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Arbitrability: The Uniform Arbitration Act in Illinois

Lawrence Kalevitch*

Until recently, Illinois, like most common law jurisdictions, adhered to a policy of restraint toward arbitration.1 How much Illinois' 1961 adoption of the Uniform Arbitration Act2 has altered the State's policy remains to be seen. For the present, it is clear that the main impact of the legislation finds its source in the validating language of the act, which makes enforceable and irrevocable "a written agreement...to submit to arbitration any controversy thereafter arising between the parties".3

Change brings new problems. The source of the particular problem discussed in this article lies in the ill-designed provisions for reconciling the institutional roles of court and arbitrator. The Illinois act, like its model, the Uniform Arbitration Act, provides some guidance but fails to give an explicit answer to a crucial question: Should doubt arise

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1. At common law, parties could agree to submit a dispute that had already arisen to arbitration, but usually either party could revoke the agreement to submit the existent dispute at any time before the arbitrator made an award. Paulsen v. Manske, 126 Ill. 72, 18 N.E. 275, 278 (1888); See 6A Corbin, Contracts § 1438, at 412; Note, A Uniform Arbitration Act for Illinois, 1955 Ill. L. For. 297, 300-01; M. Domke, Commercial Arbitration 16-19; I. Macneil, Cases and Materials on Contracts 1113-1115, 1123-1125. See also Kulukundis Shipping Co. v. Amcorp Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942) (Cited in Domke and excerpted in Macneil).
3. Id. § 101. Section 101 also validates "a written agreement to submit any existing controversy" and thereby continues prior law. See also Interstate Bakeries Corp. v. Teamsters, Local 734, 31 Ill. 2d 317, 201 N.E.2d 452 appeal transferred 58 Ill. App. 2d 485, 208 N.E.2d 397 (1964).
about whether parties (to a contract containing an arbitration of future disputes clause) intended to arbitrate the particular dispute that has in fact arisen, who shall decide this question and by what standards? Theoretically, parties may head off this fundamental issue by express instructions in the agreement to arbitrate, but practically, the problem seems to surface only when no such instructions are given. This paper aims to warn arbitration drafters of the consequences of oversight and the perils of general language, to suggest drafting techniques that will accomplish desired results, and to encourage the interpretation of the Illinois arbitration legislation in a manner less restrictive of arbitration than heretofore.

SOME "MODEL" ARBITRATION AGREEMENTS: AN INTRODUCTION TO THE PROBLEMS

The use of general language in the arbitration clause has raised a serious problem under the Arbitration Act. Below are three models employing general language which exemplify the prime deficiency of the Arbitration Act and serve to introduce the interpretative problems of the Act. (Of course, models that exemplify problems are not models for the drafter to follow).

Model A: In a contract for the sale of goods between Buyer and Seller, there appears the following clause:

Buyer and Seller agree to submit all claims, controversies, demands, disputes, differences, and matters of disagreement whatsoever, now pending between them or arising in the future, known or unknown now, claimed or unclaimed now, and relating to or arising from the attached sales contract of Buyer and Seller and performance thereunder, to arbitration in the manner designated as follows...

Model B: Again in a contract for the sale of goods between Buyer and Seller there appears the following clause:

Buyer and Seller agree that any and all disputes existing now or arising in the future will be submitted by them to arbitration in the manner designated as follows...

Model C: Buyer and Seller of goods, who have had many business dealings in the past and expect many more in the future, agree that submitting all their disputes to arbitration will be a preferable course

4. Though the Illinois arbitration clause drafter should be aware of the pitfalls of general clauses, they can be useful, and the models in the following text mirror clauses that enjoy wide-spread use. See, e.g., DOMKE, supra note 1, at 39-40, 97-98.
Arbitrability to the “bad-blood” generated by lawsuits. To that end they sign the following agreement:

Buyer and Seller agree hereby that any and all disputes now existing or arising in the future will be submitted to arbitration in the manner designated as follows... 

Model C may pose an interesting but perhaps hair-splitting question under the Arbitration Act. The validation section of the Act declares in relevant part, “a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties [is valid].”

Model C would raise the issue of whether a contract which only consisted of mutual promises to arbitrate all present and future disputes is “a provision in a written contract.” The literal distinction between “a provision” and “a written contract” might be taken to refer to two different “contracts,” with the latter, a written contract which contains an arbitration provision, including the former, the exchange of arbitration promises. No Illinois case has faced this question squarely under the 1961 Act, though cases under the prior (1917) Arbitration Act and a 1963 appellate court decision relying on cases under the old Act may be instructive.

Even so, one may suspect the validity of all-inclusive arbitration agreements not appended to, included in, or referent to a contemporaneously executed agreement or an existent agreement.

Unless C, which purports to set up an extra-judicial dispute-settlement mechanism for all future controversies separate and distinct from any particular commercial contract, models A and B illustrate another

6. Johnson v. Schuberth, 40 Ill. App. 2d 467, 189 N.E.2d 768 (1st Dist. App. Ct. 1963), held that the Chicago Real Estate Board By-laws, which provided for the arbitration of all disputes between member brokers over commissions, bound the defendant broker to arbitrate a commission dispute. Apparently there was no actual contract between the feuding brokers but some semblance of agreement or statements that led the plaintiff broker to believe (as did the arbitrator) that he was entitled to one-half the commission on a sale of realty. Of interest on the question of the validity of arbitration agreements separate from a particular commercial contract is the ground for the appellate court’s decision approving the arbitrator’s decision. On the authority of what it characterized as The Board of Trade Cases, the First District held that the by-law provisions mandating arbitration of brokers’ disputes over commissions was binding on the defendant broker, who had refused to recognize the legitimacy of the arbitration proceedings. This line of authority, marked by the Supreme Court of Illinois in Paucaud v. Waite, 218 Ill. 138, 75 N.E. 779 (1905), holds that association members may validly prospectively agree through association by-laws to arbitrate a particular issue before “persons having a special competence in [a] field”. Johnson v. Schuberth, 40 Ill. App. 2d at 478, 189 N.E.2d at 773. Since the earlier arbitration legislation of Illinois struck down (in effect) future disputes clauses, and since the present Act affirms them (at least when coupled with a written contract, see text supra), one could expect the continuing validity of The Board of Trade Cases. It may too come about that this “doctrine” and the liberalized 1961 Act will result in the validation of the Model C type of arbitration agreement. Still though, besides Johnson and the cases on which it rests, which are all decisions under earlier arbitration legislation, there is yet no direct authority on Model C. See also Note, supra note 1 at 300-01.
difficulty that has been considered on the appellate level in Illinois under the 1961 Act. These models, then, stand with a particular "written contract" and are "provisions" within it.

The controversial phrase generating litigation under the new Act is the language, "any controversy," of section one. In models A and B, the parties have apparently indicated their intention to arbitrate any controversies that might arise between them. In A, however, the parties have specifically limited "controversies" to those "relating to or arising from the attached sales contract . . . and performance thereunder." In B, the parties simply agree to arbitrate "any and all disputes" without further qualification. Under neither model would Buyer or Seller successfully argue that the parties had agreed to arbitrate a boundary dispute, regardless of whether the land was the domestic or business residence of either. The boundary dispute would be excluded from coverage on the theory that the arbitration clauses should be interpreted in pari materia with the commercial contract in which they are found, eliminating controversies stemming from clearly non-contract-related fact situations.

Nevertheless, while the boundary dispute appears blatantly beyond the scope of general arbitration clause language, there exists a great number of potential controversies that are neither clearly within nor clearly without the coverage of the arbitration clause. For instance, consider whether the following situation under either A or B, poses an arbitrable controversy:

Buyer and Seller agree to the sale of 200 bushels of a certain grade of potatoes on a date certain for a price certain. Before the arrival of that date of delivery and payment, a terrible potato plague renders the entire world crop of potatoes unmarketable. Seller naturally cannot deliver on the promised date, and Buyer seeks redress for the non-delivery under the contract (which will include either A or B arbitration clause).

At first blush, it may seem persuasive that, under either clause A or B, this dispute should be referred to arbitration. On the other hand, perhaps arbitration ought not be ordered under either model on the ground that the natural catastrophe excused seller's duty under the contract which includes the arbitration clause.7

Models A and B raise the issue of statutory interpretation of the Arbitration Act language, “any controversy.” It has been held on both trial and appellate levels, that the statutory phrase, “any controversy,” ousts the courts of any dispute-settlement role in any case where an arbitration clause of the contract says “all disputes may be arbitrated.” However, it has been argued with persuasive force that the “any controversy” language of the statute is only all-encompassing when the parties have specified with particularity those controversies they wish arbitrated. This proposition would eschew judicial recognition of general language such as “all disputes may be arbitrated.” The latter interpretation would raise doubts about the efficacy of models A and B. Some particular instances of these varying interpretations shall be considered shortly.

The choice between interpretations depends, in the prosaic case, upon the decision-maker's value-judgment on arbitration as a tool for dispute-settlement. Calling an interpretative selection a value-judgment on arbitration forces the recognition that in the common case, where it is questionable whether an issue was expected to be arbitrated, the decision by the court for or against arbitration depends on prevalent attitudes about arbitration as a dispute-settlement tool. The effect of the policy change accomplished by the Arbitration Act in Illinois will depend upon which of the two interpretations is followed. A premise of this paper is that the value-judgment on arbitration has been made and declared by the Illinois legislature to be in favor of expanded legal recognition of arbitration.

Collins, supra at 749-52, has valuable suggestions and arguments to suggest the limitations of the arbitrator's “law” specifically with respect to the sale of goods contract under Article 2 of the Uniform Commercial Code. Moreover, with respect to the particular hypothetical set out in the accompanying text, he has raised important questions about whether even the arbitrator may find the Code uncontroverting in such a situation, with many others. Still, the writer, with respect to this interesting position, will assume that the point of view taken here, that arbitrators may generally go beyond usual sources of contract law in deciding commercial disputes (including sales of goods), is proper yet, (but not without doubt). Accord, Bernstein, The Impact of the Uniform Commercial Code upon Arbitration: Revolutionary Overthrow or Peaceful Existence, 42 N.Y.U.L. Rev. 8 (1967) (Professor Bernstein's introduction dramatically states his position on Collins' assertions: “I come not to praise him, but to bury him” (at 9). His dirt movers follow).


9. A decision of the merits is the use of the term “dispute-settlement role.”

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A REVIEW OF THE ILLINOIS ARBITRATION ACT:
THE ARBITRABILITY CASES

A. Before Flood

Prior to the Supreme Court of Illinois' decision in Flood v. Country Mut. Ins. Co., the Illinois Appellate Court, Second District, presented a distinguished though flawed interpretation of the Arbitration Act in School District No. 46 v. Del Bianco. Del Bianco squarely presented the issue already discussed in United Steelworkers v. Warrior & Gulf. Warrior & Gulf's arbitration language superficially differs from Del Bianco's. The former's hedged the "arbitration of all disputes under this agreement" with a "management function" exception, while the latter's stated that all disputes under the agreement should be arbitrated. Nevertheless, the similarity of the problems facing the courts in both cases muzzles this slight semantic difference.

Warrior & Gulf and Del Bianco each faced the problem of deciding arbitrability, and both ultimately reached the same result. In Warrior & Gulf, Justice Douglas held that it was a close question with much doubt either way whether "contracting out" is "strictly a function of management," and he looked for guidance beyond the parties' written testimonial of their expectations, the collective bargaining agreement and its deliberately broad language. Seizing on a conceived federal policy of favoring extra-judicial settlement of labor-management disputes, Mr. Justice Douglas brought forth the rule of construction demanding explicit exclusion of matters from arbitration in the collective bargaining agreement.

10. 41 Ill. 2d 91, 242 N.E.2d 149 (1968) (the sole Supreme Court interpretative decision on the Arbitration Act).

In Warrior & Gulf, the Union and Employer had agreed through collective bargaining to arbitrate disputes under the collective bargaining agreement unless they were "strictly a function of management". A dispute arose over the Employer's contracting out work once done by its employees. Employer claimed contracting out was strictly a management function and Union argued contra.

The opinion for the Court by Mr. Justice Douglas demanded that exclusions from arbitration in collective bargaining agreements be specifically stated because of federal labor policy favoring arbitration of labor management disputes. Since "contracting out" had not been so excluded, the general term "strictly a function of management" would not be interpreted as including "contracting out".

11. The utility of the analogy to the labor arbitration field and Warrior & Gulf particularly, lies not in any supposed necessary relation between the interpretative methodology of arbitrability, but in the efficacy of the analogy in focusing the problem and suggesting choices of methodology. As DOMKE, supra note 1, notes: "The philosophy behind the two spheres of arbitration is quite different—commercial arbitra-
In *Del Bianco*, the school district had sued the general contractor, the architect, and the bonding company for damages arising from the alleged misbuilding of the Streamwood Elementary School. When the defendant architect sought a stay of the suit pending arbitration under the “all-disputes under this agreement” clause of his architectural services contract, the appellate court reversed the denial of the stay. As in *Warrior & Gulf*, the *Del Bianco* court conceded that the arbitrability of the issues was not free from doubt. However, the court interpreted the recent adoption of the Arbitration Act as indicative of the state's pro-arbitration policy. Hence, the court ruled that the arbitrator was the initial decision-maker with respect to the question of arbitrability.\(^{14}\)

What is meant by “disputes under this agreement,” the common catch-all of arbitration drafting, can probably never be specified. The paradox of this whole question lies in the apparent simplicity of such phrases, “all disputes under this agreement,” or “all disputes arising under this agreement,” and yet their demonstrated “open-texture”\(^ {15}\) in a common case like *Del Bianco*. The nub of the trouble is the difference very often overlooked between issues arising out of a *relationship* and those issues arising out of a *contract*. This requires a brief excursus to lay the foundation for further examination of *Del Bianco*.

Suppose Supplier agrees to ship Retailer one thousand cartons of widgets at a price certain on a day certain. No insurance of the goods in transit is discussed. No such precautions are taken. The goods are lost in fire and each party naturally assumes the risk to have fallen on the other. Suit begins with one asking for the price and the other claiming damages arising out of covering for the undelivered widgets. Do the issues arise under, or from, or out of, the contract for the sale of widgets?\(^ {16}\) It is submitted that there is a logical difference between such questions and others we customarily also refer to as “contract” questions, *i.e.*, the meaning of the language in a contract, “strictly a function of management,” found in *Warrior & Gulf*.

In court, the decision-making judge *must* look to the Uniform Commercial Code in his judgment of who bore the risk of loss of the goods. This is surely a question of contract law as much as the interpretation problem faced in *Warrior & Gulf*. However, the source of

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16. Compare this example with the potato plague hypothetical stated in the text, *supra*, and with the problem there formulated as it would appear under models \(A\) or \(B\), *supra*. 29
the governing rules of law which resolve the Supplier-Retailer hypothetical says very little about the other or Warrior type of issue.\textsuperscript{17}

Assuming an arbitration clause of the general sort mentioned above in this Supplier-Retailer hypothetical, one might say that the loss of the goods was \textit{not} intended to be arbitrated since no mention of it was made under the agreement. To continue that thought, one might propose that since the Commercial Code governs such a happenstance, risk of loss is not an issue arising under the agreement that the parties wanted arbitrated. Had the parties intended a problem of risk of loss to be arbitrated rather than adjudicated, they would have expressly included such mandate.

This argument might be distended further, yet the very material fact would remain that the parties had said that “all disputes” shall be arbitrated, even recognizing their further qualification of “under this agreement” or “arising under this agreement.” Key to the dilemma is the scope of the terms “agreement” or “contract.” Does “agreement” mean the relationship, usually commercial, established by the execution of the contract? Or, does “agreement” mean the express terms of the document? If the latter, the parties would have desired that the arbitrator function solely as a man in that field or cognate fields whose superior experience surpasses the common law judge’s ability to determine the \textit{meaning of language} in such an instrument.\textsuperscript{18} Thus, the arbitrator is consigned a role which in contract law one usually classifies as interpretative.\textsuperscript{19} The arbitrator is asked to apply existing law (\textit{e.g.}, UCC risk-of-loss provisions) so far as necessary in a mechanical or uncontroversial way while serving his “true” function of enlightened language interpreter. Accepting this assumption, the common law judge asked to order arbitration can plausibly assume that where the present disputes involve no language interpretation but only the application of legal rules, drawn from sources such as the commercial code and common law contracts, he is better qualified to decide these “legal” issues than an arbitrator. \textit{Therefore}, the parties must have intended such disputes to be adjudicated not arbitrated. This conception of arbitration depends on no logical and perverse circularity if and only if one can

\textsuperscript{17} Compare the rules of risk of loss in the absence of breach section of the UCC § 2-509 with the interpretative \textit{guidelines} provided in the UCC, § 1-205. It is no small matter to notice the specificity of the language of the former and the generality of the latter. \textit{See also} note 7, supra.


\textsuperscript{19} A chief draftsman of the Uniform Act, Dean Pirsig, has indicated that it was this interpretative arbitral function that the Act would seek. Pirsig, \textit{Some Comments on Arbitration Legislation}, 10 Vand. L. Rev. 685, 706 (1957).
suppose that there exists a class of typical arbitration-desirous people who seek arbitration for limited purposes though they have used unlimited language. What is essentially an empirical question, however, slips into dubious circularity if the assumptions lack such empirical support. Who wants arbitration and why? Who decides who wants arbitration and why? Judge, Arbitrator or Legislature? May not the arbitrator know more on this fundamental question than the common law judge? The *Del Bianco* court had many doubts.

The plaintiff School District claimed that the defendant architect's failure to use the necessary skill and diligence as contracted for caused cabinets, doorways and floors to become uneven and plumbing facilities to malfunction. The District alleged that the building was never completed because of the defendant's failures, and that the District would have to spend one hundred and fifty thousand dollars for labor and materials to remedy such deficiencies.20

The school district and architect entered into a standard form owner-architect agreement whereby defendant architect would perform professional services. Arbitration was provided for:

> Arbitration of all questions in dispute under this agreement shall be at the choice of either party in accordance with the provisions, then obtaining of the Standard Form of Arbitration Procedure of the American Institute of Architects. This Agreement shall be specifically enforceable. . . .21

The trial court rejected defendant architect's plea for a stay of the plaintiff's action pending arbitration. On appeal, which presented a noteworthy procedural point,22 the plaintiff-appellee argued that the issues in dispute went beyond the bounds of the arbitration agreement. "[T]he agreement to arbitrate does not require [the school district] to submit [to arbitration] those controversies arising out of the relationship of the parties . . . ."23 The court thought the issue of the scope of the arbitration clause, "all questions in dispute under this agreement," to be debatable, thereby accepting the soundness but not the decisiveness of plaintiff's distinction, between issues arising out of the agreement and others arising out of the relationship.24

At that point there were interesting alternatives for the appellate court: (1) Reverse the Douglas approach of *Warrior & Gulf*: unless parties expressly include the issues sought to be decided within the ar-

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22. *Id.* at 149-52, 215 N.E.2d at 27-29.
23. *Id.* at 154, 215 N.E.2d at 29-30.
24. *Id.*
bitration agreement, deny arbitration. (2) Accept the Douglas approach and send the parties to arbitration as there had been no express exclusions from arbitration. (3) Reason that since the issues in dispute do not involve questions of contract language interpretation, then the court is best equipped to handle the legal rules application, and resolve the matter against arbitration. (4) Reason that since the issues in dispute do involve the intentions and expectations of parties in a particular trade, and since the parties provided for a trade group type of arbitration process, namely the AIA, then this is a proper case to anticipate the arbitrator's superior trade knowledge of the scope of such arbitration clauses. (5) Decide only that the issue of arbitrability, that is, the scope of matters within the arbitrator's province, is a question the parties have put into the arbitrator's hands "inseparable" from the rest of the contract.25 This contention means that all disputes about what is arbitrable is one more dispute "under the agreement" which includes the arbitration provision as well as the substantive rights and obligations of performance and payment.26 (6) In addition to some or none of the above, reason that since the Illinois Arbitration Act, like the Uniform Act, provides for a review in court of the arbitrability decision of the arbitrator as another question of whether the arbitrator exceeded his power under the agreement of arbitration, defer decision awaiting the arbitrator's judgment.

The last alternative proved to be the most convincing to the Second District in Del Bianco.27 The fact that a party may later challenge an arbitrability decision under another section of the arbitration act,28 persuaded the court to give the first, but evidently not the last, word to the arbitrator. Such reasoning might be persuasive where the arbitration resulted in written findings with reasons in their support by which the reviewing court could learn whether the arbitrator knew something more than they about the arbitrability question. Unfortunately, though, it might prove to be no more than a wasteful exercise in decision deferral when the arbitration decision contains nothing but conclusion; at worse no more than a cloak for vacating arbitration awards unfitting judicial standards. Nothing in the present Uniform or Illinois legislation asks for more than arbitral conclusion.29 Moreover, one might wonder what

26. This would presume a delegation to the arbitrator of the authority to decide his own jurisdiction.
an arbitrator might know about the interpretation of standard arbitration agreements in a trade that could not be adduced or suggested in court on the preliminary application to order or stay arbitration. Given some of the suggested reasons for arbitration, speed and expense-cutting, one might wonder what arbitration promisors are getting if they must face three separate determinations or deferrals on the arbitrability question.\(^\text{30}\)

If the _Del Bianco_ dependence on the possibility of vacating the arbitration award under section 12 of the Uniform Act\(^\text{31}\) does not stand well with the usual advantages gained by arbitration, _e.g._, speed, cost savings, finality, the decisional ground also strains the language of the statutory section (12) which it seizes for support.\(^\text{32}\)

The purpose of section 12 is transparent: to allow the judicial review of arbitrations. Unlike section 2\(^\text{33}\) which provides for the judicial enforcement of arbitration _agreements_, section 12 serves the well-worn task of relieving odious unfairnesses: corruption;\(^\text{34}\) partiality;\(^\text{35}\) misconduct;\(^\text{36}\) exceeding of powers;\(^\text{37}\) erroneous and prejudicial pro-

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\(^\text{30}\) The § 102 motion and/or cross-motion to compel or stay arbitration; (2) the arbitrator's determination of arbitrability; (3) the § 111 motion and/or § 112 cross-motion to confirm or vacate the award of the arbitrator. Much doubt may properly be raised about the truth of the supposed virtues of arbitration: speed, finality, inexpense, expertise, privacy. Nobody knows, furthermore, why a given agreement included an arbitration clause: do attorneys who draft such contracts explain the "virtues" of arbitration? Do such drafters themselves know the "virtues"? Who suggests the arbitration clause? With such uncertainty of the reasons for arbitration, it is certainly necessary, if one is to legislate for _all_ arbitration agreements which are in writing, as the Illinois Arbitration Act nearly does, to make assumptions: The Act assumes, by providing expeditious judicial proceedings and by providing very circumscribed judicial review of arbitration awards (§§ 102, 111, 112), that parties desire minimal judicial compulsion and interference, just sufficient to protect one from outrageous arbitral processes, to the end of gaining the speed, finality, inexpense, expertise and privacy of arbitration. The underlying posits of the Act, however, may be set aside by the parties themselves. The assumptions, then, do not necessarily bind contracting parties, who are free to seek whatever _they will_ from arbitration. But importantly, whatever _specific_ parties wanted from arbitration is _irrelevant_ unless they plainly so stated in their contract and arbitration agreement. It follows, therefore, that the judicial interpretation of the act is best which is most consistent with these assumptions that are embedded in the act and its processes. Duplicative judicial hearings on arbitrability are inconsistent with these assumptions and with express statutory language. See Arbitration Act § 112 and n. 61, infra.

\(^\text{31}\) Arbitration Act § 112.

\(^\text{32}\) Id.

\(^\text{33}\) Id.

\(^\text{34}\) Arbitration Act § 112(a)(1).

\(^\text{35}\) Arbitration Act § 112(a)(2).

\(^\text{36}\) Id.

\(^\text{37}\) Arbitration Act §112(a)(3).
The Del Bianco opinion stresses the overall scheme of the Arbitration Act. Seeing that the language of section 2 with respect to proceedings to order or stay arbitration uses the terms, "shall proceed summarily to the determination of the issues so raised [arbitrability of the extant disputes]," and relying on the persuasive precedent of the Minnesota Supreme Court in a like question a few years earlier, the court tacitly restructured the statute's syntax. It converted the adverb "summarily" from a modifier of the verbal phrase, "shall proceed," to a qualifier of the noun "determination," and, adding for content, what also is absent, the notion that a summary determination makes for a tentative determination. Thus, after arbitration, the tentative determination of arbitrability may, on a motion to vacate the award, be superseded by what improbably will be a non-summary but what surely will be a final determination of the arbitrability question.

Syntax aside, the language of the statute authorizing review of arbitration on a motion to vacate also makes the Del Bianco resolution and the Minnesota precedent suspect: "[T]he court shall vacate an award where . . . (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 . . ." The act thus unmistakably asserts that once the determination of arbitrability has been made under a section 2 proceeding to stay or compel arbitration, that arbitrability decision is res judicata. What the two courts considering this point evidently neglected is that the section 2 arbitrability determination necessarily binds the courts, but may not bind the arbitrator, no obvious distinction, but one more congruent with both the statutory language and purpose.

40. Arbitration Act § 102(a).
42. See Arbitration Act § 112(a)(5); note 61, infra.
43. One can imagine an arbitrator deciding issue X to be non-arbitrable even after the court in a § 102 proceeding has declared the dispute arbitrable. Cf. Liberty Mut. Ins. Co. v. Duray, 5 Ill. App. 3d 187, 283 N.E.2d 58 (1st Dist. App. Ct. 1972). In Liberty, the First District held that the circuit court properly dismissed plaintiff insurer's complaint for declaratory judgment of "coverage" issues in an insurance contract with defendant. Under that contract arbitration of some issues was mandatory if demanded by either party. The insured, defendant in the declaratory judgment suit, had demanded arbitration of those issues and the insurer had lost a motion to stay arbitration pending judicial determination of the "coverage" issue in a prior terminated action under § 102. Insurer then later brought this declaratory judgment suit asking for adjudication of the legal issue of "coverage." (During the period of the end of the initial judicial proceeding under § 102, sometime in 1967, and prior to this 1972 action, the Illinois Supreme Court had decided that the standard uninsured motorist endorsement left the issue of "coverage" to the courts and not the arbitrator. Flood v. Country Mut. Ins. Co., 41 Ill. 2d 91, 242 N.E.2d 149 (1968).) Nevertheless, the First Dis-
In *Layne-Minnesota Company* and *Del Bianco* the courts under section 2 faced difficult "determinations". Both accepted a plausible premise, that the arbitrator might be the better judge of the arbitrability issues. But, each seems to have worried over an incorrect arbitral decision on these "jurisdictional" issues. Their solution would be to send the parties to arbitration hopeful of a satisfactory resolution of the entire dispute there. If, however, the party disputing arbitrability in court were not satisfied with arbitral justice, then the award-reviewing court would still have the arbitrability issue open for consideration.

If the arbitrator's "better" resolution of the scope of the arbitration agreement, or if his satisfying resolution of the dispute in toto might be forthcoming, then the proper course for these courts would be the ordering of arbitration they granted. In the face of "all-disputes" clauses in these contracts, this appealing route could not be resisted, and probably should not have been resisted. Yet, the prospect of delaying and increasing the number of decision-makers, or at least the decisional opportunities, came as an unfortunate by-product.

It is submitted that under the act, where there is doubt over the scope of the arbitration mandate, under the Act a decision by the court asked to order arbitration must be made then and not later. The statutory design forcing this proposition stems from sound arbitration policy. It is hoped that the wise course followed by the *Layne-Minnesota* and *Del Bianco* cases noted will continue and their weakest rationale be discarded.

**B. Flood and Related Litigation**

The standard arbitration clause of the uninsured motor vehicle section of automobile insurance policies has generated much controversy.44

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Unlike the *Del Bianco* situation, where the arbitrability controversy caused by the use of general language, “all disputes,” focuses on the respective roles of court and arbitrator under the Arbitration Act, the uninsured motor vehicle controversy centers on the arbitrability of two questions: (1) whether the insured is entitled to recover against the owner or operator of the uninsured vehicle and in what amount; (2) whether the insured is entitled to recover the amount of such a claim from his insurer. Most courts have recognized a distinction between the uninsured owner or operator's liability to the insured insured, and the insurer's liability to the insured insured.

Courts have dubbed the insurer's liability to the insured the issue of “coverage,” the operator or owner's liability to the insured will here be called “liability.” Between December of 1967 and January of 1968 two Illinois appellate districts differed over the distinction of coverage and liability for purposes of the arbitration clause in the uninsured motor vehicle section of the insurance policy. These courts gave different answers to an identical issue on appeal: should the trial court have decided the issue of coverage or should that issue be decided by the arbitrator?

The arbitration language in each policy left little room for distinguishing the cases. The Illinois Appellate Court, Fourth District, made

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45. See Widiss, supra note 44, at 538-42; Aksen, supra note 29, at 77, n.14 and accompanying text.


49. If any person making claim under the Uninsured Motorists Coverage [hereunder] and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured highway vehicle [Uninsured Vehicle] because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing thereunder [under this section], then upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association . . .

91 Ill. App. 2d at 375, 235 N.E.2d at 420; 41 Ill. 2d at 92, 242 N.E.2d at 150 (last reference to the Supreme Court opinion in *Flood* only because the Fourth District did not
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three related but distinct points: first, it said that “the intervention of the court is limited to the single issue as to whether or not there is an arbitration agreement”;\(^\text{50}\) second, it scrutinized the policy language beyond mere notice of “whether there is an arbitration agreement,” and decided that “the arbitration paragraph is transparently clear . . . and that the 'coverage' issues presented . . . are properly subject to arbitration. . . .”;\(^\text{51}\) third, the court reverted to the notion of the judicial role:

where the scope [of the arbitration clause] is not unequivocally limited and confined by the contract, [then] the court is in the first instance limited to a determination as to whether or not an arbitration agreement exists, and that questions of the scope of coverage should in the first instance be determined by an arbitrator.\(^\text{52}\)

In sum, the majority opinion of the Fourth District outran the insurer's contract-based contentions by several rationales, none of which is easily made consistent with the rest. Justice Trapp carefully pointed out the weaknesses in the majority's second rationale, the “transparently clear” arbitration paragraph, in his dissent.\(^\text{53}\) Their third position, deference to the arbitrator's decision on the scope of the arbitration clause \textit{in the first instance}, is precisely the \textit{Del Bianco} rationale criticized above.\(^\text{54}\) Moreover, the third position of deference of the arbitrator may be incompatible with the first position taken of the court's role being limited only to a determination of whether an agreement to arbitrate exists. Also, the deference notion, as well as the limited function idea, sits uneasily with the extensive reliance in the second position of intense arbitration clause language scrutiny. If the court should simply decide whether or not an agreement to arbitrate has been included in a contract, and no more, it would surely err in any case wherein the parties have decided to arbitrate less than all of the possible disputes that may arise. It would err not because it is inconceivable that a legislative design could have placed all arbitrability issues before the arbitrator and not the courts,\(^\text{55}\) but inconceivable because the present legislative design\(^\text{56}\) explicitly states that any contro-

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\(^{50}\) 89 Ill. App. 2d at 362-63, 232 N.E.2d at 35.
\(^{51}\) Id. at 364, 232 N.E.2d at 36.
\(^{52}\) Id.
\(^{53}\) Id. at 365-67, 232 N.E.2d at 36-38.
\(^{54}\) See text \textit{supra} at pages 29-35.
\(^{55}\) Such an assignment to the arbitrator might raise constitutional difficulties. \textit{Cf.} Interstate Bakeries Corp. v. Teamsters, Local 734, 31 Ill. 2d 317, 201 N.E.2d 452 (1964).
\(^{56}\) Arbitration Act § 101 \textit{et seq.}
versy may be arbitrated which the parties agree to, which cannot be construed as other than an invitation to limit arbitration to specific questions given the extensive preoccupation in the Act to the issue of arbitrability. Indeed, while it is instructive to mention these matters for purposes of general understanding, nobody reading the Act and the whole majority opinion of the Fourth District could have taken the limited function so narrowly, but so literally, as here suggested. This aspect, then, should not be distressing.

Of course, what is truly distressing is the reversion, or amplification of what the limited function notion entails: deference in the first instance as the opinion goes on to explicate. For the court relies on and uses the unsound Del Bianco "decision-deference" rationale. The enticing aspect of this decision-deference reasoning comes out of ineradicable variability of language.

It is what Wittgenstein aptly saw as the inexhaustible playing of the "language game." If one has a disposition to doubt the meaning of what another says, the doubting matter, so to speak, can be found. Be this true, anytime a court is asked to decide the arbitrability question of any arbitration agreement, the court can find some doubt and then, in the first instance, leave the question to the arbitrator. Even trying to address the problem in one's contract by specifying who shall decide arbitrability poses difficulties on another level and also of different kind. Prime examples of this "language game" arose in the cases under discussion.

58. For still, who decides who will decide the question of arbitrability. Concededly, the parties in theory can make that decision and do make that decision when they state that all arbitrability questions, or some named arbitrability questions, are for the court or for the arbitrator. Still, in theory like interpretation problems may arise on such arbitration language as on other contract language in dispute (what we call merits). For instance, it seems clear that whether general language or specific language is used in the arbitration clause to describe what disputes are arbitrable, and which issues composing such disputes are arbitrable, the courts will have uncertain arbitrability decisions to make. It might reasonably follow that either general language or specific language endorsing the arbitrator's sole authority to determine arbitrability, of general disputes or of specific issues in general or specific disputes, would also give rise to interpretative problems. The paradox noted earlier in the text likewise applies here: that language such as "all disputes" just does not resolve all possible situations.

Nevertheless, the difficult task of the conscientious arbitration agreement drafter may alleviate such problems by specification of arbitrable matter, but only if the parties' mutual or common experiences permit such foresight or if the relative unimportance of the substance of future disputes far outweighs on the parties' calculus of the expense, time-consumption, and disharmony of public litigation when compared with analogous
Arbitrability

The Illinois Supreme Court eliminated the appellate courts' split over arbitrability in these uninsured motorist cases by reversing the Flood decision of the Fourth District and this brought Illinois in line with the weight of authority.\(^{59}\) Though the Supreme Court's decision aptly dealt with the narrow issue of the interpretation of uninsured motorist arbitration clauses, it failed to deal with some of the methodological questions raised by the appellate report of the same case and the earlier Del Bianco decision. It is therefore not conclusive on the interpretation of the Arbitration Act. Yet some guidance for the future is present.

There is no language in either of these paragraphs, or the policy as a whole, which can be read as an agreement to submit to arbitration the issues of coverage. Despite the salutary purpose of our Arbitration Act, parties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication . . .\(^{60}\)

No direct word on the role of the court when it is in doubt; nothing explicit on what has above been styled the first and third positions in the court below; only an unequivocal disagreement and narrow judgment of the language of the arbitration clause in the case at hand.

However, it may be that the Supreme Court's failure to discuss in haec verba the question of the court's role when there is doubt about arbitrability of some issues nevertheless provided instruction in so many words. For, if the parties must arbitrate only those issues which they undoubtedly and clearly specified for arbitration, then the Supreme Court has created a presumption against the enforcement of ar-


bitration for any issue not plainly spelled out in haec verba. One will recall that this position stands as polar opposite to that taken by Mr. Justice Douglas in the Warrior & Gulf opinion. No arbitration will take place except voluntarily unless the issue or issues sought to be arbitrated have unequivocally been listed in the arbitration agreement. Unless the arbitration warrant has specifically included an issue, under this reasoning, it is beyond the ken of the arbitrator. The litmus test of the impact of this position, if it is the position, would be the case where the parties went to arbitration voluntarily under an agreement to arbitrate a future dispute wherein the arbitrator decided an issue or issues inter alia that had not been spelled out in haec verba in the arbitration clause but which debatably, as in Del Bianco, the parties could be taken to have included "by construction or implication". Must the court on a motion to vacate the arbitration award (or so much as depended on the resolution of issues not expressly contained in the arbitration agreement) then perforce vacate as an "exceeding of powers" by the arbitrator? As yet no reported case has been poised so sensitively in that procedural posture.

61. The Arbitration Act specifies (§ 112(a)(5) ) that the court shall vacate an award where that court finds no agreement to arbitrate, and if no court under a § 102 proceeding has ruled that there was an agreement to arbitrate, and if the party moving to vacate on the ground of lack of such an agreement to arbitrate did not participate in the arbitration hearing without raising the objection that there was not an agreement to arbitrate. Thus, the failure to pursue a § 102 remedy to prevent the arbitration of a dispute or any issue in a dispute is no waiver of one's objections on arbitrability grounds, but if he participates in the arbitration, the objector must make his objections then. The non-participant in arbitration preserves his right to claim non-arbitrability in a motion to vacate any award given by the arbitrator. Caution must be exercised however. The "defendant" who would not participate in the arbitration because of meritorious grounds for believing the dispute non-arbitrable still must participate in a § 102 proceeding brought to compel arbitration by the complaining party because in that proceeding the objection of non-arbitrability must be raised (if such a proceeding is brought by the complaining party). One may not always sit back and preserve his objections until the arbitration has terminated with an award. See note 43 supra.

62. Cf. Del Bianco & Assocs., Inc. v. Adam, 6 Ill. App. 3d 286, 285 N.E.2d 480 (1st Dist. App. Ct. 1972). In Adam, the defendant-appellant argued that the arbitral award ought not to have been confirmed, as it was, by the trial court on the ground, inter alia, that the arbitrator "exceeded his powers" under the arbitration clause. The arbitration clause stated that "Arbitration of all questions in dispute shall be at the choice of either party. . . ." Plaintiff-appellee so chose when a dispute over termination of the architectural service contract arose but defendant-appellant failed to participate in the arbitration and only defended in the suit later brought by plaintiff to confirm the award the arbitrator made. In that § 111 confirmation suit the court vacated the award because of testimony by a stenographer that she had miscopied an important name which the court felt might have misled the arbitrator. The court then remanded to the same arbitrator, in effect granting a § 102 order to arbitrate; the parties complied without objection and the arbitrator again granted plaintiff an award was non-arbitrable or somehow objectionable, and since all arbitrations are pre-granted it. Defendant-appellant's argument that the arbitrator exceeded his powers under the agreement might have been disposed of in four ways: first, that the agreement stipulated that there would be arbitration of all disputes and this was a dispute; second, that the only complaint in substance of the defendant-appellant was that the
Still, an interesting judicial reaction to the Flood court's "clear language" assertion has adopted the above reading: a presumption against arbitration unless with near certainty the agreement discloses an intent to arbitrate the dispute that has arisen. What makes this post-Flood decision, most interesting is the presentation of a complication absent in Flood but present, in so many general arbitration clauses. The parties specified the arbitration of "all disputes arising in connection with this contract."64

Mindful of this omnibus arbitration language, the Blades court nevertheless thought that "when the contract is silent on the issues sought to be arbitrated, there is no contract and it does not lie within the province of this or any other court to make that contract or to extend that contract by implication or construction. And as we read Flood it so holds."65 Flood does order the Illinois courts not to extend arbitration agreements by implication or construction. But, does Flood say, or must Flood be taken as saying that even in the face of an omnibus arbitration clause, use of general "arising in connection with this contract" language means that an issue arising either out of the contract or the relationship can be said to be beyond the coverage of the clause?

The nature of the dispute sought to be arbitrated in Blades could be said in fairness to have "arisen in connection" with the parties construction contract. The general contractor had moved to enjoin accounting proceedings, brought by one subcontractor against the owner, the general contractor, and another subcontractor, and the general contractor had requested an order to arbitration against the owner.

award was non-arbitrable or somehow objectionable, and since all arbitration are presumed to end with an award if called for, the authority to make an award always resides in the arbitrator unless specifically excluded (the use of arbitration for limited purposes); third, that the failure of the defendant-appellant to object to the earlier court's vacation and remand to the arbitrator, on lack of arbitrability grounds, waives the claim now; fourth, that the earlier court's vacation and remand constitutes an adjudication or opportunity to adjudicate all arbitrability issues and is thus res judicata on arbitrability questions. The First District decided this contention on the first rationale, thereby answering the contention on its merits: arbitrability. The narrow holding on the point then is that the arbitration clause that is generally drafted, "all disputes, etc" includes as an arbitrable question the authority to decide the amount of the award. No doubtful proposition. Yet, by giving very little consideration (if one goes by the four sentences in which the court disposed of the argument) to the attack on the broadly phrased arbitration clause, the court may have been legitimating general arbitration clauses in just a way, on one reading of Flood, that would be erroneous as suggested in the prior text. Contra, H.F. Blades, Inc. v. Jarman Mem. Hosp. Bldg. F., 109 Ill. App. 2d 224, 248 N.E.2d 289 (4th Dist. App. Ct. 1969) (discussed infra).

64. id. at 229, 248 N.E.2d at 292.
65. id. at 231, 248 N.E.2d at 292.
The general contractor sought to arbitrate his claim for additional consideration to cover his additional costs due to changes and delays caused by owner. The motions were denied. On appeal the general contractor argued that his claim for additional consideration constituted "a dispute arising in connection with the [construction] contract" and it should be arbitrated.\textsuperscript{66} A unanimous Fourth District affirmed under a rationale purporting to follow \textit{Flood}.\textsuperscript{67} Without a Supreme Court explication of the \textit{Flood} rationale, it seems unlikely that one can confidently dismiss \textit{Blades}.

The \textit{Blades} opinion demonstrates the danger in drafting general arbitration agreements. The contract providing for arbitration of all disputes in its connection in \textit{Blades} said not a word about additional costs occasioned by owner's delays. But, the contract did specify that "the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the work due to . . . acts of the Owner. . . ."\textsuperscript{68} Apparently no other section of this agreement spoke to owner-caused delays. The \textit{Blades} court quite correctly, perhaps too obviously, held that the mere fact that Owner could not charge or take legal action for delays he caused Contractor was too distant from the additional consideration claim to support the idea that such a claim could be arbitrated.

Granted that the specific protection of the contractor against assessment of liquidated damages or termination for owner-caused delays ignores the dispute for compensation for additional costs. The \textit{Blades} court's further negative implication, that no equitable adjustments in consideration of additional costs as a result of owner-caused delay were permissible under the contract, is unfounded when put on the ground that this specific contract clause omitted any reference to equitable adjustments for such reason. Evidently, the contractor's attorneys were pointing to this paragraph as evidence of the supposed necessary connection between the instant dispute and some contract language for purposes of arbitration. That the attorneys were wrong, as the court properly held, to point to the "liquidated damages" paragraph, did not answer the contractor's contention. If one would assume that no necessary connection be made between the instant dispute and specific contract language in the face of an omnibus arbitration clause, then the contractor need only demonstrate such an arbitration clause, as present

\textsuperscript{66} \textit{Id.} at 230, 248 N.E.2d at 293.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
in *Blades*, and show the court how the claim sought to be arbitrated is "a dispute in connection with this contract."

CONCLUSION

*Blades* adopts a pointer theory of arbitrability: unless the dispute may be affirmatively resolved by inspection of a part or all of the contract, or unless the dispute is in some strong way connected to specific contract language, it is no dispute for purposes even of an omnibus arbitration clause. Three important statements about the *Blades* pointer theory can be made at present: (1) This may, but need not, be the theory of arbitrability implicit in the Supreme Court's *Flood* decision; (2) This makes the judicial role in every case of general arbitration clause draftsmanship, that is, clauses like models *A* and *B*, and like those found in *Blades* and *Del Bianco*, that of decision-maker of most of the merits of the dispute sought to be arbitrated; (3) The drafters of the Uniform Arbitration Act thought they had provided a statutory design that would avoid the judicial role of decision-maker of the merits, at least in the first instance. By way of conclusion, these three statements will be examined in reverse order.

The drafting panel of the Uniform Arbitration Act has been said by their chairman to have sought to avoid the supposed danger of the judicial determination of arbitrability, which they conceived with good reason as, in the first instance, the arbitrator's role. Their implementation of a design in the Act to forestall this judicial arbitrability decision was to be judicial restraint in the earliest phase of controversy: the hearing on motion to compel or stay arbitration. The court would be expected to decide only whether or not there existed an arbitration agreement, and if so, order arbitration of the dispute; otherwise, stay arbitration. Furthermore, the party involuntarily sent into arbitration might protect himself later by motion to vacate the arbitrator's award, if any, on the ground that the dispute in part or whole was not arbitrable and the arbitrator erred in proceeding nevertheless. The legislative intention, insofar as the Commissioners on Uniform State Laws is relevant, would, then, endorse the approach taken and discussed above in *School District No. 46 v. Del Bianco*. Fortunately, as argued above in discussion of the *Del Bianco* reasoning, neither the Uniform nor the

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69. See Fuller, The Morality of Law 84, 228 (Rev. Ed. 1969).
71. Id.
Illinois Arbitration Act ends up necessarily sanctioning this misconceived scheme. Unfortunately, the failure of the Act to give explicit guidance on the crucial question of who is to decide arbitrability and by what standards has led Illinois to the preposterous position of the Blades result, the very danger sought to be avoided. Surely, the implementation of the desire to avoid judicial decisions of the merits of disputes arguably controlled by an arbitration agreement could have been better. Compromise, one is led to believe, knows not the virtue of decisiveness.\textsuperscript{72}

In holding that the dispute in Blades was not arbitrable because the written construction contract was silent on equitable adjustment, the Blades court decided the dispute correctly on the apparent merits under prevailing private contract law, which binds parties only to that which they have agreed.\textsuperscript{73} The best solution in such a case may be the refusal of arbitration on the ground that the merits are clearly contrary to the claimant. Nevertheless, an arbitration policy stated in the Arbitration Act clearly ordains that the right contract law solution is not necessarily desired. The preclusion of the courts from refusing arbitration because at law the claimant has no credible case speaks directly to this point.\textsuperscript{74} To what extent the Act truly seeks arbitral justice different in kind from legal justice is unclear. Evidence of implicit favor of contract law as the source of arbitral law, so to speak, has surfaced.\textsuperscript{75} But still, this does not mean that it follows that the courts may in deciding questions of arbitrability go farther to the merits of the dispute.

The Flood opinion leaves open for the Supreme Court and lower Illinois courts the task of harmonizing the language, purposes, and ends of the Arbitration Act with the false starts of the Del Bianco and Blades resolutions. Flood also leaves room for the drafter of arbitration agreements to acquire the results he seeks, when he seeks less than

\textsuperscript{72} See Isaacson, supra note 70, at 329.
\textsuperscript{73} Yet, the Blades opinion shows no sensitivity to the chance that, even under contract law despite the fact that the written agreement contained nothing on the equitable adjustment sought by the claimant contractor, there still may have been grounds for holding the contractor's claim valid in whole or part. For instance, a consistent additional clause, though oral, if agreed to, could have supported the claim. The Blades rationale eliminates any possibility of adducing such evidence. No section of the Arbitration Act can be taken as saying that only written documents can be used in arbitration.
\textsuperscript{74} Arbitration Act § 102(e).
\textsuperscript{75} Pirsig, supra, note 19, at 695 ("implicit" because the comments here cited indicate that their author held the view that some contract interpretation by the arbitrator could be so unreasonable as to be subject to vacation on the ground that the arbitrator exceeded his powers).
the arbitration of all potential disputes. Moreover, recognition that neither the Del Bianco decision-deference theory of arbitrability nor the Blades pointer theory of arbitrability squares with the statutory language or arbitration aspirations should lead to the validation of general, omnibus arbitration clauses: that an “all disputes” arbitration clause covers all claims which have a reasonable nexus with the commercial contract.\textsuperscript{76}

\textsuperscript{76} The very recent decision of the Appellate Court of Illinois, third district, Silver Cross Hospital v. S. N. Nielson Company, — Ill. App.3d —, 291 N.E.2d. 247 (Dec. 28, 1972), followed the here criticized Blades rationale on a fact pattern similar to Blades.