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An Arbitrator's Jurisdiction to Determine Arbitrability of Labor Disputes Under Public Sector Collective Bargaining Agreements: Is the Arbitrator's Jurisdiction to Decide Arbitrability in the First Instance the Worst of Both Worlds?

*McLaughlin v. Chester Upland School District*¹

I. INTRODUCTION

Although as a general rule the arbitrability of disputes under a collective bargaining agreement has been for a court to decide,² arbitrators are not entirely without jurisdiction to decide the question initially.³ Difficult jurisdictional questions arise, however, when one party seeks to compel or stay arbitration. When a party seeks to stay or oppose compulsion of arbitration on the basis that the dispute is not arbitrable under a collective bargaining agreement, *may* a court decide arbitrability in the first instance? The rule followed by federal courts construing section 301 of the Labor Management Relations Act and most state courts in construing similar state labor statutes is that courts have initial jurisdiction to decide the issue of arbitrability.⁴

The general rule permitting pre-arbitration adjudication of arbitrability has been criticized as an invitation to forum-shopping and a "race to the courthouse,"⁵

1. 655 A.2d 621 (Pa. Cmmw. Ct. 1995). Since this decision was the second major decision by the commonwealth court in a case involving the Chester Upland School District in a period of two years, subsequent short cites to this case will be to *Chester Upland II*.

2. Annotation, *Matters Arbitrable under Arbitration Provisions of a Collective Labor Contract*, 24 A.L.R. 2d 752 (1952); Ann C. Hodges, *Symposium on Labor Arbitration Thirty Years after the Steelworkers Trilogy: the Steelworkers Trilogy in the Public Sector*, 66 CHI-KENT L. REV. 631, 641 n.68 (1990).

3. 6 C.J.S. *Arbitration* § 25 (1975); Hodges, *supra* note 2, at 641 n.68.

4. Hodges, *supra* note 2, at 641 n.68.

5. Pennsylvania Labor Relations Bd. v. Bald Eagle Area Sch. Dist., 451 A.2d 671, 674 (Pa. 1982); see Mark P. Widoff & Michelle Fastiggi, *The Judiciary's Role in Compelling or Staying Public Employment Grievance Arbitration Under Pennsylvania's Enactment of the Uniform Arbitration Act: Reconciling PERA and the U.A.A.*, 98 DICK. L. REV. 630, 654 (1994).

an unnecessary obstacle to expeditious resolution of labor disputes,⁶ and a bad faith attempt by one party (usually the employer) to breach a contractual commitment to arbitration.⁷ Overruling a number of its own precedents following this majority rule, the Commonwealth Court of Pennsylvania recently held in *McLaughlin v. Chester Upland School District* that an arbitrator has the sole and exclusive jurisdiction in the first instance to decide the arbitrability of a labor dispute arising out of a public sector collective bargaining agreement.⁸

II. FACTS AND HOLDING

Mildred McLaughlin ("McLaughlin") was a special education teacher employed by the Chester Upland School District ("District").⁹ On April 2, 1992, McLaughlin received a letter from the district superintendent telling her that she was suspended without pay after hearings regarding her alleged infliction of corporal punishment on special education students.¹⁰ In response, the Chester-Upland Education Association ("Association") filed a grievance on behalf of McLaughlin.¹¹ The grievance sought restoration of McLaughlin's status as a tenured professional employee without loss of compensation or benefits.¹² On May 15, 1992, the Association, citing the collective bargaining agreement ("Agreement") between the Association and the District, sent a letter to the district superintendent requesting the selection of a mutually acceptable arbitrator.¹³ The District failed to answer this letter.¹⁴

Since the parties failed to select an arbitrator, the Association requested a list of arbitrators from the Pennsylvania Department of Labor and Industry's Bureau of Mediation ("Bureau") on June 4, 1992.¹⁵ Still no response came from the District after the Association received the Bureau's list of arbitrators.¹⁶ Alleging that the District's continued refusal to cooperate in selecting an arbitrator was an unfair labor practice under section 903 of Pennsylvania's Public Employee

6. Charles B. Craver, *Symposium on Labor Arbitration Thirty Years after the Steelworkers Trilogy: Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI-KENT L. REV. 571, 584 (1990).

7. *Id.* at 584.

8. *Chester Upland II*, 655 A.2d at 629. On September 15, 1995, the Pennsylvania Supreme Court granted an appeal from the Pennsylvania Commonwealth Court's decision in *Chester Upland II*. *McLaughlin v. Chester Upland Sch. Dist.*, 665 A.2d 471 (Pa. Cmmw. Ct. 1995). As of the date of this note, no opinion of the Pennsylvania Supreme Court on this appeal was available.

9. *Id.* at 623.

10. *Id.* The District also cited McLaughlin for such other alleged misdeeds as "her unauthorized dismissal of her class on or about May 6, 1988, endangering the students thereof." *Id.* at 623 n.2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

Relations Act ("PERA"),¹⁷ the Association filed an unfair labor practices charge with the Pennsylvania Labor Relations Board ("PLRB").¹⁸

The District filed a stay of arbitration in the trial court in which the District argued that the dispute was not arbitrable under the Agreement since McLaughlin had a remedy under Pennsylvania's Public School Code of 1949.¹⁹ After the matter was scheduled for a hearing before the trial court,²⁰ no additional action was taken by the trial court.²¹

Finding the District's refusal to arbitrate an unfair labor practice in itself, the PLRB found that under section 903 of PERA, an arbitrator initially decides if a grievance is arbitrable.²² Returning to the trial court, the District sought (1) review of the PLRB's finding that it committed an unfair labor practice by not agreeing to arbitration and (2) an injunction.²³ The District requested the trial court to determine that the demotion of McLaughlin was not arbitrable pursuant to the agreement because McLaughlin allegedly had a remedy under the Public School Code.²⁴

On July 16, 1993, the trial court issued an order granting the District's petitions for review and injunctive relief and reversing the PLRB's finding that the District's failure to arbitrate was itself an unfair labor practice.²⁵ In a second

17. The relevant portion of the statute reads as follows:

Arbitration or disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a binding decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree. Any decisions of the arbitrator or arbitrators requiring legislation will only be effective if such legislation is enacted: "(1) If the parties cannot voluntarily agree upon the selection of an arbitrator, the parties shall notify the Bureau of Mediation of their inability to do so. The Bureau of Mediation shall then submit to the parties the names of seven arbitrators. Each party shall alternately strike a name until one name remains. The public employer shall strike the first name. The person remaining shall be the arbitrator."

43 PA. CONS. STAT. ANN. § 1101.903 (1991).

18. *Chester Upland II*, 655 A.2d at 623.

19. *Id.* at 624. The stay was filed in the Court of Common Pleas for Delaware County. The District claimed that the grievance provision under the Agreement should not be construed to apply where the teacher had a statutory remedy under the Public School Code of 1949. *Id.* The relevant section of the Public School Code provides in relevant part that:

there shall be no demotion of any professional employee either in salary or in type of position, except as otherwise provided in this act, without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right of a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employee.

24 PA. CONS. STAT. ANN. § 11-1151 (1992).

20. The original trial court judge recused himself for reasons not specified in the court's opinion. *Chester Upland II*, 655 A.2d at 624.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 624 n.7.

opinion, the trial court agreed with the PLRB that arbitrability was initially to be determined by an arbitrator.²⁶ Following a hearing, the trial court issued new orders (1) granting the District a Stay of Arbitration and (2) vacating its July 16, 1993 order.²⁷ The second order also granted the District's petition for review by reversing the decision of the PLRB except insofar as it found the District's failure to arbitrate or to seek a timely stay of arbitration an unfair labor practice.²⁸ The Association and the PLRB each filed appeals in the Commonwealth Court of Pennsylvania²⁹ and the District filed cross-appeals of both orders.³⁰ The Association and the PLRB alleged error, citing section 501(a) of the Uniform Arbitration Act ("UAA") for the proposition that the trial court had the jurisdiction to determine arbitrability only to the extent the UAA is consistent with state labor statutes, in this case section 903 of the PERA.³¹

The Commonwealth Court of Pennsylvania reversed the trial court's first order granting a stay of arbitration and reversed its second order except insofar as it affirmed the PLRB's finding the refusal to arbitrate an unfair labor practice, thereby reversing the trial court's own determination that the District's failure to seek a timely stay of arbitration was an unfair trade practice.³² Explicitly overruling its own precedents to the contrary, the commonwealth court³³ stated that section 501(a) of the UAA would control to the extent it was consistent with Pennsylvania's labor statutes and held that under section 903 of PERA an arbitrator has sole and exclusive jurisdiction to determine all questions regarding the arbitrability of issues.³⁴

Judge Doyle dissented in part, disputing that an arbitrator possesses sole and exclusive jurisdiction to determine arbitrability in the first instance.³⁵ Judge Doyle argued that a trial court should still have jurisdiction to determine arbitrability until an unfair labor practice charge is filed with the PLRB, at which point the PLRB should assume exclusive jurisdiction.³⁶

26. *Id.*

27. *Id.* at 624-25.

28. *Id.* at 625.

29. The commonwealth court is Pennsylvania's intermediate court of appeals for, among other matters, appeals from decisions of administrative agencies of the Commonwealth of Pennsylvania. 42 PA. CONS. STAT. § 762(a)(3) (1981).

30. *Chester Upland II*, 655 A.2d at 625.

31. *Id.*

32. *Id.* at 629-30.

33. The opinion was written by Judge Pellegrini (Judges Collins, McGinley, Friedman, and Newman concurred; Judge Smith concurred in the result only). *Id.* at 630.

34. *Id.* at 628.

35. *Id.* at 630.

36. *Id.* at 635.

III. LEGAL BACKGROUND

It is generally not disputed that trial courts have the jurisdiction to decide whether a dispute is arbitrable.³⁷ The controversy before the Pennsylvania Commonwealth Court in *Chester Upland II* arose from the question of *when* courts have the jurisdiction to make such a determination.

To the extent there is a general rule with respect to an arbitrator's jurisdiction to determine the arbitrability of a labor dispute, it is that the courts, and not an arbitrator, have jurisdiction to determine arbitrability in the first instance.³⁸ Federal courts so decide cases brought under section 301 of the Labor Management Relations Act.³⁹ Many state courts follow a parallel rule, but some state courts hold that the arbitrator makes the initial determination of arbitrability, subject to review by a court of law.⁴⁰

The most extreme deference to an arbitrator's finding of arbitrability occurs where a statute expresses a legislative desire to supplant common law adjudication with arbitration and the statute divests a court of jurisdiction to enjoin arbitration. This view was represented by the Illinois Supreme Court in *Board of Education of Warren Township High School District 121 v. Warren Township High School Federation of Teachers*.⁴¹ Citing the drastic nature of the legislative scheme (in the Illinois Educational Labor Relations Act) and the potential for inconsistent decisions resulting from forum shopping when common law courts retain jurisdiction to enjoin arbitration, the Illinois Supreme Court held that trial courts had no jurisdiction to enjoin arbitration.⁴² Thus, the Illinois Educational Labor

37. As will be explained, Illinois is a notable exception to this rule in the area of public education labor relations. See *Board of Educ. of Warren Township High Sch. Dist. 121 v. Warren Township High Sch. Fed'n of Teachers*, 538 N.E.2d 524 (Ill. 1989).

38. Hodges, *supra* note 2, at 641 n.68.

39. Section 301, codified at 29 U.S.C. § 185(a), states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1988). Federal district courts thus have the power to decide if a question is arbitrable and may enjoin arbitration where the matter is not arbitrable under the governing collective bargaining agreement. See, e.g., *AT&T Technologies v. Communication Workers*, 475 U.S. 643, 648 (1986).

40. Hodges, *supra* note 2, at 643. When looking at arbitrability in an appeal of an award, these courts vacate awards only when it is clear that the dispute was non-arbitrable, since in such cases an arbitrator has exceeded the proper authority by going outside the essence of the collective bargaining agreement. See, e.g., *State v. AFSCME, Council 4*, 537 A.2d 517, 518-19 (Conn. App. 1988) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)); see also *Taylor v. Crane*, 595 P.2d 129, 134 (Cal. 1979).

41. 538 N.E.2d 524 (Ill. 1989).

42. *Warren*, 538 N.E.2d at 529.

Relations Board makes the initial determination of arbitrability subject to later review by an *appellate* court.⁴³

In 1982, Pennsylvania adopted the view giving arbitrators jurisdiction to decide arbitrability of public sector labor disputes in *Pennsylvania Labor Relations Board v. Bald Eagle Area School District*.⁴⁴ In that case, the Pennsylvania Supreme Court construed section 903 of PERA⁴⁵ to give the arbitrator jurisdiction to make the initial determination as to whether a matter was arbitrable under a collective bargaining agreement allegedly in conflict with state statute.⁴⁶ “[W]ere we to decide otherwise,” the *Bald Eagle* court reasoned, “we would only encourage potential parties to such disputes to continue to follow the practice of preliminary [sic] litigating through one forum the power of another to decide the substantive issue.”⁴⁷

The *Bald Eagle* court did not, however, address whether trial courts retained jurisdiction to compel or stay arbitration where the party seeking to compel or enjoin arbitration cited the arbitrability of the subject matter in dispute.⁴⁸ Section 501(a) of the UAA, adopted by the Pennsylvania legislature in 1980,⁴⁹ gave the courts jurisdiction to compel or stay arbitration, subject to the limitation that this power only extended to disputes where the arbitration is “consistent with any statute regulating labor and management relations.”⁵⁰

Without considering the effect of the UAA on trial court jurisdiction, the commonwealth court in *Mifflin County School District v. Lutz*,⁵¹ held that the trial court had jurisdiction to stay arbitration where the collective bargaining agreement expressly proscribed arbitration to settle a dispute over teacher ratings

43. *Id.*

44. 451 A.2d 671 (Pa. 1982).

45. The relevant portion of the statutory provision reads: “Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory.” 43 PA. CONS. STAT. ANN. § 1103.903 (1990).

46. *Bald Eagle*, 451 A.2d at 672.

47. *Id.* at 674. Whether the court had decided that the arbitrator has sole and exclusive jurisdiction to make the arbitrability determination is a question that divided the commonwealth court in *Chester Upland II*. However, the language of the Pennsylvania Supreme Court in *Bald Eagle* strongly supports the idea of the arbitrator’s sole and exclusive jurisdiction, at least where the issue of arbitrability implicates statutory policies: “issues involving conflicts between a public sector collective bargaining agreement and fundamental statutory policies of this Commonwealth must be presented first to arbitration for determination, subject to appropriate court review of any award in conflict with such policies.” *Id.*

48. Arbitrability in *Bald Eagle* was presented to the courts on petition for review of the PLRB’s determination that the matter was arbitrable. No injunction of the ordered arbitration was sought. *Id.* at 671-72.

49. Part of Pennsylvania statutory law as 42 PA. CONS. STAT. ANN. § 7304(b) (1990), which provides in relevant part: “On application of a party to a court to stay an arbitration proceeding threatened or commenced the court may stay an arbitration on a showing that there is no agreement to arbitrate.”

50. *Id.*

51. 551 A.2d 396 (Pa. Commw. Ct. 1988), *appeal denied*, 565 A.2d 446 (Pa. 1989).

(at issue in the case).⁵² The court reasoned that section 7304(b) of the UAA as adopted by Pennsylvania only called for arbitration where there was an agreement to arbitrate, and thus where an agreement was clear on its face in prohibiting arbitration, arbitration could not be considered mandatory.⁵³ The following year, the commonwealth court did confront the impact of the UAA on trial court jurisdiction to determine arbitrability in *Middle Bucks Area Vocational Technical School Education Ass'n v. Executive Council of the Middle Bucks Area Vocational Technical School*.⁵⁴ Comparing the supposed silence of PERA as to the arbitrator's jurisdiction to determine arbitrability with the UAA's express sanction for trial court jurisdiction to compel or stay proceedings, the court favored the specific statutory language of the UAA over the general statutory language of PERA and thus held that the trial court had jurisdiction to determine arbitrability on petition of the parties.⁵⁵

The commonwealth court arguably began to retreat from its earlier solicitude of trial court jurisdiction under the UAA in its 1993 ruling in *Phoenixville Area School District v. Phoenixville Area Education Association*.⁵⁶ There, the court held that trial court jurisdiction to determine arbitrability in the first instance was only proper where the collective bargaining agreement was clear in specifying when arbitration was appropriate.⁵⁷ The court based its holding on the grounds that PERA section 903 only mandated arbitration of disputes arising from the *interpretation* of the provisions of a collective bargaining agreement.⁵⁸ The reasoning of the court implied that where the language of the provision is clear on the face of the collective bargaining agreement, there is nothing to interpret and thus a stay is "not appropriate, and an arbitrator must determine whether the dispute is grievable."⁵⁹ The court counseled trial courts against enjoining arbitration except where it could conclude "with positive assurance" that the parties agreed that the dispute was not to be arbitrated.⁶⁰

In *Chester Upland School District v. Pennsylvania Labor Relations Board*,⁶¹ the commonwealth court elaborated on its holding in *Phoenixville Area School District*, describing the threshold showing by the party seeking to have arbitrability decided by the trial court as a "substantial, bona fide dispute as to arbitrability."⁶²

52. *Lutz*, 551 A.2d at 398.

53. *Id.*

54. 552 A.2d 763 (Pa. Commw. Ct. 1989), *appeal denied*, 562 A.2d 828 (Pa. 1989).

55. *Middle Bucks*, 552 A.2d at 765.

56. 624 A.2d 1083 (Pa. Commw. Ct. 1993).

57. *Phoenixville Area Sch. Dist.*, 624 A.2d at 1087.

58. *Id.*

59. *Id.*

60. *Id.*

61. 631 A.2d 723 (Pa. Commw. Ct. 1993). Subsequent references in the text to this case will be to *Chester Upland I*.

62. *Chester Upland I*, 631 A.2d at 727. The court clearly allowed for preliminary determination of arbitrability by a trial court where an agreement expressly provides that the dispute is not susceptible to arbitration. *Id.*

The court noted that a party could challenge the arbitrability of the dispute on appeal as a threshold for the arbitrator's jurisdiction to make an award if the question had been raised before the arbitrator.⁶³ The court further observed that the PLRB has exclusive jurisdiction to determine if the employer's failure to arbitrate is an unfair labor practice.⁶⁴

In summarizing the law since the commonwealth court's ruling in *Lutz*, the *Chester Upland II* decision made it clear that up to that moment a trial court had retained the jurisdictional power to determine arbitrability in the first instance in some disputes, such as where a party sought to stay arbitration and the collective bargaining agreement clearly precluded arbitration of the dispute. On appeal in *Chester Upland II*, the Association and the PLRB asked the commonwealth court to reconsider this grant to trial courts of permissive jurisdiction over arbitrability.⁶⁵

IV. INSTANT DECISION

A. *The Majority Opinion*

After reviewing the procedural history of the appeal, the court in *Chester Upland II* framed the crucial question as being whether PERA section 903 withdrew jurisdiction in the first instance over the arbitrability of labor disputes from trial courts, jurisdiction seemingly provided for by section 7302(b) of the UAA as adopted by Pennsylvania.⁶⁶ In order to decide which statute controlled, the court looked to the history of both statutes as well as the case law interpreting both statutes.⁶⁷

The court noted that PERA was enacted in 1970 to resolve public sector labor disputes in order to create "a harmonious and fair working relationship" for the benefit of public employees and the public at large. The court further observed that by enacting PERA section 903 the legislature intended that binding arbitration of all disputes arising out of collective bargaining agreements be mandatory.⁶⁸ The court relied on the Pennsylvania Supreme Court's 1982 decision in *Bald*

63. *Id.* The court did not mean that arbitrability could be appealed only if the question had been raised first before the arbitrator. The court stated that, regardless of whether there was a failure to file exceptions to arbitrability, that failure to arbitrate was an unfair labor practice and the District could seek relief if it genuinely disputed arbitrability. *Id.* at 725.

64. *Id.* at 727.

65. *Chester Upland II*, 655 A.2d at 628.

66. *Id.* at 625. The question as stated by the court presumed a conflict between PERA and the UAA.

67. *Id.*

68. *Id.* at 625-26.

*Eagle*⁶⁹ for the proposition that PERA section 903 requires arbitrators to first decide all matters relating to collective bargaining agreements.⁷⁰ The court emphasized the *Bald Eagle* court's disapproval of forum shopping in the form of litigants going to trial court for a preliminary determination of the arbitrator's jurisdiction under the collective bargaining agreement.⁷¹

Turning next to the UAA, the court observed that under both the UAA and the Model Act that preceded it, trial courts had the jurisdiction to compel or stay arbitration, depending on whether or not there was an agreement to arbitrate any grievances.⁷² The court then quoted UAA section 501(a)⁷³ as proof that Pennsylvania statutory law limited the trial court's jurisdiction to determine arbitrability where such jurisdiction would be inconsistent with "any statute regulating labor and management relations."⁷⁴ The court thus reasoned that a trial court would only have jurisdiction over arbitrability in the first instance if the UAA were consistent with PERA.⁷⁵

The commonwealth court next reviewed its case law interpreting the effect of the UAA on the arbitrability of disputes under collective bargaining agreements regulated by state labor statutes. Beginning with its 1988 decision in *Lutz*,⁷⁶ the court observed that it held, without citing PERA, that the trial court had jurisdiction where the collective bargaining agreement expressly prohibited arbitration of the dispute.⁷⁷ The court then explained that not until the next year did it consider the relationship between the UAA and PERA, holding in *Middle Bucks*⁷⁸ that the trial court had jurisdiction in the first instance to decide arbitrability, since PERA was supposedly silent on the issue.⁷⁹

Explaining how the court's 1993 decision in *Phoenixville*⁸⁰ limited a trial court's jurisdiction to decide arbitrability in the first instance to cases where the collective bargaining agreement clearly permitted or prohibited arbitration,⁸¹ the court further explained that its reasoning had been based on the premise that PERA only commanded arbitration where the collective bargaining agreement could be interpreted as providing for arbitration of the dispute: where the language

69. 451 A.2d 671 (Pa. 1982).

70. *Chester Upland II*, 655 A.2d at 626 (citing *Bald Eagle*, 451 A.2d at 674).

71. *Id.*

72. *Id.* at 626-27.

73. 42 PA. CON. STAT. ANN. § 7302(b) (1990).

74. *Chester Upland II*, 655 A.2d at 627 (quoting 42 PA. CON. STAT. ANN. § 7302(b) (1990)).

75. *Id.*

76. 551 A.2d 396 (Pa. Commw. Ct. 1988).

77. *Chester Upland II*, 655 A.2d at 627 (citing *Mifflin County Sch. Dist. v. Lutz*, 551 A.2d 396 (Pa. Commw. Ct. 1988)).

78. 552 A.2d 763 (Pa. Commw. Ct. 1989).

79. *Chester Upland II*, 655 A.2d at 627.

80. 624 A.2d 1083 (Pa. Commw. Ct. 1993).

81. *Chester Upland II*, 655 A.2d at 627 (citing *Phoenixville*, 624 A.2d at 1087).

of the agreement is so clear as to preclude such an interpretation, the court may stay arbitration.⁸²

Quoting at length from *Chester Upland I*,⁸³ the court concluded that up until the present appeal Pennsylvania law had allowed a trial court to enjoin arbitration in some circumstances. The court also reasoned that where no injunction has been issued the arbitrator has jurisdiction over arbitrability, and that failure to arbitrate by either party could be grounds for filing an unfair labor practice charge before the PLRB.⁸⁴

On the request of the Association and the PLRB, the commonwealth court agreed to reconsider its previous rulings concerning the trial court's jurisdiction to "preemptively" enjoin arbitration under the UAA.⁸⁵ Reasoning that the Pennsylvania Supreme Court's construction of PERA section 903 in *Bald Eagle* required all disputes arising out of collective bargaining agreements to be decided in the first instance by an arbitrator, the court concluded that the trial court could have no concurrent jurisdiction to decide arbitrability, since under the language of UAA section 501(a) that would not be "consistent" with Pennsylvania labor statutes.⁸⁶ The court therefore held that UAA section 501(a) by its own terms does not give the trial court jurisdiction to decide arbitrability in the first instance, and that under Pennsylvania statute the arbitrator has "sole jurisdiction in the first instance to decide whether an issue is arbitrable."⁸⁷ All cases holding to the contrary were expressly and specifically overruled.⁸⁸

B. Judge Doyle's Concurrence

Writing separately, Judge Doyle concurred in the result but dissented from the court's holding that an arbitrator possesses "sole and exclusive" jurisdiction to adjudicate arbitrability in the first instance.⁸⁹ To the extent the UAA was inconsistent with PERA, Judge Doyle argued that the court had already reconciled the two statutes in its prior decisions.⁹⁰

Looking at the statutory history, Judge Doyle argued that the legislature's enactment of the present version of the UAA in 1980, ten years after the enactment of PERA, could not have been intended to divest trial courts of concurrent jurisdiction to decide arbitrability in the first instance.⁹¹ Judge Doyle

82. *Id.* (quoting *Phoenixville*, 624 A.2d at 1087).

83. 631 A.2d 723, 727 (Pa. Commw. Ct. 1993).

84. *Chester Upland II*, 655 A.2d at 628.

85. *Id.*

86. *Id.* at 628-29.

87. *Id.* at 629.

88. *Id.* n.19.

89. *Id.* at 630.

90. *Id.*

91. *Id.* at 632.

charged that the court misstated the import of PERA section 903 by characterizing it as commanding arbitration of all disputes arising out of collective bargaining agreements: the dispute has to arise out of the *interpretation* of the collective bargaining agreement to be arbitrable.⁹² The applicability of the collective bargaining agreement in the first place, Judge Doyle stated, was a separate issue.⁹³ By divesting the courts of the power to decide arbitrability in the first instance, the court's decision would interfere with the "prompt disposition of the substantive dispute."⁹⁴

Criticizing the majority's characterization of the relevant case law, Judge Doyle took issue with the court's interpretation of the Pennsylvania Supreme Court's ruling in *Bald Eagle*.⁹⁵ The concurrence faulted the majority for emphasizing the *Bald Eagle* court's solicitude of arbitration at the expense of that court's concern with the swift disposition of disputes.⁹⁶ Since the petition in *Bald Eagle* came from an appeal to the courts from a decision of the PLRB that failure to arbitrate was an unfair labor practice, Judge Doyle reasoned that nothing in *Bald Eagle* should be read to apply to cases where no charge had yet been filed before the PLRB.⁹⁷ Until an unfair labor practices charge has been filed with the PLRB, Judge Doyle argued that trial courts still have concurrent jurisdiction to decide arbitrability where an equity action has been duly filed under UAA section 501.⁹⁸ Judge Doyle advanced the idea that drawing the jurisdictional boundary line at the point where a charge has been filed with the PLRB or an injunction is sought from a trial court would resolve the uncertainty remaining after *Chester Upland I* as to when arbitrability could be decided by a trial court.⁹⁹ Thus, Judge Doyle reasoned that there was not necessarily an inconsistency between PERA and the UAA.

Responding to the majority's concern that the alternative to giving the arbitrator sole and exclusive jurisdiction to determine arbitrability in the first instance would be to encourage forum shopping, Judge Doyle pointed out that any application for a stay of arbitration filed in a court subsequent to filing of a charge with the PLRB would be quashed upon application of the other party.¹⁰⁰ Observing that the courts would have to consider arbitrability either in the first instance or on appeal, Judge Doyle maintained that swift initial determination of

92. *Id.*

93. *Id.*

94. *Id.* at 632-33.

95. *Id.* at 633-34.

96. *Id.* at 633.

97. *Id.* at 633-34.

98. *Id.* at 634.

99. *Id.* at 635.

100. This argument flows directly from his previous statement that the PLRB assumes exclusive jurisdiction over arbitrability once an unfair labor practices charge has been filed with the PLRB. Presumably there would then be no greater need to rush to the courthouse than to run to the PLRB.

the threshold issue of arbitrability was a compelling public policy supporting concurrent jurisdiction prior to filing with the PLRB.¹⁰¹ Turning back to the case at hand, Judge Doyle concurred in the result since the unfair labor practices charge had been filed with the PLRB prior to the District's application for an injunction against arbitration proceedings.¹⁰²

V. COMMENT

A. Immediate Effect of Granting Arbitrator Sole and Exclusive Jurisdiction to Decide Arbitrability on Forum Shopping

Depriving courts of *any* preliminary jurisdiction over the arbitrability of labor disputes under public collective bargaining agreements, as the commonwealth court did in *Chester Upland II*,¹⁰³ would have the immediate consequence of preventing the arbitration-averse party from litigating the arbitrator's jurisdiction before a judicial forum. Non-arbitrability is no longer to be an appropriate grounds for seeking a stay of arbitration or opposing the enjoining of arbitration. Judicial determination of an arbitrator's jurisdiction prior to an arbitration award has been seemingly foreclosed by the appellate court's decision in *Chester Upland II*. This is in marked contrast to the jurisdictional scheme not considered by the majority but endorsed by Judge Doyle in his concurring opinion. On Judge Doyle's interpretation of the prior case law, a court would have the jurisdiction to rule upon the arbitrability of the labor dispute up until the point where the party seeking arbitration files an unfair labor practices charge before the PLRB against the party opposing arbitration for not complying with arbitration procedures.¹⁰⁴ Assuming that Judge Doyle's statement of the prior law is correct, the opportunity for prior judicial determination of arbitrability under the concurrent jurisdictional scheme was rather less than that suggested by the critics of prior judicial action.

But while the opportunities for judicial action may have been less, the incentives for seeking judicial action in advance of arbitration may have been very great. Responding to criticisms of prior judicial intervention in determining arbitrability, Judge Doyle dismisses the "race to the courthouse."¹⁰⁵ However, Judge Doyle overlooks that if the judiciary retains preliminary jurisdiction over arbitrability prior to any filing with the PLRB, the party wishing to oppose arbitration (usually the employer) would have an incentive to go to court as soon

101. *Id.* at 635-36.

102. *Id.* at 636.

103. *Id.* at 629. The arbitrator now "has sole jurisdiction in the first instance to decide whether an issue is arbitrable." *Id.*

104. *Id.* at 634.

105. *Id.* at 635.

as possible to stay arbitration before the filing of an unfair labor practices charge. The simple reason is that the party seeking arbitration (usually the employee) cannot file an unfair labor charge with the PLRB before the opposing party has refused to proceed to arbitration,¹⁰⁶ whereas the opposing party has an advantage in the form of an asymmetrical power of seeking to stay arbitration as soon as labor arbitration is requested. Therefore the party wanting to oppose arbitration on the grounds of non-arbitrability would have an incentive to seek judicial determination of arbitrability as soon as arbitration is first requested, lest the advantage of choosing a judicial forum be lost. Thus, the race to the courthouse would no longer be a race so much as a reflex response by those parties resisting arbitration. The obvious and now unavoidable question is whether prior judicial declarations as to the arbitrability of public labor disputes under collective bargaining agreements are something the commonwealth court in *Chester Upland II* was right in wanting to curb.

B. Effect of the Ruling on the Swift, Consistent, and Conclusive Disposition of Public Labor Disputes under Collective Bargaining Agreements

Given that the commonwealth court's ruling in *Chester Upland II* clearly changed prior Pennsylvania law by depriving trial courts of jurisdiction over preliminary questions of arbitrability,¹⁰⁷ the crucial question is whether this new approach is generally preferable to the previous scheme of concurrent jurisdiction. The comparative merits of this change in the law will be analyzed first in terms of the rapid and conclusive resolution of public labor disputes.¹⁰⁸

Assuming that the prior rule allowing trial courts to exercise preliminary jurisdiction over arbitrability in unambiguous cases did encourage parties to race to court, an argument can be made in favor of this policy on the basis that it encouraged swift and more conclusive resolution of the threshold issue of

106. It is the *refusal* to arbitrate that constitutes an unfair labor practice. 43 PA. CONS. STAT. ANN. § 1101.1201 (1990); *East Pennsboro Area Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 467 A.2d 1356, 1359 (Pa. Commw. Ct. 1983); *Chester Upland I*, 631 A.2d at 727. Unless a party has been informed that the other party desires arbitration, the party cannot be said to have refused to arbitrate. In *Chester Upland I*, the refusal was communicated in response to a grievance filing, *Id.* at 724, and in *Chester Upland II*, the refusal came in the form of a failure to respond to repeated entreaties for arbitration, 655 A.2d at 623.

107. *Chester Upland II*, 655 A.2d at 629 n.19.

108. This consideration was clearly a concern of the *Bald Eagle* court, which Judge Doyle in concurrence emphasizes as being the fundamental policy of the Pennsylvania Supreme Court's ruling. The dispute in *Bald Eagle* concerned a single day's pay and it took six years to resolve the question of arbitrability. *Id.* at 633 (citing *Bald Eagle*, 451 A.2d at 673).

arbitrability.¹⁰⁹ To the extent Judge Doyle's variation of this scheme would give the arbitration-averse party an urgent incentive to proceed immediately to court, Judge Doyle's alternative would be preferable from the standpoint of efficiency to the majority's per se jurisdictional rule. There is *some* truth to Judge Doyle's assertion that the courts will almost certainly have to decide the issue of arbitrability eventually,¹¹⁰ so it is better to have a judge sitting in equity decide the issue sooner rather than later, thereby speeding final adjudication.¹¹¹ Otherwise, the argument continues, time and resources may be expended on full arbitration of all issues when only one issue, that of arbitrability, demands resolution.

Proponents of the arbitrator's sole and exclusive initial jurisdiction over arbitrability would rightly point out that the argument above assumes that arbitrability will usually have to be decided by a court at some point later in the process.¹¹² The response is that arbitrability will only be a legitimate source of dispute in a select few cases, and that it is thus more efficient to have the arbitrator decide arbitrability along with other matters in dispute, leaving it to the judiciary to reverse the arbitrator on arbitrability in the few cases where arbitrability is legitimately in dispute and where the party opposing arbitration should prevail.¹¹³

This response to the argument for concurrent jurisdiction overlooks an important point of the efficiency argument in support of preliminary concurrent jurisdiction: the fact that arbitrability may only be legitimately in dispute in a minority of cases does not mean that arbitrability will not be argued in many more cases.¹¹⁴ It is the number rather than the quality of arbitrability challenges that threatens inefficiency when they must be processed through a system where the arbitrator has sole and exclusive initial jurisdiction over arbitrability. Merely assuming that the party opposing arbitration simply wishes to cover all bases on a petition for review of an arbitration award or of a PLRB determination, or assuming that the party opposing arbitration thinks that even a feeble arbitrability

109. Indeed, Judge Doyle himself places reliance on this argument in defending a trial court's ability to determine arbitrability before the arbitrator makes his determination. "Moreover, the compelling public policy behind this procedure is the swift determination of the threshold issue of whether the controversy/grievance should even be before an arbitrator." *Id.* at 635.

110. *Id.*

111. *Id.*

112. "Ultimately it *will* be the courts which will determine that issue [arbitrability under a collective bargaining agreement], either in the first instance or on appeal." *Id.* (Doyle, J., dissenting)(emphasis in the original).

113. Craver, *supra* note 6, at 584.

114. That an argument lacks merit does not mean that a party will forebear making it. Aside from being a general empirical truth, this is especially the case here given the reluctance of public employers to submit to arbitration if they can plausibly avoid it, a reluctance more than amply demonstrated by the multitude of cases in which public employers have disputed arbitrability and the few cases in which they have succeeded. *See infra* note 115.

challenge stands a respectable chance of success before a judge,¹¹⁵ then one sees that the courts will ultimately have to decide arbitrability on subsequent review almost as a matter of routine. In that event, all *Chester Upland II* succeeds in accomplishing is the adding of another level to the ultimate resolution of the threshold issue of arbitrability of proceedings. To the extent that the arbitrability challenges are legitimate, the resolution of arbitrability questions will demand more resources at the levels of both arbitration and judicial review.

By contrast, denying jurisdiction over arbitrability to circuit courts altogether, the approach adopted by the Illinois Supreme Court in *Warren*,¹¹⁶ streamlines the dispute-resolution process by going in the opposite direction from Judge Doyle.¹¹⁷ Instead of emphasizing the role of circuit courts over arbitrators in determining arbitrability, the Illinois scheme removes the circuit courts from the decision-making process completely and allows direct appeal to the intermediate appellate court. As a practical matter, the majority in *Chester Upland II* simply forces both the arbitrator and the trial court to rule on the same matter before it is ready for appellate review. Three decision-makers (arbitrator, trial court, appellate court) will have to rule upon what two (trial court and appellate court) could decide if the traditional sequence were followed. In addition, the arbitrator will waste time deciding other issues in the event that the dispute was not actually arbitrable in the first place.

Removing concurrent jurisdiction over pre-arbitration questions of arbitrability from trial courts has also been commended on the grounds that it removes a double threat of inconsistency in the resolution of arbitrability matters. First, some have argued that such jurisdiction creates the certainty that different trial courts will make inconsistent rulings in the same dispute.¹¹⁸ For example, one trial court may refuse to stay arbitration on the grounds of arbitrability, while

115. Why is arbitrability so often challenged by public employers in court? "The reluctance of various public employers to submit disputes to arbitration evidently centers on the limited scope of judicial review from an arbitrator's decision." *East Pennsboro Area Sch. Dist. v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Bd. & E. Pennsboro Area Educ. Ass'n*, 467 A.2d 1356, 1359-60 (Pa. Commw. Ct. 1983). Apparently, public employers feel that once arbitration begins an arbitrator is not likely to find the grievance non-arbitrable, and a court on review will, after the *Trilogy*, be reluctant to set aside the arbitration award except in extreme cases.

116. 538 N.E.2d 524 (Ill. 1989).

117. The administrative agency created by the Act, the Illinois Educational Labor Relations Board, makes a determination of arbitrability that can be challenged on appeal of an award to the Illinois Court of Appeals. *Id.* at 529 (citing Ill. Rev. Stat. ch. 48, par. 1716 (1987)). Admittedly, the Illinois alternative was clearly not available to the commonwealth court in *Chester Upland II*, since the Illinois Educational Labor Relations Act was, according to the Illinois Supreme Court, a sweeping and radical reform of labor relations in public education. *Id.* at 529. Redefinition of justiciability to exclude public education labor disputes was thus implied by the Illinois Supreme Court from the legislature's radical departure from common law and the inferred need to "prevent conflict between the circuit courts and the Board." *Id.*

118. See, e.g., Widoff & Fastiggi, *supra* note 5, at 655.

another trial court later may find that the same dispute was not arbitrable and vacate the arbitrator's award. Second, some commentators¹¹⁹ and appellate courts¹²⁰ (including the court in *Chester Upland II*)¹²¹ see cause for concern in the potential inconsistency between decisions of trial courts on arbitrability and the decisions of public labor relations commissions, such as the PLRB, on whether failure to arbitrate in the same case constitutes an unfair labor practice.

The best answer to both prongs of the inconsistency argument is that the threat of inconsistency from concurrent jurisdiction is largely chimerical.¹²² Given the extremely limited circumstances in which any decision-maker will find that the dispute is truly non-arbitrable,¹²³ it is extremely unlikely that different trial courts in the same case¹²⁴ or a trial court and a public labor board looking at the same collective bargaining agreement will find that the agreement clearly prohibits arbitration of the labor dispute. Even assuming that a labor board such as the PLRB finds a failure to arbitrate to be an unfair labor practice while either an earlier trial court finds the dispute non-arbitrable and stays arbitration or a later trial court vacates an award for non-arbitrability, the board's finding of an unfair labor practice itself will be reviewed by a subsequent trial court which will then be able to resolve the conflict by determining the arbitrability of the dispute. Conflict is even less likely under Judge Doyle's reading of the prior law, which gives the PLRB the exclusive jurisdiction over initial questions of arbitrability once failure to arbitrate has been alleged as an unfair labor practice before the PLRB.¹²⁵ That determination by the PLRB is itself reviewable by a circuit court, which suggests another answer to the inconsistency argument: where the courts and public labor relations agencies are in conflict, the conflict exists only until the judiciary exercises its supremacy over administrative agencies in the determination of arbitrability.

119. See, e.g., *id.* at 653-56.

120. See, e.g., *Warren Township*, 538 N.E.2d at 529; *Bald Eagle*, 451 A.2d at 674.

121. *Chester Upland II*, 655 A.2d at 626.

122. Widoff & Fastiggi, *supra* note 5, at 655, admit that such a case has not yet arisen but couch their argument in terms of inevitability.

123. Doubts as a general rule are to be resolved in favor of arbitrability, *Taylor v. Crane*, 595 P.2d 129, 134 (Cal. 1979), and there has to be a bona fide dispute as to arbitrability under § 501(a) of the UAA, 42 PA. CONS. STAT. ANN. § 7304(b) (1990), such that the dispute cannot be arbitrable under any asserted construction of the collective bargaining agreement. *Board of Educ. of Sch. Dist. of Philadelphia v. Philadelphia Fed'n. of Teachers, Local No. 3*, 346 A.2d 35, 41 n.13 (Pa. 1975).

124. It is assumed that the doctrine of *res judicata* does not prevent two different circuit courts in the same case from issuing contradictory rulings regarding arbitrability.

125. 655 A.2d at 634.

C. *Effect of Grant to Arbitrator of Sole and Exclusive Jurisdiction to Decide Arbitrability on Harmonious Relations between Public Employers and Employees*

Courts and commentators have attacked preliminary litigation of arbitrability on the basis that judicial intervention frustrates the arbitration process and thus interferes with the harmonious resolution of public labor disputes.¹²⁶ The Pennsylvania Supreme Court has held that PERA was intended to provide for the effective resolution of public labor disputes without disruption through strikes and other forms of economic pressure, requiring instead that all disputes relating to collective bargaining agreements be arbitrated.¹²⁷

Whether this criticism is accurate or not is less important than the presuppositions of the criticism itself and the scope. First, the argument focuses on the process of the arbitration itself without considering its essential propriety in any given dispute. The legislature does not require arbitration of all public labor disputes, only those disputes that are to be arbitrated under the terms of an underlying collective bargaining agreement. Whether a labor dispute is arbitrable under a collective bargaining agreement is precisely the question to be answered in a determination of arbitrability, whether that determination is prior to or after an award. If the dispute is actually non-arbitrable, and a trial court on a motion for stay of arbitration could swiftly find so, then maybe it is less disruptive not to have arbitration in such a case. Second, and more important, the criticism focuses on the process of arbitration alone without considering the result of the arbitration process. Under the court's approach in *Chester Upland II*, public employers can and will continue to challenge arbitrability before trial courts, but only after the arbitrator has given an award to the employee or union.¹²⁸ Arbitrability will have gone from being an early objection to the propriety of the process itself to being seen as a last ditch argument made by public employers to challenge successful aggrieved employees or unions on motions to vacate arbitration awards or review findings of an unfair labor practice. Whether this change in the dominant use of judicial intervention on matters of arbitrability is preferable in terms of harmonious public labor relations is unclear to say the least.

126. See *East Pennsboro*, 467 A.2d at 1361; Craver *supra* note 6, at 584.

127. *Philadelphia Fed'n of Teachers*, 346 A.2d at 39.

128. In considering the rule finding a waiver of arbitrability challenges where a party has proceeded to arbitration, Hodges mentions this argument as one disadvantage of the alternative policy of allowing the party who submits to arbitration to later challenge arbitrability. Hodges, *supra* note 2, at 643 n.71.

VI. CONCLUSION

By removing any jurisdiction over pre-arbitration questions of the arbitrability of public labor disputes from Pennsylvania trial courts, the *Chester Upland II* court sought to discourage the problem of preliminary forum-shopping between courts and arbitrators. However, the new rule, conferring on arbitrators sole and exclusive jurisdiction over preliminary matters of arbitrability, risks delaying the ultimate resolution of disputes if parties to public collective bargaining agreements regularly continue to challenge the arbitrability of labor disputes. By essentially mandating the involvement of arbitrators in the determination of arbitrability while still allowing appeals of awards to trial courts, the *Chester Upland II* court gave public labor relations in Pennsylvania the worst of both worlds.

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