

CHAPTER I

ARBITRABILITY AND THE ARBITRATOR'S JURISDICTION

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I

A short while ago, the Court of Appeals of New York State had before it a case which involved the following arbitration clause:¹

In the event of any dispute between the parties hereto with reference to any matter not provided for in this Contract, or in reference to the terms, interpretation or application of this Contract, such dispute shall be referred to a Board of Arbitration * * * and the decision of the Arbitrators shall be final and binding upon all parties.

The Company had discharged two employees on the grounds that they had worked for another company in competition with their employer, during their off hours.

The Union protested the Company's action and demanded that the dispute be submitted to arbitration. The Company resisted arbitration, claiming that the discharge "was a matter outside of the terms of the collective bargaining agreement and was therefore * * * not subject to arbitration."

The lower court—one judge presiding—held that the dispute was arbitrable under the foregoing arbitration clause.

The Company appealed; and the Appellate Court, dividing

¹ *Bohlinger v. National Cash Register*, 305 NY 539; 114 NE 2d 31.

four judges to one, reversed the lower court and held that the dispute was not arbitrable.²

The Union then appealed to the Court of Appeals, which held, by a divided vote of four to two—one judge not participating—that the dispute was arbitrable.

Here we have six judges holding that the dispute was arbitrable and six judges holding that it wasn't—under a clear and unambiguous arbitration agreement which said: "In the event of *any* dispute between the parties * * * with reference to *any* matter *not* provided for in this Contract, *or* in reference to the terms, interpretation or application of this Contract * * *

After reading that case, you can well appreciate the qualms I experienced in having undertaken to discuss the problems of arbitrability and jurisdiction that face *arbitrators*.

But then I began reading other court cases in which the issue of arbitrability and arbitrator's jurisdiction arose, and I found that the happenings in that case were not unusual. I found that the problems of arbitrability that beset parties and arbitrators beset the courts alike and that individual judges, like arbitrators, differ as sharply on this subject as the parties themselves.

And now, with our Federal Courts reversing their former position and holding that the Federal Arbitration Statute does cover disputes under collective bargaining contracts³ and with the question of enforcing arbitration agreements and arbitrators' awards under Section 301⁴ of the Taft-Hartley Act now fairly uniformly settled, we can expect the problems of arbitrability and arbitrator's jurisdiction to become more provoking and perplexing.

II

So, taking as my guidepost the witticism that has now become folklore among us that "an arbitrator may be wrong,

² *Bohlinger v. National Cash Register*, 113 NYS 2d 46; 280 App. Div. 751.

³ *Tenney Engineering Inc. v. United Electrical, Radio & Machine Workers of Am.*, 207 Fed. 2d 450.

⁴ *Milk & Ice Cream Drivers Dairy Employees Union and Gillespie Milk Products Co.*, 203 Fed. 2d 650.

but he's never in doubt," I venture to consider some of the problems of arbitrability and the arbitrator's jurisdiction that arise in grievance disputes during the contract term.

First, let me as best I can, and for the purposes of getting a framework within which to discuss these problems, define the terms of "arbitrability" and arbitrator's "jurisdiction."

By arbitrability, I simply mean: Did the parties agree to make the arbitration process *available* for a particular dispute under their arbitration clause? That is, Is a particular grievance or dispute that arises during the contract term *subject* to the arbitration system that the parties set up under their contract? As one court aptly put it, arbitrability seeks to answer the question: "Is the subject matter [of the grievance or dispute] comprised within the agreement to arbitrate made by the parties?"

Unfortunately I cannot as simply define arbitrator's jurisdiction because that term has been used at times to refer to arbitrability as defined above and at other times to refer to the arbitrator's authority in deciding the dispute on the merits of the case. It is because these two terms are sometimes used synonymously—as it suits one's preference at any particular time—that many of the problems of arbitrability discussed later arise. And I may suggest at this time that it is this confusion that has led some of the courts to err in deciding questions of arbitrability when the issue is brought before them.

Therefore, in order to define what is meant by the jurisdiction of an arbitrator, we first must consider what the office of arbitrator essentially means. Then we can better distinguish between the arbitrator's jurisdiction to hear the dispute and his authority in deciding the dispute on its merits.

In essence, an arbitrator is the agent of both parties—one agent jointly appointed by both parties to decide their differences for them and to make a "contract of settlement" for them.

As one court, in an early American case, put it:⁵ An award

⁵ *Ballance v. Underhill*, 4 Ill. 453.

“partakes of the nature of a contract between the parties, which they have, by their submission, authorized the arbitrator to make for them and by which they are conclusively bound * * * It is in this latter character alone [a “contract of settlement”] that an award is treated when courts of equity have interfered to enforce a specific performance of it.”

I suggest that, if we bear in mind this concept of an arbitrator—the parties’ mutual agent whose function is to make a “contract of settlement” for the parties,—much of the confusion over arbitrability, jurisdiction, and authority will dissipate—though not the problems.

The jurisdiction, then, of the arbitrator, as an agent, to make a “contract between the parties” extends only to those matters which the parties by their contract or submission agreement empowered him “to make for them.” If the parties have not empowered their agent to make a “contract of settlement” of their dispute, he is without *jurisdiction* to make one—and, to that extent, the dispute is not arbitrable.

It is in that sense that I use the term arbitrator’s jurisdiction in this discussion.

On the other hand—and here’s where the confusion often arises—if an arbitrator has jurisdiction over a dispute—that is, the parties have empowered him to make a “contract of settlement” for them—but in exercising his jurisdiction he goes beyond the *authority* which the parties have delegated to him, then his award—his “contract of settlement”—is a voidable one. It is in this area—exceeding his delegated authority within the framework of an arbitrable dispute—that the terms jurisdiction and authority are often used synonymously. In either case, whether the arbitrator has jurisdiction to decide the dispute or whether his “contract of settlement” exceeded his delegated authority, the jurisdiction and authority of the arbitrator as the parties’ agent are properly subject to court review—unless the parties expressly agree otherwise.

For it is well settled that an arbitrator, like an agent, is not the exclusive judge of his own jurisdiction or authority unless the parties expressly empower him to judge these matters.

As one Appellate Court expressed it:⁶

It is for the Court to judge whether arbitrators have exceeded their powers or refused to exercise them. The [contract] is the foundation of their jurisdiction and they are not the exclusive judges of their own powers.

Because the arbitrator's award is "a contract of settlement" made in effect by the parties themselves through the medium of an agent they both mutually appointed, the parties are bound by that "contract" to the same extent that they are bound by any other kind of contract they voluntarily enter into.

The courts uphold the sanctity of a "contract of settlement" made by the arbitrator for the parties as they uphold the sanctity of any other contract voluntarily entered into by the parties. Thus, as another court put it:⁷

In the absence of fraud or other wrongful act on the part of another contracting party, he who signs or accepts a written contract is bound by the stipulations and conditions expressed in it.

To the extent that parties are not bound to observe strict rules of law or evidence in making a contract, the arbitrator, as their agent, is not bound to observe them. Just as the parties are not required to give reasons why they entered into a contract, so too the court cannot inquire into the reasons why the arbitrator made his "contract of settlement"—his award. On the other hand, whatever breaches of conduct make a contract a nullity—fraud, undue influence, corruption—those same breaches of conduct make an arbitrator's award—his "contract of settlement"—a nullity.

In fact, if we keep in mind that the arbitrator essentially acts as the agent of both parties and that his award constitutes

⁶ Halstead v. Seamon, 82 NY 27.

⁷ Lehman v. Ostrovsky, 264 NY 130; 190 NE 208.

a "contract of settlement" voluntarily entered into by the parties through their own mutual agent's office, then we find the answer to many of the perplexing problems of arbitrability and arbitrator's jurisdiction that face parties as well as arbitrators.

In many jurisdictions, the law clothes the office of arbitrator with "quasi-judicial" responsibilities, and others make legal procedures available to effectuate quickly an arbitrator's award into a judgment of the court. Yet, under the common law, which prevails in most of the states and in many foreign jurisdictions, a party can institute a plenary action and sue upon an arbitrator's award, as upon any other contract voluntarily entered into by contracting parties, to obtain a court judgment.

In whatever areas under prevailing public policy parties can enter into contracts, they can delegate authority to an arbitrator to contract for them, and his "contract of settlement" is not subject to review or attack either by a court or by a disappointed party.

As an early New York Court put it:⁸

Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination as to the law or the facts is final and conclusive. * * * The award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it. * * * Otherwise the court would substitute its own judgment in place of the judgment of arbitrators freely chosen by the parties to settle the controversy and the award would thus become the commencement instead of the end of litigation.

Now, the last part of that opinion—"Otherwise the court would substitute its own judgment in place of the judgment of arbitrators freely chosen by parties to settle the controversy

⁸ In re Wilkins, 16 NY 494.

* * *”—brings into sharp focus the conflict and the confusion resulting from mixing up initially the arbitrator's *jurisdiction* on the one hand and his *authority* to decide the merits of the dispute on the other hand. For, though the generally prevailing law is clear that the court should not substitute its own judgment in place of the judgment of the parties' agent in making "a contract settlement," courts have in fact done so in determining questions of arbitrability and the arbitrator's jurisdiction.

Thus, in the often referred to Cutler Hammer and International Association of Machinists case,⁹ the Court of Appeals of New York State, by a divided vote, denied the Union's application for arbitration of a disputed contract clause and held that the dispute was not arbitrable because the "meaning" of the clause was "beyond dispute."

The contract in that case provided for arbitration of:

Any dispute * * * as to the meaning, performance, or application of the provisions of this agreement.

The majority of the Court found their own interpretation—their own judgment—of the disputed provision so clear to themselves that they held any other interpretation untenable and therefore not arbitrable. The majority said:

If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate, and the contract cannot be said to provide for arbitration.

Then, in a subsequent case—Western Union Telegraph Co. and American Communications Association¹⁰—the same Court, again by a divided vote (this time 4 to 3), set aside the arbitrator's award on the ground that he had exceeded his jurisdiction. There the Court held that it was not within the arbitrator's power to construe or interpret language of a disputed clause in the collective bargaining contract in light of the

⁹ Int'l Assoc. of Machinists v. Cutler Hammer, Inc., 297 NY 519; 74 NE 2d 464.

¹⁰ Western Union Telegraph Co. v. American Communications Assoc., 229 NY 177; 86 NE 2d 162.

custom and practice in the industry in which the agreement was operating. The majority stated:

As the language employed to express the Union's agreement leaves no doubt as to its meaning, there is no occasion to resort to other means of interpretation.

The three dissenting judges in that case, however, said that the issue in dispute "was a pure question of interpretation and application, and the very kind of question which the parties themselves had agreed should be decided by the arbitrator alone." They added: "It is the duty of the Court to enforce their agreement rather than undertake itself to settle the dispute or to narrow the field of arbitrable disputes."

These statements of the minority of the Court find strong support in the long history of arbitration. I suggest that they serve the self-interest of both management and labor best in the long run. As was pointed out in an early case in the same Court:¹¹

The Court possesses no general supervisory power over awards and if the arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law.

If the court is called upon to decide the arbitrability or the jurisdiction of the arbitrator over a particular dispute, it should decide that question alone and not the merits of the dispute. Nor should the court use the merits of the dispute to support its finding on the issue of arbitrability or jurisdiction of the arbitrator.

Even where the court may see only one decision possible or reasonable, if the dispute lies within the framework for which the parties have agreed to make arbitration available, the court should constrain itself to allow that dispute to go to arbitration. If the parties have voluntarily agreed to have the meaning of a disputed provision or phrase decided by arbitration, then their agreement ought to be honored. This should follow even

¹¹ Fudicker v. Guardian Mutual Life Ins. Co., 62 NY 392.

though the court may be fearful that the arbitrator, in deciding the case on its merits, may exceed the limits of his delegated authority which the parties have vested in him under the contract. Such error or abuse by the arbitrator should not be anticipated but should be left to be challenged by the aggrieved party later in a proceeding to vacate the award on that ground. It is proper for the court, if called upon, to decide the arbitrability of a dispute. It is not for the court itself to decide the dispute or to decide the meaning of the disputed clause or phrase.

The members of the National Academy of Arbitrators will have opportunity to discuss more fully in other sessions at this conference this subject of arbitrability as it relates to the enforceability of agreements to arbitrate and the extent of court review of arbitrators' awards. The Academy's Committee on Law and Legislation has prepared a concise Report commenting on the draft of a model Arbitration Act, adopted on August 20, 1955, by the National Conference of the Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar Association. That Report raises in more specific terms of reference the conflict over arbitrability and the arbitrator's jurisdiction as well as the extent to which courts should exercise general supervisory powers over awards.

As our Committee's Report correctly points out:

One of the possible objections to prearbitration jurisdiction is that courts may, under the guise of inquiring whether an agreement to arbitrate exists, pass on the merits of the underlying dispute between the parties.

Section 2 (c) of the proposed Act apparently safeguards against this objection in that it provides that "an order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown." Apparently, then, as our Committee's Report states, under this Section the "only issue to be tried is whether there is an agree-

ment to arbitrate” and, insofar as this Section will be so construed, the Arbitrator’s function would be adequately safeguarded. However, as our Committee’s Report makes clear, this safeguard would seem to be relaxed by Section 12 (a) of the proposed Act. This Section sets forth, among the grounds for vacating an arbitrator’s award upon court review, the consideration whether the award is “contrary to public policy” or is “so grossly erroneous as to imply bad faith on the part of the arbitrators.” Commenting on these additional grounds, our Committee’s Report states:

Thus, instead of using language which would attempt to limit judicial intervention, and thus meeting a problem which has developed under the traditional language, the draftsmen seem to have invited still more appeals to the courts from arbitration decisions.

Now, if the court initially decides the arbitrability of a dispute, then the question of the jurisdiction of the arbitrator to make a “contract of settlement” no longer exists as a problem for the arbitrator or the parties. If the court finds that the particular dispute is not arbitrable, it cannot go to arbitration. While the dispute may remain unresolved, arbitration is no longer available to determine it as long as one party resists. If the court holds that the dispute is arbitrable, that decision binds the arbitrator as it does both parties. Then neither one can again raise the question of arbitrability before the arbitrator.

However, the court’s finding on arbitrability does not measure the extent of the arbitrator’s authority in deciding the dispute. After the arbitrator renders his award, either party may, in a subsequent appeal to court, question whether the arbitrator’s “contract of settlement” exceeded the authority which the parties had delegated to him. As pointed out later, this is one of the essential safeguards that parties may well consider in determining whether to authorize their arbitrator to judge his own jurisdiction instead of resorting to the court to initially decide that question.

III

This, then, is the framework and definition of terms under which I intend to discuss the problems of arbitrability and arbitrator's jurisdiction that arise during the contract term.

I can best discuss these problems under three areas:

1. Procedural problems that arise in processing the case;
2. Balancing the scope of the arbitration clause with the "no strike—no lockout" clause; and
3. The effect of contractual time limits, conditions precedent, and prior settlements.

1. Procedural problems that arise in processing the case

Just as the parties can voluntarily agree to substitute arbitration for court action, so can they voluntarily agree to submit the question of arbitrability and the arbitrator's jurisdiction to the arbitrator. The parties have the right to allow their agent to make a "contract settlement" for them, not only on the merits of a dispute, but also on the extent of his jurisdiction and authority in making that "contract settlement."

Unless the court has predetermined the issue of arbitrability or the contract or submission agreement expressly provides otherwise, either party can raise the issue of arbitrability in the arbitration proceeding before the dispute reaches the arbitrator or when the dispute is before him.

The party objecting to arbitration may raise the issue of arbitrability, as a preliminary one, before the administering agency which the contract designates to appoint the arbitrator or administer the proceedings. Parties frequently name the American Arbitration Association, the Federal Mediation and Conciliation Service, or State Boards of Mediation and Conciliation as agencies to nominate lists of arbitrators from which the parties may make their own selection or, if the parties fail to agree, to appoint an arbitrator or chairman of an arbitration board. Some contracts designate a State or Federal Court as the appointing agency.

Some of these public agencies do not as yet have a fixed policy for processing cases and appointing an arbitrator where one party raises the question of arbitrability or of the arbitrator's jurisdiction at the initial steps. Others have a practice which varies and is applied on a case-to-case basis.

The Connecticut State Board of Mediation has just recently outlined "a general procedure which may be applied at the discretion of the [Board] panel assigned in individual cases" when one party raises the question of arbitrability.

The Board will inform the party protesting arbitrability that it will be permitted to raise that issue at the hearing. The Board will then first hear arguments on arbitrability before it proceeds to the merits of the dispute. The Board makes clear that at the hearing both parties must be prepared to proceed on the merits after the Board has heard them on arbitrability.

After the issue on arbitrability has been presented, "the Board will assess the circumstances then obtaining to determine if it will proceed directly to the merits."

Under its policy, the Board reserves the right either to require the parties "to go forward directly on the merits" at the same hearing or to determine that "the decision on arbitrability should be made first before proceeding on the merits."

The New Jersey State Board of Mediation allows, under its published Rules, a party claiming a "contractual bar" to the proceedings or a "challenge of the demanding party's expression of the issue or issues" to raise such claim in its reply to the other party's demand for arbitration. The Rules then provide that, "where the parties differ as to the arbitrability of an issue or as to the expression of the issue, the Board's Agent will arrange a meeting with the parties for the purpose of drafting and signing of proper submissions."

The New York State Board of Mediation is in the process of drafting a guide to parties on arbitration held under its jurisdiction. Where one party raises questions of timeliness or arbitrability, the Board endeavors to have the parties consent to submit such questions to the arbitrator. If the parties refuse,

the Board may proceed under its appointing function to designate an arbitrator, unless stayed by court action; or the Board may decline to designate an arbitrator until the party seeking arbitration either serves a notice of intention to arbitrate or seeks a court order to compel arbitration, in accordance with the Arbitration Statute of the State of New York.

The American Arbitration Association follows a more formal procedure in processing cases where one party raises the issue of arbitrability. Under its published Rules, the Association states that it "exercises no judicial function and never acts as an arbitrator." The party demanding arbitration initiates the proceeding by "giving written notice to the other party of intention to arbitrate" setting forth "the nature of the dispute and the remedy sought"; and files with the Association two copies of that notice and of the collective bargaining contract, including the arbitration provisions. The other party may, if it so desires, file an answering statement. If no answer is filed, "it will be assumed that the claim is denied." The Rules expressly provide that "failure to file an answer shall not operate to delay the arbitration."

While not set forth in the published Rules, the Association follows a fairly uniform policy for handling cases where one party raises the question of arbitrability and resists the selection or appointment of an arbitrator. Applied on a case-to-case basis, this policy, established by the Association's Law Committee, assures reasonably adequate safeguards to the parties in the arbitration process.

Thus, generally, if the party demanding arbitration makes a showing that the issue in dispute arises under a written collective bargaining contract containing an arbitration clause which on its face presumptively covers the area in dispute, the Association will process the case towards the selection or appointment of an arbitrator, even over the objection of the other party that the dispute is not arbitrable.

Where, however, the objecting party makes a showing (1) that there is no written agreement to go to arbitration or (2)

that the arbitration clause or the contract expressly excludes arbitration over the issue sought to be arbitrated, then the Association will not process the case nor appoint an arbitrator. The Association premises its procedure in handling questions of arbitrability on maintaining a balance between frustration of the arbitration process and the exercise of "judicial functions."

To aid its staff in keeping this balance, the Association seeks the advice of its Law Committee in the more involved cases. The Association's officers and staff also confer with the parties in an effort to have them resolve the arbitrability problem. In this connection, the Association may suggest that the parties submit the question of arbitrability as the first issue to be decided by the arbitrator, if they proceed; or the question of arbitrability may be referred to a separate arbitrator; or the parties may refer the question to the appropriate court.

If the Association proceeds, it notifies the objecting party of its intentions. If it does not proceed, it notifies the demanding party of its intentions. Thus, in either situation, it allows the "aggrieved" party a reasonable period of time to apply to the court, if it deems it advisable, for an order staying or compelling arbitration, as the case may be.

The Federal Mediation and Conciliation Service in December 1955 issued a general policy to handle cases where one party raises the question of arbitrability. The Service makes clear that its primary function is to render mediation and conciliation service to the parties. When a party calls upon the Service to nominate a list of arbitrators or to make an appointment, its policy provides:

Where either Party claims that a dispute is not subject to arbitration the Service will not decide the merits of such claim. The submission of a panel should not be construed as anything more than compliance with a request.

In an effort to further aid the parties, the Service will, when it deems it appropriate, send a mediator to confer with the parties with a view towards resolving the question of arbitra-

bility or other matters concerned with the processing of the case.

State Boards or governmental agencies, in exercising their appointing functions, must consider whether they have legal authority to determine a dispute over arbitrability or the timeliness of a dispute. Generally they limit themselves to decide only questions of procedure. Often they reserve the right to process or refrain from processing the dispute or to appoint an arbitrator, leaving the parties themselves to pursue any remedies available to them under the law. As a rule, appointing agencies endeavor to assist the parties in finding an acceptable solution. One of the methods commonly followed is to have the parties mutually agree to present the question of arbitrability to an arbitrator, either in an independent proceeding or as an issue in the pending dispute.

On the whole, I suggest that the procedures followed by administering agencies in handling this problem of arbitrability provide equitable safeguards to the contracting parties for maintaining their arbitral system. Unlike the tendency of some of the courts, as pointed out above, administering agencies strive to fulfill their appointing function in handling procedural questions, without deciding the merits of the case or without using the merits of the dispute to justify their action. I recognize, however, that at times only a tenuous line separates these two areas. Yet the balance between respecting the parties' agreement to arbitrate and frustrating the arbitral process depends in large part upon keeping these two areas separate and independent. By leaving the "judicial function" in deciding the question of arbitrability to the arbitrator or the court, the administering agencies provide the best safeguard to both parties. It then becomes the responsibility of the contracting parties to decide whether the issue of arbitrability shall be decided by the courts or by the arbitrator.

Now as to the rights of parties to pursue the question of arbitrability before the arbitrator.

Parties may voluntarily submit the question of arbitrability to the arbitrator either in a separate proceeding or as preliminary issue in the proceeding on the merits of the dispute. In either case where the parties choose arbitration as the forum within which to decide arbitrability, they waive thereafter the right to go to court to determine that issue. A party who participates in the processing of the dispute, in selecting the arbitrator, or in attending the hearing will be deemed to have submitted the question of arbitrability to the arbitrator in that proceeding. They thereby, in effect, empower the arbitrator to determine his own jurisdiction over the merits of the dispute.

Just as the court's finding of arbitrability does not measure the arbitrator's authority on the merits, so too the arbitrator's own finding on his *jurisdiction* does not measure his *authority* in rendering an award on the merits of the dispute. Neither does the arbitrator's finding on arbitrability foreclose either party from thereafter appealing the award to the court on the ground that the arbitrator had exceeded his delegated authority in making his award.

Submitting the question of arbitrability to the arbitrator initially, either in the same or in an independent proceeding, offers adequate, if not often better, safeguards to the parties than submitting the issue of arbitrability initially to the court. For, where the court initially determines that a particular issue is not arbitrable, it only means that the parties under their contract cannot use the arbitration process to resolve that dispute. This leaves the dispute unsettled and creates a stalemate. However, where the parties submit the question of arbitrability to the arbitrator, the arbitrator, if he comes to the same conclusion, may deny the grievance on the ground that the dispute lies without the framework of the contract as agreed to by the parties. The arbitrator's denial thus ends the dispute instead of having it result in a stalemate.

Here, again, I recognize that only a tenuous line separates the area between arbitrability and the arbitrator's authority to decide the case on its merits. Yet I suggest that in many cases

a party bases its claim that an issue is not arbitrable on the ground that the contract expressly or impliedly excludes that dispute as a *processable grievance* during the contract term. In those cases, the arbitrator's finding of no jurisdiction rests on the rule of contract construction that an arbitrator has no authority under the guise of arbitrating a dispute to "bargain into" the contract a matter which the parties themselves have "bargained out." Of course, in the final analysis, the forum for deciding the question of arbitrability and arbitrator's jurisdiction rests with the parties. That is their responsibility.

Now, unless the contract or submission agreement provides otherwise, the arbitrator's office constrains him to decide, in the same proceeding and in a single award, all issues submitted to him. The arbitrator cannot, without the consent of the parties, sever the issue of arbitrability from the issue on the merits of the case and decide either issue separately.

Under the common law, which generally prevails in most states as supplemented by statutory law, the arbitrator's jurisdiction in the proceeding terminates when he hands down his award. He becomes, as they say, "*functus officio*"—no longer with authority to act in that proceeding. His "contract of settlement"—his award—divests him of his office of arbitrator.

Thus, unless the parties agree to separate the issue of arbitrability and allow the arbitrator to decide that issue in an independent award, the parties must be prepared to proceed with the merits of the case and submit the entire dispute to the arbitrator. This is not an "arbitrary" choice on the arbitrator's part. It stems from the responsibility which his office places upon him and which he undertakes upon accepting the role of arbitrator. His office of arbitrator constrains him to decide all the issues submitted to him and to make a final determination of them.

A sidelight on this responsibility of the arbitrator—and one which sometimes creates another problem for the arbitrator—arises when one party seeks to withdraw a grievance from the arbitration proceeding after the hearing has commenced.

To illustrate: In a recent case, the Union processed three separate grievances to arbitration. Under each, it claimed that the Company had violated a contract clause by not giving thirty days' prior notice of changes in certain operating jobs. The Company claimed that the parties did not intend that clause to apply to the kind of "changes" which it had undertaken.

After presenting its evidence on the merits of one of the grievances, the Union sought to withdraw it "without prejudice." The Company objected and demanded that the arbitrator render an award denying the grievance. The Union argued that, since it had demanded arbitration for that grievance, it had the right to withdraw it without prejudice and that the arbitrator did not retain "jurisdiction" to decide it on its merits.

In the presence of the parties, I ruled that, once a grievance is submitted to arbitration and a hearing commenced on it before the arbitrator, the withdrawal by the Union which raised it in the proceeding would constitute a final settlement of that grievance on its merits—on the basis of the Company's last answer given in the last step of the grievance procedure. The Union having refrained from proceeding further on that grievance, I incorporated that ruling in the award, stating:¹²

The office of Arbitrator charges him with the responsibility of finally determining a dispute voluntarily submitted to arbitration by the Parties. The Arbitrator's jurisdiction and authority which imposes that responsibility stems from the Contract, and binds the Arbitrator as it does both Parties. Once the Arbitrator acquires jurisdiction, neither Party, over the objection of the other, retains the right, in the absence of a contrary contract provision, to frustrate the function of the Arbitrator's office; or prevent the Arbitrator from making a contract of settlement on the merits of the issue before him. After the dispute is submitted to the Arbitrator and the hearing commenced on its merits, neither Party can prevent the rendering of a

¹² Celanese Corp. of America, Narrows, Va., and United Construction Workers, Local 153, Aff. United Mine Workers of America.

binding settlement by his own default or request to withdraw, upon the objection of the other Party.

Another arbitrability problem arises where an arbitrator in a prior case held that a particular grievance raised by the Union was not arbitrable or where he denied the grievance on its merits and the Union later demands arbitration of a grievance involving the same facts or issues but affecting other employees in the bargaining unit.

To illustrate: The Union had claimed,¹³ in a prior dispute that went to arbitration, that the Company had violated the contract by improperly re-evaluating and reducing the jobs of certain machine operators to a lower labor grade, with consequent loss in incentive earnings. The re-evaluation arose from changing single machine operations to operating multiple machines in tandem. The arbitrator's award, in effect, held that the Company's action in re-evaluating the jobs in question and reducing them one labor grade did not violate the contract.

Thereafter the Company extended the re-evaluating program to other operations, affecting other employees. Meanwhile, the then existing contract between the parties expired.

During the negotiations, the Union did not raise the issues of the re-evaluation and reduction in labor grade of the jobs that had been the subject of the arbitrator's award, nor of the extension of the re-evaluating program.

After the Parties had executed the renewal contract, the Company further extended the multiple "tandem" machine operations to other departments, affecting still more operators. The Union then filed another grievance. The Company denied it on the ground, among others, that the same issue had been decided by arbitration in a prior case and that it was therefore not arbitrable. At the hearing, the Company claimed that the arbitrator in the instant case did not have jurisdiction. The Company argued that the award in the prior arbitration case "foreclosed" the Union from raising the same issue again and

¹³ Federal Bearings Co., Inc. and United Automobile Workers, CIO Local 297.

that that award "bars" the arbitrator from passing upon it. In effect, the Company claimed that the Union was attempting to get a "second shot" on the same issue in a second arbitration proceeding.

In the award, I held that the issue presented in the instant case was arbitrable under the contract. I stated:

Unless the Parties agree otherwise in their contract, an arbitrator's award rendered in a prior arbitration proceeding between the same parties does not stop either party from raising the same issue in a subsequent arbitration; nor does it bar the arbitrator from determining the same or a similar issue anew.

While a prior award between the parties does constitute a "contract of settlement" by the parties themselves and therefore can be considered as material evidence on the merits of the dispute, it does not constitute a "judicial precedent" affecting the arbitrability or limiting the arbitrator's jurisdiction in future cases between the parties, unless by their contract the parties agree that it should. The legal doctrine of "stare decisis"—judicial precedents—does not apply to the arbitration process. That doctrine, which prevails under our common law judicial system, in effect cautions the courts against declaring wrongful that which custom and usage has sanctioned and which the weight of judicial authority has approved. Under that doctrine, legal principles of contract construction which have been distinctly enunciated have been given the force of law. Court decisions and judgments are thereby accorded authoritative weight as "legal precedents" in determining similar principles in future cases.

Arbitrators' awards do not have a corresponding authority or force. They are not accorded the weight of "judicial authority" in determining future controversies, even between the same parties or over the same issues. They are not conclusive or binding upon an arbitrator in subsequent cases. In arbitration, all questions of fact and law are deemed to be referred to the arbitrator for decision. Unless restricted by the contract or sub-

mission agreement or an applicable state statute, the arbitrator is not bound by the strict rules of law or evidence. As long as the arbitrator keeps within his delegated authority, he can decide the issues submitted to him, notwithstanding any prior awards between the parties, unless they have agreed otherwise.

I may say that prior awards often do, however, play a part in arbitration. They may exert a "persuasive" force which compels consideration. Prior awards which enunciate just and reasonable principles of conduct and contract interpretation command respect from an arbitrator, as they should from the parties themselves. The considered judgment of one arbitrator cannot be lightly dismissed or ignored. Though not controlling as a bar to the arbitrability of future cases, the award or the principles enunciated by the award in a prior arbitration between the same parties may be accepted by the arbitrator in a future case as a "contract of settlement" by the parties and thus considered as a material fact on the merits of the dispute. Awards between other parties may also be considered by an arbitrator as any other expert or opinion evidence if it is material to the issue before him and may aid him in reaching a fair decision.

In case some of you are wondering how that dispute was decided, I may say that the Union's grievance was denied on its merits, principally on the ground that the Union, by failing to raise the issues of the Company's action and of the holding of the prior award during the renewal contract negotiations, had in effect acquiesced in and accepted the propriety of the Company's evaluation of the changed jobs as found by the prior award—the prior "contract of settlement."

There was another procedural question in that case which raised a different problem of arbitrability—enlarging or adding other issues to the material one raised by the grievance as processed through the grievance steps.

The Union claimed during the hearing that, were the Company's action in re-evaluating the jobs to be upheld, the arbitrator should adjust the base rates of the jobs to allow the em-

ployees to maintain their former incentive earnings, which the re-evaluation program had reduced in violation of the contract.

The Company claimed that the arbitrator did not have "jurisdiction" in the instant proceeding to consider that issue, as it had not been raised in the grievance.

The Company's objection to the arbitrator's jurisdiction was sustained on the ground that the setting of base rates and applying the incentive plan established by the contract were not material to the issue raised by the grievance. The arbitrator held that they were independent issues, which the Union must raise under a separate grievance and process through the grievance procedure in accordance with the contract.

There are, of course, other procedural problems affecting arbitrability and jurisdiction that confront arbitrators in the processing of the case. I will refer to some later. At this point, I would like to raise a broader problem as it affects this subject, namely:

2. Balancing the scope of the arbitration clause with the "no-strike—no lockout" clause

I can best introduce this problem by referring to that memorable paper—"Reason, Contract, and Law in Labor Relations"¹⁴ which our former colleague, Professor Harry Shulman delivered shortly before his untimely death last year. Professor Shulman presented that paper as the 1955 Oliver Wendell Holmes Lecture at Harvard Law School. Our Academy has made that paper available to us as a tribute to one who lent his great talents in developing the field of labor arbitration.

Professor Shulman, like a skillful surgeon, reveals the fundamental role that arbitration plays in modern labor-management relations. Speaking of the function of grievance machinery whereby labor and management seek to settle their differences and resolve stalemates, Professor Shulman said:

¹⁴ Harvard Law Review, Vol. 68, No. 6, April 1955. Reprinted as Appendix A in this volume.

In the absence of provision for resolution of stalemate, the parties are left to their own devices. Since grievances are almost always complaints against action taken or refused by the employers, a stalemate means that the employer's view prevails. Of course, in the absence of some restraint by contract or otherwise, the Union is free to strike in order to reverse the employer's choice.

Noting that "parties do not generally restrict their own joint powers in the grievance procedure" but customarily "limit the arbitrator's jurisdiction with apparent strictness," Professor Shulman observes:

Doubtless these are wise, perhaps even necessary, safeguards—at least before the parties develop sufficient confidence in their private rule of law to enable them to relax the restriction. And an arbitrator worthy of appointment in the first place must conscientiously respect the limits imposed on his jurisdiction, for otherwise he would not only betray his trust, but also undermine his own future usefulness and endanger the very system of self-government in which he works.

Then Professor Shulman considers "some of the difficulties and limitations of the arbitrator's functions"—as where the contract "is completely silent on a matter in dispute." The problem then arises as to the relation between the arbitrator's jurisdiction under the limited arbitration clause and the "reserved power" of management, often expressed in the labor agreement.

"The obvious alternative," Professor Shulman says in dealing with this problem, "is for the arbitrator to refrain from affirmative decision and to remand the dispute to the parties on the ground that it is outside of his jurisdiction." "But would not that," Professor Shulman asks, "be in effect a decision supporting the employer's freedom of action?" He concludes this subject by referring back to his earlier remarks on resolving stalemates under the grievance machinery:

Again, the denial of jurisdiction presumably leaves the dispute for resolution by the parties. But whether the Union may properly resort to economic pressure in the effort at resolution may depend upon the construction of the "no strike" provision of the agreement. The obligation not to strike may or may not be coextensive with the arbitrator's jurisdiction.

These observations of Professor Shulman sharply raise the underlying conflict between the scope of the arbitration system parties set up under their contract and the jurisdiction they intend to confer upon the arbitrator called upon to serve under it.

To what extent do parties intend their arbitration system to be a substitute for the use of economic force to settle differences during the contract term? To what extent do they expect their private arbitration system to help them in self-regulating their affairs and secure for them continuity of relations and uninterrupted production and jobs during the contract term?

Clearly, these are basic "interest" questions which only the parties themselves can give the answer to.

Yet I suggest it is because the parties in many cases have not had a "meeting of minds" on these basic questions that many of the problems of arbitrability and arbitrator's jurisdiction arise—for the parties as well as for their arbitrator.

Thus, when the arbitration clause provides:

Any grievance or dispute arising during the term of this Agreement, between the Company and the Union or between the Company and any employees covered by this Agreement, if not settled by the Parties, shall be submitted to final and binding arbitration.

is it not reasonable to assume that those parties intended their private arbitration system to be equivalent—coextensive—with the "no strike—no lockout" clause or concept, expressed or implied in their contract? And is it not equally reasonable to find that, under the clear and unambiguous language of such a clause, they intended "any grievance"—whether or not covered

by a contract clause—to be arbitrable? and to give the arbitrator serving under such a clause jurisdiction to decide “any dispute” that the parties themselves were unable to settle? We are not here concerned with the standards or guideposts that the arbitrator under such a clause would follow in deciding the merits of the dispute, but only with the question whether he would have jurisdiction to decide it.

Likewise, under a similar “unlimited” clause, which provides for arbitration of “any dispute relating to rates of pay, hours or working conditions,” it is not reasonable to assume that the parties intended their arbitration system to be coextensive with the goal of uninterrupted production and jobs which the “no strike—no lockout” clause expresses. This type of unlimited arbitration clause comes about, though sometimes unwittingly, when the grievance procedure provides for arbitration as the terminal step and the contract fails to define what constitutes a grievance that is processable under the grievance steps or fails to enumerate the kinds of “unsettled” grievances that the parties intend to be “subject to arbitration.”

Under such an unlimited arbitration clause, the problem arises whether the parties intended “working conditions,” not expressly covered by a substantive provision, to be subject to the arbitrator's jurisdiction.

Thus, in one case under this type of unlimited clause, the Union appealed to arbitration a grievance that the Company failed to provide employees with “sufficient coffee” because the foremen, whose “coffee break” took place ten minutes before that of the production workers, “had drunk up all the coffee.”

In another case, the Union appealed to arbitration a grievance that the Company had refused to provide “adequate rest room facilities,” thereby causing employees working on piece rates to lose incentive earning opportunity when they had to leave their machines and “wait on line” to use the facilities.

Other examples are claims for “extra” premium pay for employees “called in” before their regularly scheduled hours of work or “called back” after the end of their scheduled shift;

disputes over preferential seniority rights of employees transferred out of, and then back into, the bargaining unit; or grievances over the "equal distribution of overtime work." When the contract is silent on these matters, disputes over them raise problems, under the unlimited type of arbitration clause, of the arbitrator's jurisdiction to make a "contract of settlement" for the parties.

On the other hand, when the clause limits arbitration to "grievances or disputes involving the interpretation, application, or claimed violation of the provisions of this Agreement," is it not equally reasonable to assume that the parties did *not* intend their private arbitration system to be equivalent in scope with the "no strike—no lockout" clause? And is it not equally reasonable to find that, under the clear and unambiguous language of such a clause, the parties intended grievances not covered by expressed contract provisions to be outside of the arbitrator's jurisdiction?

I do not raise these rhetorical questions for my colleagues in the National Academy alone. I raise them for our principals—management and unions—whom we seek to serve under the standards that Professor Shulman described above.

For just as an arbitrator "worthy of appointment" must "conscientiously respect the limits imposed on his jurisdiction," so too must the parties respect the limits of his function as set forth in the clause which creates his office. Both are equally vital to preserve the "very system of self-government" which the arbitral process seeks to establish under the labor contract. Both must be respected to preserve that sense of security which arbitration offers to the parties.

The way management and labor in Canada have sought to answer these basic questions may help parties in resolving this problem.

In the Province of Ontario¹⁵ the law requires that "every collective agreement * * * shall provide that there will be no

¹⁵ The Labour Relations Act, Revised Statutes of Ontario, as amended 1954, Chapter 42.

strikes or lock-outs so long as the agreement continues to operate." To balance that prohibition, the law further provides that "every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, *including any question as to whether a matter is arbitrable.*" (emphasis supplied)

Thus empowering the arbitrator to determine his own jurisdiction as to whether "a matter is arbitrable" makes the final and binding arbitration system co-extensive with the "no strike—no lockout" prohibition during the contract term.

On the other hand, the Labour Relations Act of the Province of Quebec¹⁶ provides that "any strike or lockout is prohibited for the duration of a collective agreement, until the complaint has been submitted to arbitration in the manner provided in said agreement, or failing any provision for such purpose, in the manner contemplated by the Quebec Trades Disputes Act and until 14 days have elapsed since the award has been rendered without it having been put into effect."

Since under the Quebec Trades Disputes Act the arbitrator's award is not final or binding upon the parties, the law in effect only tolls the right to strike or lockout until the lapse of the stated period of time after the award has been rendered. There again, though in converse, the limited scope of the arbitration process bears an equivalent relationship to the limited scope of the "no strike—no lockout" prohibition during the contract term.

While under the Ontario system problems of arbitrability and jurisdiction may and do arise, no question exists as to the forum to decide them. The law expressly requires that the parties empower the arbitrator to determine his own jurisdiction and, coextensive with that, the law prohibits strikes or lockouts during the contract term.

¹⁶ The Labour Relations Act, Revised Statutes of Quebec, as amended 1954.

I may say that, during my several trips to Canada this year, I heard problems of arbitrability and arbitrator's jurisdiction discussed with somewhat the same vehemency as parties do in some of our States. However, I did not find any substantial feeling that submitting the issue of arbitrability to the arbitrator provided less safeguards to the parties than submitting it to the courts; nor did this procedure lessen the sense of security that the arbitration process served to give both parties under the labor agreement.

Of course, the "limited" type of arbitration clause, referred to above, does not preclude problems of arbitrability and arbitrator's jurisdiction from arising. Frequently these problems arise where one party relies upon "past practice"—either by a course of conduct or through prior settlements of grievances—to support its claim of "contract" violations. Such a problem arose in a case which came before me this year.

The Union claimed that the Company had violated the "Hours of Work and Overtime" clause by failing to pay premium pay to employees assigned to work a shift different than their posted scheduled shift of work. The Company claimed that the dispute was not arbitrable, since the contract clause relied upon by the Union was silent on the subject of posting schedules and premium pay for working out of shift.

The Union acknowledged that the written provisions of the contract did not expressly cover those "matters"; but it claimed that years back, after the original contract had been executed, the parties had agreed to modify the written clause to provide for the posting of schedules and the payment of premium pay for working assignments outside of the posted schedules, and that the parties had, during all the ensuing years, applied those changes. The Union relied upon "written minutes" of that meeting and the "past practice" under it to support its claim.

The Company countered that the arbitration clause covered only the "interpretation and application of the provisions of this agreement"—emphasizing the phrase "this agreement." It further pointed to the contract clause that stated that the

arbitrator "shall only have jurisdiction and authority to interpret, apply and determine compliance with the provisions of this Agreement, but he shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement."

The Company argued that, whether or not such a collateral or "extra-contractual" agreement had been made or a "past practice," as claimed by the Union, had in fact existed, these facts were not material to the question of arbitrability under the contract as written. The Company claimed that the arbitrator did not have jurisdiction to decide the dispute under the explicit language of the arbitration clause, which limited his jurisdiction to "provisions of this Agreement."

As the parties had settled that case after the oral hearing, I did not have to decide my jurisdiction over that issue. But the problem it raised still persists with me. For, while the arbitration clause stated that the arbitrator "shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions" of the agreement, it did not limit the parties themselves from "adding to" those provisions. In applying general contract standards at the bench level—and in settling grievances—parties of necessity add the muscle and sinews to the contract framework in working out their day-to-day relationship. And, if in fact the parties had "added to" areas covered by the contract by a collateral agreement—oral or in writing—substantiated by an established "past practice," would not that collateral agreement have become a "provision" of the agreement and therefore subject to the arbitrator's jurisdiction?

While arbitrators, like courts, may disagree on the answer to that question, I suggest that a "collateral" agreement that relates to the area covered by a contract clause, if proved, becomes as much a provision of the contract as the written provision itself. To the same degree, a "past practice" based on conduct or prior grievance settlements, if proved, becomes, in effect, a collateral supplement or addendum to the written contract, and, under the commonly used "limited" arbitra-

tion clause, the arbitrator has jurisdiction to decide a grievance arising thereunder.

I realize that this position has exceptions and that the facts and circumstances of each case will in the final analysis determine the question of jurisdiction. However, in considering the effect of the "not add to, subtract from" clause, I suggest that parties intended such clause to limit the arbitrator's authority in deciding the grievance on its merits, and not to limit either the arbitrator's jurisdiction to hear the case or the arbitrability of the dispute.

I may point out that the provision setting forth the grievance and arbitration system in the case I referred to concluded with the following clause:

No suspension of work shall take place by lockout or strike pending the adjudication of any matter taken up for adjustment until the above procedures have been followed through or during the life of this Agreement.

Since the "above procedures" covered the grievance and arbitration system, would it not be reasonable to find that, under that clause, the parties intended to make their grievance and arbitration system coextensive with the "no strike—no lockout" prohibition "pending the adjudication of any matter taken up for adjustment?"

A problem of like kind arises, under a contract term of two years or more with a "reopening" clause, on the yearly anniversary date of the contract. If the contract fails to provide for the event where the parties fail to reach agreement after negotiations, would that omission toll the "no strike—no lockout" clause? Or would that prohibition be contractually binding?

I suggest that, under the "unlimited" arbitration clause, referred to earlier, in the absence of any provision or facts showing a contrary intent, the parties intended that either the dispute under the "reopening" was arbitrable or that the "no strike—no lockout" clause was to be tolled.

On the other hand, under the "limited" arbitration clause, I suggest that the parties did not intend a dispute over new

contract clauses under a "reopening" to be arbitrable. This, of course, would not resolve the question of the effect of such a finding upon a "no strike—no lockout" clause which did not provide for such contingency. That, I suggest, is a matter for the parties themselves to resolve.

Here, again, these are general observations primarily given to point up the problems that sometimes face arbitrators and to encourage you, during the discussion, to give us the benefit of your views and experiences.

I now come to the third area.

3. The effect of contractual time limits, conditions precedent, and prior settlements upon arbitrability and the arbitrator's jurisdiction

Time limits or conditions set forth in contract clauses bind the parties as they do the arbitrator. The problem that often arises, however, is whether the parties intended those time limits or conditions to limit the arbitrability of the dispute or to limit the arbitrator's authority in deciding the dispute.

This problem comes about when the time limits or conditions are set forth in substantive clauses, without reference to the grievance or arbitration clause.

Thus, a contract clause may provide:

Qualified employees must submit their bids, in writing within ten (10) days after the openings are posted.

If a qualified employee fails to bid for the job within the prescribed time or fails to comply with the condition that he submit his bid in writing, irrespective of the reason for his failure, and a dispute subsequently arises over the Company's action in disregarding that employee's late bid, is the Union foreclosed from appealing the dispute to arbitration? In other words, is such a dispute arbitrable? Does the arbitrator have jurisdiction to pass upon it and consider the reasons for the employee's failure to bid in time?

The answer to those questions depends on the intent of the parties in setting up those time limits and conditions. In the

absence of facts showing a contrary intent, I suggest that time limits and conditions expressed in substantive clauses which do not refer to the grievance or arbitration clause may reasonably be construed as not limiting the arbitrator's jurisdiction to hear the case—the arbitrability of the dispute—but are matters which the arbitrator should consider in deciding the dispute on its merits.

On the other hand, time limits or conditions set forth in the grievance or arbitration provisions, unless waived by the parties, limit the processing of the dispute and its arbitrability.

Thus, in a clause which states:

If the Union desires to appeal the Company's answer rendered in the last step of the grievance procedure to arbitration, it must do so in writing, within ten (10) days after the Company's answer is given.

the time limit and requirement of written notice there goes to the processing of the grievance; unless they are met, those preconditions can reasonably be construed as a bar to processing the case further under the grievance or arbitration system. Here it would appear that the parties intended that, unless the employee or the Union processed the grievance in the way the parties agreed, the grievance was to be considered "settled" on the basis of the Company's last answer rendered in the grievance steps; and that such a settlement was not further processable or arbitrable.

In the same way both the arbitrability of a dispute and the arbitrator's jurisdiction over it are limited by the time limits within which a grievance progresses from one step to another in the grievance procedure or by a contract condition that states:

An unsettled grievance may be submitted to arbitration only after it has been processed under the foregoing steps of the grievance procedure.

Claims that the parties had waived such time limits or conditions, either by expressed consent or by an unequivocal course

of conduct showing that the parties had acquiesced in the waiver, become material facts which the arbitrator may consider in determining whether the dispute is arbitrable. Here, again, I suggest that if the arbitrator finds that the parties had not waived the time limits or conditions, he may properly deny the grievance on those grounds rather than leave the grievance in a stalemate. I suggest that that is what the parties had intended when they agreed upon time limits and conditions precedent for going to arbitration.

Another problem affecting arbitrability arises when the parties' representatives in the grievance steps settle a grievance and then, later, one party seeks to disavow the settlement and submit it to arbitration.

Questions then arise whether the parties' representatives had "authority" to make the settlement; whether a settlement, as such, had been made or merely "discussed"; and what are the extent and effect of such settlement upon the written provisions of the contract.

Grievance machinery in most contracts name the office of the parties' representatives charged with the responsibility of settling grievances in each step. Unless expressly stated otherwise, representatives who fill those offices have authority, expressed or implied, to make final settlements that bind their principals. Otherwise there would be no validity to the system of "self-government" that the grievance procedure seeks to set up. Arbitration, used most frequently as the terminal step in that procedure, serves to handle those grievances that the parties themselves are unable or fail to settle. Otherwise, the "settlement,"—to use words of one of the cases I referred to earlier—"would become the commencement instead of the end" of the dispute or grievance.

I suggest that the arbitrator's responsibility as part of that system of "self-government" constrains him to respect a settlement made by the parties' representatives in the grievance steps. The "contract of settlement" made by parties or their authorized representatives should be honored by the arbitrator,

just as the "contract of settlement" made by their arbitrator should be honored by the court. Differences over the authority of representatives to make the settlement under the contract or over the extent or effect of such settlement may be considered as material facts to determine the arbitrability and the arbitrator's jurisdiction. But here, again, those facts should be considered independently of the merits of the settlement.

And now I would like to close my part of this proceeding with the words of Professor Harry Shulman on the arbitrator's role in labor arbitration—both as a tribute to him and as a reminder to our principals whom we serve under the labor contract:

A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.

Discussion—

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Jules Justin has made a genuinely helpful contribution to improved knowledge and understanding of this subject and has provided a sound analytical base for fruitful discussion.

The conventional role of a discussant is to tear a paper apart when he finds himself in basic disagreement with the paper's thesis or its findings. This role I cannot play because I find

nothing to quarrel with in Mr. Justin's factual reporting, nor do I differ with most of his value judgments.

This being the case, the available alternatives are as follows: (1) to engage in "fly-specking" criticism on minor points of disagreement, (2) to hand down an award sustaining the paper without opinion, (3) to summarize and repeat some of the paper's principal conclusions, or (4) to present a thesis of my own on the subject under discussion.

I am ethically opposed to resorting to the first of the four alternatives mentioned and constitutionally unable to render an award without an opinion. The paper is so meaty and covers such a range of discussable subjects that an attempt at summary would require exceeding the time limits. Therefore, I am taking the liberty of presenting briefly some views of my own within the framework of Mr. Justin's analysis and related to some of his principal conclusions.

In adopting this alternative, I am aware that most arbitrators present would vote to sustain a motion to vacate these remarks on the ground that the discussant has exceeded his delegated authority.

My own arbitration experience does not support Mr. Justin's conclusion that problems of arbitrability and arbitrator's jurisdiction are of serious magnitude and are likely to become more provoking and perplexing in the future. I have never been involved in a situation where either party went to court on a motion to stay arbitration on a contention of non-arbitrability, nor have I had any awards reviewed by a court on a motion to vacate or in a proceeding to compel enforcement.

Thus much of Mr. Justin's paper deals with matters that are foreign to my own experience. Also, I have had little contact with contracts providing for unlimited arbitration. A survey of the recent literature on arbitrability leads me to conclude that I have led a sheltered, happy, and perhaps a typical life as an arbitrator.

I agree emphatically with Mr. Justin's carefully drawn distinction between what is arbitrable and the delegated scope of

the arbitrator's authority. As Mr. Justin correctly points out, it is judicial confusion over this basic distinction that has been largely responsible for court decisions making arbitrability rulings in terms of the merits of the dispute. I like Mr. Justin's description of an arbitrator as an agent appointed by both parties whose "office" is to make a "contract of settlement" for the parties. If this view of the arbitrator's function were more widely understood and held by the parties, the existing confusion on problems of arbitrability and jurisdiction would certainly be reduced.

The proper point of departure for an attack on arbitrability questions is the attitudes and understandings of the parties to the contract. In a model relationship from the standpoint of stable and constructive contract administration, the parties agree on the role they wish arbitration to play and conduct themselves in accordance with such fundamental understanding. In so far as carefully drawn contract language can accomplish the purpose, the contract will delineate those matters which are arbitrable and those which are not. More important, however, is a joint willingness to abide by the principle that the parties themselves are best fitted to decide arbitrability issues that may arise.

If the contract is one whose grievance procedure is open in the early steps but confines arbitration to those grievances involving interpretation and application of the contract, it is vitally important that there be a fundamental understanding of the need to abide by rather than circumvent this distinction. Specifically, it is essential that the Company avoid an overly narrow view as to what is an arbitrable grievance and that the Union refrain from seeking to stretch limited into unlimited arbitration or from seeking to secure through arbitration what it failed to obtain in negotiations.

Even in an ideal relationship, occasionally a bona fide dispute will arise as to whether a particular grievance is properly arbitrable. If so, should the dispute be resolved by an arbitrator or by a court?

On this issue I must commend Mr. Justin for his self-restraint. Although Mr. Justin would doubtless prefer to have arbitrability issues decided by arbitrators rather than by courts, he never says so in so many words. He limits himself to emphasizing that it is the responsibility of the contracting parties to decide whether the issue of arbitrability shall be decided by the courts or by the arbitrator.

I agree that it is the parties' responsibility to choose their forum. However, if the parties are jointly concerned over improving contract administration, it seems to me that the case for making arbitrability an arbitrable issue is a highly persuasive one. I find myself in agreement with the 1951 Majority Report of the American Bar Association's Committee on Administration of Union-Employer Contracts, Section of Labor Law, which concludes that "a preliminary decision relating to arbitrability by the arbitrator is an inherent part of his duty."¹

I am not convinced by the arguments of those who prefer the courts as the forum for deciding arbitrability. I suspect that resort to the courts in the great majority of cases reflects imperfect understanding of the arbitration function, lack of confidence in the arbitrator before whom the issue might arise, or in some cases bad faith on the part of the party seeking a motion to stay (i.e., motives of delay or harassment).

Using courts rather than arbitrators to decide arbitrability questions is frequently supported by the argument that this is the most effective way, if not the only way, to discourage a stream of irresponsible grievances outside the contract via arbitration.² I submit that if such a belief is widely and sincerely entertained, it should stimulate every one of us in the arbitration profession to do some soul-searching re-appraisal of our own standards in deciding arbitrability issues.

¹ The text of majority and minority reports of this committee may be found in 18 *LA* 942-955. The quoted sentence from the majority report appears on p. 950.

² For a penetrating discussion of arbitration versus the courts as a forum for arbitrability issues, see Jesse Freidin, *Labor Arbitration and the Courts*, Philadelphia: University of Pennsylvania Press, 1952, *passim*.

If a party genuinely feels that a particular dispute is non-arbitrable, i.e., that its subject matter is outside the contractual agreement to arbitrate, and he chooses the court rather than the arbitrator to test the validity of his belief that the dispute is in fact non-arbitrable, his action clearly implies lack of faith either in the arbitrator's ability to understand or in the arbitrator's ability to resist the temptation to enlarge improperly the scope of his jurisdiction. In either case, such lack of faith constitutes a serious indictment of arbitrators and the arbitration function.

Some foundation for this scepticism undoubtedly exists. Arbitrators are human and may well be more deeply convinced of the utility of the arbitration mechanism than the parties they serve. Therefore, some arbitrators may be prone to take a more elastic view of arbitrability than perhaps they should. In some cases, one suspects the arbitrator's unspoken policy in borderline cases has been to take jurisdiction on the arbitrability issue and then to deny on the merits. This is exactly the reverse principle of the one for which we are belaboring the courts of allowing their views on the merits, or their fears of what arbitrators might do on the merits, to push them into an abnormally narrow construction of what is arbitrable.

To the extent that we as arbitrators have been guilty of the temptation to enlarge improperly the scope of our jurisdiction as defined by contract, we must assume some share of the blame for the march to the courts as a forum on arbitrability issues. However, most arbitrators are firmly committed to the principle that the parties are entitled to have the type of arbitration they want.

Mr. Justin's thoughtful delineation of the arbitrator as an agent engaged by the parties to make a contract of settlement for them on certain types of disputes underlines this basic fact that the arbitration mechanism is solely a creature of the parties and can be tailored to their purposes. If a party considers that a particular arbitrator's views on arbitrability are too elastic or flexible for his taste, I submit that the remedy is not to reject arbitration but to reject the arbitrator.

In summary on this issue of the proper forum, I find myself in complete agreement with Jesse Freidin's conclusion in favor of placing arbitrability issues in the hands of the arbitrator "on the ground that he is as capable as the judge of deciding the question of contract interpretation, and that he will bring to bear upon it and the manner and language of its decision important considerations that he is normally more capable of weighing."³

Realistically, even if the type of improved understanding by the parties and arbitrators called for in these remarks is achieved, we are not likely to achieve the millenium of all arbitration for the arbitrators. If the parties continue to use courts as a forum on arbitrability, it is sincerely to be hoped that Mr. Justin's paper will be widely studied by the learned judges. It is also to be hoped that the judges will pay heed to his stricture that when a court is called upon to decide on arbitrability it should decide that question alone—and not the merits of the dispute. Nor should a court permit itself to use the merits of the dispute to support its finding on the issue of arbitrability or jurisdiction of the arbitrator.

The foregoing remarks have been concerned primarily with only one of several intriguing problem areas thoroughly explored in this excellent, scholarly paper. I should not wish the emphasis of these remarks to be interpreted as depreciating in any way the value of the paper's thorough treatment of other aspects of the central problem which time precludes me from discussing. We are greatly indebted to Mr. Justin for his thoughtful exposition of the procedural policies of designating agencies when a party raises an arbitrability question and for his thorough analysis of the problem of dovetailing the scope of the arbitrator's jurisdiction with the contract's no-strike clause.

In conclusion, I should like to comment very briefly on the question as to whether an arbitrability issue should be argued in an independent proceeding or combined with argument on

³ *Ibid.*, p. 6.

the merits without prejudice to the rights of the party raising the issue of arbitrability. Mr. Justin states flatly that the arbitrator's office prevents him from severing the arbitrability issue from the merits of the case without the consent of the parties. I am in no position to quarrel with the legal correctness of his conclusion. Also, there are obvious practical considerations of hearing efficiency and avoidance of delay that favor combining jurisdictional argument and argument on the merits in the same proceeding. However, I respectfully suggest that whenever this is done the force of the argument of the party contesting the arbitrator's jurisdiction is realistically, if not technically, somewhat weakened. In the first place, it is a psychologically difficult role to contend vigorously that the arbitrator has no jurisdiction over the case and then proceed to assert that, even if the arbitrator holds such contention to be in error, the case has no substantive merit anyway. Furthermore, when the arbitrator has heard both the jurisdictional argument and the argument on the merits, he is exposed to the temptation to allow his judgment on the merits to influence his ruling on jurisdiction. Both of these difficulties are avoided if arbitrability is argued independently by consent of the parties.⁴

Parties who are operating in good faith with a mature understanding of the arbitration function should rarely disagree on arbitrability. When a genuine disagreement arises, it will be important enough to merit independent consideration.

at 22 LA 143.

⁴ For an illustration of the procedure here advocated, see my decision in a case involving the John Deere Des Moines Works and Local No. 450, UAW-CIO, February 2, 1954, reported