HARPER, J., with whom, PALMER, J., joins, dissenting. In considering whether the plaintiff, the city of New Britain, was entitled to have the arbitration award in favor of the defendant, AFSCME, Council 4, Local 1186, vacated on the ground that the issue of foremen pay upgrades was not arbitrable, the majority applies de novo review, notwithstanding the fact that the parties unmistakably agreed to empower the arbitration panel (arbitrators) to resolve their disagreement as to whether the defendant's grievance is arbitrable. The parties signed a document clearly and unmistakably manifesting this intention, and the plaintiff has never suggested thereafter that the arbitrators were not authorized to resolve their dispute over arbitrability. Instead of construing these essential facts in light of their self-evident meaning, the majority determines that the parties did not authorize the arbitrators to decide whether the dispute was arbitrable because the document does not contain certain talismanic language of authorization. Reviewing the arbitration question de novo, the majority then concludes that the Appellate Court improperly determined that the issue of foremen pay upgrades is arbitrable, thereby failing to give legal effect to the parties' conduct or to afford the arbitrators' decision the level of judicial deference required by our case law and General Statutes § 52-418.[1] Because, under the proper standard of review, it cannot be said that the arbitrators "exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made"; General Statutes § 52-418 (a) (4); I must respectfully dissent.

I

The plaintiff seeks to vacate the arbitration award in favor of the defendant on the ground that the dispute between the parties, namely, whether the plaintiff violated the collective bargaining agreement by failing to upgrade the position of foremen to conform with civil service rules requiring foremen to be paid at least 5 percent more than their subordinates, is not arbitrable.[2] I agree with the majority regarding the basic legal principles that are implicated when such a dispute arises. Where the majority and I depart is in the application of those principles to the clear facts in the present case. I briefly summarize those principles and then turn to the relevant facts.

A determination of whether an issue is arbitrable can implicate three related questions: "(1) whether the matter is arbitrable; (2) who has primary authority to decide that question—the arbitrator or the court; and (3) if the matter is one over which the court would have primary authority, did the parties engage in, or fail to engage in, conduct that precludes judicial review

of the arbitrator's decision on that matter."[3] *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709–10, 987 A.2d 348 (2010). With respect to the question of who has primary authority to determine arbitrability, it is a well settled principle that "[w]hether a particular dispute is arbitrable is a question for the court, *unless*, *by appropriate language*, *the parties have agreed to arbitrate that question*, *also*." (Emphasis in original; internal quotation marks omitted.) Id., 714; see also *Connecticut Union of Telephone Workers*, *Inc.* v. *Southern New England Telephone Co.*, 148 Conn. 192, 197, 169 A.2d 646 (1961) ("[w]hether the parties have agreed to submit to arbitration not only the merits of the dispute but the very question of arbitrability, as well, depends upon the intention manifested in the agreement they have made"). Elaborating on the proper method for determining whether the parties have chosen to empower the arbitrator to determine arbitrability, this court has held that "[t]he intention to have arbitrability 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*, 229 Conn. 465, 472, 641 A.2d 1381 (1994).

This specific principle proceeds from a general recognition that "[a]rbitration is a creature of contract between the parties and its autonomy requires a minimum of judicial intrusion. . . . The parties themselves, by the agreement of the submission, define the powers of the arbitrator." (Internal quotation marks omitted.) *Office of Labor Relations* v. *New England Health Care Employees Union*, *District 1199*, *AFL-CIO*, 288 Conn. 223, 228–29, 951 A.2d 1249 (2008).

Therefore, we must consider whether, in the present case, the parties contractually agreed to submit to the arbitrators their dispute as to whether the foremen pay upgrades is arbitrable. Because the parties executed several agreements, I briefly outline the course of the parties' dealings as revealed by the following undisputed facts in the record. First, the parties entered into a collective bargaining agreement, which provides for a multistep internal grievance procedure and for arbitration of grievances on which satisfactory resolution has not been reached; both procedures must be initiated within specified time limits. Article XIV, § 14.8, of the collective bargaining agreement provides: "The grievance procedure shall be the sole method of processing claims concerning rights and/or privileges provided herein or concerning interpretation or application of provisions of this [a]greement." The collective bargaining agreement further provides in article XIV, § 14.9 (F), that, effective upon a specified date, "the parties agree that arbitration shall be used to redress all upgrades that have not been resolved in negotiations."

Several years after that collective bargaining agreement went into effect, the parties entered into negotiations that ultimately led to pay upgrades for certain positions. After these negotiations, the parties signed a memorandum of understanding setting forth those upgrades and further providing: "The parties agree that arbitration shall NOT be used to redress all upgrades that have not been resolved in negotiations."

Thereafter, the defendant filed an unfair labor practice complaint with the state board of labor relations, claiming that the plaintiff had failed to bargain in good faith by violating the collective bargaining agreement because the recent pay upgrades had resulted in a violation of the city's civil service rules, which the defendant contended had been incorporated into the collective bargaining agreement, requiring that foremen (whose pay had not been the subject of negotiation and had not been upgraded) be paid at least 5 percent more than subordinates. Weeks later, while that complaint was pending, the parties entered into a settlement agreement, which provides as follows: "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* [*g*]*rievance 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.[4]

"In consideration of the above, the [defendant] agrees to the withdrawal and closing of [the unfair labor practice complaint]." (Emphasis added.)

It is clear that neither the collective bargaining agreement nor the memorandum of understanding vests the arbitrators with authority to decide a dispute as to arbitrability.[5] The text of the settlement agreement, however, cannot be mistaken for anything other than a declaration by the parties that the issue of arbitrability should be resolved by the arbitrators. As the parties agreed, the defendant "may file a grievance . . . [that] shall be filed directly to arbitration." To state the obvious, this language establishes that the parties agreed to present some issue to the arbitrators. Dispelling any uncertainty regarding the scope of the submission to the arbitrators, the settlement agreement sets forth the specific dispute and further provides, immediately after providing for the matter to be filed directly to arbitration, that either party may raise otherwise available defenses "*including the issue of arbitrability* . . . ." (Emphasis added.) This latter provision of the settlement agreement highlights the fact that the plaintiff did not believe that the *merits* of the defendant's grievance properly could be arbitrated, but it also makes abundantly clear that the defense of nonarbitrability was

intended to be raised and decided, in the first instance, by the arbitrators.

The unusual specificity and concreteness of the settlement agreement sets this case apart in an important respect from the usual arbitration clause. The majority has cited *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), for the principle that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[6] I highlight that case not only because I believe this principle to be sound but also because it is useful to understand the policy concerns behind the principle. Per *First Options of Chicago, Inc.*, a heightened clarity requirement is appropriate because, unlike the question of what types of disputes should be arbitrated, "[a] party often might not focus upon [who (primarily) should decide arbitrability] or upon the significance of having arbitrators decide the scope of their own powers." Id., 945. In the present case, however, the settlement agreement is both perfectly clear and unusually attentive not only to the narrow issue in dispute but also to the question of who should decide the arbitrability of that dispute; the agreement's sole function was to submit to the arbitrators a limited set of disputes, one of which is arbitrability. Thus, there can be no question that the concern underlying the heightened clarity requirement enunciated in *First Options of Chicago, Inc.*, has been satisfied in the present case.

Reinforcing the clear significance of the text of the settlement agreement, the course of the parties' dealings in this case forecloses any conclusion other than that the parties intended to submit to the arbitrators the issue of arbitrability. The settlement agreement brought to a close formal proceedings initiated by the defendant and moved the dispute to a new forum—arbitration—for resolution. To infer from this course of events that the parties intentionally transferred their dispute from a forum that was able to resolve the defendant's grievance to a forum that they knew was incapable of resolving even the threshold issue in that matter is to foist on the parties an intent that they could not possibly, in good faith, have held.[7]

Finally, I draw attention to the course of litigation in the present case. Not only has the plaintiff consistently framed its contentions in a manner that unequivocally demonstrates that it does not challenge the arbitrators' authority to decide the question of arbitrability, the plaintiff also has made judicial admissions attesting to this grant of authority. Specifically, in its application to vacate the arbitration award submitted to the trial court, the plaintiff stated: "[O]n August 3, 2007, the parties *submitted the issue of arbitrability to the arbitrator*[*s*]." (Emphasis added.) In that application to vacate, the plaintiff further contended that, because the

grievance was not arbitrable under the memorandum of understanding, "[t]he [arbitrators], *by retaining jurisdiction* of the award, did not issue a final and definite award as required by [§ 52-418]." (Emphasis added.) The plaintiff's latter assertion clearly presupposes that the arbitrators possessed initial "jurisdiction"[8] to determine the threshold question of whether the merits of the plaintiff's grievance could be arbitrated. These express admissions, moreover, accord with the manner in which the plaintiff has presented its claims throughout the litigation process. At no point—not before the arbitrators, not before the trial court, not before the Appellate Court, not before this court—has the plaintiff ever contended that the arbitrators lacked contractual authority to resolve the issue of arbitrability.[9]

I recognize that the settlement agreement lacks some of the linguistic hallmarks of agreements that have been found to clearly and unmistakably vest the arbitrator with authority to arbitrate arbitrability. The settlement agreement does not vest the arbitrator with authority to resolve "any and all" disputes; see footnote 5 of this dissenting opinion; or provide that the grievance shall be "decided," "resolved" or "adjudicated" by the arbitrators or "committed to" the panel.[10] Nor does the settlement agreement contain an express provision that the arbitrator has authority to decide its own "jurisdiction."[11] See footnote 7 of this dissenting opinion. Such agreements, however, have not been drafted by parties considering the specific question of whether a narrow issue in dispute should be arbitrated. A contextual and common sense reading of the settlement agreement, as well as the plaintiff's judicial admissions as to the arbitrators' authority, compels a conclusion that the parties clearly and unmistakably committed the question of arbitrability to the arbitrators. To conclude otherwise, as has the majority, would not only elevate form over substance but also would assume and reward the plaintiff's bad faith in inducing the defendant to withdraw the matter from a competent forum to one wholly lacking authority.

II

Having concluded that the arbitrators were contractually authorized to determine whether the defendant's grievance was arbitrable, I turn to the plaintiff's claim that the Appellate Court improperly affirmed the trial court's judgment denying the plaintiff's motion to vacate the award on the ground that the dispute at issue was not arbitrable. Specifically, the plaintiff contends: (1) in light of the memorandum of understanding expressly stating that "arbitration shall NOT be used to redress all upgrades that have not been resolved in negotiations," the Appellate Court should have concluded that the arbitrators exceeded their authority in violation of § 52-418 (a) (4) by determining that the

dispute was arbitrable; and (2) in reaching a contrary conclusion on the basis of the settlement agreement, the Appellate Court disregarded the plaintiff's reservation of its right to assert the defense of nonarbitrability. I agree with the plaintiff's secondary contention, but disagree with its primary claim. Although the Appellate Court properly recognized the obvious—that the settlement agreement vested the arbitrators with authority—in so concluding, it appears to have conflated the distinct inquiries into the arbitrators' authority to decide the merits of the dispute and its authority to decide whether the dispute is arbitrable and, in so doing, applied an improper standard of review. Nonetheless, I agree with the Appellate Court's conclusion that the plaintiff is not entitled to have the award vacated, though I reach that conclusion by a different route.

The Appellate Court, like the majority in this certified appeal, applied the positive assurance test in reaching its conclusion. Under that test, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Internal quotation marks omitted.) *White* v. *Kampner*, supra, 229 Conn. 473, quoting *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). The positive assurance test is applied, however, when courts determine, *in the first instance*, whether a dispute is arbitrable. See, e.g., *Board of Education* v. *Nonnewaug Teachers' Assn.*, 273 Conn. 28, 30–32, 866 A.2d 1252 (2005) (action for declaratory judgment that dispute is not arbitrable); *White* v. *Kampner*, supra, 472–73 (motion to vacate award where court determined that arbitrator lacked authority to determine arbitrability); *Welch Group, Inc.* v. *Creative Drywall, Inc.*, 215 Conn. 464, 467, 576 A.2d 153 (1990) (plaintiff's application for injunction restraining defendant from proceeding with arbitration); *John A. Errichetti Associates* v. *Boutin*, 183 Conn. 481, 488–89, 439 A.2d 416 (1981) (plaintiff's application for order directing defendant to proceed with arbitration); *Board of Education* v. *Frey*, 174 Conn. 578, 581–82, 392 A.2d 466 (1978) (action for injunction staying arbitration). That test is inapplicable when the threshold question of arbitrability has been committed to the arbitrator. See *Bridgeport* v. *Bridgeport Police Local 1159, AFSCME, Council 15*, 183 Conn. 102, 106, 438 A.2d 1171 (1981) ("[o]nce the trial court has determined that arbitrability is to be decided by the arbitrators, there is no need for it to apply the 'positive assurance' test").

When the parties have agreed to vest the arbitrator with primary authority to decide whether the dispute is arbitrable, as in the present case, we generally defer to the arbitrator's determinations of fact and law, vacating the award only on narrow grounds.[12] As the United

States Supreme Court explained in *First Options of Chicago, Inc.* v. *Kaplan*, supra, 514 U.S. 942: "[The parties] disagree about who should have the primary power to decide [whether the dispute is arbitrable]. Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? . . . Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan*, 346 U.S. 427, [436–37, 74 S. Ct. 182, 98 L. Ed. 168] (1953) (parties bound by arbitrator's decision not in 'manifest disregard' of the law), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 [109 S. Ct. 1917, 104 L. Ed. 2d 526] (1989). Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration." See also *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 835, 6 A.3d 1142 (2010) (citing "three recognized grounds for vacating an award: [1] the award rules on the constitutionality of a statute . . . [2] the award violates clear public policy . . . or [3] the award contravenes one or more of the statutory proscriptions of § 52-418 [a]" [internal quotation marks omitted]).

The plaintiff cites § 52-418 (a) (4) as the basis for its application to vacate, under which "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." The plaintiff's central complaint is that the arbitrators exceeded their power by forcing the parties to arbitrate the issue of foremen's pay when the parties had signed a memorandum of understanding, following a round of wage negotiations, agreeing "that arbitration shall NOT be used to redress all upgrades that have not been resolved in negotiations."[13] The plaintiff points to an Appellate Court case in which that court had stated the principle that "an arbitrator cannot find a dispute arbitrable if language in the contract indicates that it is not"; *Wallingford* v. *Wallingford Police Union, Local 1570*, 45 Conn. App. 432, 437, 696 A.2d 1030 (1997); and concluded that the collective bargaining agreement could not reasonably have been given any other interpretation than to exclude the issue on which the defendant had sought

arbitration. Id. The plaintiff cannot prevail on this claim.

The plaintiff's claim suffers from several fatal defects. First, "[w]e have explained that, [i]n our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 84, 881 A.2d 139 (2005); see also *Board of Education* v. *AFSCME, Council 4, Local 287*, 195 Conn. 266, 271, 487 A.2d 553 (1985) ("[t]he memorandum of decision may . . . be examined to determine if an arbitrator has exceeded his or her authority by making an award beyond the scope of the submission"). The plaintiff does not contend, however, that the award fails to conform to the submission, and there appears to be no basis to make such an assertion. See footnote 2 of this dissenting opinion. Ordinarily, if an issue is submitted to an arbitrator, this court will not second-guess the reasoning behind the arbitrator's resolution of that issue. *Garrity* v. *McCaskey*, 223 Conn. 1, 12, 612 A.2d 742 (1992) ("[a]n award conforming to an unrestricted submission should generally be confirmed by the court").[14]

Second, the *Wallingford* case and the others cited by the plaintiff in its brief to this court are inapposite. In those cases, the court had applied the positive assurance test to determine whether the dispute was arbitrable. See, e.g., *Wallingford* v. *Wallingford Police Union, Local 1570*, supra, 45 Conn. App. 437. For the reasons I previously have set forth, that test is not applicable in the present case.

Third, it is clear that in reaching its decision, the arbitrators attempted to ascertain the parties' intent in drafting the memorandum of understanding. The arbitrators found as follows: "A reading of the January 19, 2006 [m]emorandum of [u]nderstanding providing the upgrades clearly shows that no [f]oremen positions were at issue in the upgrades. Nor is there testimony that at anytime the parties discussed the upgrading of [f]oremen during the upgrade negotiations. It is very questionable whether the prohibition against the use of arbitration was meant to concern the *unforeseen* consequences of an *automatic* upgrade to the [f]oremen through reliance on the [c]ivil [s]ervice [r]ules."[15] (Emphasis added.) Thus, it plainly appears that the arbitrators concluded, as a matter of contract interpretation, that the memorandum of understanding was inapplicable to an upgrade that is mandated, rather than subject to negotiation. This court has explained: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the

arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Internal quotation marks omitted.) *Board of Education* v. *AFSCME, Council 4, Local 287*, supra, 195 Conn. 273; accord *Major League Baseball Players Assn.* v. *Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) (explaining that "[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable"). Review of the arbitration decision reveals no such blatant disregard for the contract and reliance on the arbitrators' own view of public policy, but, rather, a different construction of the document on which the plaintiff relies. "With respect to contract interpretation, this standard essentially bars review of whether an arbitrator misconstrued a contract." *T.Co Metals, LLC* v. *Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010). Thus, whether the arbitrators' decision is well reasoned or correct is not for me, or for this court, to decide. Accordingly, the Appellate Court properly affirmed the trial court's judgment denying the plaintiff's motion to vacate the award.

I respectfully dissent.

[1] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, 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." The plaintiff seeks to vacate the award on the basis of § 52-418 (a) (4).

[2] The issues identified by the arbitrators in their interim award and award as those submitted to it, respectively, were: (1) "Is [c]ase [number] 2007-A-0214 [assigned to the grievance] arbitrable?"; and (2) "Did the [plaintiff] violate [§§] 11.0 and or 2.0 of the collective bargaining agreement by not upgrading the position of [f]oreperson? If so, what shall the remedy be?" As the plaintiff has never contended that the arbitrators exceeded the scope of the submission, I presume that the issues stated in the awards accurately reflect those submitted for the arbitrators' consideration.

[3] Because I conclude that the parties have contractually agreed that the arbitrators will decide the issue of arbitrability, thus satisfying prong two, I do not reach the further question of whether the plaintiff has waived judicial review of this issue. The question of waiver can arise only when the dispute being arbitrated is otherwise a matter for the court to decide; *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709, 987 A.2d 348 (2010); a condition that is not met in the present case because the parties have agreed to empower the arbitrators to resolve the issue of arbitrability. I note, however, that, even if the settlement agreement plausibly could be deemed to fall short of the clear language necessary to contractually vest the arbitrators with authority to decide arbitrability, a dubious supposition, that agreement and the plaintiff's subsequent conduct undoubtedly would qualify as clear evidence that the plaintiff "agree[d] to vest the arbitrator with authority to decide that issue"; id., 710; thereby waiving de novo judicial review of the question of arbitrability.

[4] Article XIV, § 14.1, of the collective bargaining agreement provides with

respect to commencement of the internal grievance process: "No grievance may be filed after fifteen (15) working days of the event giving rise to it." That article further provides in § 14.3 that the defendant must receive written notice of an intention to submit the grievance to arbitration within twenty days after an adverse decision or the expiration of the time limits for a decision on the grievance to be rendered. The memorandum of understanding that resulted in the violation of the civil service rule regarding pay differential was executed on January 19, 2006. The only grievance in the record before this court is one filed with the plaintiff's personnel director received on September 29, 2006.

[5] Although the collective bargaining agreement provided for arbitration of any grievance, a term defined as "a claim by an employee or the [u]nion that rights under the specific language of this [a]greement have been violated, or that there has been a misinterpretation or misapplication of the specific provisions of this [a]greement," courts have held that authority linked to interpretation of the contract is not clear and unmistakable evidence of intent to vest the arbitrator with authority to decide whether a matter is arbitrable. See, e.g., *Peabody Holding Co., LLC* v. *United Mine Workers of America*, 665 F.3d 96, 102 (4th Cir. 2012) ("an arbitration clause committ[ing] all interpretive disputes relating to or arising out of the agreement does not satisfy the clear and unmistakable test" [internal quotation marks omitted]); *Spahr* v. *Secco*, 330 F.3d 1266, 1270 (10th Cir. 2003) ("broad provisions to arbitrate all disputes arising out of or relating to the overall contract, like the one at issue here, do not provide the requisite clear and unmistakable evidence within the four corners of the . . . [a]greement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator" [internal quotation marks omitted]); *McLaughlin Gormley King Co.* v. *Terminix International Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (arbitration clause did not clearly and unmistakably evidence parties' intent to give arbitrator power to determine arbitrability where clause did not mention "controversy over arbitrability" [internal quotation marks omitted]); cf. *PaineWebber, Inc.* v. *Bybyk*, 81 F.3d 1193, 1199–1200 (2d Cir. 1996) (provision requiring arbitration of "[a]ny and all controversies" indicates parties' intent to submit to arbitration question of arbitrability [internal quotation marks omitted]); *White* v. *Kampner*, supra, 229 Conn. 472 (authority vested in arbitrator when contract uses language "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]).

[6] The Supreme Court has explained: "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'—for in respect to this latter question the law reverses the presumption." *First Options of Chicago, Inc.* v. *Kaplan*, supra, 514 U.S. 944–45; see also *PaineWebber, Inc.* v. *Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996) ("where the arbitration agreement contains an ambiguity as to who determines eligibility, the [Federal Arbitration Act's] presumption favoring arbitration is reversed so that the court will ordinarily decide the question").

[7] Thus, the plaintiff's role in directing the grievance to arbitration renders its position substantively different than a party that plays no role in the commencement of arbitration proceedings, manifests a clear intention to resist arbitration, and appears in the arbitral forum for the sole purpose of asserting its defense of nonarbitrability. See *Opals on Ice Lingerie* v. *Body Lines, Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) ("The Supreme Court has held that 'merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue.' *First Options of Chicago* [*Inc.*] v. *Kaplan*, [supra, 514 U.S. 946]. To the contrary, the [c]ourt noted in [that case], the fact that a party 'forcefully object[s]' to having an arbitrator decide a dispute—as [the defendant] clearly did—suggests an unwillingness to submit to arbitration. Id. See also *Textile Unlimited* v. *A..BMH & Co.*, 240 F.3d 781, 788 [9th Cir. 2001] [holding that party did not waive right to object to arbitration by participating in arbitration proceedings where the party 'only participated in the arbitration to contest the arbitration itself']; *Coady* v. *Ashcraft & Gerel*, 223 F.3d 1, 9 n.10 [1st Cir. 2000] [holding that party's objection to scope of arbitration was not waived by its participation in hearings because the party 'consistently and vigorously maintained its objection to the scope of arbitration'].").

[8] As this court clarified in *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 388–92, 926 A.2d 1035 (2007), arbitrators do not possess subject matter

jurisdiction, a term that has a specific significance in court proceedings, but, rather, authority derived from the consent of the parties.

[9] In its brief to this court, the plaintiff does rely on certain appellate cases, and an examination of those cases reveals that the courts had applied the positive assurance test. As I explain in part II of this dissenting opinion, that test applies only when the court has primary authority to decide whether the dispute is arbitrable. For the reasons I previously have set forth, the parties clearly vested the arbitrators with primary authority to decide that question. Even if I were to interpret the plaintiff's reliance on these cases as a vague belated claim on appeal that it did not agree to arbitrate the issue of arbitrability, the plaintiff's role in directing the grievance to arbitration would preclude it from successfully advancing such a claim. Cf. *PowerAgent, Inc.* v. *Electronic Data Systems Corp.*, 358 F.3d 1187, 1192 (9th Cir. 2004) ("PowerAgent [Inc.] was the plaintiff in arbitration and affirmatively sought to submit the issue of arbitrability to the arbitration panel, arguing in favor of the arbitrators' authority to decide the issue. . . . Having affirmatively urged the arbitrators to decide arbitrability and asserted their authority to do so, PowerAgent [Inc.] cannot await the outcome and, after an unfavorable decision, challenge the authority of the arbitrators to act on that very issue.").

[10] See, e.g., *Rent-A-Center, West, Inc.* v. *Jackson*, U.S. , 130 S. Ct. 2772, 2779, 177 L. Ed. 2d 403 (2010); *Carson* v. *Giant Food, Inc.*, 175 F.3d 325, 331–32 (4th Cir. 1999); *Telectronics Pacing Systems* v. *Guidant Corp.*, 143 F.3d 428, 431 (8th Cir. 1998); *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 711.

[11] See *Qualcomm, Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006) (parties' agreement incorporated American Arbitration Association rules that expressly provided arbitration panel had power to rule on own jurisdiction).

[12] In the present case, the trial court properly recognized that a more deferential standard of review was required, also apparently recognizing that the settlement agreement conferred authority on the arbitrators. In particular, the court noted: "In *Costello Construction* [*Corp.*] v. *Teamsters Local 559*, 167 Conn. 315, 318, 355 A.2d 279 (1974), the court held that where the parties have *submitted the issue of arbitrability to the arbitrator for determination*, the court is bound by the arbitrator's determination unless that determination clearly falls within the proscriptions of [§ 52-418], or procedurally violates the parties' agreement." (Emphasis added.) Because the trial court viewed the plaintiff's claims as essentially charging the arbitrators with making "erroneous legal interpretation[s]," it concluded that such a claim was not a proper basis to vacate the award under § 52-418 (a) (4). I note that this court has "overrule[d] the statement in *Costello* [*Construction Corp.*] implying that the review of the procedural determination of an arbitrator is not restricted by the criteria established by § 52-418." *East Hartford* v. *East Hartford Municipal Employees Union, Inc.*, 206 Conn. 643, 650, 539 A.2d 125 (1988).

The Appellate Court did not explain why it had applied a different standard of review than the trial court and did not state a conclusion as to whether the question of arbitrability itself had been committed to the arbitrators, although it quoted case law stating that such authority may be committed to the arbitrators. The fact that the Appellate Court failed to give any legal effect to the settlement agreement's express reservation of the plaintiff's right to assert the defense of nonarbitrability suggests that the court may have conflated the question of whether the arbitrators were empowered to decide arbitrability, under which the defendant's reservation of that defense would not bar the exercise of authority, and the merits of the arbitrability question, under which such a fact could be dispositive.

[13] I agree with the majority that the plaintiff waived any claim regarding the existence of a condition precedent to arbitration that had not been met—negotiation—by failing to assert this claim prior to its appeal to this court, and I therefore also do not consider its merits.

[14] The court in *Garrity* v. *McCaskey*, supra, 223 Conn. 5, further explained that "[t]he authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. In the absence of any such qualifications, an agreement is unrestricted." In the present case, the submission provides for certain defenses to be available at arbitration, but it reserves no explicit rights from the submission, and it makes no mention of court review. The submission is therefore plainly unrestricted, and neither party has suggested otherwise.

[15] In addition to the arbitrators' reasoning, I note that, although it is unmis-

takable from the text of the memorandum of understanding that the parties intended to impose an unconditional ban on arbitration, its reference to "all upgrades that have not been resolved in negotiation" creates an ambiguity with respect to the scope of that ban. Specifically, it is not clear whether the memorandum of understanding applies only to a limited set of upgrades that were the subject of previous, unresolved, negotiations or whether it applies to all possible upgrades, even those that were not addressed in the negotiations leading to the settlement agreement. For both that reason and the one articulated by the arbitrators, even if I were to agree with the majority that the positive assurance test applies, I would be compelled to conclude that the presumption in favor of arbitration has not been overcome.