CITY OF NEW BRITAIN *v.* AFSCME, COUNCIL 4, LOCAL 1186
(SC 18671)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan and Harper, Js.

Argued December 6, 2011—officially released May 1, 2012

Mary C. Pokorski, associate city attorney, for the appellant (plaintiff).

J. William Gagne, Jr., with whom, on the brief, was *Kimberly A. Cuneo*, for the appellee (defendant).

Opinion

ROGERS, C. J. The issue in this certified appeal[1] is whether the plaintiff, the city of New Britain, agreed to arbitrate a dispute with certain city employees, classified as foremen, regarding an alleged violation of the city's civil service rules. The plaintiff appeals from the judgment of the Appellate Court affirming the trial court's denial of its application to vacate the arbitration award in favor of the defendant, AFSCME, Council 4, Local 1186.[2] *New Britain* v. *AFSCME, Council 4, Local 1186*, 121 Conn. App. 564, 570, 997 A.2d 560 (2010). The plaintiff claims that the Appellate Court improperly concluded that it agreed to arbitrate the foremen's dispute in a settlement agreement between the parties. Id. We agree with the plaintiff that it never agreed to arbitrate the matter and, accordingly, we reverse the judgment of the Appellate Court.

The following facts are undisputed. The plaintiff and the defendant negotiated a collective bargaining agreement, effective July 1, 2003, to June 30, 2008. Article XIV, § 11.5, of the collective bargaining agreement provides: "The collective bargaining process will be the sole means for submitting requests for upgrading and/or title changes." Article XIV, § 14.9 (F), of the collective bargaining agreement provides: "Effective [July 1, 2005] the parties agree that arbitration shall be used to redress all upgrades that have not been resolved in negotiations."

In January, 2006, the plaintiff and the defendant negotiated a number of upgrades that increased the pay of certain city employees. *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 121 Conn. App. 566. The foremen did not receive upgrades during these negotiations, but the subordinate employees whom they supervise did.[3] To memorialize their agreement, the parties signed a memorandum of understanding, which provided in relevant part: "The parties hereby mutually agree that the list of proposed upgrades on the attached pages (dated [January 18, 2006]) would go into effect retroactive to January 1, 2006. Any omissions, adjustments, corrections, etc. can only be made with the signature of both parties. The parties agree that arbitration shall NOT be used to redress all upgrades that have not been resolved in the negotiations." (Internal quotation marks omitted.) Id., 567.

Thereafter, it was discovered that, as a result of these upgrades, the foremen were paid at a rate less than 5 percent above the rate paid to the subordinates, in violation of the rules of the city's civil service commission. The civil service rule at issue provides that persons classified as foremen shall be paid at least 5 percent more than the employees whom they supervise. The foremen, as a class, filed an unfair labor practice complaint regarding the violation of the civil service rules.

The defendant, on behalf of the foremen, then entered into a settlement agreement with the plaintiff on September 8, 2006. That settlement agreement provided: "[The plaintiff] hereby agrees that [the defendant] may file a grievance regarding the issue of [f]oremen being paid less than 5 [percent] more than their subordinates. This grievance shall be filed directly to arbitration. [The plaintiff] and [the defendant] further agree that either party may raise any claim or defense they could otherwise have made had they filed at step [one], including the issue of arbitrability but not including timeliness. In consideration of the above, [the defendant] agrees to the withdrawal and closing of [the unfair labor practice action]."

The matter was thereafter submitted to arbitration in two phases. In the first submission to the state board of mediation and arbitration (board), the plaintiff argued that the matter was not arbitrable at all. *New Britain* v. *AFSCME*, *Council 4*, *Local 1186*, supra, 121 Conn. App. 566–67. In support of its claim, the plaintiff referred the arbitrators to the arbitration provision in the memorandum of understanding. Id. Specifically, the plaintiff claimed that it never agreed to arbitration because the memorandum of understanding specifically prohibited arbitration regarding upgrades not resolved therein, and the settlement agreement specifically reserved the plaintiff's right to raise the defense of arbitrability.

The board issued an award concluding that the matter was arbitrable. While recognizing that no foremen positions were at issue in the upgrades that had been negotiated for subordinates, the board concluded that it was "very questionable whether the prohibition against the use of arbitration [in the memorandum of understanding] was meant to concern the unforeseen consequences of an automatic upgrade to the foremen through reliance on the [c]ivil [s]ervice [r]ules." The board also concluded, in light of the settlement agreement, that it would be unreasonable to conclude that the matter was not arbitrable.

The parties then moved to the second phase of the arbitration. After hearing evidence, the board determined that the civil service rule mandating a 5 percent pay differential for supervisors applied in the present case. *New Britain* v. *AFSCME*, *Council 4*, *Local 1186*, supra, 121 Conn. App. 567–68. The board further determined that the civil service rule did not conflict with the provisions of the parties' collective bargaining agreement. Id., 568. The board thus concluded in the defendant's favor that the parties intended to incorporate the language of the civil service rules into their collective bargaining agreement, and that the two provisions should therefore be read and applied in concert. Id.

On February 29, 2008, the plaintiff filed an application

to vacate the arbitration award pursuant to General Statutes § 52-418 (a) (4),[4] claiming that the arbitrators improperly concluded that the dispute was subject to arbitration and, on the merits, that the foremen were entitled to be paid a rate 5 percent above the employees they supervise. The trial court denied the application, concluding that it was not empowered to overturn the arbitrators' decisions, even if their interpretation of the parties' agreements was wrong.

The plaintiff appealed to the Appellate Court, which, applying the positive assurance test,[5] concluded that "eight months after agreeing that arbitration should not be used to redress the upgrades, [the plaintiff] agreed to arbitrate the foremen's grievance as part of its settlement agreement with the defendant." Id., 570. Thus, because the Appellate Court concluded that it could not state "with positive assurance that the parties intended to exclude the issue from arbitration," it affirmed the judgment of the trial court. Id. This appeal followed.

The plaintiff claims that the Appellate Court improperly affirmed the trial court's denial of its motion to vacate. First, the plaintiff claims that collective bargaining negotiations were a condition precedent to arbitration under the collective bargaining agreement and the memorandum of understanding, and that the mandatory negotiations did not take place. Second, the plaintiff asserts that the memorandum of understanding clearly evidenced the parties' intent not to arbitrate this dispute and the settlement agreement merely allowed the defendant to file a grievance in arbitration while specifically reserving the plaintiff's right to raise nonarbitrability as a defense. The defendant, on the other hand, claims that the condition precedent was satisfied when the parties negotiated the upgrades set forth in the memorandum of understanding, and, regardless, the plaintiff subsequently agreed to arbitrate the pay differential dispute in the subsequent settlement agreement.[6] For the reasons we set forth in the following discussion, we agree with the plaintiff that the foremen's dispute was not arbitrable and, accordingly, reverse the judgment of the Appellate Court.

We first determine our standard of review. In doing so, we note that both parties assert in their briefs that our standard of review in this case is limited. Indeed, when reviewing a denial of a motion to vacate under § 52-418 (a) (4), we generally reverse a decision upholding the denial only if we conclude that the arbitrator acted in manifest disregard of the law.[7] Because, however, the plaintiff appeals from the arbitrators' determination that the dispute was arbitrable, rather than from the award itself, we must examine more closely the question of our standard of review.

"[A party] can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, [it]

has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute." (Citation omitted; internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 386, 926 A.2d 1035 (2007). We recently noted that three distinct issues arise in cases such as the present one: (1) whether the parties agreed to arbitrate the underlying merits of the case, i.e., whether the matter is arbitrable; (2) who has the primary authority to decide that question—the arbitrator or the court; and (3) if the court has the primary authority to decide that question, whether the parties engaged in conduct that precludes judicial review of the arbitrator's decision on that matter.[8] *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709–10, 987 A.2d 348 (2010).

In accordance with these principles, in determining our standard of review, we first examine who had the primary authority to resolve the question of arbitrability in the present case: the court or the arbitrators. It is well established that, absent the parties' contrary intent, it is the court that has the primary authority to determine whether a particular dispute is arbitrable, not the arbitrators. Id., 714. Thus, courts generally review challenges to an arbitrator's determination of arbitrability de novo.[9] Id.; see also *White* v. *Kampner*, 229 Conn. 465, 472, 641 A.2d 1381 (1994).

Because, however, "[a]rbitration is a creature of contract"; (internal quotation marks omitted) *State* v. *Philip Morris, Inc.*, 289 Conn. 633, 642, 959 A.2d 997 (2008); parties may agree to arbitrate the question of arbitrability; *White* v. *Kampner*, supra, 229 Conn. 472. "It is well established . . . that parties may agree to have questions concerning the arbitrability of their disputes decided by a separate arbitrator. . . . In apportioning, between the court and the arbitrators, the responsibility for determining which disputes are arbitrable, the language of the contract controls . . . ." *Wallingford* v. *Wallingford Police Union Local 1570, Council 15, AFSCME*, 45 Conn. App. 432, 436, 696 A.2d 1030 (1997). When deciding whether a party has agreed that an arbitrator should have the sole authority to decide arbitrability, we must "not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "In this manner the law treats silence or ambiguity about the question who (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 944–45. In this state, the intention to have arbitrability solely determined by an arbitrator "can be manifested by an express

provision or through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated." (Internal quotation marks omitted.) *White* v. *Kampner*, supra, 229 Conn. 472.

We review the documents at issue in the present case in chronological order. First, the arbitration provision in the collective bargaining agreement clearly did not contain an agreement by the parties to submit the issue of arbitrability to the arbitrator's sole authority. Likewise, that provision did not contain broad terms from which we may infer such intent. Rather, by providing in article XIV, § 14.9 (F), of the collective bargaining agreement that "arbitration shall be used to redress all *upgrades* that have not been resolved in negotiations"; (emphasis added); the arbitration provision limits the submission to the arbitrator to the merits of the dispute. According to this provision, the arbitrator is given the authority to resolve disputes regarding pay upgrades, but not the overall question of arbitrability. The memorandum of understanding further restricted the scope of the arbitrator and indicated in no way that the parties intended to submit the question of arbitrability to the arbitrator for final determination. Finally, the settlement agreement explicitly indicated only that the defendant could file a grievance in order to arbitrate the underlying question of the civil service rule violation.[10] For all of these reasons, we conclude that the trial court had the primary authority in the present case to determine whether the foremen's pay differential dispute was arbitrable.[11]

This conclusion does not end the inquiry into our appellate standard of review. Having determined that the parties did not clearly and unmistakably indicate in any of the three documents an intention to waive judicial review of the question of arbitrability, we next turn to the third inquiry set forth in *Bacon Construction Co.*, which consists of two parts: preservation and waiver. *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 710. A party preserves its right to judicial review of an arbitrator's conclusion regarding arbitrability by raising that issue before the arbitrator. Id. "A party who [makes] such a challenge nonetheless may waive its right to judicial review by agreeing to vest the arbitrator with authority to decide" whether the matter is arbitrable. Id. In order to obtain judicial review of the arbitrator's arbitrability determination, therefore, a party must both preserve its claim and refrain from activities that would, in essence, estop that party from asserting its claim at a later time.

The plaintiff asserts two theories in support of its appeal. First, it claims that the collective bargaining agreement and the memorandum of understanding require negotiations as a condition precedent to arbitration. Second, it claims that the memorandum of under-

standing evidences the parties' intent not to arbitrate the foremen's dispute, and that the settlement agreement did not evidence a contrary intent. Because the record reveals that the plaintiff did not raise its first claim before the arbitrators, we conclude that the plaintiff did not preserve this claim. With respect to its second claim, however, the plaintiff argued before the arbitrators that the memorandum of understanding clearly evidenced the parties' intent not to arbitrate. Having preserved one of its claims that it never agreed to arbitrate, the plaintiff is therefore entitled to de novo judicial review of that claim so long as it did not engage in behavior precluding such review.

As we have indicated, the plaintiff never waived its right to judicial review by agreeing to have the issue of arbitrability decided solely by the arbitrators. In *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 710, we concluded that the defendant waived its right to judicial review by agreeing that the arbitrator would be the final authority on the question of arbitrability. Specifically, in its answering statement to the arbitrator, the defendant in that case had stated: "The actual issues in this proceeding are [the plaintiff's] delay and disruption claims, and [the defendant's] special defenses that: [the plaintiff's] claims are barred by the doctrine of sovereign immunity [and thus are not arbitrable] . . . . *Those issues may be heard and fully and finally determined by this arbitration.*" (Emphasis in original; internal quotation marks omitted.) Id., 711. This unequivocal declaration by the defendant that the arbitrator would determine arbitrability " 'fully and finally,' " demonstrated that "the defendant intended to be bound by the arbitrator's decision and constitute[d] a waiver of judicial review of the issue of arbitrability." Id. Contrastingly, as we noted previously, the settlement agreement in the present case did not evidence any intention by the parties to submit the question of arbitrability to the arbitrators for their full and final decision on the matter. Finding no indication that the parties intended to contract out of judicial review in the present case, we review the plaintiff's claim de novo in accordance with the principle that courts have plenary review over the question of arbitrability absent a showing of the parties' contrary intent.

Turning to the merits of the appeal, the plaintiff claims that it never agreed to arbitrate the foremen's dispute. Specifically, the plaintiff contends that the memorandum of understanding evidenced its intention to avoid arbitration, and that the settlement agreement preserved its right to raise the defense of nonarbitrability. The defendant responds that, regardless of the memorandum of understanding, the settlement agreement contains the plaintiff's agreement to arbitrate the foremen's dispute. We agree with the plaintiff.

"[A] person can be compelled to arbitrate a dispute

only if, to the extent that, and in the manner which, he has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute." (Citation omitted; internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 386. Nevertheless, "[b]ecause we favor arbitration, we will defer to this alternative method of dispute resolution if the contractual arbitration provisions fall within the grey area of arbitrability, employing the positive assurance test as set out in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). Under this test, judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance . . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Internal quotation marks omitted.) *Board of Education* v. *Wallingford Education Assn.*, 271 Conn. 634, 639, 858 A.2d 762 (2004).

In analyzing the plaintiff's claims, the Appellate Court concluded that, "[a]lthough the parties originally stated that arbitration would not be used to redress the issue of upgrades, they later signed . . . [the] settlement agreement . . . ." *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 121 Conn. App. 570. On the basis of its reading of the settlement agreement, the Appellate Court concluded that, "eight months after agreeing that arbitration should not be used to redress the upgrades, [the plaintiff] agreed to arbitrate the foremen's grievance . . . ." Id. The Appellate Court thus concluded that it could not say "with positive assurance that the parties intended to exclude the issue from arbitration." Id. Upon review of the contested documents, we agree that the parties agreed initially in the memorandum of understanding not to arbitrate the foremen's dispute, but we disagree that the settlement agreement prevents us from concluding with positive assurance that the plaintiff never agreed to arbitration.

Specifically, we note that the memorandum of understanding contained an agreement between the parties that "arbitration [would] NOT be used to redress all upgrades that ha[d] not been resolved in the negotiations." The parties thus explicitly agreed not to arbitrate any disputes involving upgrades that were not the subject of the negotiations memorialized in the memorandum of understanding. Because the foremen were not upgraded in these negotiations, their pay differential dispute falls within the class of disputes that the parties specifically agreed not to arbitrate.

Subsequently, in the settlement agreement the parties agreed that "the defendant may file a grievance regard-

ing the issue of [f]oremen being paid less than 5 [percent] more than their subordinates." The agreement further provides that the grievance could be filed directly at arbitration, and that "either party may raise any claim or defense they could have made had they filed at step [one], including the issue of arbitrability but not including timeliness." Although the first clause in this settlement agreement indicated that the parties agreed that the defendant could file a grievance directly in arbitration, it clearly provides that the plaintiff did not concede the issue of arbitrability. Furthermore, reading the settlement agreement in its entirety, the second clause actually indicates that the plaintiff intended to preserve the defense of nonarbitrability, presumably because it planned to continue asserting that claim. We thus conclude that the settlement agreement, by its plain language, did not alter the parties' agreement to avoid arbitration that was contained in the memorandum of understanding, but, rather, preserved the plaintiff's right to assert its defense of nonarbitrability. Because the plaintiff did not agree to arbitrate the foremen's dispute, it could not be compelled to submit to arbitration.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court with direction to grant the plaintiff's application to vacate the arbitration award.

In this opinion NORCOTT, ZARELLA and McLACHLAN, Js., concurred.

[1] We granted the plaintiff's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the issue of the foremen's pay differential was arbitrable?" *New Britain* v. *AFSCME, Council 4, Local 1186*, 298 Conn. 903, 3 A.3d 69 (2010).

[2] The defendant appears in this case on behalf of the foremen whose pay is at issue.

[3] The list of employees receiving upgrades was attached to the parties' memorandum of understanding and is thus contained in the record. At oral argument in this court, the plaintiff explained that the foremen were not discussed during the negotiations leading up to the memorandum of understanding. The defendant acknowledges this fact in its brief as well, as it provides, "[t]he memorandum [of understanding] does not apply to the foremen's pay issue *as they were not a part of the negotiations that resulted in the memorandum*." (Emphasis added.)

[4] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[5] As set forth in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960), judicial review under the positive assurance test must be "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be

said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

[6] Significantly, the defendant does not claim that it had no obligation to satisfy the condition precedent contained in the collective bargaining agreement. Indeed, it could not so claim, in light of the arbitrators' determination, during phase two, that the collective bargaining agreement and the civil service rules do not conflict and therefore both apply in the present case. Consistent with this conclusion, the defendant specifically indicated that, "[p]ursuant to the parties' *collective bargaining agreement*, [the alleged violation of the civil service rule] led to the filing of . . . a prohibited practice complaint [by the foremen]." (Emphasis added.) The defendant further explains that, in accordance with the settlement agreement, "[p]ursuant to [a]rticle XIV of the parties' *collective bargaining agreement*, a grievance [in arbitration] was filed." (Emphasis added.)

[7] Our standard of review of motions to vacate an arbitration award under § 52-418 (a) (4) is well established: "[A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418 (a) (4) because the arbitrator has exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. We emphasize, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *McCann* v. *Dept. of Environmental Protection*, 288 Conn. 203, 220, 952 A.2d 43 (2008).

[8] Although these three inquiries are inextricably linked, we note that most cases like the present one require appellate courts to examine them out of order. Appellate courts must first examine the second and third inquiries in order to determine whether they should review the question of arbitrability de novo. Only after determining the appropriate standard of review should an appellate court turn to the first question of whether the parties intended to arbitrate the particular dispute at issue.

[9] Unlike the question of whether the foremen's dispute is arbitrable, this preliminary inquiry into whether the parties submitted that question for the arbitrator's sole determination is one we review de novo. In reviewing this question, we note that our preliminary inquiry into the standard of review is not dictated by the positive assurance test. See footnote 5 of this opinion.

[10] The dissent places much significance upon two statements in the settlement agreement, namely, that the "grievance shall be filed directly [in] arbitration," and that "either party may raise any claim or defense . . . including the issue of arbitrability . . . ." We disagree that these statements clearly and unmistakably demonstrate an intent by the parties to submit the question of arbitrability to the arbitrator's sole determination. The former evidences the parties' intent to submit the underlying dispute regarding the foremen's pay differential to the arbitrator solely in the event that the dispute is deemed arbitrable in the first place. The latter, meanwhile, does not in any way indicate who has the authority to decide the question of arbitrability, but merely preserves the parties' ability to raise that issue as a defense.

[11] In response to the dissent's statement that "the majority determines that the parties did not authorize the arbitration panel to decide whether the dispute was arbitrable," we clarify that, although arbitrability was one of the two issues that the parties submitted to the arbitrators, that submission did not give the arbitrators the authority to decide that issue conclusively without judicial review of its determination on appeal. "We have long recognized two procedural routes by which a party may preserve the issue of the arbitrability of a particular dispute for judicial determination. . . . A party initially may refuse to submit to an arbitration and instead compel a judicial determination of the issue of arbitrability. . . . Alternatively, the issue of arbitrability may properly be left to an arbitrator or arbitration panel for a determination . . . . In the latter situation, a court may properly entertain a challenge to an award alleging disregard of the limits of the parties' agreement with respect to arbitration." (Citations omitted; internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 392. In other words, a claim that a dispute is not subject to arbitration may be submitted to the arbitrator without waiving the claim that the court has the primary authority to determine arbitrability. We thus conclude that the parties' submission of the question of arbitrability to the arbitrators is not dispositive in the present case.

Finally, the dissent contends that the plaintiff never claimed that the

board was not authorized to decide finally the question of arbitrability and, indeed, that the plaintiff has made judicial admissions that the board had such authority. With respect to the plaintiff's purported admissions, as we have indicated, submission of the question of arbitrability to the arbitrator in the first instance does not constitute an admission that the arbitrator has the authority to decide that issue finally, without de novo review by the court. With respect to the dissent's contention that the plaintiff has *never* raised the claim that the issue of arbitrability was to be decided by the trial court rather than the arbitrator, we note that, as the dissent recognizes, the plaintiff did claim on appeal that this court should apply the positive assurance test, which is applicable only when the court has the primary authority to decide arbitrability. Accordingly, we conclude that the claim is fairly before us.