Supreme Court To Revisit Delegation of Arbitrability in *Henry Schein II*

Skadden

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For the second time in two years, the U.S. Supreme Court will hear a case where the central issue is whether a court (or an arbitrator) should decide whether a dispute belongs in the courts or in arbitration.

The Court heard oral argument on December 8, 2020, in *Henry Schein, Inc. v. Archer & White Sales, Inc.* (*Henry Schein II*), having already issued a decision in January 2019 in the first iteration of the dispute.

This case arises from a 2012 antitrust lawsuit between a distributor of dental equipment and its supplier. The distributor brought a lawsuit against the supplier claiming it had improperly restricted the distributor's sales. The supplier moved to stay litigation and argued that the distributor was bound to arbitrate its disputes based on the arbitration clause in an agreement signed by the supplier's predecessor.

That clause provided that "any dispute arising under or related to this Agreement (***except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property...***), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association" (emphasis added).

The supplier claimed that arbitrators — not the courts — should decide whether the case was arbitrable because the AAA rules empower arbitrators to decide issues of arbitrability. The AAA Commercial Arbitration Rules state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."

In 2016, the U.S. District Court for the Eastern District of Texas denied the supplier's motion to stay litigation, and the U.S. Court of Appeals for the Fifth Circuit affirmed in 2017. Finding the supplier's theory of arbitrability "wholly groundless" and thus exempt from arbitrability, the Fifth Circuit held that courts should not have to refer frivolous arbitrability arguments to the arbitrators.

The Supreme Court granted *certiorari* and in its January 2019 decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.* 586 U.S. ___, 139 S. Ct. 524 (2019) (*Henry Schein I*), unanimously disagreed with the Fifth Circuit's approach. In an opinion written by Justice Brett M. Kavanagh, the Court explained that where, as here, "the parties' contract delegates the arbitrability question to an arbitrator ... a court may not override the contract" by simply deciding that the theory of arbitrability was groundless.

Henry Schein I "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to the arbitrator." Thus, that question was at the forefront when the case reached the Fifth Circuit on remand.

In August 2019, the Fifth Circuit issued a new decision in which it again refused to allow arbitration — this time by construing the arbitration clause to create a carve-out for "actions seeking injunctive relief," such that a claim seeking injunctive relief (as here) was simply beyond the scope of arbitration. In reaching this ruling, the Fifth Circuit acknowledged the Supreme Court's view in *Henry Schein I* that in some cases, issues of arbitrability should be decided by an arbitrator. But it held that, in the case of the carved-out claims, only the court could decide arbitrability.

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In 2020, the Supreme Court granted *certiorari* again. As framed by the supplier, the issue to be decided now is "whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator." The supplier's position is that a contrary ruling would eviscerate the delegation of arbitrability to the arbitrators and dilute the arbitration clause itself.

In opposition, the distributor argued that referencing the AAA rules alone is not enough to delegate all questions of arbitrability to the arbitrators, particularly where an arbitration clause has a clear scope limitation. The meaning of the scope limitation, the distributor claims, should be resolved by a court, not an arbitrator.

The Court's opinion in *Henry Schein II* is expected to bring clarity to the principles governing who decides arbitrability in the context of scope limitations, such as "carve-outs" of certain classes of disputes. The December 8, 2020, oral argument gave no clear indication of where the Supreme Court justices may be leaning in this dispute. Either way, this case — with its multilayered appellate history — is a cautionary tale, as it illustrates the perils of unclear drafting in contractual dispute resolution clauses. It may also offer important guidance to future drafters of such clauses.