

The letter of the law

Procedural due process is the bedrock of the legal system, declares Len Kirsch, who expresses concern over some recent cases.

In my last column, I gave vent to one of my pet peeves, that of arbitration. In this column I'd like to air two other pet peeves: unclear law and the regulation and the absence of procedural due process. Many of you have either heard of or read about the great debate at Los Angeles International airport involving the payment of health benefits and an increased living wage. Forget about whether it is right or wrong for city governments to require handlers and others to pay their employees a higher wage than mandated by a state government or the federal government. Forget about whether it is right or wrong to require the payment of benefits to low wage workers. What is clearly wrong is the drafting of a regulation requiring a living wage in a manner so that no-one really understands who is covered and where different companies (and the lawyers who advise them) each reach a different understanding of who is covered by the regulation.

Fortunately, after the regulation came into effect, the city publicly clarified who was covered. Even if we question whether, under the regulation, ramp workers, among others, are covered and even if we question why a city would require huge increases in wages at a time of economic distress and high unemployment, at least handlers now know who to pay what and do not have to gamble that if they guessed wrongly, they could become subject to a class action employment lawsuit (another peculiarity of doing business in California).

Generally, a law or regulation applied equally to all similarly situated airline service companies will not have a drastic economic or legal impact on handlers as long as airlines are willing to accept price increases reflecting the cost and impact of such a law or regulation. What would have wreaked havoc and would have had a dramatic impact is a situation where some handling companies imposed the living wage increase and others did not. If those who imposed the increase guessed incorrectly, then they would have become competitively disadvantaged and (perhaps unfairly) have lost customers. If these who did not impose the increase were over time proven wrong they could have become subject to fines, penalties, judgements in class action suits and huge legal fees associated with these suits (in addition to an unhappy workforce).

I had read the Regulation, but was unable to provide an opinion with any certainty about who was covered. I assume several labour law firms disagreed (although I understand at least one got it right). No law or regulation should be drafted with such a lack of clarity, and if this does happen, the governmental entity should immediately (not belatedly) clarify the issue.

Another pet peeve of mine is a growing trend by busy courts to find shortcuts to either resolve or force the resolution of a controversy. I assume this trend is not limited to US courts but exists in other systems of justice that are trying to find a way to deal with the growth of litigation, especially litigation involving multinational parties.

Recently, I was up against a judge (a lawyer is supposed to be up against a lawyer on the other side, not against a judge), who issued two critical rulings from the bench without reading the motion papers, holding a trial, or even following (in my view) *stare decisis*. While the judge *did* force a settlement in the end (before I had a chance to appeal the two decisions), he did not allow for what is called in the US "procedural due process," which can be defined as a just process which allows all sides to be heard before decisions are rendered.

While this judge's conclusions may have not been entirely wrong on the substantive law, sometimes the process is as important as the result, especially when the parties are foreign entities who expect that the American justice system is at least fair and that both sides in a dispute will be heard.

My law firm, like all others, can never guarantee a result. We cannot even guarantee that the law, as it exists, will be followed. However, I feel that until recently, we could at least guarantee that the process would be fair and that our client's position would be heard, if not followed. Resolving conflicts without a trial is good; speedy justice is good; but not at the cost of an unfair process.

Lastly, having just returned from the IATA Legal Conference in Lisbon, I am even more impressed by this magazine's annual Ground Handling Conferences. While the IATA Legal Conference brought together many knowledgeable and important people (mostly in-house airline lawyers and law firms who primarily represent airlines), the presentations did not follow this magazine's defined structured formula, backed up by PowerPoint presentations containing specific information. Kudos to *GHI*. I never thought I would miss PowerPoint presentations - but I did.



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