Georgia Law Review

Volume 1
Number 3 *Number 3*

Article 3

4-1-1967

Express Exclusions from Arbitration--Accommodating the Consensual with the Non-Consensual

S. Phillip Heiner

EXPRESS EXCLUSIONS FROM ARBITRATION —ACCOMMODATING THE CONSENSUAL WITH THE NON-CONSENSUAL

*S. Phillip Heiner**

ANY attempt to digest the Supreme Court's 1960 "Steelworker's Trilogy"[1] of arbitrability decisions meets the same difficulty generally encountered in Supreme Court decisions, *i.e.*, in attempting to provide guidelines for the lower courts, the Court departs from the confines of the fact situation at hand and sets forth broad, sweeping principles to dictate the judicial approach in coping with the myriad fact situations yet to arise. Emanating from a less august source, such attempts to lay down rules not necessary to the disposition of the "case" being decided might be dismissed more lightly as "judicial legislation" or dicta.[2] However, when the Supreme Court performs in this manner, such jurisprudential slips, although not unnoticed, become secondary to ascertaining the content of the guidelines.

It is not the purpose of this Article to attack the general legal, historical or policy bases of the Supreme Court's arbitrability decisions. Not only is it too late, but it is submitted that they are eminently sound, since arbitration of labor disputes has a quite different function from arbitration under an ordinary commercial agreement.[3] Thus the judicial hostility usually evidenced by courts toward commercial arbitration has no place in the labor field.[4] Therefore, the purpose of this article is [i] to ascertain the content of the broad rules laid down by certain of the Supreme Court's "substantive" arbitrability decisions to date,[5] [ii] to suggest the proper application of these rules

* Member of Georgia Bar, Associate, Kilpatrick, Cody, Rogers, McClatchey & Regenstein; B.A. 1962, LL.B. 1965, Univ. of Va.

1 United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) [hereinafter cited as *Warrior & Gulf*]; United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) [hereinafter cited as *American Mfg. Co.*]; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) [hereinafter cited as *Enterprise*]. Since the *Enterprise* case dealt with the judicial enforceability of an arbitral award, and not with the threshold question of arbitrability, it is not within the scope of this work.

2 See generally Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

3 *Warrior & Gulf*, 363 U.S. 574, 578 (1960).

4 *Ibid.*

5 In addition to the Trilogy decisions cited in note 1, *supra*, the following Supreme Court decisions have made distinct contributions to the question of "substantive" arbitrability: John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Local 721, Packinghouse

to certain fact situations not yet faced by the Court; and [iii] to warn against an inflexible application of the principle that

> an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[6]

Some Preliminary Observations

A quite natural reaction to the subject matter at hand is "what difference does it make?", that is, why would parties ever desire to exclude claims from arbitration? It is undoubtedly true that many employers view arbitration as a means whereby the union attempts to extract from management concessions which it could not win at the bargaining table. As such, in the employer's view, the only certain way to make its collective bargaining rights a reality is to exclude from arbitration those disputes involving the "true" management functions.

As to certain categories of grievances which may have been a source of uncertainty and conflict under the immediately preceding agreement, either party may desire to remove them from the "give and take" arena. Perhaps the union would rather obtain the right to strike over such grievances, and the employer, in turn, would prefer to put the union to this "all or nothing" choice. This writer can find nothing in any of the Supreme Court's opinions to date which would suggest that "labor and management are no longer free to retain the strike as a means of settling industrial disputes or to limit the scope of arbitration to a minimal number of issues . . . ,"[7] despite the contrary policy inhering in many of our national labor laws.

Workers v. Needham Packing Co., 376 U.S. 247 (1964); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962). I do not include within this group Local 2549, Piano Workers v. W. W. Kimball Co., 379 U.S. 357 (1964), or Petroleum Workers v. American Oil Co., 379 U.S. 130 (1964), since the Supreme Court's summary disposition of those two cases added little to an understanding of the emerging federal law of grievance arbitration.

Moreover, it is necessary to distinguish at the outset between what appear to be two distinct types of substantive arbitrability rules: (1) *general* rules for construing the scope of the arbitration promise, and (2) more specific rules, the applicability of which is limited to the existence of particular facts (*e.g.*, the "no waiver" rule of *Drake Bakeries* and *Needham Packing*, *supra*, and the "survival" rule of *John Wiley*, *supra*). Although these latter rules are an outgrowth of those of the former type, their application is not within the scope of this Article.

6 *Warrior & Gulf*, 363 U.S. 574, 582-83 (1960).

7 Carey v. General Elec. Co., 315 F.2d 499, 507 (2d Cir. 1963); *cf. Warrior & Gulf*, 363 U.S. 574, 580 (1960). Nor does an employer commit an unfair labor practice by insisting

In addition, an employer understandably might not want to submit to arbitration the question of whether particular action on the union's part will amount to a breach of its no-strike pledge, thus expediting its damages action in the courts.[8] Finally, either or both parties may have had such singular failure with arbitral determination of a particular type of dispute that it would prefer to stake its lot with another forum or with no forum at all.

With these motives inducing parties to exclude claims from arbitration in mind, and assuming, as we may, that these motives will not be effectively stifled by the existence of a judicial[9] or administrative[10]

(to the point of impasse) upon the insertion of such an exclusionary clause in the collective agreement. See Procter & Gamble Mfg. Co., 160 N.L.R.B. No. 36 (1966).

8 See Local 721, Packinghouse Workers v. Needham Packing Co., 376 U.S. 238 (1964); Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 477 (1962).

9 To the effect that the courts will be open when the arbitration process is not, where "the end result of [the procedures agreed to by the parties], . . . if differences between the parties remained unresolved, was economic warfare, not 'the therapy of arbitration,'" see NLRB v. C & C Plywood Corp., 385 U.S. 421, 426 (1967). The Court also stated that "Where, as here, the parties have not provided for arbitration, the union would have to institute a court action to determine the applicability of the premium pay provision of the collective bargaining agreement." *Id.* at 429. The Court in this case was considering the question of whether the NLRB might construe a labor agreement where necessary to decide an unfair labor practice case, when the parties had not provided for arbitration as the terminal point of their grievance machinery. The employer's contention that before considering the unfair labor practice the Board must obtain an "authoritative construction by the courts" of the contractual provision in question was rejected. *Id.* at 429. As indicated by the last-quoted portion from the Court's opinion, it assumed that where the parties had not made arbitration available, the courts would be open.

As noted by the Court in that same case, however, *id.* at 429 n. 15, the following substantial barriers exist to effective judicial redress in this section 301 context:

[i] difficulty in translating damages to dollars and cents;

[ii] the potential applicability of the Norris-LaGuardia Act to federal court actions attempting to enforce arbitration promises by injunctive relief. *Compare* International Elec. Workers v. General Elec. Co., 341 F.2d 571 (2d Cir. 1965), and Publishers' Ass'n of New York City v. Local 6, Mailers' Union, 317 F.2d 624 (2d Cir.), *cert. granted*, 375 U.S. 901, *judgment vacated in part for dismissal as moot*, 376 U.S. 775 (1963), *with* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458 (1957).

[iii] assuming the applicability of Norris-LaGuardia, the likelihood that state court actions similarly would be barred. See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

10 Although the potential existence of a statutory duty to bargain over such disputes under section 8(a)(5) of the NLRA may present a substantial impediment, see, *e.g.*, Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964) (duty to bargain over decision to subcontract work formerly performed by unit employees); New York Mirror, 151 N.L.R.B. 15,372 (1965) (duty to bargain over decision to sell and shut down an entire operation). *But see* Martin Marietta Corp., 159 N.L.R.B. 26,236 (1966) (no duty to bargain over bona fide sale of going concern), where the employer's decision must be made as a matter of

forum we shall proceed to examine the content of the rules for construing the scope of the arbitration promise.

The Rule of Construction

The difficulty which one encounters in separating the rules of general application from the particular context in which they were promulgated highlights the problem facing the lower courts. The following principles for interpreting the scope of the arbitration promise, which stand out at first blush, are deceptively simple:

RULE (1). The problem of determining whether the reluctant party has breached his promise to arbitrate is one for *judicial* resolution, absent a "clear demonstration" of a purpose to exclude "from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability."[11]

RULE (2). Apart from matters that the parties specifically exclude from arbitration, all questions on which the parties disagree must come within the scope of the grievance and arbitration provisions of the collective agreement.[12]

RULE (3). Such specific exclusion, however, need not be an express provision in the collective agreement, but rather, may result from "the most forceful evidence of a purpose to exclude the claim from arbitration . . . ."[13]

---

business necessity, his right to act now and bargain later over the *effects* of his action has been recognized. See Ozark Trailers, Inc., 161 N.L.R.B. 26,871, 26,879 (1967); Duvin, *The Duty to Bargain: Law In Search of Policy*, 64 Colum. L. Rev. 248, 278-79 (1964). Moreover, if the bargaining obligation requires only

> that an employer give [the union] . . . notice and opportunity to confer about and discuss the [decision] . . . , not for the purpose of securing the employees agreement before he may proceed but to give his employees an opportunity to induce him to follow a different course of action. . . ,

Royal Plating and Polishing Co., 152 N.L.R.B. 619, 622, *enforcement denied*, NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965), then such bargaining may take place without any serious detriment to the company's plans. See Schnell Tool & Die Corp., 162 N.L.R.B. 27,320 (1967) (bargaining duty requires only notice to and discussion with union over decision).

11 *Warrior & Gulf*, 363 U.S. 574, 583 n.7 (1960).

12 *Id.* at 581. This assumes, of course, an arbitration clause which is otherwise broad enough to cover the dispute in question.

13 *Id.* at 585. As an example of such collateral evidence, the Court offers "a written collateral agreement," which makes it clear that the subject matter of the dispute was not intended to be a matter for arbitration. *Id.* at 584. In support of this proposition, that a court may consider collateral evidence apart from the agreement itself in order to determine the scope of the arbitration promise, see Drake Bakeries, Inc. v. Local 50, Bakery & Confectionery Workers, 370 U.S. 254, 260 (1962), where the Court deemed "of significance" the fact that the employer, just four months prior to instituting an action

RULE (4). Where the exclusion clause is vague and the arbitration clause quite broad, a party arguing non-arbitrability will bear a heavier burden of proof.[14]

RULE (5). "An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[15]

RULE (6). Courts should not undertake to determine the merits of a grievance under the guise of interpreting the scope of the arbitration clause.[16]

RULE (7). At some point the demand of the moving party might be "so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction."[17]

---

for damages for the union's breach of a no-strike clause, had treated that same question as appropriate for arbitration.

14 *Warrior & Gulf*, 363 U.S. 574 (1960). This situation was presented in *Warrior & Gulf*, *supra*, where the collective agreement contained a form of so-called "standard" arbitration clause covering "differences [arising] . . . . as to the meaning and application of the provisions of this Agreement," or the occurrence of "any local trouble of any kind," and expressly excluded from the arbitration process "matters which are strictly a function of management." Where the collective agreement contains a broad arbitration clause and no exclusion clause whatsoever, the party arguing non-arbitrability will bear a heavier burden, a fortiori.

It should be emphasized that the "management functions" clause there in question was not a *substantive* clause—of a type which would form the basis for the employer's argument, *on the merits*, that he had the right to perform the act complained of—but rather, was an express attempt by the company to exclude *from arbitration* "matters which are strictly a function of management."

15 *Id.* at 582-83. Obviously the Court did not intend to say that in determining whether such "doubt" exists, a court is confined to the four corners of the arbitration clause itself, since specific exclusions from arbitration are often found in substantive clauses of the collective agreement, and since the Court, elsewhere in its opinion, suggests that forceful evidence of an intent to exclude may prevail, even in the absence of any express exclusion whatsoever. See note 13 *supra* and accompanying text.

16 *American Mfg. Co.*, 363 U.S. 564, 569 (1960); *Warrior & Gulf*, 363 U.S. 574, 585 (1960). Stated another way, a non-arbitrability contention cannot be based upon the argument that the collective agreement does not contain any substantive commitment of a kind which must exist in order for the moving party's claim to be sustained on the merits.

17 John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964). Although the Court cites *Warrior & Gulf*, 363 U.S. 574, 582-83 (1960), in support of this proposition, it is difficult indeed to wrest this principle from the Court's opinion in the earlier case, especially in light of the language used in *American Mfg. Co.*, 363 U.S. 564, 568 (1960), so long as the moving party's claim is allegedly premised upon the collective agreement itself.

In attempting to accommodate Rule (7) with Rule (6), the courts must be careful not to base holdings of "frivolity" upon the mere absence from the collective agreement of a substantive commitment of a kind which must exist in order for the moving party's

The pro-arbitration bias of the above rules of construction cannot be denied. Indeed, the *Warrior & Gulf* and *American Manufacturing Co.* cases could well be described as setting forth a rebuttable presumption of arbitrability—rebuttable either by a specific exclusion from arbitration contained in the collective agreement itself or by forceful collateral evidence of a purpose to exclude.

Although such a description seems simple enough, the real issue is clouded by several factors. First, in laying the foundation for these rules, Mr. Justice Douglas felt compelled to make several gratuitous statements regarding the nature of the collective bargaining process, the agreement in which that process is culminated, and the grievance machinery which forms "a part of the continuous collective bargaining process . . . the terminal point of a disagreement."[18] Without regard to the acceptance of his descriptions as general propositions, they tend to divert one's attention from the real issue facing the Court: Did the parties intend to allow that grievance machinery and, in particular, the arbitration aspect thereof, to operate upon the type of dispute in question? It is easy to overlook the fact that in resolving this latter issue, Mr. Justice Douglas' general statements are not strictly relevant. In other words, given the general presumption in favor of arbitration which emerges from the above rules, it is improper to treat the policy bases upon which these rules were grounded as rules of decision.

Second, it should be emphasized that despite the presumption in favor of arbitrability which inheres in these guidelines, arbitration is still "a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[19] Thus, the Court has provided us with a "neutral principle,"[20] almost lost in the shadow of rigid "arbitration worship" dicta, a principle embodying a promise that the courts will give full play and effect to the manifested intent of the parties.

---

claim to be sustained on the merits. See note 10 *supra*. See generally Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831, 859 (1966). If it becomes necessary for a court to examine collateral evidence in resolving the issue of frivolity, that fact, in itself, is a good indication that the claim is not frivolous and that the policy embodied in Rule (6) should prevail—assuming that the moving party has some contractual theory which, if supported, would constitute a substantive basis for the grievance.

18 *Warrior & Gulf*, 363 U.S. 574, 581 (1960).

19 *Id.* at 582.

20 See generally WECHSLER, THE COURTS AND THE CONSTITUTION (1965); reprinted in 65 COLUM. L. REV. 1001 (1965). (John A. Sibley lecture delivered by Professor Wechsler at the University of Georgia School of Law on January 19, 1965.).

Finally, we are confronted with the still unanswered question of the relevance of a no-strike pledge on the part of the union in determining the scope of the arbitration promise. Although Mr. Justice Douglas' opinion informs us that

> Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the '*quid pro quo*' for the agreement not to strike . . . ,"[21]

at least three Justices "[did] not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause . . . ."[22]

The logical corollary to the Douglas view that a party faced with a broad, all-encompassing no-strike clause must sustain a heavier burden in order to prevail on a non-arbitrability contention[23] would be that if the no-strike pledge were qualified, the arbitration promise should be limited, pro tanto. Such an implied limitation upon the employer's duty to arbitrate, however, is inconsistent with at least three of the rules set forth above.[24] Although the employer's promise to arbitrate grievances may be the *"quid"* for the union's agreement not to strike, that promise is only as broad as the employer makes it, *i.e.*, the value of the *"quo"* will vary from employer to employer.

Even with the removal of these impediments to a proper understanding and application of the above rules, the lower courts are still faced with the difficult task of accommodating those rules by giving

---

21 *Warrior & Gulf*, 363 U.S. 574, 578 n.4 (1960).

22 *Id.* at 573 (Brennan, J., concurring). See also Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 261 (1962). This leaves only two Justices in apparent agreement with the Douglas position, since Justice Whittaker dissented and Justice Black took no part in the consideration of the Trilogy decisions. The Supreme Court consisted of only eight members at the time the Trilogy cases were decided.

23 See *Warrior & Gulf*, 363 U.S. 574, 583 (1960); *American Mfg. Co.*, 363 U.S. 564, 567 (1967).

24 *But cf.* Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). In this case the Supreme Court implied a no-strike pledge on the union's part, as a matter of federal substantive labor law under § 301 of the LMRA, where the collective agreement contained a standard arbitration clause but lacked a no-strike clause. Arguing that there should not be "discovered" in § 301 an implied arbitration provision, see Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A.L. REV. 675, 787 (1964); Jones, *Autobiography of a Decision: The Function of Innovation in Labor Arbitration, and the National Steel Orders of Joinder and Interpleader*, 10 U.C.L.A.L. REV. 987, 1017-18 (1963).

effect not only to the policy favoring arbitration as the means "chosen" by the parties for the resolution of grievances arising under collective agreements, but also to the policy preserving their freedom to choose or reject arbitration in the first place.[25] In the following two sections of this Article, I shall offer certain proposals regarding both the proper application of the above rules and the accommodation thereto which must be made if the arbitrability presumption is to remain rebuttable.

THE APPLICATION[26]

Type I Claims

First, given a broad or "standard" arbitration clause, where the party seeking to arbitrate the grievance bases its claim upon a construction of any of the specific substantive provisions of the contract, where this claim cannot be labelled "frivolous," and where neither the agreement itself nor extraneous evidence contains anything to indicate that such a dispute was intended to be excluded *from arbitration*, the grievance is arbitrable.[27] In this context "the function of the court is very limited . . . [and is] confined to ascertaining whether the party

---

25 This latter policy finds expression in §§ 1 and 8(d) of the National Labor Relations Act, 29 U.S.C. § 151, 158(d) (1964). See NLRB v. Taormina, 244 F.2d 197, 198 (5th Cir. 1957); NLRB v. Corsicana Cotton Mills, 179 F.2d 234, 235 (5th Cir. 1950).

26 Two articles by Messrs. Russell A. Smith and Dallas L. Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965) and *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831 (1966), present an excellent discussion and analysis of this question. I shall utilize a portion of their framework for analysis in categorizing certain fact situations to be discussed in this section.

27 This is the standard *American Mfg. Co.* situation, with the Rule (7) proviso. See note 17 *supra*. Unless the moving party's claim has reached the point of "frivolity," the reluctant party's argument that it had not violated the *substantive* provision in question is not relevant to the question of arbitrability.

The employee whose grievance was the subject of the *American Mfg. Co.* decision had left work as a result of an injury, and, while unemployed, brought an action for compensation benefits. His case was settled upon the basis of a 25% permanent partial disability. Two weeks later, however, he attempted to return to his job. Upon the employer's refusal, the union filed a grievance charging that he was entitled to his job by virtue of the seniority provisions of the collective bargaining agreement. That agreement contained, *inter alia*, a form of standard arbitration clause, providing for the arbitration of any "disputes, misunderstandings, differences, or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided. . . ." The agreement also contained a reservation of the power in management to discharge "for cause . . . provided it does not conflict with this agreement." There were neither any express exclusions from arbitration, nor any collateral evidence demonstrating an intent to so exclude.

seeking arbitration is making a claim which on its face is governed by the contract."[28]

Type II Claims

Also compelled by those rules is the result in cases which are like Type I claims with the additional fact that the reluctant party's claim of nonarbitrability is based upon the alleged recognition of its right to perform the act complained of—either in the collective agreement or by virtue of some collateral agreement, express or implied. Again, subject to an exception for frivolous claims,[29] not one of the above rules would support a non-arbitrability holding in such a case, since evidence bearing upon the existence of the substantive right in question is irrelevant to the scope of the arbitration promise.

Although the Supreme Court has not been squarely faced with a Type II case to date, it has left little doubt as to the result which should be reached therein. Not only do the general rules set forth above compel an arbitrability holding in such cases, but, in addition, it is clear that the Court in *Warrior & Gulf* refused to allow the employer to reinforce his non-arbitrability argument with "substantive" evidence[30] of bargaining history.[31] Despite the fact that a majority of courts have properly rejected claims of non-arbitrability in the Type II situation,[32] there are enough laggards to provide grounds for concern.[33]

---

28 *American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); see, *e.g.*, Brick & Clay Workers v. A. P. Green Fire Brick Co., 343 F.2d 590, 593 (8th Cir. 1965); Association of Indus. Scientists v. Shell Dev. Co., 348 F.2d 385, 387 (9th Cir. 1965); Electrical Workers v. General Elec. Co., 332 F.2d 485, 489 (2d Cir.), *cert. denied*, 379 U.S. 928 (1964); Taft Broadcasting Co. v. Local 253, Radio Broadcast Technicians, 298 F.2d 707, 709 (5th Cir. 1962).

29 See note 17 *supra*.

30 By "substantive" evidence is meant evidence not relating to the scope of the arbitration promise itself.

31 Although the majority opinion makes no mention of the fact, we are told by the concurrers in *American Mfg. Co.* that the evidence of bargaining history between the parties was not deemed relevant on the *Warrior & Gulf* facts. *American Mfg. Co.*, 363 U.S. 564, 572 (1960). It is clear that the bargaining history evidence in this case did not relate to the scope of the promise to arbitrate, but rather, to whether the employer had the substantive right to perform the act in question. See United Steelworkers v. Warrior & Gulf Nav. Co., 168 F. Supp. 702, 704-05 (S.D. Ala. 1958), *aff'd*, 269 F.2d 633, 636-37 (5th Cir. 1959).

32 See, *e.g.*, Local 636, Warehousemen and Employees v. American Hardware Supply Co., 329 F.2d 789 (3d Cir.), *cert. denied*, 379 U.S. 829 (1964); Local 12,298, United Mine Workers v. Bridgeport Gas. Co., 328 F.2d 381 (2d Cir. 1964).

33 See Torrington Co. v. Local 1645, Metal Prods. Workers, 347 F.2d 93 (2d Cir.), *cert. denied*, 382 U.S. 940 (1965) (a Type II case, with Type I and Type V, *infra*, incidents); Local 483, Boilermakers Union v. Shell Oil Co., 63 LRRM 2173 (7th Cir. 1966) (a Type II case with Type I incidents).

Type III Claims

Under this heading are grouped all non-arbitrability claims based upon express exclusions from arbitration which are phased in broad, general terms. Within this category falls the *Warrior & Gulf* case in which the parties expressly excluded from the arbitration process matters that were "strictly a function of management."[34] The dispute there in question arose out of the employer's contracting out maintenance work previously done by its employees, resulting in the layoff of employees in the bargaining unit. The collective agreement was silent on the subject of contracting out and contained a broad arbitration clause covering "differences [arising] . . . as to the meaning and application of this agreement,"[35] or the occurrence of "any local trouble of any kind."[36] Emerging from the Court's meaty opinion were the first six of the seven rules discussed above. Equally important for present purposes, however, is the general approach taken by the Court as a vehicle for resolving the problems presented by the Type III case. The Court made it clear that although an arbitrability holding in a Type I case may be based merely upon the moving party's articulating a contractual theory providing a potential substantive bases for the grievance in question, in a Type III case a court may not so abbreviate its inquiry. Rather, it must then examine the breadth of the exclusion clause *vis a vis* the arbitration clause, together with other evidence of a purpose to exclude the claim from arbitration, if any, in order to resolve the issue of arbitrability.

The number and kind of Type III limitations upon arbitral jurisdiction would appear to be limited only by the ingenuity of labor negotiators. As examples, note the following:[37]

(1) A clause stating that "in order for a grievance to be arbitrable, it must involve and allege the violation of a provision of this agreement which specifically and expressly deals with the subject matter of the grievance."

(2) Exclusion from arbitration of any grievance, which, in order to be sustained, must rest upon some contractual obligations *implied* from some provision or provisions of the collective agreement or must

---

34 *Warrior & Gulf*, 363 U.S. 574, 576 (1960).

35 *Ibid.*

36 *Ibid.*

37 These examples have been taken from a listing found in Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 791-92 (1965).

rest upon the alleged binding effect of some past practice or agreement not expressed in or part of the labor agreement.

(3) The collective bargaining agreement contains a "management rights" clause and provides either (i) that "all management rights other than those qualified or surrendered by some specific provision of this agreement are not subject to arbitration hereunder," or (ii) that "the exercise by the company of any of its exclusive rights shall not be subject to arbitration except with respect to a claim that such right was exercised in bad faith."

(4) The arbitration clause in the labor agreement provides that, whenever it is contended that the subject matter of a grievance is not arbitrable, the arbitrator shall be without jurisdiction to proceed with the grievance unless (i) the parties specifically stipulate that he may decide the arbitrability issue, or (ii) the grievance is determined to be arbitrable by a court of competent jurisdiction.

With regard to such Type III exclusionary clauses, certain writers have expressed the opinion that

> most of these types of ostensible contractual restrictions upon the jurisdiction of the arbitrator are simply different ways of structuring the labor agreement in an attempt to preclude a finding that there is a contractual commitment of the kind which must be found to exist in order to sustain the grievance. Thus analyzed, the underlying question really involves the merits and should be relegated to the arbitration process.[38]

Although this may be valid as a general proposition,[39] it is necessary

---

38 *Id.* at 793. *Compare* Camden Indus. Co. v. Local 1688, Carpenters Union, 353 F.2d 178 (1st Cir. 1965), *with* Boeing Co. v. UAW, 231 F. Supp. 930 (E.D. Pa. 1964), *aff'd per curiam*, 349 F.2d 412 (3d Cir. 1965).

39 *But cf.* Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir.), *aff'd per curiam* by equally divided Court, 379 U.S. 130 (1964), *rehearing denied*, 379 U.S. 985 (1965). In this case the union brought suit under § 301 to compel the company to arbitrate a "contracting out" dispute. Under the recognition clause of their collective agreement, the employer "recognize[d] the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company. . . ." *Id.* at 904.

The arbitration provisions of the labor agreement provided, in relevant part:

> As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Question directly involving or arising from applications, interpretations or alleged violation of the terms of this agreement.
>
> • • •
>
> The Company will bargain with the Union with respect to matters relating to

to set aside for special treatment Type III limitations which, although "general" in the sense that they are not directed to any particular type

---

rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate.

Id. at 905.

The union contended that in contracting out, the employer had breached "the terms" of the labor agreement, *i.e.*, the recognition clause quoted above. *Id.* at 906. The Seventh Circuit dismissed this argument, since that "clause makes no reference either to arbitration or to the contracting out of work." *Ibid.* Apparently the court regarded the recognition clause in this context as requiring only that the employer bargain in good faith with the union (which was done here), and it eliminated that clause as a basis, in itself, for the union's argument on the merits of the "contracting out" dispute. Unless the court intended to label the union's claim "frivolous," within the meaning of Rule (7) (which it did not purport to do), its approach in resolving the merits of the union's claim, rather than limiting itself to the threshold issue of arbitrability, is clearly erroneous.

The court found reinforcement for its non-arbitrability holding in the following two factors:

[i] The portion of the arbitration clause, quoted above, contemplating various conditions of employment which would not be covered by the collective agreement, and as to which, although the parties had an obligation to bargain, each party was expressly given the right to refuse to arbitrate. The court said that that section was "significant because the parties agreed that certain disputes were not subject to compulsory arbitration, which destroys plaintiff's theory that the mere allegations of contract violation requires arbitration." *Id* at 907.

[ii] The bargaining history between the union and the employer related not to the exclusion of "contracting out" from arbitration, but rather, to the employer's substantive right to contract out work. For the proposition that such bargaining history might be considered on the question of arbitrability, the court cited Justice Brennan's concurring opinion in *American Manufacturing Co.* and *Warrior & Gulf. Ibid.* It will be recalled, however, that Justice Brennan expressly approved the majority's refusal, in *Warrior & Gulf*, to consider evidence of "substantive" bargaining history. *American Mfg. Co.*, 363 U.S. 564, 572 (1960).

The significance of the Supreme Court's affirmance, without opinion, of the *American Oil Co.* decision is clouded by the presence of another issue in the case. The company urged that the union was barred by collateral estoppel from seeking a decree compelling arbitration, based upon the fact that in an earlier case between the same parties, involving the same type of dispute and similar arbitration provisions, a decision against arbitrability had been rendered and had not been appealed. Although the union in the prior case had relied upon a different subsection of the arbitration clause in support of its contention, the court held that since it *might have* relied upon the subsection here in question, but failed to do so, it was barred by the doctrine of collateral estoppel. This was an alternative holding, and the Supreme Court's affirmance did not specify the ground therefor. Moreover, it is clear that both the question of (1) arbitrability, and (2) collateral estoppel, were presented to the Supreme Court. See *petition for cert. filed*, 33 U.S.L. WEEK 3015 (U.S. July 7, 1964) (No. 55). Accordingly, the precedent value of the *American Oil Co.* case can only be described as nugatory.

of grievance, are specific in the sense that there is no doubt regarding the applicability and meaning of the language used. Example (4) above affords a good illustration. Whenever such a joint stipulation clause is worded so as to negate any requirement that a refusal to stipulate must be exercised in good faith,[40] and so as to make it clear that the unilateral act of either party in refusing to stipulate constitutes an effective bar to arbitration, the words used should be given effect. On such facts, unless the public policy in favor of arbitration is made absolute—a result not achieved in the Supreme Court's arbitrability decisions to date—the manifested intent of the parties to contractually avoid the effect of those decisions should control.

It should be recalled at this point that RULE (3) above is applicable in this Type III context, *i.e.*, it is open to a party to fill in the gaps left by broad exclusionary language with collateral evidence bearing on the purpose to exclude (or include) the type of grievance in question from arbitration. This conclusion is not precluded by *Warrior & Gulf*, since the collateral evidence which the employer there attempted to introduce related not to his purpose to exclude the dispute in question from arbitration, but rather to his right to perform the act complained of.

The Accommodation

Type IV Claims

To be contrasted with such general attempts to limit the duty to arbitrate are claims that some provision of the labor agreement specifically excludes the subject matter of the grievance in question from arbitration. Although the Supreme Court has never been faced directly with a case involving such a specific exclusionary clause, it left no doubt in *Warrior & Gulf* that it would give effect thereto.[41]

Theoretically then, on the avenue of the specific exclusionary clause the rebuttable presumption in favor of arbitration must yield. Again, however, the surface simplicity is potentially deceptive. The essential problem lies in the formulation of workable rules for ascertaining the existence of "doubt," so as to bring into play the mandate of RULE (5) that "doubts should be resolved in favor of coverage."

The authority pursuant to which such rules may be formulated is the necessary accommodation between the consensual and the noncon-

40 *But see* Independent Soap Workers v. Procter & Gamble Mfg. Co., 314 F.2d 38 (9th Cir. 1963) (the "joint stipulation" clause was worded in mandatory language). Note, however, that the court's holding in that case was not so limited. See *ibid.*

41 *Warrior & Gulf*, 363 U.S. 574, 585 (1960).

sensual which is inherent in applying RULE (5) to the Type IV case. Although we must work within the framework of the proposition that "a collective bargaining agreement is not an ordinary contract,"[42] nevertheless, here, by hypothesis, we know that the parties intended to place a specific, meaningful[43] limitation upon the scope of the promise to arbitrate.[44] Accordingly, this Type IV case is a culmination of the proposition that the collective bargaining agreement does not achieve its desired "stabilizing"[45] function unless the parties can be confident that the intent which they manifest therein will be given effect.

The following examples, taken from post-Trilogy cases, will not only serve to illustrate the wide range of fact situations which may arise and the delicate operation presented to the courts in this Type IV context, but also should suggest some rules for effectuating the necessary accommodation.

Example 1. The collective bargaining agreement contained a provision for the arbitration of grievances, which concluded: "It is understood that the above shall not apply in any way concerning wages."[46] A dispute arose as to whether the employer's driver-salesmen were entitled to overtime compensation for work in excess of forty hours per week. Treating[47] the above clause as an express exclusion of disputes "con-

[42] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964); see *Warrior & Gulf, supra* note 41, at 578-79; *American Mfg. Co.*, 363 U.S. 564, 567 (1960).

[43] Contrast those attempted limitations which are phrased not in terms of exclusions from the arbitration process, but rather, in terms of the power or authority of the arbitrator—once that process is in effect. See, *e.g.*, Local 4377, United Steelworkers v. General Elec. Co., 327 F.2d 853 (6th Cir. 1964); Radio Corp. of America v. Association of Professional Eng'r Personnel, 291 F.2d 105, 109 (3d Cir. 1961); Electrical Workers v. Westinghouse Elec. Corp., 228 F. Supp. 922 (S.D.N.Y. 1964). As to such attempted exclusionary clauses, it has been aptly observed that

> [T]he fact that the arbitrator is forbidden to make a specified type of award does not necessarily mean that the arbitrator has no jurisdiction to hear and determine the grievance. Conceivably, the arbitrator might devise an award which is not forbidden by the contract.

Id. at 924.

[44] *But cf.* Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 571 (1962), indicating that the Supreme Court may be willing "to promote the arbitral process as a substitute for economical warfare" at any price. See note 24, *supra.*

[45] See *Warrior & Gulf*, 363 U.S. 574, 578 (1960).

[46] Desert Coca Cola Bottling Co. v. Local 14, General Sales Drivers, 335 F.2d 198, 200 (9th Cir. 1964).

[47] Although, arguably, a substantial issue existed as to whether this clause actually constituted an express exclusion from arbitration, this author believes that the court was correct in treating it as such.

cerning wages" from arbitration, the court[48] nevertheless found doubt in the term, "wages,"[49] so as to bring RULE (5) into play, and thus sent the dispute to arbitration.

Although one may sympathize and even agree with the court's observation that "a dispute [may] affect compensation without affecting wages,"[50] nevertheless it is clear that the parties intended to withdraw from arbitral consideration a specifically defined area of dispute. It is true, as the court emphasizes,[51] that "wages" could be given a narrower definition and that grievances over other matters, *e.g.*, hours worked, "concern wages" so as to arguably fall within the above exclusion. By the same token, it could be argued that discharge grievances relate to wages in an even more fundamental (all or nothing) sense. However, it must be admitted by even the most ardent worshiper of the arbitration process that disputes "concerning" hours (and discharges) are just that, and any effect upon wages is secondary or incidental. Rather than following the easy path of "saddl[ing] the exclusionary clause . . . with ambiguity,"[52] the courts in Type IV cases must be willing to draw the practical and reasonable lines and distinctions which are so appropriate to the judicial function and so necessary to the correct decision of individual cases.[53]

---

48 Desert Coca Cola Bottling Co. v. Local 14, General Sales Drivers, 335 F.2d 198 (9th Cir. 1964).

49 On this issue of "doubt," the court said the following:

> The district court broadly interpreted the word "wages" as commensurate with "compensation," quoting 92 C.J.S. p. 1035. But the word "wages" can also be given a narrower definition commensurate only with "wage scale." Although hours, overtime, and vacations all can affect one's income for tax purposes, the word "wages" in the contract might well only have been intended to mean the general wage scale. Here the arbitration clause, paragraph (d), was broad, and the exclusion clause, on its fact, uncertain, if not vague. Can we say the issue here presented clearly "concerns wages" any more than the total number of hours to be worked each day or week "concerns wages," and would hence be beyond arbitration?
>
> . . .
>
> In other words, can dispute affect compensation without affecting wages? We think it can fairly and honestly be thought that it can. We cannot hold that the term is "clear and unambiguous," or say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Id. at 201.

50 *Ibid.*

51 *Ibid.*

52 Communications Workers v. New York Tel. Co., 327 F.2d 94, 96 (2d Cir. 1964).

53 The term, "wages," has been held to include overtime for purposes of § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1964). *E. g.*, NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953). The court said § 8(d) uses both the terms, "wages" and "hours," to describe the mandatory subjects of bargaining under the Act.

Example 2. What appears to be the correct result in Example 1 is highlighted by a case[54] in which an employee worked two hours and fifteen minutes on Sunday and was paid at twice his straight time rate for said time worked, according to the following provision in the collective agreement: "All work performed on Sunday prior to the commencement of an employee's regular work week shall be compensated for at the rate of double time (two times)."[55] The employee contended, however, that he should have been paid double the straight time rate for four hours worked, reading the above-quoted provision together with the following: "When an employee is called in at a time other than his regular shift, he shall be paid a minimum of four (4) hours' pay at said employee's regular straight-time hourly rate of pay."[56] Although the agreement contained a broad arbitration provision, the employer defended his refusal to arbitrate upon the basis of the express exclusion from arbitration of "rates of pay," with an exception not here relevant. The Ninth Circuit correctly rejected the employer's contention, observing:

> To accept the employer's position that a dispute as to the interpretation of sections 4 and 5 of the agreement's articles III and IV respectively involves a dispute as to "rates of pay," we would be required to hold that the hours for which a man is paid are "rates of pay." It is true that the amount of an employee's pay is measured by the number of hours that he works, but it does not follow that a dispute as to the number of hours to which one's rate of pay is to be applied is a dispute as to "rates of pay." Here, because of the artificiality of the four-hour provision, confusion is understandable. We conclude, however, that the grievance did not arise from a dispute as to "rates of pay" but from a dispute as to the amount of time to which the "rates of pay" should be applied.[57]

In other words, although the employee's rate of pay might have been "involved" in his grievance, it was involved only in the remote or secondary sense that the rate of pay (doubled) ultimately would be applied to the number of hours which the employee was deemed to have worked in order to derive his compensation therefor.

Example 3. Here the dispute arose out of the employer's attempt to

54 Rubber Workers v. Kirkhill Rubber Co., 63 L.R.R.M. 2196 (9th Cir. 1966).
55 *Id.* at n.1.
56 *Id.* at n.2.
57 *Id.* at 2196.

change from a "swing operation" system of delivering its product to a "drop-out day system,"[58] a change resulting in a probable loss of jobs for some fifty-five "swing men." The relevant portions of the collective agreement provided as follows:

> Article 19(a). There shall be arbitration for all disputes which may arise between the parties hereto, except that the arbitrator shall have no power to alter, amend, revoke, or suspend any of the provisions of this Agreement.
> Article 24. The Union and the Employer recognize the changes that have occurred in retail food stores, *i.e.*, their replacement at an accelerated rate by the large corporate and cooperative food chains, and accordingly it may be necessary to recognize the appropriateness of considering changes in delivery, merchandising and compensation methods.
>
> In view of this, the Employer may at any time request a meeting with the Union, for the purpose of negotiating and mutually agreeing on different commission payments or other methods of compensation or delivery methods which may be desirable under such changed conditions.
>
> In the event of such request, the parties will meet promptly for the purposes outlined above.
>
> In the event the parties are unable to agree, the dispute shall not be subject to the Arbitration Procedure of this Agreement.[59]

The court pinpointed the problem existing in Type IV cases with the following language: "It is clear that a provision must be specific if it is to exclude a claim from arbitration, but it is not clear how specific the provision must be in order to have this effect. It is this area of uncertainty in the law that underlies the present appeal."[60]

As the party seeking to arbitrate, the employer contended that the only changes in delivery methods contemplated by the exclusionary language of Article 24, *supra*, "were changes not in the number of employees or in the number of days of delivery under a given method of distribution [which this proposed change was], but a shift in the whole method of distribution . . . ."[61] The court, treating this as a case in which neither party's construction of the scope of the arbitration

58 Strauss v. Silvercup Bakers, Inc., 353 F.2d 555 (2d Cir. 1965). The distinction between those two types of delivery methods is explained at page 556 of the court's opinion.

59 *Id.* at 556.

60 *Id.* at 557.

61 *Id.* at 558.

promise was "patently impossible or unreasonable,"[62] remanded to the district court for the acceptance of proof "relevant to the intentions of the parties at the time they drafted their agreement,"[63] stating as follows:

> The duty to arbitrate being contractual in origin, the court must make an effort to construe the extent of that contractual duty, rather than force arbitration even of arbitrability upon parties who did not bind themselves to such a submission. Further inquiry may well enable the trial court to say with "positive assurance" that the exclusionary clause covers this dispute, so that the request for an order compelling arbitration should be denied. On the other hand, further inquiry may also indicate that the trial court cannot positively declare that the parties intended to exclude the dispute from arbitration—in which case, the trial court must issue an order directing the parties to proceed to arbitration.[64]

Although, collateral evidence should certainly be admissible in a Type IV case[65] for the purpose of ascertaining either (i) whether the apparent scope of an exclusionary clause has been limited thereby, or (ii) whether the apparent limits of an exclusionary clause have been extended thereby, nevertheless, the presumption should favor the normally intended meaning of the language actually used. Accordingly, it is submitted that the instructions on remand were erroneous in suggesting that if no collateral evidence were introduced to limit the objectively manifested scope of the exclusionary clause ["changes in delivery . . . shall not be subject to . . . Arbitration"] the trial judge might compel arbitration. The fact that the moving party's construction of the exclusionary clause is not frivolous should not suffice to sustain his arbitrability contention, where that construction is unreasonable, as here, when measured by objective standards.

Example 4. Shortly after a lockout by the employer in response to employee "slowdowns," the employer terminated the employment of all of his employees and refused to process grievances arising out of these allegedly wrongful discharges. Excluded from arbitration were controversies "concerning whether there has been a strike, picketing, stoppage, slowdown, sitdown, staying or other curtailment or inter-

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 See Local 787, IUE v. Collins Radio Co., 317 F.2d 214 (5th Cir. 1963) (refusing to allow union, through a "guise," to arbitrate an obviously excluded claim).

ference with work on the part of employees or a lockout on the part of the employer."[66] Remaining subject to the arbitration procedure, however, were disputes involving management's right to discipline or discharge for just cause, as well as grievances submitted by discharged employees who felt they had been "unjustly dealt with."[67] Refusing to extend the words of the exclusionary clause beyond their objectively manifested effect, the court correctly construed this dispute as involving the propriety of the discharge resulting from the work stoppage or lockout, rather than the question of whether there has been a slowdown or lockout in the first place, and accordingly, ordered arbitration.

Example 5. The collective bargaining agreement contained a broad arbitration clause, expressly covering, *inter alia*, grievances over "dismissals." Another article of the collective agreement incorporated by reference the company's pension plan and further provided that "nothing in this Contract [*i.e.*, the collective bargaining agreement] shall be construed to subject the Plan or its administration to arbitration."[68] The pension plan itself provided that male employees who had reached fifty-five (55) years of age and who had been employed twenty-five (25) years or more "may, if the case is approved by the Committee as appropriate for such treatment, be retired from active service. . . ."[69] It was "clear from the Plan as a whole that [the last-quoted provision] contemplates the involuntary retirement of an employee."[70] An Employees' Benefit Committee was specifically charged with *the administration* of the Plan.

An employee involuntarily retired pursuant to the above provision initiated a grievance as a "dismissed" employee which the company refused to arbitrate. There was no dispute that this employee had met the age and years of requirements for involuntary retirement under the Plan. Moreover "the circumstances leading to this action by the Employees' Benefit Committee [were] irrelevant to [the court'] inquiry."[71]

In the court's view,

> To deny arbitration, we must conclude that the words "dismissal" and "dissmissed" in Article 17 patently do not mean, within the

66 United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147, 151 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965).

67 *Ibid.*

68 Order of Repeatermen v. Bell Tel. Co., 63 LRRM 2167, 2168 (D. Nev. 1966).

69 *Id.* at 2169.

70 *Ibid.*

71 *Ibid.*

> intent of the parties, every involuntary permanent termination of active employment. And with respect to the exclusionary clause, we must find that the pension "Plan" and its "administration" do plainly and unequivocally include a determination by management and its representatives, the Committee, that an employee should be retired and pensioned without his consent . . . .[72]

Speculating as to potential limited constructions which might be given the exclusionary clause,[73] the court equated it with the general (Type III) "management rights" exclusionary clause in *Warrior & Gulf* and applied the principle that doubts must be resolved in favor of coverage.

The court, in so holding, demonstrates its failure to appreciate the proper position which the Type IV case occupies within the framework of the general arbitrability presumption. So long as the exclusionary clause in such a case is meaningfully specific[74] as was the clause in this case, it should be treated, *in itself*, as rebutting that presumption. Since this case arose upon the union's motion for summary judgment, there was never any attempt to show through collateral evidence that the exclusionary language had a more limited scope than the meaning conveyed by the words actually used.

A more difficult case would have been presented if the union had contended that the employer had "manufactured" facts which, on their surface, would be sufficient to bring the grievance within the express exclusion.[75] Although consideration of such evidence, strictly speaking, may be outside of the realm of the judicial function, as circumscribed by the Supreme Court, nevertheless, just as a party may not obtain arbitration of an excluded dispute through a "guise,"[76] neither should the reluctant party be allowed to avoid his arbitration obligation through a similar pretext. Accordingly, it is suggested that the receipt of such evidence, relating not to the meaning, but rather, to the applicability of the exclusionary clause, is justified in order to avoid the abuses inherent in the favorable treatment which this writer feels should be accorded the Type IV case in general.

---

72 *Id.* at 2170.

73 *Ibid.*

74 Contrast the type of clause discussed in note 43 *supra*, as well as the type contained in Type III cases.

75 Although the union in this case did allege that the company's action was "arbitrary and not in good faith," *id.* at 2169, the court apparently gave no credit to these conclusionary assertions, as is evidenced by its statement that "the circumstances leading [to the involuntary retirement] . . . are irrelevant to our inquiry." *Ibid.*

76 Local 787, IUE v. Collins Radio Co., 317 F.2d 214, 220 (5th Cir. 1963).

Implicit in the foregoing analysis are the following rules and principles, the application of which to the Type IV case is necessary in order to accommodate the arbitrability presumption with the free and consensual nature of the collective bargaining process itself, "the virtue of [which] . . . is that it is a process which forces its participants to face up to the consequences of their agreements,"[77] as well as their failure to agree.

(1) First, and foremost, from among all of the potential standards of interpretation[78] must be selected the one by which the courts are to be governed. Absent some peculiar plant usage or pre-existing arbitral determination giving a different meaning to the excluded subject matter, the reasonable expectations of the parties should be given effect. In other words, at the risk of being accused of irreverance, I am suggesting that at least in this limited Type IV context the courts should apply "ordinary" contractual standards, in resolving the threshold issue of arbitrability. To allow the parties, like Humpty Dumpty, to argue that "when I use a word, it means just what I choose it to mean—neither more nor less,"[79] would strip the courts of their little remaining judicial function in this area by rendering the arbitrability presumption irrebuttable in effect.

(2) It should remain open to either of the parties, however, to render this standard one of more limited usage, either by contractually rebutting the general standard or by proving its inapplicability in light of the peculiarities of the time and/or place where the contract was made and the circumstances surrounding its making. In this manner, room is left to insure that the actual intention of the parties will not be sacrificed in favor of the certainty obtainable by always enforcing the general standard.

(3) In determining whether exclusionary language is so clear and unambiguous as not to bring into play the rule that doubts must be resolved in favor of coverage, this language, initially, should be examined standing alone. If a clear meaning emerges, then, unless it is specifically qualified or broadened in some other provision of the collective agreement, or by collateral evidence, the issue of arbitrability should be resolved by a direct application of this meaning to the grievance in question.

---

77 Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 399 (1965).

78 4 WILLISTON, CONTRACTS § 603 at 344 (Jaeger ed. 1961).

79 CARROLL, THROUGH THE LOOKING GLASS 124 (1919).

(4) As a corollary to this latter principle, provisions in a collective agreement which would otherwise compel arbitration of the dispute in question (such as the "dismissal" provision in Example 5 above) should not be considered in determining whether the exclusionary effect of the language used has been limited.

(5) If the meaning of the exclusionary language is ambiguous, then the case should be treated as a Type III problem, and the parties should be allowed to fill in this gap with extrinsic evidence bearing upon an intent to exclude. It must be borne in mind, however, that a party attempting to utilize evidence for this purpose bears a heavy burden, since the arbitrability presumption is still intact. Moreover, it would seem appropriate for the courts to impose limitations in the nature of the parol evidence rule upon the introduction of such evidence.

Although not purporting to be exhaustive,[80] these principles of construction for the Type IV case, if accorded judicial acceptance as a general approach to the problem of the express exclusion, would prevent the arbitration promise itself from being "something imposed from without, not reasonably to be found in the . . . bargaining agreement . . . ."[81]

Type V Claims

The final classification of non-arbitrability claims is that group in which there is a contention that the subject matter of the grievance has been excluded from arbitration by virtue of some collateral agreement, express or implied. The arguable justification for receiving such extrinsic evidence, of course, is the fact that the parties did not intend the written labor contract to be a final expression or integration of their agreement. In other words, just as the collective bargaining agreement is not the exclusive source of *substantive* rights and duties, neither is it the exclusive source of *arbitral* rights and obligations.

The polar fact situation under this category is the "written collateral agreement [to] make clear that [the subject of the grievance in question] was not a matter for arbitration."[82] Theoretically, once the existence of such a collateral agreement is established, the approach outlined for the Type IV case should carry over to Type V. Nevertheless, it has been argued with much force that

> [T]he question of the existence or nonexistence of the alleged

80 Another principle of potential applicability which comes to mind is the *expressio unius est exclusio alterius* maxim. *Cf.* Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962).

81 John Wiley & Sons v. Livingston, 376 U.S. 543, 551 (1964).

82 *Warrior & Gulf*, 363 U.S. 574, 584 (1960). See also Boilermakers v. Shell Oil Co., 63 L.R.R.M. 2173 (7th Cir. 1966).

collateral agreement involves an adjudicatory function in which the arbitrator's expertise may be important to a correct determination.

This is peculiarly so where the only evidence bearing on the existence or nonexistence of a collateral exclusion is "collective bargaining history." It is ordinary grist of the mill in the arbitration process for arbitrators to be confronted with, and to consider, the contractual implications to be drawn from collective bargaining history. Arbitrators may be deemed to have a special competence to "read" bargaining history, and it may be contended with some reason that this special competence should be utilized to resolve the question of arbitrability.[83]

It must be admitted, however, that determining the scope of contractual promises is a historical judicial function. Accordingly, since the difference between Types IV and V is one of degree, and not of kind, so long as the courts hold the party making a Type V contention to a higher standard of proof, commensurate to this degree of difference, the judicial function should continue to operate in this context.[84]

CONCLUSION

Although the "institutional competency"[85] of the arbitrator cannot be denied, the precise question to be faced by the courts in resolving the question of arbitrability is whether the parties have expressed a clear intent that the arbitral institution should not operate upon the type of dispute in question. According to the rules promulgated by the Supreme Court for construing the scope of the arbitration promise, such a non-arbitrability contention may be made only in a Type III, IV or V context. This Article has attempted to offer an approach for the courts to follow when faced with such non-arbitrability claims, the key to which lies in the accommodation of the principle that "doubts must be resolved in favor of coverage" with doctrines governing the interpretation and construction of contracts in general. Absent such accommodation, that principle will become merely a cliche, a substitute for analysis, and a rigid barrier to meaningful collective bargaining.

83 Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831, 854 (1966).

84 And it has. See Communications Workers v. Pacific Northwest Bell Tel. Co., 337 F.2d 455 (9th Cir. 1964), *affirming*, 310 F.2d 244 (9th Cir. 1962). Compare IUE v. General Elec. Co., 332 F.2d 485 490 (2d Cir.), *cert. denied*, 379 U.S. 928 (1964), where the reluctant party sought to introduce the wrong type of collateral evidence (*i.e.*, relating to its right to perform the act in question) and, apparently, had none of the right type to offer.

85 NLRB v. Acme Indus. Co. 385 U.S. 432, 436 (1967).