA CODE § 20.22(9)(c) (“the interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services”); OHIO REV CODE ANN. § 4117.14(c) (“the interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service”).

<sup>90</sup> See ELKOURI, *supra* n. 2, at 1433; GRODIN AT AL., *supra* n. 1, at 339; Laner & Manning, *supra* n. 8, at 859.

was issued after the collapse, so that the employer would not have had any opportunity to present economic hardship as a result of the economic collapse at hearing. *North Maine Fire Dist.*, however, was not a transition case, but Arbitrator Benn’s approach was not significantly different. The employer made an economic argument, but the award still relied significantly on national economic data and news cited by the arbitrator, such as unemployment data, stock market data, and inferences about public employer revenue based thereon.<sup>91</sup> The union argued that because the district was not reliant upon sales tax for revenue, the CPI did not adversely affect the district the way it would other government bodies.<sup>92</sup> The union also observed that the “record is curiously devoid of any budget information.”<sup>93</sup> The district argued that its property tax extension for 2009 would be based on a mere 0.01% CPI estimate, thus only increasing by \$4,578.<sup>94</sup> The arbitrator concluded that portion of the discussion by observing that as such, the low CPI did adversely affect the employer, and must therefore be considered.<sup>95</sup> Unsurprisingly, in light of the economic data emphasized in the award, the district’s wage offer was selected.<sup>96</sup> Thus, while the arbitrator did not entirely alleviate the district’s burden, he did not exercise much scrutiny in the way of the employer’s ability to pay argument, or alternately, gave dispositive weight to one aspect of revenue, the property tax extension.

*Blue Earth County* is another example of an arbitrator applying a low level of scrutiny to an employer’s economic arguments. The county was “unalloted” as much as \$471,439 in state aid. In discussing ability to pay, however, Arbitrator Ver Ploeg concluded that the union’s evidence rebutted the employer’s claim of inability to pay.<sup>97</sup> Nevertheless, only the union’s

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<sup>91</sup> *North Maine Fire Dist.*, *supra* n. 22, at 9-14.

<sup>92</sup> *Id.* at 15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 16.

<sup>96</sup> *Id.* at 17.

<sup>97</sup> *Blue Earth County*, *supra* n. 37, at 4.

across-the-board wage increase offer was selected, in contrast to all other issues, and the arbitrator implied that had it not been for the fact that all other bargaining units had settled wage increases before the award issued, the union offer would not have been selected on that issue either.<sup>98</sup> Therefore, the arbitrator seems to have either applied a low level of scrutiny to the employer's ability to pay arguments or have given significant weight to those arguments.

In *Village of Beverly Hills*, the employer argued in its post-hearing brief that the arbitrator must consider changed circumstances, presumably meaning circumstances since the time of the hearing and the economic collapse, though that is not clear from the award.<sup>99</sup> It is unclear from the award precisely what information the employer provided, but the arbitrator explained merely that "the national and state economies have reached a crisis stage and property values are declining limiting revenues that can be assessed."<sup>100</sup> No other content about the impact of the economy on the village was contained in the award. The arbitrator then concluded that given "the financial picture as presented, the time that has expired since the settlement of the other bargaining units, and the overall compensation" of the bargaining unit members, no retroactivity of wages was warranted.<sup>101</sup> It therefore appears either that little scrutiny was applied to the village's economic arguments, or else that whatever economic data the post-hearing brief cited was given dispositive weight, and that the mere mention of the economic collapse was deemed sufficient to articulate the reasoning behind that decision.

At the other end of the spectrum is Arbitrator Dichter's approach in *City of Oshkosh* or Arbitrator Yaeger's approach in *Lincoln County*, both of which assert that financial arguments must be made by reference to external comparables, so that an employer must show it is uniquely

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<sup>98</sup> *Id.* at 4.

<sup>99</sup> *Village of Beverly Hills*, *supra* n. 42, at 7.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

affected by economic factors for its argument to carry the day.<sup>102</sup> Less harsh towards employers, but still rather exacting, would be the approach taken in *City of Menomonie*. There, the city argued that it had not filled three vacant positions, citing declining state aid and revenue limits.<sup>103</sup> Arbitrator Greco responded that such “belt-tightening,” standing alone, did not support finding the employer’s offer to be in the public interest.<sup>104</sup> The city also cited layoffs at a local company and rewriting of contracts by the University of Wisconsin-Stout, but the arbitrator noted that the extent of layoffs were unknown and that in the absence of proof concerning the rewriting of University contracts, the evidence carried little weight.<sup>105</sup>

In *Jefferson County Law Enforcement Ass’n and Jefferson County*, Arbitrator Nancy Brown closely examined the inability to pay arguments made by the sheriff’s office. The sheriff argued that it had an inability to pay its dispatchers, citing a local newspaper article emphasizing the deficit in fiscal year 2004-2005 and its impact on having more than one dispatcher on duty, leading to unavailability during the sole dispatcher’s bathroom break.<sup>106</sup> The arbitrator indicated that based on the turnover rate of eight employees between July 2005 and June 2008, turnover was as reasonable an explanation for dispatcher shortages as the county’s deficit.<sup>107</sup> The sheriff also argued that the State might reduce the Community Corrections functions fund.<sup>108</sup> The arbitrator noted that even if that were to occur, the revenue generated from that fund was \$120,000, a small portion of the overall jail budget.<sup>109</sup> The sheriff also asserted that it was understaffed by one patrol deputy as a result of a 2003 interest arbitration award and that if the union’s offer were accepted this time, three or four additional deputies would have to be laid

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<sup>102</sup> *City of Oshkosh*, *supra* n. 35, at 5; *Lincoln County*, *supra* n. 15, at 14.

<sup>103</sup> *City of Menomonie*, *supra* n. 36, at 15-16.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* n. 12.

<sup>106</sup> *Jefferson County*, *supra* n. 17, at 9.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

off.<sup>110</sup> The arbitrator responded that the county did not present evidence of any specific reductions in grants or contracts.<sup>111</sup> She also noted that the Sheriff's testimony at hearing confirmed that the first year of the county's wage offer had already been budgeted for, and the first year of the county's offer was more costly than the first year of the union's offer.<sup>112</sup> She moreover identified four patrol officers whose salaries were funded by contract or an alternate fund, ultimately concluding that the county's threat to reduce the patrol deputies by multiple positions not to be credible.<sup>113</sup>

Similarly, in *Harrison Township and Harrison Township Firefighters Local 1737*, the arbitration panel did not accept the township's inability to pay arguments. The township asserted that the national and state economic crisis undermined "fiscal integrity," citing the fact that 85% of the property within the township was residential.<sup>114</sup> The township also noted that five of the mills that it assessed were dedicated to the fire department, would expire in 2009, and would need to be renewed by referendum.<sup>115</sup> The panel replied that since the citizens had previously approved a five mill dedicated fund for the fire department, the township general fund and state aid played no role.<sup>116</sup> The panel concluded that ability to pay was not an impediment, but rather that "reluctance to do so, for whatever reason, is why arbitration is now necessary."<sup>117</sup>

Some arbitrators are willing to give weight to economic arguments without requiring the employer to prove an absolute inability to pay, while still requiring compelling evidence. In *City of Effingham and Ill. FOP Labor Council*, the city had argued that it relied on sales tax revenue

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<sup>110</sup> *Id.* at 10.

<sup>111</sup> *Id.* at 11.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Harrison Township and Harrison Township Firefighters Local 1737*, Case No. D07 G-1111, 10 (2009) (Frankland, Chair), available at <<http://turf.lib.msu.edu/awards/pdfs/awards/r2263.pdf>>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 11.

from fuel purchase since gasoline sales were the majority of the city's economic activity. The city argued that while it had experienced sales tax revenue increases of eight to nine percent in the past several years, the increase in 2008 was half a percentage point.<sup>118</sup> The city also argued that several truck stops in the city's territory had recently switched over to bio-diesel fuel, which did not generate sales tax.<sup>119</sup> Finally, the city noted that it anticipated reduction in state aid, and that it had chosen to discontinue certain public services.<sup>120</sup> Arbitrator Raymond McAlpin did not find that an inability to pay was "conclusively proven" by the city.<sup>121</sup> Nevertheless, while the interest and welfare of the public and the financial ability of the government unit to pay was not dispositive, he concluded that it "mitigates in favor of the Employer's position and it must be given substantial weight in the final decision."<sup>122</sup>

Without drawing any broad empirical conclusions, then, it appears that at least for certain arbitrators, the undeniably bleak economic circumstances impact the ability to pay analysis.

## 2. Discussion

First, although giving ability to pay more probative weight and lessening the employer's burden to prove inability to pay can be theoretically differentiated, they are functional equivalents of one another. All other things being equal, either approach will militate in favor of 1) selecting the employer's offer in a final offer jurisdiction; or 2) more closely approximating the employer's offer in a traditional jurisdiction. If the arbitrator exacts little scrutiny, she is more likely to find that inability to pay has been proven. If she exacts a good deal of scrutiny, but gives great weight to any evidence presented, she is also more likely to find that inability to

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<sup>118</sup> *Id.* at 10-11.

<sup>119</sup> *Id.* at 11.

<sup>120</sup> *Id.*

<sup>121</sup> *City of Effingham, supra* n. 19, at 19.

<sup>122</sup> *Id.* at 19-20.

pay tips the scales. I would assert that arguing for one is effectively arguing for the other, since there is no functional difference.

It is worth reminding ourselves that concern about ability to pay being given short shrift by arbitrators has always been part of the landscape. In 1984, just as Illinois was adopting comprehensive public sector collective bargaining statutes, including interest arbitration, Richard Laner and Julia Manning warned:

Arbitrators have tended to place a heavy burden on public employers because arbitrators believe that to do otherwise would render ability to pay the controlling factor. Arbitrators also seem to unrealistically believe that notwithstanding a plea of inability to pay, priorities can be altered, taxes raised, etc., to pay a salary increase to public employees.<sup>123</sup>

In 1991, Arbitrator Marvin F. Hill, Jr. and Emily DeLacenserie similarly warned:

Employers, labor organizations, and interest neutrals must accept that ability to pay is a valid interest arbitration criterion, just as comparability is. The chance of survival of arbitration as a substitute for the strike will be greatly enhanced if neutrals give proper weight (and not just lip service) to all the statutory criteria.<sup>124</sup>

Yet it can hardly be said that the system has unraveled itself because ability to pay has been treated as an affirmative defense. The fact that hard economic times are upon us does not necessitate a fundamental change in the interest arbitration system any more than the Reagan recession did in the early 1980s or the tech bubble burst did in the early 2000s. No two recessions are alike. At the same time, however, the accepted system of interest arbitration as it existed in early 2008 is capable of accommodating recessions, whatever their peculiar characteristics.

There is no logical basis to conclude that the respective burdens of parties to interest arbitration need to change because of economic recession. Let us assume for the sake of argument that as an empirical matter, every township, city, county, and state simply cannot meet

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<sup>123</sup> Laner & Manning, *supra* n. 8, at 859 (citations omitted).

<sup>124</sup> Marvin F. Hill, Jr & Emily DeLacenserie, *Interst Criteria in Fact-Finding and Arbitration: Evidentiary and Substantive Considerations*, 74 MARQ. L. REV. 399, 444-45 (1991) (citations omitted).

their unions' demands for compensation, either in terms of wages or benefits. Let us assume even further that no single bargaining unit within these government units accepts that truth, and every dispute goes to interest arbitration. Provided that the units of government have competent counsel, they will be able to assert inability to pay as an affirmative defense and persuade the arbitrator that whatever other factors suggest would be appropriate, it simply cannot be awarded. This is the worst case scenario, and it has steep collateral effects, such as significant time delays and litigation costs, but it in no way fails to account for economic realities in the adjudicatory process. Fortunately, this scenario by no means reflects reality or the probabilities.

The fact is that the economic collapse, while it is devastating, has impacted every unit of government differently. For those units of government that in fact *can* meet union demands, an alleviation of the burden to prove inability to pay at interest arbitration is a generous gift. For those units of government that cannot pay, alleviation of their burden to prove it at interest arbitration appears less generous, but it is still a gift to public employers and their counsel. It is a gift because it is not necessary to address the underlying problem. If we assume that arbitrators will not accept legitimate arguments, then we have to conclude that the system never worked in the first place: a change in objective facts ought to change the parties' ability to make their adjudicatory arguments persuasively. If it does not, the problem is much bigger than the fact that ability to pay has been treated as an affirmative defense. Fortunately, there is no empirical evidence to suggest that there is such a problem.

## CONCLUSION

The economic crisis of 2008 has had a noticeable impact on the deliberative processes of arbitrators awarding public sector contracts. There is insufficient data to draw any broad empirical conclusions, but certain trends appear likely. The weight that arbitrators accord

general economic conditions independent of the statutory factors varies tremendously, with some arbitrators openly acknowledging that it is paramount in their award, and others ignoring it altogether.

There is a noticeable inverse relationship between awards that focus on external comparability and awards that place emphasis on the economic outlook, sometimes explicitly articulated. Moreover, as a general matter, awards that draw attention or give weight to generalized economic concerns tend to also take account of internal comparables. The arbitral response to the economic crash in relation to the burden placed on public employers to prove inability to pay or the weight it is assigned varies considerably. For at least some arbitrators, the level of scrutiny seems to be low in the wake of the crisis.

Normatively, I do not believe that the economic crash should significantly alter how interest arbitration functions, primarily because interest arbitration is a component of the overall public sector collective bargaining scheme and a basic policy choice of state legislatures. The statutory schemes allow for public employers to make strong arguments about the impact economic conditions have had or will have on their budgets through ability to pay arguments.