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Deciding Arbitrability: AT&(and)T Technologies, Inc. v. Communications Workers of America

Sondra B. Morgan

NOTE

DECIDING ARBITRABILITY: *AT&T Technologies, Inc. v. Communications Workers of America*[1]

Who decides arbitrability—the courts or the arbitrator? The United States Supreme Court recently addressed this issue in the case of *AT&T Technologies, Inc. v. Communications Workers of America*.[2] The Court in *AT&T* reaffirmed its earlier holding from *United Steelworkers v. Warrior & Gulf Navigation Co.*,[3] where it held that arbitrability is a matter for judicial determination.[4]

The Court in *AT&T* granted certiorari to consider the issue because of a ruling by the Court of Appeals for the Seventh Circuit creating an exception to the rule of court-determined arbitrability. The Seventh Circuit held that a court could allow the issue of arbitrability to be decided by the arbitrator when the issue was so entangled with the merits that a ruling on arbitrability would necessarily be a ruling on the merits.[5] In vacating the Seventh Circuit's decision, the Supreme Court stated that such an exception was never intended—the courts are always to decide whether the parties' dispute falls within the arbitration agreement. After this determination, the arbitrator rules on the merits of the dispute.[6] The Supreme Court did not offer any

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1. 106 S. Ct. 1415 (1986).

2. *Id.* The union brought suit in federal district court pursuant to § 301(a) of the Labor Management Relations Act, ch. 120, 61 Stat. 156 (1947) (codified at 29 U.S.C. § 185(a) (1978)) which provides:

> 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 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.

3. 363 U.S. 574 (1960).

4. 106 S. Ct. at 1418-20; *Accord*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); *see also*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

5. Communications Workers of Am. v. Western Elec. Co., Inc., 751 F.2d 203, 207 (7th Cir. 1984), *vacated*, 106 S. Ct. 1415 (1986). (Western Electric changed its name to AT&T Technologies, Inc.)

6. 106 S. Ct. at 1420.

new guidelines to aid courts in the difficult task of differentiating between ruling on the question of arbitrability and ruling on the merits of the dispute, but it did reaffirm the principles laid down in the Steelworkers Trilogy[7] and explain those holdings on the issue of arbitrability.

The dispute between AT&T and the Communications Workers arose when AT&T laid off 79 telephone equipment installers from its Chicago base. The Union protested that this was in violation of Article 20 of the collective bargaining agreement between the parties, which the Union interpreted as not allowing layoffs in any geographic area unless there was a lack of work in that area. Since AT&T later transferred workers from other areas to Chicago to fill these jobs, the Union said the lack-of-work provision had been violated. AT&T contended that Article 20 only specified the order in which layoffs would occur. In addition, AT&T asserted that the right to lay off or transfer workers was a right reserved to them under Article 9 of the agreement—the management functions clause.[8]

The Union filed a grievance under Article 8, the arbitration clause, of the collective bargaining agreement, but AT&T refused to submit the issue to arbitration on the grounds that the decision was not arbitrable.[9] The Union filed suit to compel arbitration, and the district court, finding that the Union's interpretation of Article 20 was at least "arguable," held that it was "for the arbitrator, not the court to decide whether the union's interpretation has merit."[10]

The Court of Appeals for the Seventh Circuit affirmed, announcing an exception to the general rule that courts are to decide the issue of arbitrability. The court stated:

> A court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive

7. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) [hereinafter Steelworkers Trilogy].

8. 106 S. Ct. at 1417. Article 8 of the agreement between the parties is the arbitration clause which provides that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" will be referred to a mutually agreeable arbitrator upon written demand of either party. Article 9 of the agreement is the management functions clause which gives management the right to hire and terminate employees. Article 20 prescribes the order in which employees are to be laid off "when lack of work necessitates." *Id.* at 1416-17.

9. *Id.* at 1417.

10. *Id.*

provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute.[11]

The Seventh Circuit used as support for its holding the language in *United Steelworkers v. Warrior & Gulf Navigation Co.*[12] where the Supreme Court admonished lower courts to "view with suspicion an attempt [by parties to litigation] to persuade [the court] to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."[13] The Seventh Circuit also cited language from *United Steelworkers v. American Manufacturing Co.*[14] which warned against becoming involved in the merits "when 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 . . . [of] the arbitration tribunal."[15] In order to avoid deciding any of the substantive issues of the dispute, the court held that "[s]ince the Agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and to decide arbitrability would require interpretation of substantive provisions of the Agreement, we decline the invitation to decide arbitrability."[16]

The Supreme Court vacated and remanded the holding of the Seventh Circuit, ruling that the threshhold question of whether an agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination.[17] In arriving at its decision, the Court followed the principles set out in the so-called Steelworkers Trilogy of cases decided in 1960.[18] Stating that the precepts of these cases had served industrial relations well, the Court

11. Communications Workers of Am. v. Western Elec. Co., 751 F.2d 203, 206 (7th Cir. 1984).

12. 363 U.S. 574 (1960).

13. *Western Elec. Co.*, 751 F.2d at 205 (quoting *Warrior & Gulf*, 363 U.S. at 585).

14. 363 U.S. 564 (1960).

15. *Western Elec. Co.*, 751 F.2d at 206 (quoting *American Mfg. Co.*, 363 U.S. at 569). The court also cited previous holdings of the Seventh Circuit. In Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753, 422 F.2d 546 (7th Cir. 1970), the court decided arbitrability, but remarked that it would not be proper to do so where interpreting a broad exclusionary clause would involve consideration of the merits. *Western Elec. Co.*, 751 F.2d at 206 (citing *Associated Milk Dealers, Inc.*, 422 F.2d at 552). In Local 156, United Packinghouse, Food and Allied Workers v. Du Quoin Packing Co., 337 F.2d 419 (7th Cir. 1964) and Local 703, Int'l Bhd. of Teamsters v. Kennicott Bros. Co., 725 F.2d 1088 (7th Cir. 1984), the court refused to decide the arbitrability issue definitely, despite ordering arbitration "when the claim itself purported to be based on an integral clause of the contract." *Western Elec. Co.*, 751 F.2d at 206 (citing *Kennicott Bros. Co.*, 725 F.2d 1088).

16. *Western Elec. Co.*, 751 F.2d at 207.

17. 106 S. Ct. at 1420.

18. Steelworkers Trilogy, *supra* note 7.

saw no reason to "question their validity" or "eviscerate their meaning by creating an exception."[19]

The Court used four principles drawn from the Steelworkers Trilogy in its analysis. The first principle from *Warrior & Gulf* states that "arbitration 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."[20] The second principle, also from *Warrior & Gulf*, states that the question of arbitrability, in the sense of deciding whether or not a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance, is undeniably an issue for judicial determination.[21] The third principle, and the troublesome one in this case, states that while deciding arbitrability the court is not to rule on the merits of the case. This principle comes from *United Steelworkers v. American Manufacturing Co.*[22] where the Court stated: "courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim."[23] The last principle used by the Court was from *Warrior & Gulf* and states that where the contract contains an arbitration clause there is a presumption of arbitrability, and "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[24] Using these principles, the Court concluded that courts should not decide whether the issue was "arguable" or not, because even if it appears to the court to be frivolous, the Union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.[25]

The Court then held that the Seventh Circuit was in error when it ordered the parties to arbitrate before a court determination of arbitrability. The courts must first determine the parties' intent through an interpretation of their agreement to arbitrate, and then it is the arbitrator's duty to decide the merits of the dispute.[26] Thus, the Court upheld the demarcation between the court's right to decide arbitrability and the arbitrator's right to decide the merits.

The Court vacated and remanded for a new determination of whether the Company should arbitrate, saying it was not that Court's function to

19. 106 S. Ct. 1415, 1418 (1986).
20. *Id.* at 1418 (quoting *Warrior & Gulf*, 363 U.S. at 582).
21. *Id.* at 1418-19.
22. 363 U.S. 564 (1960).
23. 106 S. Ct. at 1419 (citing *American Mfg. Co.*, 363 U.S. at 568).
24. *Id.* at 1419 (citing *Warrior & Gulf*, 363 U.S. at 582-83).
25. 106 S. Ct. at 1419.
26. *Id.* at 1420.

construe collective bargaining contracts and arbitration clauses in the first instance, and that there was not sufficient evidence of the parties' previous bargaining history before the court to determine if the present conflict is arbitrable.[27] The issue to be decided by the lower court on remand was whether the conflict over the interpretation of Article 20 of the contract is to be excluded from arbitration under the arbitration clause of the agreement.[28]

In a concurring opinion Justice Brennan further explained the Court's holding, stating that the Seventh Circuit misunderstood the rules of contract construction and did "precisely what was disapproved of in *Warrior & Gulf*—it read Article 9 . . . to make arbitrability depend upon the merits of the parties' dispute."[29] The judicial inquiry required to determine arbitrability is much simpler according to Brennan. The question for the courts is strictly confined to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration. Justice Brennan reasoned that since the contract contained a standard arbitration clause, the answer must be yes, unless there is explicit language excepting it or AT&T can show forceful evidence from the bargaining history of the parties that it should be excluded. A determination of arbitrability does not require the court even to consider which party is correct.[30]

Justice Brennan's directive is perhaps deceptively simple, and a court faced with deciding arbitrability without considering the merits of a particular grievance must make a subtle differentiation. The language from the Steelworkers Trilogy itself can lead one astray, as demonstrated by the Seventh Circuit's disposition of this case.[31] The reluctance of the Seventh Circuit to decide the arbitrability issue in *AT&T* is easily understood, since the decision does seem to require interpretation of the language of Articles 8, 9, and 20 of the parties' agreement and would seem to be the very situation that the Court warned against in the Steelworkers Trilogy.[32] When the court in *AT&T* decided that there was a chance that the Union had a valid claim and the dispute over the layoffs should be arbitrated, it was ruling on the same question that the arbitrator will be asked to rule on in deciding the merits—does this dispute fall within the arbitration clause of the parties' collective bargaining agreement? How is a court to decide whether the dispute should be submitted to arbitration without interpreting the articles of the agreement?

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27. *Id.*
28. *Id.*
29. *Id.* at 1421.
30. *Id.* at 1421-22.
31. *See supra* text accompanying notes 12-16.
32. The district court also saw the case as necessitating a ruling on these other provisions before it could decide whether they were properly excludable or not. Communications Workers v. Western Elec. Co., 751 F.2d 203, 205 (1984).

This note will examine the guidelines laid down by the Court in the Steelworkers Trilogy to help a court make this decision, and also look at the development of the federal substantive law of collective bargaining agreements. It will also discuss the problems courts have had in following the principles laid out in these cases and in interpreting the language of these decisions that culminated in the Seventh Circuit's exception. The Supreme Court's ruling in *AT&T* should clarify these previous holdings on the role of the judiciary in interpreting arbitration agreements and in deciding arbitrability.

In order to understand the Court's directive in *AT&T* it is necessary to understand the background to this decision. Before the decisions in the Steelworker Trilogy of 1960, the Supreme Court decided *Textile Workers v. Lincoln Mills*[33] and held that Section 301 of the Labor-Management Relations Act empowered the courts to grant specific performance of the promise to arbitrate.[34] Before this decision there was uncertainty as to whether a collective bargaining agreement was a contract fully enforceable by the courts.[35] Enforceability depended on the laws of the several states, and the common law in most states did not allow for specific performance of a promise to arbitrate.[36] *Lincoln Mills* changed this by allowing the courts to develop a federal common law covering collective bargaining agreements.[37]

The Steelworkers Trilogy of cases decided in 1960 laid down a series of guidelines clarifying the role of the judiciary in the labor arbitration process. In two of the cases the Union asked the court to compel the employer to arbitrate when the employer insisted it had not promised to do so, as in *AT&T*.[38] In the third case, the court was asked to enforce an arbitration

33. 353 U.S. 448 (1957).

34. *Id* at 451. *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS, 90-125 (1968); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 755 (1965).

35. *See* H. WELLINGTON, *supra* note 34, at 96. Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 74 (1985). Judicial hostility to enforcement of arbitration agreements apparently rested on two concerns; enforcement of arbitration agreements would wrest power from the courts, and weaker parties would be forced to relinquish their right to a judicial forum.

36. *See* H. WELLINGTON, *supra* note 34, at 99.

37. *Id.* at 100. Wellington feels the Court merely issued an *ipse dixit*. He sees the decision as an intrusion by the Court into labor-management affairs that is contrary to the aims of the FAA (allowing the arbitration process to function without serious judicial review).

38. *American Mfg. Co.*, 363 U.S. 564 (1960) and *Warrior & Gulf*, 363 U.S. 574 (1960). The facts of *Warrior & Gulf* were very similar to those of *AT&T* in that the employer insisted that the provision under dispute was excluded from arbitration because of its rights under the management functions clause. Warrior & Gulf had laid off several employees after arranging to contract out the work that had been done by these employees. The Company insisted this was a right reserved to them under the management functions clause and refused to arbitrate.

award that the employer insisted was outside the arbitrator's authority.[39] The Court indicated in all these cases that if a collective bargaining agreement contains a general promise to arbitrate grievances, a court is to order arbitration or enforce an arbitration award without serious inquiry into whether the parties agreed to submit the particular grievance to an arbitrator.[40] The Court thus created a strong presumption in favor of arbitration, saying 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."[41]

Despite this strong presumption in favor or arbitrability, these cases also emphasize the consensual nature of the collective bargaining agreement. Parties agree to submit disputes to arbitration through a contract, and no one should be forced to arbitrate a grievance that was not intended to be a part of the contract or agreement.[42] Disputes over the meaning of the arbitration clause itself must be decided by a judge unless the parties have clearly stated contrary intentions. Parties must also clearly exclude any matter they do not want submitted to an arbitrator, or the presumption favoring arbitration will be operative.[43] Courts are not to consider the relative merits of the dispute when considering whether to order arbitration.[44] These are the general guidelines from the Steelworkers Trilogy that the courts have struggled to implement.

Another important step in the development of a federal substantive law of arbitration came in 1967 in the case of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[45] There, the Supreme Court declared that the Federal Arbitration Act (FAA) was a product of Congress' admiralty and commerce powers and opened the way for future preemption of state laws and a major expansion of the scope and applicability of federal rules governing arbitration.[46] The Court noted, however, that the FAA permits federal courts to inquire only into "the making of the agreement for arbitration or the failure

39. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

40. *See* H. WELLINGTON, *supra* note 34, at 101.

41. *Warrior & Gulf*, 363 U.S. at 582-83.

42. *Id.* at 582. "For arbitration 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." *Id. See generally* M. DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 12 at 151 (G. Wilner rev. ed. 1984); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1515-16 (1959).

43. *Warrior & Gulf*, 363 U.S. at 582-83.

44. *Id.* at 585.

45. 388 U.S. 395 (1967).

46. *Id.* at 404-05. *See* Atwood, *supra* note 35, at 80-81 (arguing that by ignoring the Act's procedural origin, the Court opened the way for intrusion into state substantive law); *see also* Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1307 (1985).

to comply" in proceedings to compel arbitration.[47] This ruling led to the severing of the arbitration clause from the rest of the contract in any analysis by a court considering arbitrability.[48]

The arbitration clause itself thus becomes the focus for an analysis of arbitrability, and the provisions of the collective bargaining agreement as a whole, or the "container" contract, are excluded. This traditional view was stated by the court in *Necchi v. Necchi Sewing Machine Sales Corp.*:[49]

> The court must decide whether the parties had agreed to submit the particular disputes to arbitration. Neither the federal policy in favor of arbitration nor the ostensible broad reach of the arbitration provision in question relieves the District Court of [the] judicial responsibility of determining the question of arbitrability, unless the arbitration provision is so unusually broad that it clearly vests the arbitrators with the power to resolve questions of arbitrability as well as the merits.[50]

The mistake of the district court that decided *AT&T* was in finding the arbitration provision broad enough to exclude the role of the court in determining arbitrability.

The parties can include in their agreement a provision that disputes regarding all the provisions of the contract, including the arbitration agreement, will be submitted to an arbitrator. But, according to the Supreme Court's analysis in *AT&T*, the parties must expressly state that the arbitrator is to have authority to make a binding determination of such matters. Absent such a provision, the threshhold issue of arbitrability is for the courts to decide.[51] General language contained in a broad arbitration clause will not be sufficient in itself to bring the arbitration agreement within the clause.[52]

The court asked to decide arbitrability will first look to see if the arbitration clause is broad or narrow.[53] Broad arbitration clauses, such as the one recommended by the American Arbitration Association,[54] combined with

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47. *Prima Paint*, 388 U.S. at 403.

48. *Id.* at 404. The Second Circuit in Robert Lawrence Co. v. Devonshire Fabrics Inc., 271 F.2d 402 (2d Cir. 1959) first held that the arbitration clause was severable from the container contract under federal common law, thus insulating the arbitration clause from attacks on the container contract. *Id.* at 407.

49. 348 F.2d 693 (2d Cir. 1965), *cert. denied* 383 U.S. 909 (1966).

50. *Id.* at 696.

51. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 571 (1960) (Brennan, J., concurring).

52. *Id.*

53. *See* Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1144-47 (1986); Kalevitch, *Arbitrability: The Uniform Arbitration Act in Illinois*, 4 LOY. U. CHI. L.J. 23 (1973).

54. The standard American Arbitration Association arbitration clause states:

> Any controversy or claim arising out of or in relation to this contract, or the breach thereof, shall be settled by arbitration in accordance with the

the underlying standard of doubt from *Warrior & Gulf*, will almost always lead to a finding of arbitrability. A narrow clause will require closer scrutiny by the court before compelling arbitration. The Court of Appeals for the Second Circuit formulated the following test in *Prudential Lines, Inc. v. Exxon Corp.*:[55]

> Simply stated, a court should compel arbitration, and permit the arbitrator to decide whether the dispute falls within the clause if the clause is "broad." In contrast, if the clause is "narrow," arbitration should not be compelled unless the court determines that the dispute falls within the clause. Specific words or phrases alone may not be determinative although words of limitation would indicate a narrower clause. The tone of the clause as a whole must be considered.[56]

Thus, use of a broad arbitration clause is strong evidence of the parties' intent to arbitrate.

There is a difference, however, between saying that a court should rule that a dispute is arbitrable because there is a broad arbitration clause which evidences the parties' intent to use arbitration, and saying, as the Seventh Circuit did in *AT&T*, that because there is a broad clause there is no need for a determination by the court. The arbitration clause in the collective bargaining agreement between AT&T and the Communications Workers called for the arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder. . . ."[57] This is a broad clause, and the Seventh Circuit interpreted it as being broad enough to cover all disputes having to do with the collective bargaining agreement, or container contract, in which case the court has no role except to defer to the arbitrator.

Article 8 also expressly states, however, that it does not cover disputes "excluded from arbitration by other provisions of this contract."[58] So in determining the scope of the arbitration clause, the court is forced to examine the other provisions of the container contract, such as article 9 concerning the right of the employer to manage the company, and article 20 concerning the procedure to be followed when layoffs occur. The Supreme Court, however, says this is as far as the analysis should go. It is not necessary to look at the merits of the dispute and become involved through the backdoor of

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> Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

American Arbitration Ass'n Commercial Arbitration Rules of the American Arbitration Ass'n 2 (1964).

55. 704 F.2d 59 (2d Cir. 1983).

56. *Id.* at 64.

57. 106 S. Ct. at 1416. *See* Note, *supra* note 53, at 1148 (discussing language used in determining whether a clause is broad or narrow).

58. 106 S. Ct. at 1416.

interpreting the scope of the arbitration clause. Whether the claim has merit or not, it should be arbitrable if the court finds that the arbitration clause is sufficiently broad and there is no specific exclusion elsewhere in the agreement.[59]

Properly determining what was exluded from the scope of the arbitration clause is a job for the court, even if it does seem to be deciding the same question that an arbitrator must decide. The question then becomes one of semantics. What is arbitrability? Who decides? When?

In its brief submitted as *amicus curiae* in support of the Communications Workers, the National Academy of Arbitrators (Academy) urged the Court to keep in mind the two ways in which the word arbitrability is used.[60] Arbitrability can be used when referring to the merits of a dispute—was AT&T limited from laying off workers as the Union contends?—and this is clearly a decision for the arbitrator.[61] But arbitrability can also be used in the sense of a dispute being adjudicable in the process of arbitration, and when used in this sense, arbitrability "must be decided by a court and the court must do so solely with reference to the provision dealing with arbitration."[62] If there is an arbitration clause calling for arbitration of questions of interpretation of the agreement and no specific exclusion, then a court should order arbitration and never involve itself in the "arbitrability" of the merits.[63] The Academy urged that the decision of the lower court ordering arbitration be affirmed, but that the faulty reasoning carving out an exception to court-ordered arbitrability be corrected.[64]

The Supreme Court agreed with the reasoning proposed by the Academy and reaffirmed the traditional role of the court in deciding arbitrability as well as the role of the arbitrator in deciding the merits. *AT&T* reiterates the principles of substantive federal law established in the Steelworkers Trilogy. First, arbitration is a matter of contract and a party cannot be required to arbitrate any dispute which he has not agreed to submit.[65] Second, arbitrability in the sense of whether a grievance is adjudicable is an issue for judicial

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59. *Id.* at 1419.

60. Brief of the National Academy of Arbitrators at 5-6. AT&T Technologies, Inc. v. Communications Workers of America, 751 F.2d 203 (7th Cir. 1984) (No. 84-1913). This was the first brief ever filed before the Supreme Court by the Academy. The Academy gave as its reason the potential this case had for disturbing prior decisions of the Court and for affecting the relationship between the courts and the arbitration process in future cases. *See also* Kalevitch, *supra* note 53, at 30 (pointing out the ambiguity of the word "agreement" as used in these discussions).

61. Brief of National Academy, *supra* note 60, at 5.

62. *Id. See also* Note, *supra* note 53, at 1138 (calling a dispute over the scope of an arbitration clause substantive arbitrability).

63. Brief of National Academy, *supra* note 60, at 5-6.

64. *Id.* at 6.

65. United Steelworkers v. Warrior & Gulf, 363 U.S. 574, 582 (1960).

determination.[66] Third, a court must not rule on the merits of a claim while deciding arbitrability.[67] Finally, where the contract contains an arbitration clause there is a presumption of arbitrability unless the matter under dispute is clearly excluded.[68]

These principles were well known to the Seventh Circuit, however, and were used by them in formulating their exception to court decided arbitrability. The problem faced by that court was deciding where to draw the line between determining the scope of the arbitration clause and ruling on the merits of the dispute when both issues involved interpreting the same provisions of the agreement. Whether the Court's decision in *AT&T* will serve as sufficient guidance to a court asked to determine arbitrability remains to be seen, but the judiciary should now realize that the Supreme Court does see a distinction between the two activities, and a careful court should be able to determine arbitrability without ruling on the merits.

The holdings in the Steelworkers Trilogy were seen as indicating a strong federal policy favoring the arbitration process as a means of resolving disputes concerning the interpretation or application of collective bargaining agreements and as restricting the role of the courts in this area.[69] *AT&T* can be seen as indicating that there still is a role for the courts in interpreting the scope of the arbitration clause in a collective bargaining agreement that cannot be abdicated to the arbitrator in the first instance.[70]

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66. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 571 (1960) (Brennan, J., concurring).

67. *Id.* at 568.

68. *Warrior & Gulf*, 363 U.S. at 582-83; *accord* Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1984).

69. Smith & Jones, *supra* note 34, at 757.

70. The holding in *AT&T* reaffirmed not only the right of the courts to decide arbitrability, but also the right of the arbitrator to decide the merits. This ruling is in line with other recent Supreme Court decisions that uphold arbitration as a favored method of dispute resolution. One commentator has called three recent cases involving arbitration a *new* Trilogy in that the Court has dramatically expanded the federal policy favoring arbitration. Hirshman, *supra* note 46, at 1307.

In the first of these cases, Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983), the Court held that a federal district court abused its discretion by staying a federal action to compel arbitration until completion of a state court proceeding between the same parties. *Id.* at 27-28. The Supreme Court held the stay was inconsistent with "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 24.

The next term the Court decided Southland Corp. v. Keating, 465 U.S. 1 (1984) and ruled that the Federal Arbitration Act preempted any state law that was in contradiction. *Id.* at 16. The Court held that Section 2 of the Act making arbitration agreements irrevocable and enforceable is substantive federal law enacted under Congress' commerce power, and agreements to arbitrate that might be non-arbitrable under state law are enforceable under the Act. *Id.* at 11, 17. *See* Note, *supra* note

The role of the court in deciding arbitrability is strengthened by the decision in *AT&T*, and the earlier language of the Court from the Steelworkers Trilogy is clarified and explained so that a lower court asked to rule on the arbitrability of a claim will better understand its role in the process and will not be fearful, as the Seventh Circuit was, of usurping the role of the arbitrator. The task facing a court asked to decide arbitrability will still be a delicate one, but the guidelines from *AT&T* should help a court to better maintain its balance as it walks the tightrope.

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53, at 1141-42; Hirshman, *supra* note 46, at 1307.

The third case in the Trilogy is Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). The Supreme Court held that arbitrable state claims pendent to federal securities claims must be arbitrated if requested by either party. *Id.* at 217. The Court concluded that the chief goal of Congress was to ensure the effectiveness of contracts to arbitrate and if there is a conflict with other goals, as in the intertwining cases, the Arbitration Act should prevail. *Id.* at 216-18. *See also* Note, *The Doctrine of Intertwining: A Dead-End After Dean Witter Reynolds, Inc. v. Byrd*, 1986 Mo. J. DISP. RES. 131.