THE SCOPE OF ARBITRATION AGREEMENTS—THE ARBITRABILITY OF COLLECTIVE BARGAINING AGREEMENT TERMINATIONS AND EXPIRATIONS: *ROCHDALE VILLAGE, INC. V. PUBLIC SERVICE EMPLOYEES LOCAL 80*

Since the question of arbitrability can be answered only by evaluating the grievance in relation to the contract, it would seem to follow that arbitrability must itself be an arbitrable issue.[1]

I

INTRODUCTION

The question of how broadly arbitration[2] agreements should be interpreted has been the subject of much judicial and legislative consideration since early in this century.[3] Originally, executory agreements to settle disputes by arbitration were not judicially enforceable. In the 1920's, Congress made arbitration agreements enforceable in federal courts and many states quickly enacted similar provisions. Labor agreements were, however, generally excluded from this early arbitration legislation. In 1947, Congress enacted a comprehensive labor relations scheme which granted federal courts the power to enforce labor-management arbitration agreements.[4] Ten years later, the United States Supreme Court began to develop a substantive federal common law of labor relations by expanding upon the Congressional enactments.[5]

This article is dedicated to the late Mr. Alfred Baruth of the Horace Mann School.

1. Section of Labor Law, American Bar Association, 1951 Majority Report of the Committee on Administration of Union-Employer Contracts, *reprinted in* 18 Lab. Arb. & Disp. Settl. 942, 950 (1952) [hereinafter cited as ABA Report].

2. "The settlement of controversies by arbitration is a legally favored contractual proceeding of common law origin by which the parties by consent submit the matter for determination to a tribunal of their own choosing in substitution for the tribunals provided by the ordinary processes of the law." 6 C.J.S. *Arbitration* § 2 (1975).

3. On the subject of labor arbitration, *see generally* F. & E. ELKOURI, HOW ARBITRATION WORKS 169-80 (3d ed. 1973); O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 80-120 (1973). *See also* 48A AM. JUR. 2D *Labor Relations* §§ 1787, 1792, 1842-97, 1914-18, 1920-37, 1984-88 (1979); 6 C.J.S. *Arbitration* § 1-188 (1975 & Supp. 1980); R. GORMAN, BASIC TEXT ON LABOR LAW; UNIONIZING AND COLLECTIVE BARGAINING 540-74 (1976); R. SMITH, L. MERRIFIELD & D. ROTHCHILD, COLLECTIVE BARGAINING AND LABOR ARBITRATION (1970); C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS 120-24 (1970); S. WILLISTON, 17 A TREATISE ON THE LAW OF CONTRACTS 1-834 (3d ed. 1977); Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999 (1955).

4. Labor Management Relations Act, Pub. L. No. 80-101, §§ 1-303, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-87 (1976)). *See* notes 46-51 and accompanying text *infra.*

5. *See* notes 52-64 and accompanying text *infra;* F. & E. ELKOURI, *supra* note 3, at 28-43; C. UPDEGRAFF, *supra* note 3, at 29-33, 39-64.

For many years, the federal and state courts had reserved all decisions of arbitrability[6] of labor disputes for judicial resolution. In the past few years, however, the courts have been increasingly willing to allow arbitral decisions in areas which were previously reserved for judicial determination. In 1960, the Supreme Court found that the right to arbitrate attaches during the course of the labor agreement and survives beyond the end of the agreement, whether the agreement ends by expiration[7] or by termination.[8] The Court held that labor-management disputes arising *prior to* the end of the agreement remain arbitrable even when the agreement is no longer operational.[9] In 1977, the Supreme Court rendered its most recent arbitrability decision and again expanded the role of arbitration. The Court ruled that even those disputes which arise *after* the end of the agreement, but which are based upon an obligation created by the agreement, are arbitrable.[10]

These issues of arbitrability, however, have generally arisen in the context of labor-management disputes concerning matters tangential to the specific question of whether the collective bargaining agreement and its arbitration clause have expired or terminated.[11] In these cases, the termination question has been relevant only insofar as it determines whether or not a valid and binding arbitration clause existed at the time arbitration was demanded. The Supreme Court has yet to decide whether a party's demand for an arbitrator's determination as to whether or not a collective bargaining agreement has terminated or expired presents an arbitrable issue.[12]

Until recently, the seminal decision governing the arbitrability of direct questions of contract termination or expiration was the holding of the United States Court of Appeals for the Second Circuit in *Procter & Gamble Independent Union v. Procter & Gamble Manufacturing Co.*[13] In *Procter & Gamble,* the Second Circuit ruled that the courts, and not the arbitrator,

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6. One commentator views the question of "arbitrability" as asking whether "the agreement of the parties—the contract—indicate[s] that they intended 'to make the arbitration process available for a particular dispute?'" Note, *"Arbitrability" of Labor Disputes,* 47 VA. L. REV. 1182, 1183 (1961) (quoting Justin, *Arbitrability and the Arbitrator's Jurisdiction, Management Rights and the Arbitration Process,* Proceedings, 9th Ann. Meeting, Nat'l Acad. of Arbitrators 1, 3 (1956)).

7. Any discussion of the arbitrability of termination questions also refers to the arbitrability of questions of expiration under the terms of the contract.

8. This rule was first enunciated in a series of cases commonly known as the *Steelworkers Trilogy:* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). For further discussion of these cases, *see* note 30 *infra.*

9. *Steelworkers Trilogy, supra* note 8.

10. Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243 (1977).

11. *See* notes 177-222 and accompanying text *infra.*

12. *See* notes 78-90, 218-22 and accompanying text *infra.*

13. 312 F.2d 181 (2d Cir. 1962), *cert. denied,* 374 U.S. 830 (1963).

must "determine whether at the time these grievances arose there was any [existing and valid] agreement to arbitrate grievances."[14] Although the *Procter & Gamble* court did not specifically address the arbitrability of direct questions of contract termination or expiration, *Procter & Gamble* has generally been relied upon for the proposition that such questions are reserved for judicial determination only.[15] In *Rochdale Village, Inc. v. Public Service Employees Local 80,*[16] the Second Circuit Court of Appeals directly addressed this question of first impression. The Second Circuit, following the framework created by the Supreme Court,[17] effectively reversed the implications of its earlier decision in *Procter & Gamble.* The court held that the question of the arbitrability of contract termination, under a broad, all-inclusive arbitration clause, is an issue for the arbitrator.[18]

This Note will begin with a description of the role of arbitration within the labor-management relationship and the policy considerations favoring arbitration. It then presents an analysis of the judicially molded framework for arbitration and its development. The Note will continue by describing the facts of the *Rochdale* case. After examining the reasoning of the *Rochdale* decision, this Note will conclude with a discussion of how this decision has shifted questions of arbitrability from judicial to arbitral determination.

II

THE ROLE OF ARBITRATION AND POLICY CONSIDERATIONS FAVORING ARBITRATION

A. The Need for Arbitration of Labor Disputes

Labor disputes, an unavoidable characteristic of our free-enterprise system, arise when the demands of labor and management clash, each striving to acquire what it preceives as its fair share of the financial profits and other benefits of industrialization. To limit disputes and formalize the

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14. *Id.* at 184.

15. *See* text accompanying notes 198-208 *infra.*

16. 605 F.2d 1290 (2d Cir. 1979). *See* text accompanying notes 153-72 *infra.* This decision resulted from consolidated appeals to the Second Circuit Court of Appeals in Rochdale Village, Inc. v. Public Service Employees Local 80, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979), and in Public Service Employees Local 80 v. Rochdale Village, Inc., 102 L.R.R.M. 2470 (E.D.N.Y. 1979). The records on appeal to the Second Circuit in Rochdale Village, Inc. v. Public Service Employees Local 80, No. 79-7200, and in Public Service Employees Local 80 v. Rochdale Village, Inc., No. 79-7440, are hereinafter cited, respectively, as Appendix I and Appendix II, Rochdale, 605 F.2d 1290 (2d Cir. 1979). The decision on remand from the Court of Appeals in the consolidated action is Rochdale Village, Inc. v. Public Service Employees Local 80, 103 L.R.R.M. 2281 (E.D.N.Y. 1979). *See* note 172 *infra.*

17. *See* notes 52-90 and accompanying text *infra;* F. & E. ELKOURI, *supra* note 3, at 28-35.

18. *See* notes 153-72, 218-22 and accompanying text *infra.*

relationship between labor and management, a collective bargaining agreement is negotiated and signed.[19] However, even after the collective bargaining agreement is entered into, disputes will continue to arise under the agreement.

Unlike the parties to a typical contractual relationship, labor and management have not freely chosen each other as partners in their business enterprise. Rather, business necessity has brought the parties together, for each is dependent upon the other for its livelihood. The profitable operation of business and industry is jeopardized when a major contract-related dispute suspends business operations (*e.g.*, a strike or a management lockout), or when counterproductive hostility erupts in the workplace. For operations and profits to continue unimpeded, the differences between the parties must be resolved quickly, peacefully, and effectively.[20]

The collective bargaining agreement, intended to prevent these labor-management disputes, is not a panacea. The agreement cannot anticipate and provide explicit guidance for every potential disagreement. The agreement necessarily leaves many potential problems undiscussed or requires inferences based only on its general statements. Subsequent adjustments to the agreement will be provided by flexibility in its administration.[21]

Paradoxically, the collective bargaining agreement, which seeks to prevent disputes, may itself be the source of some disputes. The existence of a written agreement fixing the responsibilities of the parties tends to cause rigidity and formality. The agreement promotes reliance upon its specific terms, discouraging a more individualistic problem-solving approach. The true test of the success of the agreement should not be the extent to which it can be rigidly enforced, but rather its ability to promote understanding and cooperation between the parties so as to prevent disputes and facilitate their resolution when they do arise.[22]

Prior to the comparatively recent use of labor arbitration, disputing parties often resolved their differences by bringing suit. Resort to the courts, however, can be an impractical remedy. Litigation is expensive in many ways: trials and appeals are time-consuming, creating costly delays in the resumption of business; litigation presents the parties with a win-or-lose situation with limited opportunities for compromise; and litigation clearly does not promote harmony in the workplace. Consequently, resort to private arbitration of labor disputes has increased substantially in recent years.[23]

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19. *See* H. SHULMAN & N. CHAMBERLAIN, CASES ON LABOR RELATIONS 2-3 (1949); F. & E. ELKOURI, *supra* note 3, at 1.
20. *See* H. SHULMAN & N. CHAMBERLAIN, *supra* note 19, at 4-5.
21. *See id.*
22. *See id.* at 5-6.
23. *See id.* at 6.

B. The Source of the Arbitrator's Power

In the United States, labor's right to strike is considered a fundamental economic freedom.[24] However, even if a genuine disagreement exists, a peaceful resolution is preferable to a work stoppage.[25] An agreement to arbitrate effects a complete surrender of both the powers of labor unions and the prerogatives of management to resolve their disputes by unilateral action and economic strength.[26] Management agrees not to lock out or fire its employees in return for labor's assurance of continued production. The union members forfeit their right to strike in return for fixed salary, guaranteed raises, a definite term of employment, and other rights and benefits.[27] Uninterrupted operation of the business is thereby ensured while a dispute is resolved through arbitration.[28]

Beyond avoiding strikes and the problems of litigation, arbitration provides an informal, fast, and flexible means for dispute resolution. As the Eighth Circuit Court of Appeals stated:

> [it is our] conviction that labor disputes ought to be kept out of the courts whenever possible, that arbiters are usually qualified by experience and training to decide such disputes . . . that the informality of arbitration proceedings and the leadership of the arbiter is [sic] conducive to the settlement not only of the precise dispute being arbitrated but of other differences which may be festering in the relationship between the parties, and that an arbiter is in a position to act more expeditiously . . . than is a court.[29]

A labor arbitrator is not subject to many of the limitations which restrict a court's ability to resolve disputes. As the late Justice Douglas said in the *Steelworkers Trilogy*:[30]

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24. *See* F. & E. ELKOURI, *supra* note 3, at 5. *But see, e.g.*, N.Y. CIV. SERV. LAW §§ 200-207.3 (McKinney 1973 & Supp. 1980) (prohibiting public employee strikes and requiring binding arbitration).

25. *See* F. & E. ELKOURI, *supra* note 3, at 5-6.

26. *Id.* at 5-8.

27. Hays, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901, 917-19 (1960). The author, Paul R. Hays, was appointed to the Second Circuit Court of Appeals in 1962 and wrote the opinion of the court in *Procter & Gamble*.

28. C. UPDEGRAFF, *supra* note 3, at 22-23.

29. Northwest Airlines, Inc. v. Airline Pilots Ass'n, 442 F.2d 251, 254 (8th Cir. 1971), *cert. denied*, 404 U.S. 871 (1971) (citations omitted). Concerning the advantages of arbitration over litigation, *see* F. & E. ELKOURI, *supra* note 3, at 8-10; C. UPDEGRAFF, *supra* note 3, at 21-22; Smith, *The Question of "Arbitrability"—The Roles of the Arbitrator, the Court, and the Parties*, 16 SW. L.J. 1, 12-13 (1962).

30. Justice Douglas wrote the opinion for the Court in all three cases comprising the *Steelworkers Trilogy*, *supra* note 8. For analysis and discussion of the *Steelworkers Trilogy*, *see, e.g.*, Hays, *supra* note 27, at 920-33; Smith, *supra* note 29. *See also* Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A. L. REV. 360 (1962).

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts.
>
> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.[31]

Generally, an arbitrator is chosen for his particular expertise in relation to the parties and their problems. As Justice Douglas noted:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that this judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[32]

Arbitration, like collective bargaining, provides a flexible procedure which is adaptable to the needs of the parties and the circumstances of the dispute.[33] The parties are compelled by their contract to accept the decision of the arbitrator as final and binding, so that the dispute is resolved without interruption of business. Arbitration, however, does more than prevent work stoppages. As the noted commentator Harry Shulman has observed:

> The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.[34]

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31. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

32. *Id.* at 582.

33. "[A]rbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Id.* at 581.

34. Shulman, *supra* note 3, at 1024. *See* F. & E. ELKOURI, *supra* note 3, at 5, 13.

In the United States, labor and management are generally not required to submit their disputes to arbitration.[35] Instead, the arbitrator possesses his power solely because the parties chose to have their disputes settled by his binding determination. Once a dispute is before the arbitrator, his power is firmly limited by the scope of the parties' collective bargaining agreement.[36]

C. *The Scope of the Arbitrator's Power*

Until recently, an arbitrator could decide questions involving the existence of an arbitration agreement and of his authority thereunder only if the agreement's arbitration clause specifically gave him such power. Without such a specific grant of power, these questions had to be judicially resolved. Congress had gradually adopted a public policy favoring arbitral rather than judicial determination of questions of arbitrability.[37] In practice, however, the courts tended to decide the merits of the dispute under the guise of determining its arbitrability.[38] The *Steelworkers Trilogy,* in theory, brought this judicial practice to a halt.[39]

In the *Steelworkers Trilogy* the Court held that because arbitrability and a determination on the merits are so often intertwined, the parties must have intended to leave both decisions for the arbitrator. The Court feared that finding otherwise would be a judicial usurpation of responsibilities which the collective-bargaining agreement reserved for the arbitrator. A court's role in determining arbitrability was, therefore, limited to a threefold threshold inquiry into whether (1) a collective bargaining agreement existed; (2) the agreement provided for arbitration; and (3) there was a claim that the agreement had been violated.[40]

III

THE LEGAL FRAMEWORK FOR ARBITRATION DECISIONS

A. *The Federal Policy Favoring Arbitration*[41]

Prior to 1925, the federal courts followed the common law rule against specific enforcement of executory agreements to arbitrate disputes.[42] Legis-

35. Smith, *supra* note 29, at 3-4. The Railway Labor Act § 3, 45 U.S.C. § 153 (1976), provides an exception to this rule. It requires that railroad and airline labor disputes be submitted to the Railroad Adjustment Board for binding arbitration. *See* Yarowsky, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality,* 23 U.C.L.A. L. Rev. 936, 952-54 (1976).

36. Smith, *supra* note 29, at 3-4.

37. *See* text accompanying notes 41-64 *infra.*

38. *See, e.g.,* notes 178-80 and accompanying text *infra.*

39. *See* note 30 *supra.*

40. *Id. See* notes 229-39 and accompanying text *infra.*

41. *See generally* F. & E. ELKOURI, *supra* note 3, at 26-35; R. GORMAN, *supra* note 3, at 543-56; C. UPDEGRAFF, *supra* note 3, at 23-31, 39-64; Cox, *Current Problems in the Law of*

lation was therefore necessary to grant the federal courts the power to enforce arbitration clauses. Accordingly, Congress in 1925 passed the United States Arbitration Act,[43] making executory agreements to settle disputes by arbitration specifically enforceable in federal courts.[44] The Arbitration Act, however, expressly excluded "contracts of employment"[45] and thus additional legislation was required to permit the enforcement of labor arbitration clauses.

In 1947 Congress, acting pursuant to its power to regulate interstate commerce,[46] enacted the Labor Management Relations Act (LMRA).[47] The LMRA was designed to protect individual workers and to promote industrial stability through binding labor-management collective bargaining agreements.[48] Congress recognized that the mere execution of such agreements would bind neither party, so the desired stability would not be achieved unless collective bargaining agreements were made enforceable at law.[49] The LMRA, therefore, allowed labor organizations representing employees in industries affecting interstate commerce to sue and be sued in federal courts. It also granted concurrent federal jurisdiction over all actions involving violations of labor contracts.[50]

Grievance Arbitration, 30 ROCKY MTN. L. REV. 247, *passim* (1958) [hereinafter cited as Cox, *Current Problems*]; Smith, *supra* note 3, at 119-203.

42. Agreements to arbitrate disputes were generally enforceable. "The substantive rights created by an agreement to submit disputes to arbitration is recognized as a perfect obligation." Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123 (1923) (Brandeis, J.). The problem was one of remedies. An action would lie for damages for breach of an arbitration agreement, but federal courts would not enforce it by specific performance. *Id.* The parties' goal of obtaining dispute settlement by arbitration was thereby frustrated. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 466 (1957) (Frankfurter, J. dissenting); F. & E. ELKOURI, *supra* note 3, at 35-38; Gregory & Orilikoff, *The Enforcement of Labor Arbitration Agreements,* 17 U. CHI. L. REV. 233, 238-45 (1975) (discussing state arbitration statutes).

43. Pub. L. No. 401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-14 (1976)).

44. The Arbitration Act supplied the necessary remedy by instructing federal courts to use their equity powers to order arbitration if the parties had entered into a valid agreement requiring arbitration. United States Arbitration Act, §§ 2, 4, 9 U.S.C. §§ 2, 4 (1976).

45. United States Arbitration Act, § 1, 9 U.S.C. § 1 (1976). *See* Note, *"Arbitrability" of Labor Disputes, supra* note 6, at 1185; F. & E. ELKOURI, *supra* note 3, at 27-28.

46. "The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

47. Labor Management Relations Act, Pub. L. No. 101, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-87 (1976)). *See* [1947] U.S. CONG. SERV. 1135.

48. *See* notes 19-36 and accompanying text, *supra*; United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); Labor Management Relations Act, § 201, 29 U.S.C. § 171 (1976). This policy favoring arbitration accurately reflects the congressional intent. *See* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

49. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 453-54 (1947); S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

50. Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1976). *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1961) (section 301 designed to expand available forums with concurrent, not exclusive, jurisdiction). *See generally* Annot., 16 L.Ed. 2d 1143 (1966).

The LMRA provides that "[f]inal adjustment *by a method agreed upon by the parties* is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[51] In *Textile Workers Union v. Lincoln Mills*[52] the Supreme Court, relying principally on legislative intent, held that the LMRA authorized federal courts to fashion a body of substantive federal common law for the enforcement of collective bargaining agreements.[53] The Court then recognized a substantive right to the specific enforcement of the agreement to arbitrate.[54] The common law rule barring specific enforcement of executory agreements to arbitrate disputes was thus rejected by both the legislature[55] and judiciary[56] and was replaced with a clear, judicially enforceable "congressional policy in favor of the enforcement of agreements to arbitrate . . . ."[57]

Thirteen years later, the Supreme Court in the *Steelworkers Trilogy*[58] further emphasized that arbitration is the preferred method for achieving the peaceful settlement of labor-management disputes.[59] The Court recog-

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51. Labor Management Relations Act, § 203(d), 29 U.S.C. § 173(d) (1976) (emphasis added). *See* Labor Management Relations Act, § 201(b), 29 U.S.C. § 171(b) (1976).

52. 353 U.S. 448 (1957).

53. *Id.* at 450-51, 456 (1957). *See* S. WILLISTON, *supra* note 3, at 159; Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301,* 66 YALE L.J. 167 (1956). Once commentator believes that section 185 of the LMRA *"requires* the judiciary to develop a federal substantive law of collective-bargaining agreements derived from the provisions and policies of the NLRA, general legal principles, and other appropriate sources." Cox, *Reflections Upon Labor Arbitration,* 72 HARV. L. REV. 1482, 1484 (1959) (emphasis added) (citations omitted) [hereinafter cited as Cox, *Reflections*].

54. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 541 (1957). *See* Moss, *The Fate of Labor Arbitration in the Supreme Court: An Examination,* 9 LOY. CHI. L.J. 369, 369 n.3 (1978). The rationale behind this extension is that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964).

55. *See* notes 43-51 and accompanying text *supra.*

56. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

57. *Id.* at 458. *See, e.g.,* Gateway Coal Co. v. UMW, 414 U.S. 368, 377 (1974); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 265 (1964); United Steelworkers v. American Mfg. Co., 363 U.S. 574, 578 (1960). According to one author, however, the Court has gone beyond legislative intent in extending LMRA § 203(d) to a national labor policy favoring arbitration. *See* Goetz, *Arbitration After Termination of a Collective Bargaining Agreement,* 63 VA. L. REV. 693, 705 n.48 (1977).

58. *See* note 8 *supra.*

59. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), emphasized the distinction between general commercial arbitration and arbitration of labor disputes stating that:

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no

nized the broad stabilizing purpose behind the use of arbitration clauses. A collective bargaining agreement "states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . [It] is an effort to erect a system of industrial self-government."[60] The parties to an arbitration agreement have specifically chosen arbitration to settle their disputes, relying upon the general system of law governing the community and transcending the parties,[61] in order to avoid a judicial resolution. They seek instead an informed resolution of the problem based upon the common law of the shop.[62] As Aristotle observed over two thousand years ago: "[t]he arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced; namely, that equity might prevail."[63] The Court in the *Steelworkers Trilogy* therefore concluded that the parties "should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[64]

B. The Contractual Basis of the Duty to Arbitrate[65]

It is well established that the duty to arbitrate arises only by agreement: "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[66] Once an agreement is entered into, the expressed preference of the parties for an arbitral, rather than a judicial, interpretation of their obligations will be enforced.[67] Since the duty to arbitrate is of contractual origin, a judicial determination that such an obligation was created by the collective bargain-

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place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

60. *Id.* at 578-80. *See* Cox, *Reflections, supra* note 53, at 1498-99; Shulman, *supra* note 3, at 1004-05.

61. *See* Northwest Airlines, Inc. v. Airline Pilots Ass'n, 442 F.2d 251, 254 (8th Cir. 1971), *cert. denied,* 404 U.S. 871 (1971).

62. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960); Shulman, *supra* note 3, at 1016. *Compare* Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments,* 62 MICH. L. REV. 1115, 1116-17 (1965) (overwhelming majority of union and management officials surveyed prefer arbitration) *with* HAYS, LABOR ARBITRATION: A DISSENTING VIEW (1966) (criticizing labor arbitration) The author of the latter study, Paul Hays, wrote the decision in *Procter & Gamble.*

63. RHETORIC, Bk. 1, ch. 13.

64. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

65. *See generally* R. GORMAN, *supra* note 3, at 563-64.

66. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). *See, e.g.,* Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 250 (1977); Gateway Coal Co. v. UMW, 414 U.S. 368, 374 (1974).

67. Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 253 (1977).

ing agreement may precede a compulsory submission to arbitration.[68] The scope of the judicial inquiry, however, is narrowly defined.[69]

Initially, the Supreme Court held that when the parties have agreed to a "broad arbitration clause,"[70] the function of a court is confined to determining whether the contract permits arbitration of the dispute.[71] Recently, the Court has gone further, holding that the mere contractual obligation to arbitrate creates a "strong presumption favoring arbitrability . . . [which] must be negated expressly or by clear implication."[72] Arbitration "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."[73] Regarding broad arbitration clauses, the Court provided that "[a]part from matters that the parties *specifically exclude,* all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."[74] The Court has also found

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68. John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964). *See, e.g.,* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

69. *See* text accompanying note 40 *supra*; Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 425 (1976) (Stevens, J., dissenting); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

70. The phrase "broad clause" has never been adequately defined even though it is often used. One author has referred to the "typical broad arbitration clause" as one "covering any dispute over the interpretation or application of the agreement . . . ." Goetz, *supra* note 57, at 696. *See* F. & E. ELKOURI, *supra* note 3, at 64-66. The Supreme Court has found the following to be "broad" arbitration clauses: "all disputes and claims not settled by agreement" except those which are "national in character," Gateway Coal Co. v. UMW, 414 U.S. 368, 376 (1974); "differences aris[ing] between the company and the Union as to the meaning and application of [the] Agreement" including "any trouble aris[ing] in the plant," Alexander v. Gardner-Denver Co., 415 U.S. 36, 40 (1974); and "'any grievance' arising between the parties," Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 245, 254 (1977).

71. *See* text accompanying note 40 *supra.*

72. Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 254-55 (1977). One commentator has stated that the presumption of arbitrability established in *Nolde*

> does not represent any factually-based inference as to what the parties probably had in mind but failed to state in the agreement, or even as to what they probably would have expressed if they had thought about the matter; it is simply a result the Court imputes to the parties for policy reasons.

Goetz, *supra* note 57, at 729. *See* Feldwisch, Nolde *and Arbitration of Post-Contract Disputes,* 40 OHIO ST. L.J. 187, 194-200 (1979).

73. Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 254-55 (1977) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-85 (1960)). *See* Goetz, *supra* note 57, at 703, 705, 728-29. For example, the Supreme Court has held that in a merger, the surviving company is bound by the arbitration clause in the extinguished company's labor contract as to those employees of the extinguished company retained by the surviving company. John Wiley & Sons v. Livingston, 376 U.S. 543, 550-51, *cited in* Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 251-52 (1977).

74. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581, 584-85 (1960) (emphasis added). *See also* McAllister Bros. v. A & S Transp. Co., 621 F.2d 519, 522

that arbitration clauses which themselves have not been repudiated may survive a partial or total breach[75] or termination[76] of the collective bargaining agreement.[77] The contractual duty to arbitrate thus has been judicially expanded beyond the specific wording of the contract to presume arbitrability of all issues not expressly excluded.

C. Posing the Arbitrability Problem[78]

The Supreme Court has held that only matters specifically made arbitrable under the collective bargaining agreement, or susceptible of such an interpretation through the presumption favoring arbitrability, may be determined by the arbitrator.[79] The next question is whether it is for the arbitrator or the courts to address questions of arbitrability under a broad arbitration clause. Historically, only the courts themselves have determined arbitrability.[80] Recently, however, the courts have encouraged arbitral determination of such questions.[81]

In shifting the question of arbitrability to the arbitrators, the courts have made a difficult decision. If the courts themselves decided these questions, they would often be deciding the keystone issue, obviating the need for arbitration and thwarting the intent of the parties. On the other hand, if the question of arbitrability is immediately referred by the court to the arbitrator, then a familiar jurisdictional paradox results: the arbitrator determines whether he has power to decide the case at all, and if he decides that he does not have power, then he has made a decision which was beyond his power.[82]

Professor Cox has summarized this arbitrability problem as the need to decide

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(2d Cir. 1980) (quoting Rochdale Village, Inc. v. Public Service Employees Union, 605 F.2d 1290, 1295 (2d Cir. 1979)).

75. *See, e.g.,* Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers, 370 U.S. 254, 262 (1962).

76. Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 250-51 (1977); Local 721, United Packinghouse, Food and Allied Workers v. Needham Packing Co., 376 U.S. 247, 251-52 (1964).

77. In other than a labor context, the Supreme Court has held that an arbitration clause is severable from the remainder of a contract and the invalidity of another section of the contract does not affect the validity of the arbitration clause. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (quoting United States Arbitration Act, § 4, 9 U.S.C. § 4 (1925)). This rule has been applied in a labor context by the Seventh Circuit in Operating Eng'rs Local 139 v. Carl A. Morse, Inc., 529 F.2d 574, 578 (1976).

78. *See generally* R. GORMAN, *supra* note 3, at 551-61.

79. *See* notes 65-77 and accompanying text *supra.*

80. *See* S. WILLISTON, *supra* note 3, at 6-28 and cases cited therein; notes 41-50 and accompanying text *supra.*

81. *See* notes 51-64 and accompanying text *supra.*

82. *See* Case Note, *Labor Law—Arbitrability—In-Course Termination of Collective Bargaining Agreement Presents Issue for Judicial Resolution,* 43 FORDHAM L. REV. 880, 883-84 (1975).

> which tribunal should determine the scope of the contract. . . . [D]oes the court or the arbitrator have power to determine the armistice line between the area marked off for administration under the regime established by the contract and the area . . . left unregulated . . . ?[83]

While this issue has not been directly addressed by the Supreme Court, it has been claimed that the Supreme Court has specifically reserved the question of arbitrability for the courts. In an often-quoted passage in *Atkinson v. Sinclair Refining Co.*, the Court said, "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."[84] Furthermore, the Court concluded in a footnote to *United Steelworkers v. Warrior & Gulf Navigation Co.*, "[i]t is clear that under both the agreement in this case and that involved in *United Steelworkers v. American Manufacturing Co.* . . . the question of arbitrability is for the courts to decide."[85] In this footnote, the Court placed the burden of proof as to arbitrability upon the party claiming arbitrability.[86]

Despite the Supreme Court's occasional statements in dictum, which appear to reserve decisions of arbitrability for judicial determination, a close reading of the Court's opinions reveals that such an interpretation takes these comments out of context. The Supreme Court has established a policy favoring arbitration[87] and has extended this policy to include questions of arbitrability.[88] These questions of arbitrability have frequently arisen when a collective bargaining agreement containing an arbitration clause has allegedly terminated and one of the parties claims that due to the termination of the agreement and its arbitration clause, the dispute is not arbitrable. This was the issue presented in *Rochdale*, in which the Second Circuit held that questions of contract existence arising out of contract termination are arbitrable.[89] This holding has effectively completed the shift from judicial to arbitral determinations of questions of arbitrability.[90]

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83. Cox, *Reflections, supra* note 53, at 1515.

84. 370 U.S. 238, 241 (1962). *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570-71 (1960) (Brennan, J., concurring).

85. 363 U.S. 574, 583 n.7 (1960). *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 546 (1964).

86. 363 U.S. at 583 n.7 (1960).

87. *See* text accompanying notes 41-64 *supra*.

88. *See, e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243 (1977).

89. 605 F.2d 1290 (2d Cir. 1979). *See* text accompanying notes 153-72 *infra*.

90. *See* text accompanying notes 193-217 *infra*.

IV

THE ROCHDALE CASE

A. The Facts[91]

Rochdale Village, a "Mitchell-Lama" subsidized, cooperative housing development[92] located in Queens, New York, houses 5,760 low- and moderate-income families.[93] To most of its twenty-five thousand residents, Rochdale represents the best housing available within the City of New York.[94] Due to the recent inflationary spiral, however, Rochdale's residents have been unable to pay the ever-increasing operating costs of the development.[95] The resulting financial instability led Rochdale to explore cost-saving possibilities, including the subcontracting of its security force.[96]

The Public Service Employees Union Local 80 was the exclusive bargaining representative for the 175 maintenance and supervisory employees and the fifty-three security guards employed at Rochdale.[97] In March 1977, Rochdale and the Union entered into a two-year collective bargaining agreement retroactive to and dated as of November 1, 1976.[98] The agreement fixed the wages, benefits, terms, and conditions of employment of Rochdale's maintenance and security employees. It provided that, unless written notice of the intent to modify or terminate the agreement was given by either party, the agreement would be automatically renewed for successive one-year periods. Such notice was required to be given during a specified forty-five day "window period" that ended thirty days prior to the expira-

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91. The factual background is described in detail because a complete understanding of the development of the termination dispute is necessary to clarify the difference between disputes arising before or after termination, when the termination issue is only tangential to the actual dispute, and the instant dispute, when one party sought an arbitral determination of the direct issue of whether the collective bargaining agreement had terminated.

92. "Mitchell-Lama" housing obtained subsidies under N.Y. PRIV. HOUS. FIN. LAW art. II (McKinney 1961).

93. The 122-square-block development was conceived and built by master builder and power-broker Robert Moses. Its twenty high-rise residential buildings make Rochdale the world's second largest residential cooperative development, second only to Co-op City in the Bronx. *See* R. MOSES, PUBLIC WORKS: A DANGEROUS TRADE 465-66 (1970); Buck, *The Death of a Dream: Rochdale v. The Teamsters,* NEW YORK MAGAZINE, Aug. 6, 1979, at 29.

94. Buck, *supra* note 93, at 29-33.

95. *Id.* at 30. *See* Keating, *What Price Union Busting? Village Voice,* June 18, 1979, at 22, col. 1.

96. Rochdale estimated that subcontracting the security services could reduce security expenses by almost 50%, resulting in an annual savings of $350,000. Complaint at 3, ¶ 13, Rochdale, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979).

97. Rochdale, 605 F.2d 1290, 1292 (2d Cir. 1979); Complaint at 2, 3, ¶¶ 6, 8, Rochdale, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979). The Union is associated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Id.*

98. Rochdale, 605 F.2d 1290, 1292 (2d Cir. 1979). The full text of the agreement is set forth in Appendix I at 48-76, Rochdale, 605 F.2d 1290 (2d Cir. 1979) [hereinafter cited as Agreement].

tion of the agreement.[99] The agreement also required that no work "performed . . . [by] the collective bargaining unit will be subcontracted" to anyone not covered by the agreement.[100] The agreement further provided for "binding arbitration, upon the request of either party" for "[a]ll grievances" and "[a]ny and all disputes hereunder."[101]

Long before the scheduled expiration date of the agreement, both Rochdale and the Union expressed an unwillingness to renew the agreement under its then-existing terms.[102] The Union proposed fifteen modifications and a 20% wage increase.[103] Rochdale responded, demanding a 10% across-the-board wage reduction for maintenance and supervisory employees and the replacement of union security guards with non-union personnel.[104] To open the door for the negotiation and signing of a new

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99. Article XXIV of the agreement, entitled "Duration of Agreement," provided for the opening and closing of the "window period," the only time during which the agreement could be terminated:

> This [A]greement shall continue in effect until the 31st day of October, 1978, and thereafter shall be automatically renewed for successive yearly periods unless written notice is given, by either party to the other, of its desire to modify, amend or terminate this Agreement. Such notice shall be given not more than seventy-five (75) days nor less than thirty (30) days prior to the expiration date of this Agreement or of any annual extension thereof.

Agreement, *supra* note 98, at 72. *See* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979).

100. Agreement, *supra* note 98, at 52. *See* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979).

101. Article XVIII of the agreement established a three-stage procedure for all employee grievances with binding arbitration as the final stage. Article XX of the agreement, "Arbitration," specified:

> SECTION 1. Grievances
>
> (a) All grievances between the parties hereto that are not satisfactorily settled after following the procedures hereinabove set forth shall, at the request of either party, be submitted for arbitration . . . .
>
> * * * * *
>
> SECTION 2. Other disputes
>
> Any and all disputes hereunder shall be subject to binding arbitration, upon the request of either party hereto . . . .

Agreement, *supra* note 98, at 66-67. *See* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979). The parties apparently intended this arbitration clause to be all-inclusive, and the district court so held. *See* notes 124, 135, 166 and accompanying text *infra*. The Second Circuit, however, held that the arbitration clause was intended to be less than "all-inclusive." *See* notes 160-65 and accompanying text *infra*.

Grievances generally involve specific employees and their working conditions. Disputes under the agreement or questions of contract interpretation are generally broad union-employer disagreements involving the application of provisions of a collective bargaining agreement to groups of union members. *See generally* F. & E. ELKOURI, *supra* note 3, at 44-67, 109-10.

102. Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979).

103. *Id.*; Letter from the Union's business agent to Rochdale's president (June 8, 1978) (Appendix II at 111-12, Rochdale, 605 F.2d 1290 (2d Cir. 1979)).

104. Affidavit of Sol Friedman at ¶ 17 (Feb. 1, 1979) (Appendix I at 90, Rochdale, 605 F.2d 1290 (2d Cir. 1979)).

agreement, the Union gave Rochdale formal notice of its intent to terminate the existing agreement as of its expiration date and offered to meet to discuss the terms for a new agreement. This notice, however, fell outside the window period.[105] Rochdale agreed to negotiate a new agreement as to maintenance and supervisory employees, but it formally advised the Union that unless it agreed to wage reductions for the security guards, Rochdale would subcontract security services.[106]

Negotiations continued unsuccessfully through August 15, 1978, when Rochdale proposed a new agreement excluding security guards. On August 18, 1978, the window period opened; neither party, however, gave the required notice of termination during this period. Negotiations continued fruitlessly, and on September 29, 1978, Rochdale entered into a contract with the International Bureau for Protection and Investigation, Ltd. (IBPI),[107] to provide security services at Rochdale Village commencing on November 1, 1978, the date that Rochdale assumed the agreement with the Union would expire.[108] At midnight on October 31, 1978, Rochdale, maintaining that the agreement had expired, discharged the union security guards and replaced them with employees of IBPI. The Union thereupon called a strike of all of its members employed by Rochdale.[109]

B. The Decisions Below

1. Rochdale I

On January 4, 1979, after unsuccessful state court anti-strike injunction proceedings brought by Rochdale[110] and IBPI[111] and unfair labor practice

105. Rochdale, 605 F.2d 1290, 1293-94 (2d Cir. 1979); Rochdale, 103 L.R.R.M. 2281, 2282-83 (E.D.N.Y. 1979). Post-Trial Brief of Public Service Employees Local 80 at 8-9, Rochdale, 103 L.R.R.M. 2281 (E.D.N.Y. 1979).

106. *See* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979); Letter from Rochdale's attorney to Union (July 18, 1978) (Appendix II at 113, Rochdale, 605 F.2d 1290 (2d Cir. 1979)). "That was union busting, plain and simple," according to Barry Feinstein, the head of the Union and the City Employees Union. "They told us they were going to bring in minimum-wage scabs to do our work for us . . . ." Buck, *supra* note 93, at 30.

107. The IBPI security service is said to have a reputation for strikebreaking. Buck, *supra* note 93, at 30.

108. Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979); Rochdale, 103 L.R.R.M. 2281, 2282 (E.D.N.Y. 1979). *See* Letter from Rochdale's attorney to Friedman enclosing Rochdale's proposed agreement (Aug. 15, 1978) (Appendix II at 119-59, Rochdale, 605 F.2d 1290 (2d Cir. 1979)); Letter from Rochdale's attorney to Friedman (Oct. 3, 1978) (Appendix I at 116, Rochdale, 605 F.2d 1290 (2d Cir. 1979)); Brief for Defendant-Appellee at 10, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

109. Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979). *See* Buck, *supra* note 93, at 30. The strike was a long and bitter one, causing economic hardship for Rochdale and its residents, as well as for the Union and its membership. The nearly one-year-long strike was characterized by numerous incidents of violence, vandalism, and property damage, including the kidnapping of one IBPI guard and the fatal shooting of a striking union member by another IBPI guard. *See* Buck, *supra* note 93, at 29-31; Keating, *supra* note 95, at 22.

110. Rochdale Village, Inc. v. Beverly, 96 Misc. 2d 1080, 410 N.Y.S.2d 508 (Sup. Ct. 1978). The state court suit, commenced the morning after the strike began, alleged unlawful

charges filed by both Rochdale[112] and the Union,[113] the Union demanded arbitration as provided under the agreement.[114] In essence, three questions were presented to the arbitrator: whether Rochdale, by signing the IBPI subcontract during the term of the agreement, had breached the prohibition that "no work or services of the kind . . . presently performed . . . [by the Union] will be subcontracted . . . to any . . . employee not covered by this Agreement";[115] whether the agreement was automatically renewed for one year by the failure of Rochdale to give timely notice of termination within the window period;[116] whether, assuming the agreement had been renewed, Rochdale had violated both the subcontracting and the no-lockout provisions[117] by implementing the subcontract?[118]

Rochdale responded to the demand for arbitration by commencing an action against the Union in the United States District Court for the Eastern District of New York.[119] Rochdale sought a judicial determination by declaratory judgment, in lieu of a decision by the arbitrator, that the agreement had expired on October 31, 1978, and that Rochdale's subcontract with IBPI was proper. Rochdale contended that its

> letter to the Union dated August 15, 1978, enclosing a proposed new collective bargaining agreement "was not mailed until some time during the day of August 16, 1978 and could not possibly have been received until August 17 or 18, 1978 [during the window period]" . . . . The sending of that letter literally complies with the [termination notice] requirements of the Agreement.[120]

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acts occurring during the first four hours of the strike and sought to enjoin picket-line violence and to limit picketing. *See* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979).

111. International Bureau for Protection & Investigation, Ltd. v. Public Service Employees Local 80, 98 Misc. 2d 409, 413 N.Y.S.2d 962 (Sup. Ct. 1979). This suit was commenced for IBPI by the same counsel used by Rochdale and this action substantially mirrored the complaint filed in Rochdale Village, Inc. v. Beverly, 96 Misc. 2d 1080, 410 N.Y.S.2d 508 (Sup. Ct. 1978). *See* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979).

112. Appendix II at 230-32, 233-34, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

113. The Union filed three unfair labor practice charges against Rochdale. Appendix I at 27, Rochdale, 605 F.2d 1290 (2d Cir. 1979); Appendix II at 109, 110, 218, 219, 226, 227-28, 229, 262, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

114. *See* note 101 and accompanying text *supra;* Union's Notice of Intention to Arbitrate and Demand for Arbitration (Jan. 3, 1979) (Appendix II at 20-25, Rochdale, 605 F.2d 1290 (2d Cir. 1979)) [hereinafter cited as Demand for Arbitration]. *Accord,* Rochdale, 102 L.R.R.M. 2470, 2471 n.1 (E.D.N.Y. 1979) (citing issues originally presented for arbitration and the additional issue presented on February 2, 1979).

115. Demand for Arbitration, *supra* note 114, at 21. *See* Rochdale, 102 L.R.R.M. 2470, 2471 n.1 (E.D.N.Y. 1979); note 100 and accompanying text *supra.*

116. Demand for Arbitration, *supra* note 114, at 21; Rochdale, 102 L.R.R.M. 2470, 2471 n.1 (E.D.N.Y. 1979). *See* note 99 and accompanying text *supra.*

117. Article XVII of the Agreement, entitled "No Strikes or Lock-Outs," provided that "[t]here shall be no strike, slowdown or work stoppage during the term of this Agreement, and the Employer shall not lock out the employees." Agreement, *supra* note 98, at 65-66.

118. Demand for Arbitration, *supra* note 114, at 22.

119. Rochdale, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979).

120. Brief for Plaintiff-Appellant at 20-21, Rochdale, 605 F.2d 1290 (2d Cir. 1979). *See* Rochdale, 605 F.2d 1290, 1296 (2d Cir. 1979); text accompanying note 128 *infra.*

Rochdale also sought a permanent injunction staying the arbitration commenced by the Union.[121]

The Union counterclaimed for an order compelling arbitration of all issues in dispute and dismissing or staying the court action pending arbitration. The Union claimed that the required notice of termination had not been given during the window period and therefore the agreement automatically renewed itself for one year. The Union argued that the "all disputes" aspect of the arbitration clause[122] was sufficiently broad to require arbitration of the present disputes, including the termination question.[123]

Chief Judge Mishler held for the Union:

> When presented with an "all disputes" arbitration clause drafted "against a backdrop of well-established federal labor policy favoring arbitration as a means of resolving disputes over the meaning and effect of collective bargaining agreements" . . . the conclusion is inescapable that the parties "intended to arbitrate all the grievances arising out of the contractual relationship" . . . including the issue of whether the contract was automatically renewed . . . .[124]

Rochdale promptly appealed to the Second Circuit Court of Appeals. In the interim, however, the arbitrator rendered his award and the Second Circuit postponed argument of Rochdale's appeal pending proceedings relating to the award.[125]

2. *Rochdale II*

On May 9, 1979 the arbitrator rendered his "Opinion and Award."[126] The arbitrator found that Rochdale's signing of the IBPI subcontract did not violate the agreement.[127] He did find, however, that proper notice of

121. Complaint at 1, 16, Rochdale, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979). *See* Rochdale, 605 F.2d 1290, 1294 (2d Cir. 1979); Rochdale, No. 79-C-189, slip op. at 2 (E.D.N.Y. Feb. 23, 1979). Jurisdiction was predicated on the Labor Management Relations Act, § 301(a), 29 U.S.C. § 185(a) (1976). *See* note 50 *supra;* Declaratory Judgments Act, § 111, 28 U.S.C. §§ 2201-02 (1976).

122. *See* note 101 and accompanying text *supra.*

123. Rochdale, No. 79-C-189, slip op. at 2, 6 (E.D.N.Y. Feb. 23, 1979). *See* Rochdale, 605 F.2d 1290, 1294 (2d Cir. 1979).

124. Rochdale, No. 79-C-189, slip op. at 8 (E.D.N.Y. Feb. 23, 1979) (footnotes and citations omitted) (quoting Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 254 (1977)).

125. Rochdale, No. 79-7200 (2d Cir. May 17, 1979) (order postponing argument); Rochdale, 605 F.2d 1290, 1292 (2d Cir. 1979).

126. Appendix II at 11-16, Rochdale, 605 F.2d 1290 (2d Cir. 1979). The arbitrator's findings and award are reprinted as the Appendix to Rochdale, 102 L.R.R.M. 2470, 2475-76 (E.D.N.Y. 1979). *See* Rochdale, 605 F.2d 1290, 1294 (2d Cir. 1979).

127. Rochdale, 605 F.2d 1290, 1294 n.4 (2d Cir. 1979); Rochdale, 102 L.R.R.M. 2470, 2476 (E.D.N.Y. 1979). This portion of the arbitrator's decision, adverse to the Union's claim that the signing of the subcontract violated the agreement, was never appealed. For tactical reasons the Union chose not to challenge any part of the arbitrator's otherwise favorable award.

an intent to terminate was not given during the window period[128] and, therefore, the agreement had automatically renewed itself for one year. Accordingly, implementation of the IBPI subcontract violated the agreement by transferring and assigning work to persons not covered by the agreement.[129] The strike did not violate the no-strike provisions of the agreement, as renewed, since the strike was in response to Rochdale's improper lock out of the union security guards.[130] The arbitrator ordered the reinstatement of all union employees and the removal of all non-union employees performing security or maintenance functions. However, in light of Rochdale's financial circumstances, the arbitrator denied the Union's claims for money damages, back pay, and benefit contributions. Additionally, the arbitrator denied all of Rochdale's counterclaims.[131]

The Union then brought suit in the Eastern District of New York to confirm and enforce the arbitrator's award, in accordance with section 301 of the LMRA.[132] The Union contended that arbitration was required both under the agreement and under Judge Mishler's earlier decision,[133] that proper arbitration had taken place, and that a just award had been rendered. Rochdale's principal defense was that "the Union [was] estopped to seek confirmation of the arbitrator's award because of its prior admissions that the agreement had expired . . . ."[134]

In this decision, Chief Judge Mishler reiterated his earlier holding that the question of contract termination was an arbitrable issue under the broad "any and all disputes" arbitration clause.[135] He determined that the proper scope of judicial review of an arbitrator's award was "extremely narrow": "The court may not overturn the award because the court's interpretation of the contract differs from the arbitrator's."[136] Rather, an award may be overturned only because of fraud, corruption, misconduct, action in excess of the arbitrator's power, or complete disregard of the agreement or applicable law. Judge Mishler found that none of these conditions was present, and confirmed the arbitrator's award.[137] Rochdale appealed this decision; the appeal was expedited and consolidated with Rochdale's earlier appeal.[138]

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128. *See* text accompanying notes 99-108, 116 *supra.*

129. *See* text accompanying note 100 *supra;* Rochdale, 605 F.2d 1290, 1293 (2d Cir. 1979).

130. *See* notes 117-18 *supra.*

131. Appendix II at 11-16, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

132. Rochdale, 102 L.R.R.M. 2470, 2472 (E.D.N.Y. 1979); Complaint *passim,* Rochdale, 102 L.R.R.M. 2470 (E.D.N.Y. 1979). *See* Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1976).

133. *See* Rochdale, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979).

134. Answer at 3, Rochdale, 102 L.R.R.M. 2470 (E.D.N.Y. 1979). *See* Rochdale, 102 L.R.R.M. 2470, 2472 (E.D.N.Y. 1979).

135. Rochdale, 102 L.R.R.M. 2470, 2474 (E.D.N.Y. 1979). *See* text accompanying note 124 *supra.*

136. Rochdale, 102 L.R.R.M. 2470, 2475 (E.D.N.Y. 1979). *See* Rochdale, 605 F.2d 1290, 1294 (2d Cir. 1979).

137. Rochdale, 102 L.R.R.M. 2470, 2475 (E.D.N.Y. 1979).

138. Rochdale, 605 F.2d 1290, 1292 (2d Cir. 1979).

C. Appeal to the Second Circuit

1. Rochdale's Claims on Appeal

To obtain consolidation of the appeals and an expedited decision thereof, Rochdale agreed to limit its appeals to the question of arbitrability.[139] Rochdale presented three principal claims of error by the district court. First, Rochdale claimed that the decisions below were inconsistent with the Second Circuit's established rule[140] that questions of arbitration agreement termination are to be determined by the court and not by the arbitrator.[141] Rochdale argued that had the district court properly exercised its obligation to decide the issue of contract termination, it would have found that the agreement had been terminated[142] and that arbitration was therefore improper.[143] Second, Rochdale contended that even if termination questions can properly be decided by the arbitrator, the court and not the arbitrator must determine whether the parties entered into a separate "side agreement," embodied in oral discussions and conduct of the parties, to terminate the contract.[144] Third, Rochdale maintained that the doctrines of collateral and judicial estoppel[145] barred the Union from claiming that

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139. Memorandum of Law for Appellant [in support of pretrial stay and consolidation] at 3, Rochdale, 605 F.2d 1290 (2d Cir. 1979). *See* Supplemental Brief for Appellee at 9, Rochdale, 605 F.2d 1290 (2d Cir. 1979) (Rochdale "has elected not to pursue on appeal its claims that the Arbitrator's award should be vacated for bias or because unfounded or arbitrary").

140. *See* Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962). For discussion of *Procter & Gamble, see* notes 193-208 and accompanying text *infra*.

141. Brief for Appellant at 2-4, 23-37, Rochdale, 605 F.2d 1290 (2d Cir. 1979); Reply Brief for Appellant at 6-23, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

142. Rochdale claimed that termination occurred by proper notice within the "window period," (*see* note 99 and accompanying text *supra*) or, alternatively, that termination occurred by the conduct of the parties evidencing acceptance of mutual early termination notices, (*see* text accompanying notes 102-108 *supra*).

143. Rochdale's claims throughout the trials and appeals implied that a determination that the collective bargaining agreement had terminated a fortiori required a holding that arbitration was no longer proper regardless of the issue. *E.g.*, Brief for Plaintiff-Appellant at 2, Rochdale, 605 F.2d 1290 (2d Cir. 1979) ("under the undisputed facts of this case, it is clear that the Agreement had, in fact, terminated and the court should have held that Rochdale was under no obligation to arbitrate"). This is incorrect because the obligation to arbitrate often continues after the agreement has terminated or expired. *See* text accompanying notes 211-17 *infra*.

144. Rochdale, 605 F.2d 1290, 1296-97 (2d Cir. 1979); Brief for Appellant at 2-3, 37-40, Rochdale, 605 F.2d 1290 (2d Cir. 1979). *See* note 142 *supra;* notes 161-72 and accompanying text *infra*.

145. Rochdale argued that judicial estoppel "precludes a party from taking inconsistent positions before the same or a different court on the same issue—even if there has been no determination of the issue." Brief for Appellant at 54, Rochdale, 605 F.2d 1290 (2d Cir. 1979). *See* Davis v. Wakelee, 156 U.S. 680, 689 (1895); Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings,* 9 BROOKLYN L. REV. 245, 248 (1940); Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings,* 59 HARV. L. REV. 1132 (1946). *But see* note 151 and accompanying text *infra*.

the contract had not terminated and was automatically renewed.[146] Rochdale also insisted that the district court addressed only the first of these assertions and that its decision was wrong.[147] Rochdale concluded that because the facts relevant to an appellate decision were undisputed and fully set forth in the record, a remand for further proceedings was unnecessary.[148]

2. The Union's Claims on Appeal

The Union's principal claim on appeal was that the district court properly compelled arbitration under the broad "any and all disputes" clause of the agreement.[149] The Union contended that its claims of improper subcontracting and automatic renewal of the agreement, as well as Rochdale's claims of contract termination or modification by a separate "side agreement," were properly referred to the arbitrator because the agreement contained no limiting language. It further argued that collateral estoppel was not applicable because the issue of contract expiration was not fully and fairly litigated, actually decided, or necessary to the holding in either state court action.[150] Similarly, since contract termination was not at issue in the state court proceedings, the Union had not maintained a contrary legal position to Rochdale's detriment, and judicial estoppel was therefore inapplicable.[151] The Union concluded that the district court's decisions compelling arbitration and confirming the arbitrator's award should therefore be affirmed.[152]

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146. *See* Brief for Appellant at 44-56, Rochdale, 605 F.2d 1290 (2d Cir. 1979); Reply Brief for Appellant at 23-30, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

147. Brief for Appellant at 4, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

148. *Id.* at 67-68. After obtaining consolidation by voluntarily limiting its appeals to the issue of arbitrability, Rochdale presented an additional claim. Rochdale stated that it no longer consented to the representation of guards and other employees by one union, as required by the LMRA. *See* Labor Management Relations Act, § 9(b)(3), 29 U.S.C. § 159(b)(3) (1976). In what appears to have been an attempt to circumvent its self-imposed appeal limitation, Rochdale claimed that this new issue was not arbitrable and therefore should have been decided by the court. *See* Reply Brief for Appellant at 30-33, Rochdale, 605 F.2d 1290 (2d Cir. 1979). This issue, however, was never raised in the demand for arbitration or in either of the complaints, and does not present a true question of arbitrability. *See* Demand for Arbitration, *supra* note 114, at 20-26; Complaint, Rochdale, No. 79-C-189 (E.D.N.Y. Feb. 23, 1979); Complaint, Rochdale, 102 L.R.R.M. 2470 (E.D.N.Y. 1979).

149. *See* notes 70-77, 101 and accompanying text *supra.*

150. *See* Supplemental Brief for Appellee at 26-33, Rochdale, 605 F.2d 1290 (2d Cir. 1979); Brief for Defendant-Appellee *passim,* Rochdale, 605 F.2d 1290 (2d Cir. 1979).

151. Judicial estoppel

> [a]rises from sworn statements made in the course of judicial proceedings . . . . The rule may be invoked only where the prior and subsequent litigation involves the same parties and *where one party has relied on the former testimony and changed his position by reason of it.* But [some courts have held] that judicial estoppel is based on public policy and not on prejudice to an adverse party.

BLACK'S LAW DICTIONARY 985 (4th ed. 1968) (emphasis added) (citations omitted). *See* note 165 *infra. But see* note 145 *supra;* Supplemental Brief for Appellee at 33-34, Rochdale, 605 F.2d 1290 (2d Cir. 1979).

152. *See* Brief for Defendant-Appellee *passim,* Rochdale, 605 F.2d 1290 (2d Cir. 1979); Supplemental Brief for Appellee *passim,* Rochdale, 605 F.2d 1290 (2d Cir. 1979).

3. The Decision of the Second Circuit

The Second Circuit Court of Appeals reversed in part, vacated in part, and remanded the decisions of the district court.[153] The practical effect of this holding, however, was to partially affirm and partially reverse the lower court's decisions. Judge Kearse's opinion recognized that the duty to arbitrate is of contractual origin[154] and that arbitration clauses are to be construed broadly.[155] The court perfunctorily stated the "rule" that, generally, questions of contract termination are for judicial determination,[156] but set forth exceptions which virtually swallow the rule. If there is a broad "all disputes" arbitration clause, then "all questions, including those regarding termination, will be properly consigned to the arbitrator . . . ."[157] If there is a narrower arbitration clause, then the presumption favoring arbitrability operates to include all areas not specifically excluded from arbitration, except that the court is not to compel arbitration as to issues clearly beyond the scope of the arbitration clause.[158] "[I]f the arbitration clause covers disputes as to contract interpretation, and the termination is alleged to have occurred on a basis 'implicit in [the] contract,' the termination question is arbitrable."[159]

The court then examined the agreement's arbitration clause which extended to "[a]ny and all disputes hereunder." It found, in contrast to the Supreme Court's policy favoring broad interpretation of arbitration clauses,[160] that "[t]he insertion of the word 'hereunder' after the otherwise all-inclusive phrase 'any and all disputes' has the effect of limiting, albeit slightly, the parties' duty to arbitrate. All disputes arising 'under' the agreement are to be arbitrated; those that are collateral to the agreement are not."[161] The court found that the issue of termination was an arbitrable question arising under the agreement,[162] as was the question of the Union's repudiation of any alleged renewal of the agreement.[163] However, "ques-

153. *See* text accompanying notes 167-72 *infra.*

154. Rochdale, 605 F.2d 1290, 1294 (2d Cir. 1979) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962)). *See* notes 65-77 and accompanying text *supra.*

155. Rochdale, 605 F.2d 1290, 1295-96 (2d Cir. 1979) (citing Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 254 (1977); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

156. Rochdale, 605 F.2d 1290, 1294 (2d Cir. 1979) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962)).

157. Rochdale, 605 F.2d 1290, 1295 (2d Cir. 1979).

158. *Id. See* McAllister Bros. v. A & S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980) (quoting Rochdale, 605 F.2d 1290, 1295 (2d Cir. 1979)).

159. Rochdale, 605 F.2d 1290, 1295-96 (2d Cir. 1979) (quoting Local 4, IBEW v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 613 (8th Cir. 1972)).

160. *See* notes 70-77 and accompanying text *supra.*

161. Rochdale, 605 F.2d 1290, 1296 (2d Cir. 1979).

162. *Id.*

163. *Id.* at 1297.

tions as to whether the parties entered into a side agreement . . . do not arise 'under' the collective bargaining agreement. This issue was therefore beyond the scope of the arbitration clause and should have been determined by the court."[164] In deciding this issue, the "actions by the Union arguably constituting repudiation may be highly relevant to the question of whether the parties mutually agreed, by words or conduct, to allow the collective bargaining agreement to lapse on October 31."[165]

In so holding, the court disregarded the intent of the parties. At no point in the trials or appeals did either party allege or imply that their intent was to provide a limited arbitration clause. In fact, at trial both Judge Mishler and Rochdale's attorney referred to the arbitration clause as being "very broad" and extending to "all disputes," implying that the clause was not limited solely to disputes arising "under" the agreement.[166]

The opinion of the district court was effectively affirmed insofar as it required arbitration of disputes arising directly under the contract: that is, whether contract termination was effected either by the operation of the contract's termination provision or by a repudiation of the contract by the Union.[167] The district court was reversed to the extent that it compelled arbitration of issues not arising "under" the agreement,[168] *i.e.,* whether Rochdale and the Union entered into a "side agreement" evidenced by words or conduct of the parties, implying mutual acceptance of termination notices not conforming to the contractual requirements. The Union was victorious in obtaining a decision requiring arbitration of virtually all labor-management disputes, including all disputes as to contract termination, except those specifically excluded from arbitration by the collective bargaining agreement. This was a pyrrhic victory for the Union, however, because the court found that the arbitration clause involved was not all-inclusive.[169]

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164. *Id.*

165. *Id.* The Second Circuit did not respond to Rochdale's claim that the Union was estopped from claiming that the agreement had expired. *See* notes 145, 151 and accompanying text *supra.* Rochdale's argument of estoppel based on inconsistent positions taken before previous judicial tribunals may have failed because the facts presented in the two adjudications were different; therefore the Union's positions were not necessarily inconsistent. *See* Himel v. Continental Ill. Nat'l Bank Trust Co., 596 F.2d 205, 210-11 (7th Cir. 1979); RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 68, Comments e, h (Tent. Draft No. 4, 1977).

166. Furthermore, during oral argument in the district court Judge Mishler inquired of the parties "[d]o we also agree that the arbitration clause is a very broad clause? It is what we usually call an all disputes clause?" Rochdale's counsel responded, "[i]t couldn't be any broader. . . . [W]e agree it is as broad as one can draft a clause." Brief for Defendant-Appellee at 30-31, Rochdale, 605 F.2d 1290 (2d Cir. 1979). *See* note 70 *infra.*

167. Rochdale, 605 F.2d 1290, 1296-97 (2d Cir. 1979).

168. *Id.* at 1297.

169. Whether a dispute is arbitrable often depends upon the specific wording of the arbitration clause. A broad arbitration clause generally utilizes terminology such as "all disputes" of "any difference" between the parties. *See, e.g.,* note 101 *supra.* Such a clause frequently excludes specifically stated types of disputes. Notwithstanding such specific exclu-

The court thus required a judicial determination of whether the so-called oral "side agreement" constituted an implied, collateral modification of the contract.[170] The court thereby frustrated the parties' intent that an arbitrator should settle "all disputes."[171] The court remanded the case to the district court for a determination of whether there actually was such a "side agreement" to terminate the contract.[172]

V

THE ARBITRABILITY OF QUESTIONS INVOLVING CONTRACT TERMINATION—ROCHDALE AND THE FRAMEWORK

Problems involving the arbitrability of disputes affected by termination of a collective bargaining agreement can be divided into three categories which are based upon the time at which the issue for arbitration arose. First, there are grievances or questions of contract interpretation arising prior to termination of the agreement.[173] Second are issues which arise after termination of the agreement but are based upon an obligation created by the

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sions, broad clauses permit arbitration of a wide variety of rights and differences involving the parties, including disputes which do not involve the interpretation or application of the agreement.

Narrow arbitration clauses generally restrict arbitration to the interpretation or application of purely contractual disputes between the union and management. These clauses also can limit arbitration solely to employer-employee grievances and exclude any questions requiring contract interpretation. Such clauses typically also restrict the arbitrator's power by prohibiting him or her from adding or deleting contract provisions, or otherwise altering the agreement. Further restrictions can be imposed by excluding additional specific areas of disputes from arbitration. *See generally* F. & E. ELKOURI, *supra* note 3, at 64-67.

One-third of the arbitration clauses examined in a study by the U.S. Labor Department contained broad arbitration clauses and two-thirds contained narrow arbitration clauses. *See* U.S. DEP'T OF LABOR, BULL. No.1425-26, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES 6, 10 (1966), *noted in* F. & E. ELKOURI, *supra* note 3, at 65 & n.81.

170. Rochdale, 605 F.2d 1290, 1297 (2d Cir. 1979).

171. *See* note 166 and accompanying text *supra*. In frustrating the parties' intent, the court disregarded the Supreme Court's observation that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all disputes* that arise under the agreement." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960) (emphasis added). *See* text accompanying notes 70-77 *supra*.

172. Rochdale, 605 F.2d 1290, 1297 (2d Cir. 1979). On remand, Judge Nickerson, ruling against the Union, found that "the parties mutually agreed that the agreement would expire on October 31, 1978." Rochdale, 103 L.R.R.M. 2281, 2283 (E.D.N.Y. 1979). This mutual agreement, Judge Nickerson reasoned, arose as a result of the conduct of the parties: for several months both Rochdale and the Union acted as if the agreement had expired. Rochdale, 103 L.R.R.M. 2281, *passim* (E.D.N.Y. 1979). The Union filed a notice of appeal as to this decision but the appeal was withdrawn with prejudice. The matter was thus settled approximately seventeen months after the disputed termination. *See* Stipulation of Settlement, Rochdale, 103 L.R.R.M. 2281 (E.D.N.Y. 1980).

173. *E.g.*, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) (arbitration commenced prior to expiration of agreement and merger of company). *See* text accompanying notes 177-92 *infra*.

agreement.[174] Third is the question whether a valid agreement existed, binding the parties by its arbitration clause, or whether the agreement terminated, thereby ending the obligation to arbitrate. In this third category, the fact of termination is the central issue for arbitration, while the first and second categories involve disputes tangential to the termination event itself.[175] The pro-arbitration position of Congress and the Supreme Court might imply that arbitrability is unquestionably a decision for the arbitrator;[176] this, however, has not always been the case.

A. Disputes Arising Prior to Contract Termination[177]

In 1947, the same year that Congress enacted the LMRA, the New York State Court of Appeals established the *Cutler-Hammer* doctrine,[178] which provides that "[i]f 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."[179] This doctrine, which allowed New York courts to decide both arbitrability and the merits of disputes subject to arbitration under the guise of deciding whether there was any dispute to be arbitrated, was adopted by many other states.[180] In 1960, in *United Steelworkers v. American Manufacturing Co.*,[181] the Supreme Court invalidated the *Cutler-Hammer* doctrine because of its "crippling

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174. *E.g.*, Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243 (1977) (dispute as to severance pay acquired under agreement arose after plant closed and agreement terminated). *See* text accompanying notes 193-217 *infra*. *But see* Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962) (employee disciplinary grievances arising after expiration of agreement not arbitrable).

175. *See* text accompanying notes 218-22 *infra*.

176. *See* text accompanying notes 46-77 *supra*. *But see* notes 84-86 and accompanying text *supra*.

177. This category includes grievances which arose prior to termination but which were filed either before or after the alleged termination.

178. Machinists Local 402 v. Cutler-Hammer, Inc., 271 A.D. 917, 918, 67 N.Y.S.2d 317, 318, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947) (per curiam). *See* Hayes, *supra* note 27, at 933-38.

179. Machinists Local 402 v. Cutler-Hammer, Inc., 271 A.D. 917, 918, 67 N.Y.S.2d 317, 318 (1947). *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-67 (1960); Smith, *supra* note 29, at 4-5; Goetz, *supra* note 57, at 695. Judge Fuld dissented from the Court of Appeals' per curiam affirmance in *Cutler-Hammer*: "If there is a possibility of such a construction [that the dispute is not frivolous], the court should not remove the controversy from the sphere of arbitration, particularly when the applicable arbitration clause—'If any dispute shall arise as to meaning, performance, non-performance or application of the provisions of this agreement'—is so broad." 297 N.Y. 519, 74 N.E.2d 464, 464-65 (1947).

180. *E.g.*, Standard Oil Dev. Co. Employees Union v. Esso Research & Eng'r Co., 38 N.J. Super. 106, 118, 118 A.2d 70, 75 (App. Div. 1955); Women's Soc'y for the Prevention of Cruelty to Animals v. American Arbitration Ass'n, 440 Pa. 34, 269 A.2d 888 (1970). *See* Cox, *Current Problems, supra* note 41, at 260-62; Note, *Arbitrability of Labor Disputes, supra* note 6, at 1184-85.

181. 363 U.S. 564 (1960).

effect on grievance arbitration."[182] The Court reasoned that "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under [the agreement] is entrusted to the arbitration tribunal."[183]

In a companion case, *United Steelworkers v. Enterprise Wheel & Car Corp.*,[184] the Court first considered the issue of termination as it related to arbitrability. The Court recognized that the arbitrability of disputes arising prior to the termination was a decision for the arbitrator.[185] In a dispute involving an employee discharge grievance arising and filed prior to termination of the agreement, the arbitrator, after termination, held that termination did not bar reinstatement of the employees and awarded reinstatement and back pay. The employer refused to comply, and the union brought suit to enforce the award.[186] On appeal from the district court's affirmance of the arbitrator's award, the Court found that the dispute required interpretation of the agreement and that the parties had agreed to submit to interpretation by the arbitrator and not the courts.[187] To avoid unnecessary review of the merits of every arbitral construction of labor agreements,[188] the Court affirmed the decision of the district court, holding that once the arbitrator has ruled, the courts will not overrule.[189]

In so holding, the Supreme Court properly recognized that, as to disputes arising out of the agreement, the right to arbitrate survives termination.[190] Even Justice Whittaker, dissenting, agreed that "[d]oubtless all rights that accrued to the employees under the collective [bargaining] agreement during its term, and that were made arbitrable by its provisions, could be awarded to them by the arbitrator, even though the period of the agreement had ended."[191] The obvious rationale for requiring arbitration of

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182. *Id.* at 566-67. *See* Hays, *supra* note 27, at 921.

183. 363 U.S. 564, 569 (1960). *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

184. 363 U.S. 593 (1960).

185. *Id.* at 595, 599-600. *See* Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 250-51 (1977).

186. 363 U.S. 593, 595 (1960).

187. *See* text accompanying note 67 *supra.*

188. 363 U.S. 593, 598-99 (1960).

189. *Id.* at 599. This is, of course, subject to the limitations discussed at notes 136-37 and accompanying text *supra.*

190. 363 U.S. 593 (1960). This interpretation is implicit in the *Enterprise Wheel & Car Corp.* decision and has been followed by other courts. For example, the *Procter & Gamble* court stated that "the duty to arbitrate survives termination of the agreement. Grievances which are based upon conditions arising *during the term of the agreement* to arbitrate are arbitrable after that term has ended. This is the real meaning of the cases cited by the appellee." Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 186 (2d Cir. 1962) (citing United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)).

191. 363 U.S. 593, 601 (1960).

disputes arising prior to termination was that if subsequent termination precluded arbitration, "a party [could] simply . . . stall the arbitration hearing until after the expiration of the contract and thus not be bound by the award."[192] Thus, questions for arbitration arising prior to the termination of an agreement are clearly arbitrable.

B. Disputes Arising After Contract Termination

In 1962, after the Supreme Court had recognized the enforceability of agreements to arbitrate,[193] and had enforced an arbitration agreement after the contract had expired,[194] the Second Circuit decided *Procter & Gamble Independent Union v. Procter & Gamble Manufacturing Co.*[195] This was the first appellate decision involving the arbitrability of questions arising *after* termination, and underlies the position many courts have taken with respect to such disputes.[196] In *Procter & Gamble,* the union demanded arbitration of grievances arising out of disciplinary measures taken after termination of the agreement and prior to the execution of a new agreement. The union's position was that, in the interim, the employer-employee relationship continued under the terms of the expired agreement; therefore, the agreement that grievances be arbitrated also continued.[197] The employer responded that it was not bound to arbitrate, since no agreement embodying an arbitration clause existed when the grievances arose.

In *Procter & Gamble*, the Second Circuit took notice of the Supreme Court's decision that the duty to arbitrate disputes arising prior to termination of the agreement extends beyond the termination date. The court recognized the distinction between disputes arising prior to termination and those arising after termination, but then stretched this distinction to harmonize its decision with the Supreme Court's policy favoring arbitration.[198] The court professed to follow the Supreme Court's general policy favoring

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192. Piper v. Meco, Inc., 302 F. Supp. 926, 927 (N.D. Ohio 1968), *aff'd,* 412 F.2d 752 (6th Cir. 1969).

193. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See* text accompanying notes 52-57 *supra.*

194. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See* text accompanying notes 184-92 *supra.*

195. 312 F.2d 181 (2d Cir. 1962).

196. Goetz, *supra* note 57, at 718-19. *See, e.g.,* Local 2369 v. Oxco Brush Div. of Vistron Corp., 517 F.2d 239, 243 (6th Cir. 1975); International Union, UAW v. ITT, 508 F.2d 1309, 1313 (8th Cir. 1975); Local 998, UAW v. B. & T. Metals, 315 F.2d 432, 435 (6th Cir. 1963). *But see, e.g.,* Local 4, IBEW v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 614 (8th Cir. 1972); Monroe Sander Corp. v. Livingston, 377 F.2d 6, 10 (2d Cir.), *cert. denied,* 399 U.S. 831 (1967).

197. 312 F.2d 181, 183 (2d Cir. 1962). *See* S. WILLISTON, *supra* note 3, at 52-54.

198. 312 F.2d 181, 186 (2d Cir. 1962). *See* John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) (obligation to arbitrate survives contract terminated by merger); Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243, 251-52 (1977) (elaborating upon *Wiley*). *See* notes 173-76 and accompanying text *supra.*

dispute settlement by arbitration[199] and the Court's holding that disputes arising prior to the termination of the arbitration agreement are arbitrable after the termination.[200] The *Procter & Gamble* court, however, frustrated the intent of the Supreme Court by providing a very narrow interpretation of the Court's arbitration decisions.[201] The Second Circuit held that the principle that the duty to arbitrate extends beyond termination "has no application to grievances which arise *after the expiration* of the agreement to arbitrate," and, therefore, for issues arising after termination, "no right of employees to arbitrate survived the expiration of the . . . agreement."[202]

Through *Procter & Gamble* and its progeny, the Second Circuit limited the Supreme Court's policy favoring arbitration by revitalizing the *Cutler-Hammer* doctrine that allows courts to decide the merits of an issue for arbitration under the guise of determining arbitrability.[203] The reasoning of *Procter & Gamble* was the basis for similar holdings by the Sixth[204] and Seventh Circuits,[205] but it has been rejected by the Third,[206] Fourth,[207] and Eighth Circuits.[208]

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199. *See* text accompanying notes 41-64 *supra.*

200. 312 F.2d 181, 186 (2d Cir. 1962). *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Monroe Sander Corp. v. Livingston, 377 F.2d 6, 10 (2d Cir.), *cert. denied,* 389 U.S. 831 (1967); Piano & Musical Instrument Workers Local 2549 v. W.W. Kimball Co., 221 F. Supp. 461, 464 (N.D. Ill. 1963) (dispute held arbitrable after contract termination), *rev'd,* 333 F.2d 761 (7th Cir. 1964) (no contract violation before termination, therefore no arbitrable dispute), *rev'd per curiam,* 379 U.S. 357 (1964), *decision on remand,* 239 F. Supp. 523 (N.D. Ill. 1965) (arbitration ordered).

201. 312 F.2d 181, 186 (2d Cir. 1962). *See* text accompanying notes 51-64 *supra.*

202. 312 F.2d 181, 186 (2d Cir. 1962). *See* National Marine Eng'rs' Beneficial Ass'n v. Globe Seaways, Inc., 451 F.2d 1159, 1160 (2d Cir. 1971). *See* Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 184-86 (2d Cir. 1962) ("Our task is, then, to determine whether at the time these grievances arose there was any agreement to arbitrate grievances. . . . [T]he right to arbitrate . . . depends . . . on the existence of an agreement to arbitrate").

203. *See* notes 205-06 and accompanying text *infra.*

204. OPEIU Local 42 v. UAW Local 174, 524 F.2d 1316, 1317 (6th Cir. 1975) ("it was for the district judge, not the arbitrator, to decide whether the contract had terminated"); Chattanooga Mailers Local 92 v. Chattanooga News-Free Press Co., 524 F.2d 1305, 1311 (6th Cir. 1975); Machinists Local 2369 v. Oxco Brush Div. of Vistron Corp., 517 F.2d 239, 243 (6th Cir. 1975); Local 998, UAW v. B. & T. Metals Co., 315 F.2d 432, 435-37 (6th Cir. 1963) (court determines arbitrability citing *Procter & Gamble*).

205. Oil, Chem. and Atomic Workers v. American Maize Prods. Co., 492 F.2d 409, 412 (7th Cir. 1974) (grievance arising after contract expiration not arbitrable).

206. General Warehousemen and Employees Local 636 v. American Hardware Supply Co., 329 F.2d 789, 792-93 (3d Cir. 1964) (validity of employment termination upon moving facilities held arbitrable).

207. Winston-Salem Printing Pressmen and Assistants' Local 318 v. Piedmont Publishing Co., 393 F.2d 221, 227-28 (4th Cir. 1968) (arbitrator to determine whether arbitration was properly requested prior to contract renewal date).

208. Local 589, ILGWU v. Kellwood Co., 592 F.2d 1008, 1011-12 (8th Cir. 1979) (employee pension rights accrued prior to execution of agreement held arbitrable under *Nolde*); Local 198, United Rubber Workers v. Interco, Inc., 415 F.2d 1208, 1211 (8th Cir. 1969) (dispute over termination by plant closing held arbitrable). *Cf.* International Union, UAW v. ITT, 508 F.2d 1309, 1314 (8th Cir. 1975) (dictum that broad arbitration clause would require arbitration of dispute arising after termination).

In *Nolde Brothers v. Local 358, Bakery & Confectionery Workers,*[209] the Supreme Court in its most recent arbitrability decision effectively muted the significance of *Procter & Gamble.* The Court held that the termination question presented by a severance pay dispute which arose after termination is not a relevant issue. The union had terminated its agreement with Nolde during negotiations for contract changes and had threatened a strike. Nolde then closed off its plant and refused the union's demand of severance pay for qualified employees as required by the agreement. Nolde refused to arbitrate the severance pay dispute, claiming that its obligations to arbitrate disputes ended with the termination of the agreement.[210]

The *Nolde* Court held that the merits of the underlying dispute were not and should not be before the Court. The role of the Court is limited to the threshold determination of whether the claim presented is governed by the contract. Arbitration must be ordered regardless of whether the issue arose prior to or after termination, as long as the claim arose under the contract.[211] The Court stated that "even though the parties could have so provided, there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based on events that occur after its termination."[212] Although the termination has changed the relationship between the parties, it has not changed their decision to resolve their disputes through arbitration.[213] Referring to *Procter & Gamble,* the Court said that "it could not seriously be contended . . . that the expiration of the contract would terminate the parties' contractual obligation to resolve . . . dispute[s] in an arbitral, rather than a judicial forum."[214] The Court, therefore, effectively reversed the test of *Procter & Gamble* and its progeny. In place of this test, the Court enunciated a procedure similar to the federal courts' test of subject matter jurisdiction:[215] "[A] court has jurisdiction to determine its own jurisdiction,"[216] and, therefore, "arbitration should be ordered . . . whenever the claim might fairly be said to fall within the scope of the collective bargaining agreement."[217]

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209. 430 U.S. 243 (1977).

210. *Id.* at 244-48.

211. *Id.* at 249-55. *See* notes 70-74 and accompanying text *supra. See also* Feldwisch, *supra* note 72; Goetz, *supra* note 57; Miller, *Labor Law—Collective Bargaining Agreements—Arbitration Required After Expiration of Contract,* 60 MARQ. L. REV. 1142 (1977).

212. 430 U.S. 243, 253 (1977). *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 554-55 (1964). *Nolde* has also been interpreted to require arbitration of a dispute concerning employee rights which arose prior to execution of the agreement. *See* Local 589, ILGWU v. Kellwood Co., 592 F.2d 1008, 1012 (8th Cir. 1979).

213. 430 U.S. 243, 254 (1977). *See* notes 48-49 and accompanying text *supra.*

214. 430 U.S. 243, 251 (1977). *Accord,* John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Piano & Musical Instrument Workers Local 2549 v. W.W. Kimball Co., 221 F. Supp. 461 (N.D. Ill. 1963), *rev'd,* 333 F.2d 761 (7th Cir.), *rev'd per curiam,* 379 U.S. 357 (1964). *See* Miller, *supra* note 211, at 1148-49.

215. *See* notes 229-31 and accompanying text *infra.*

216. United States v. UMW, 330 U.S. 258, 292 n.57 (1947).

217. Cox, *Reflections, supra* note 53, at 1516.

Questions of arbitrability arising after termination are now clearly arbitrable.

C. Disputes Directly Involving Contract Termination

After the Supreme Court's decision in *Nolde,* the remaining issue was the scope of the arbitrator's power to determine arbitrability of questions directly involving termination. Under *Procter & Gamble,* these questions were reserved for the courts, which must "determine whether at the time these grievances arose there was any agreement to arbitrate grievances."[218] Although *Nolde* specifically overruled *Procter & Gamble* for disputes arising under the agreement but after termination, *Nolde* did not go so far as to deal with disputes over contract termination itself.[219] *Rochdale,* however, did deal with this heretofore untouched area of the law of arbitrability. In *Rochdale,* the dispute arose neither prior to nor after termination; the dispute involved the very existence of a contract which one party alleged had terminated.

In *Rochdale,* the Second Circuit filled the void and properly recognized that the policy favoring arbitration permits the arbitrator to rule on questions going to the very existence of a contract.

> If a court finds that the parties have agreed to submit to arbitration disputes "of any nature or character," or simply "any and all disputes," all questions, including those regarding termination, will be properly consigned to the arbitrator: "With that finding the court will have exhausted its function, except to order the reluctant party to arbitration."[220]

In its first post-*Rochdale* contract termination case, the Second Circuit reemphasized that "[i]f the arbitration clause is broad and arguably covers disputes concerning contract termination, arbitration should be compelled and the arbitrator should decide any claim that the arbitration agreement, because of substantive or temporal limitations, does not cover the underlying dispute."[221] The Second Circuit has thus limited *Procter & Gamble* to its facts and recognized "that arbitrability must itself be an arbitrable issue."[222]

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218. 312 F.2d 181, 184 (2d Cir. 1962).

219. 430 U.S. 243, 244 (1977).

220. 605 F.2d 1290, 1295 (2d Cir. 1979) (quoting United Steelworkers v. American Mfg. Co., 363 U.S. 564, 571 (1960) (Brennan, J., concurring)). *See* Bressette v. International Talc Co., 527 F.2d 211, 215 (2d Cir. 1975) (court considered merits of claim and held that contract termination was an arbitrable issue); Trans World Airlines, Inc. v. Beaty, 402 F. Supp. 652, 656 (S.D.N.Y. 1975), *aff'd per curiam,* 81 Lab. Cas. ¶ 13,023 (2d Cir. 1976) (court determines termination issue under narrow arbitration clause but recognizes, in dictum, that "[a]n exception to the general rule . . . exists where the parties have agreed to arbitrate the issue of contract termination" by adopting a broad arbitration clause).

221. McAllister Bros. v. A. & S. Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980).

222. ABA Report, *supra* note 1, at 944.

D. Rochdale *and* Nolde *Revisited: The Arbitrator's Power to Determine Arbitrability*

The decision of the Second Circuit in *Rochdale* signaled the end of the progression toward complete arbitrability. Until the passage of the LMRA in 1947, labor arbitration clauses were not judicially enforceable. In *Textile Workers Union v. Lincoln Mills,* the Court began developing the substantive common law of labor arbitration.[223] The Supreme Court's subsequent decisions in the *Steelworkers Trilogy* recognized the limited right to arbitrate disputes arising prior to contract termination after the termination had occurred.[224] As one commentator has pointed out:

> The notion that arbitrators are better judges in [the collective bargaining] area than courts was not an easy one for the courts to accept. And so the Supreme Court [in the *Steelworkers Trilogy*], of necessity, had to spell out, perhaps in somewhat extravagant terms, exactly why arbitrators are better able to make decisions in this area than the courts.[225]

In *Procter & Gamble,* the Second Circuit temporarily halted the expansion of arbitrability by limiting that right solely to disputes arising prior to termination.[226] With its decision in *Nolde,* the Supreme Court effectively overruled *Procter & Gamble* and underscored its policy favoring arbitration and arbitrability.[227] In *Rochdale,* the Second Circuit recognized that *Procter & Gamble* is no longer valid law and that arbitrability is now the rule, unless explicitly excluded by the agreement. At the same time, *Rochdale* properly interpreted and extended *Nolde* to hold that direct questions of contract termination are arbitrable.[228]

In 1959, after the *Lincoln Mills* decision established the judicial foundation for the enforcement of arbitration agreements, but prior to any other Supreme Court decisions on arbitrability, Professor Archibald Cox suggested the following solution to the arbitrability problem:

> Determining the scope of the contract is interpretation, which is for the arbitrator, yet the arbitrator is not to be allowed to lift himself by his bootstraps. *The solution appears to lie in a distinction paralleling the test of federal jurisdiction over the subject matter of an action.* The federal courts have jurisdiction over actions arising under the laws of the United States . . . . If the [complaint] . . . makes a claim which if well founded is within the jurisdiction of

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223. 353 U.S. 448 (1957).
224. *See* note 8 *supra.*
225. Feller, *Comments,* in ARBITRATION AND PUBLIC POLICY, 18, 23 (S.D. Pollard ed. 1961). *See* Aaron, *supra* note 30, at 361.
226. 312 F.2d 181 (2d Cir. 1962).
227. 430 U.S. 243 (1977).
228. 605 F.2d 1290 (2d Cir. 1979).

> the court, it is within that jurisdiction whether well founded or not—at least where not "wholly frivolous." "[T]he case should be decided upon the merits unless the want of jurisdiction is entirely clear." Upon parallel reasoning *arbitration should be ordered . . . whenever the claim might fairly be said to fall within the scope of the collective-bargaining agreement.* If the latter contention be made but is patently frivolous, arbitration should be denied.[229]

Today, it is well established that "a court has jurisdiction to determine its own jurisdiction."[230] It appears that the federal courts have followed Professor Cox's suggestion and have given the arbitrator an initial power to determine his jurisdiction, a power which is later reviewable by the federal courts in proceedings to enforce the arbitration award. Although portions of some decisions might be construed as reserving to the courts the fundamental question of arbitrability, a thorough examination of these cases reveals the contrary: courts are to make only a threshold determination of whether the claim is covered by the contract, and doubts are to be resolved in favor of arbitration.[231]

As Justice Brennan, concurring in the *Steelworkers Trilogy,* stated: "On examining the arbitration clause, the court may conclude that it commits to arbitration any 'dispute, difference, disagreement, or controversy of any nature or character.' With that finding the court will have exhausted its function, except to order the reluctant party to arbitration."[232] The Eighth Circuit has also adopted Justice Brennan's approach.[233] Once this threshold decision is made, the court must defer all other questions to the arbitrator because "whether the moving party is right or wrong is a question of contract interpretation for the arbitrator."[234]

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229. Cox, *Reflections, supra* note 53, at 1516 (footnotes omitted) (emphasis added) (quoting Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271, 274 (1923)). *See* Cox, *Current Problems, supra* note 41, at 258-59, 265-66.

230. United States v. UMW, 330 U.S. 258, 292 n.57 (1947). *See* Rosado v. Wyman, 397 U.S. 397, 403 n.3 (1970); Land v. Dollar, 330 U.S. 731 (1947); Local 205, United Electrical, Radio and Machine Workers v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), *aff'd,* 353 U.S. 547 (1957); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, 57-58, 60 (3d ed. 1976); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3536, at 330 (1975 & Supp. 1979); Dobbs, *The Validation of Void Judgments: The Bootstrap Principle,* 53 VA. L. REV., 1003 & 1241 (1967) (two parts).

231. *See* text accompanying notes 67-74, 173-222 *supra.*

232. 363 U.S. 570, 570-71 (1960) (Brennan, J., concurring in all three cases of the *Steelworkers Trilogy*).

233. Local 598, ILGWU v. Kellwood Co., 592 F.2d 1008, 1011-12 (8th Cir. 1979) (dispute concerning former employees' rights which allegedly were vested prior to execution of the agreement held arbitrable under *Nolde*).

234. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). *See* McAllister Bros. v. A. & S. Transp. Co., 621 F.2d 519, 522-23 (2d Cir. 1980); note 73 and accompanying text *supra. Contra,* International Union, UAW v. ITT, 508 F.2d 1309, 1313 (8th Cir. 1975).

The courts are not to weigh the merits of the claim. As the Court stated in *Wiley*:

> Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction.[235]

The bargained-for agreement between the parties was to submit all disputes to arbitration, not merely those which the trial court deems meritorious.[236] Furthermore, the strong federal labor policy favors dispute settlement by the method chosen by the parties, particularly if that method is arbitration.[237] Similarly, after the arbitrator's decision, the courts are not to overrule that decision because their interpretation of the contract differs.[238]

As Professor Williston recognized, "[j]ust as a court has jurisdiction to determine its own jurisdiction, so the arbitrator . . . has power to interpret the scope of the arbitration terms of the contract including questions of whether the dispute at issue is made arbitrable" by the collective bargaining agreement.[239]

VI. CONCLUSION

Thirty-two years after Congress acted to allow enforcement of the parties' intent to arbitrate their disputes, the judiciary has recognized that these expressions of the parties' intent must govern. When the parties choose arbitration for all of their disputes, they intend that the arbitrator, and not the courts, decide disputes as to whether the contract has terminated. The primary purposes of the policy favoring arbitration—allowing the common law of the shop to govern through the expertise of the arbitrator, and decreasing the burden on our already congested judicial system—have overridden the self-interest of those who seek a judicial resolution of their conflicts believing that they will fare better before the court than before the arbitrator. Although the Union, its members, Rochdale, and its

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235. John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964). *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); Cox, *Reflections, supra* note 53, at 1515.

236. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). *See* notes 60-64 and accompanying text *supra.*

237. *See* notes 51-57 and accompanying text *supra.*

238. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). As to arbitral finality, *see* Moss, *supra* note 54, at 383-84; Yarowsky, *supra* note 35, at 948-62. If, however, the award does not draw "its essence from the collective bargaining agreement," enforcement might be denied. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

239. S. WILLISTON, *supra* note 3, at 161.

residents suffered through a long and bitter strike, the possibility of such occurrences in the future has decreased. *Procter & Gamble* has been silently overruled, and under the *Steelworkers Trilogy, Nolde,* and *Rochdale,* the arbitrability of collective bargaining disputes, regardless of contract termination, is now firmly established.

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