New Arbitrability Decision from the Supreme Court

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A new arbitration decision was handed down by the U.S. Supreme Court on January 8, 2019. My colleagues in our labor and employment practice swiftly blogged about the new decision so I won’t repeat their cogent analysis. The case has nothing to do with insurance or reinsurance. But the principles set forth by Justice Kavanaugh in his first opinion (unanimous at that) are relevant to insurance and reinsurance arbitrations because most insurance and reinsurance arbitrations come within the Federal Arbitration Act (“FAA”).

In Henry Schein, Inc. v. Archer and White Sales, Inc., No. 17-1272 (U.S. Sup. Ct. Jan. 8, 2019), the Court resolved a federal circuit dispute about whether there was a “wholly groundless” exception to allowing the arbitration panel address issues of arbitrability. Simply put, the Court held that no such exception exists within the FAA and that courts must respect the parties’ decision in their contracts to delegate the arbitrability question to the arbitration panel. What the Court did not decide was whether delegation of arbitrability actually occurred under the contract in issue (it was argued that the delegation arose because the arbitration clause invoked the American Arbitration Association Rules, which gave power to the arbitrators to decide arbitrability questions).

The relevance to insurance and reinsurance arbitrations is obvious. Questions of arbitrability often arise, especially where allegations of fraud are made or where the dispute is somewhat collateral to the actual insurance or reinsurance contract. If the arbitration clause clearly and unmistakably delegates questions of arbitrability to the arbitration panel then these issues will be decided by the arbitrators and not the courts. The alleged “wholly groundless” exception gave a party resisting arbitration an out if it could convince a court that the issue in dispute clearly did not come within the arbitration clause. That “out” is now gone, or as Justice Kavanaugh said in the opinion, “that ship has sailed.”

Some interesting comments about arbitration from the opinion are worthy of repeating here. For example, the FAA “allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as the underlying merits disputes.” The courts “are not at liberty to rewrite the statute passed by Congress and signed by the President.” This quote may be come more relevant if “manifest disregard” continues to rear its head. “We must interpret the [FAA] as written and the [FAA] in turn requires that we interpret the contract as written.” “When the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.” “That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.” “[W]e may not engrain our own exceptions onto the statutory text.” And finally, “it is not our proper role to redesign the statute.”

Based on this opinion and under this Court, judicial exceptions to the FAA likely will no longer survive.