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U.S. Supreme Court Again Rules for Arbitration, Rejecting Judge-Made Doctrine That Gave Courts Authority to Reject Arbitration

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In yet another win for businesses seeking to shift the forum for their disputes from the courtroom to the conference room, the U.S. Supreme Court this week unanimously decided an important case that makes it easier to compel recalcitrant parties to agreed-upon arbitration of their disputes. The case is *Henry Schein Inc. v. Archer & White Sales Inc.*

In his debut opinion for the Court, Associate Justice Brett Kavanaugh rejected the so-called "wholly groundless" exception to arbitration, finding it inconsistent with the Federal Arbitration Act (FAA) and the Court's precedents. Now, where the parties have agreed in advance that an arbitrator must decide whether their particular dispute falls within the scope of what they agreed to arbitrate, no longer can a court refuse to let the arbitrator make that call if the court finds the argument for arbitrability "wholly groundless."

The Decision

The case involved a dispute between a company that made dental equipment and one that distributed it. When the parties' relationship soured, the distributor sued the manufacturer in federal court in Texas for antitrust violations, seeking damages and an injunction. The parties' distribution agreement said that "any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association."

Citing this provision, the manufacturer sought to compel the dispute to arbitration. The district court declined, finding "wholly groundless" the notion that the dispute was within the scope of what the parties agreed to arbitrate, since the distributor sought an injunction, which was carved out of the agreement. The Court of Appeals for the Fifth Circuit affirmed. The U.S. Supreme Court agreed to hear the case because of the disagreement in the courts of appeals over whether the "wholly groundless" exception to arbitration is consistent with federal law.

It reversed, finding that exception "inconsistent" with the text of the FAA and "with our precedent." With respect to text, the FAA, the Court said, requires courts to interpret the contract as written. When the contract "delegates the arbitrability question to an arbitrator, a court may not override the contract." It has no power to do so. That is true "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless."

As for precedent, the Court said its past cases held that a court may not decide the merits of a dispute the parties assigned by contract to an arbitrator, even if the claim appears to the court frivolous. It's no different for arbitrability, the Court held. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator," it explained, "a court may not decide an arbitrability question that the parties have delegated to an arbitrator."

The Court then considered and rejected a handful of arguments the distributor made for why the result should be different. It vacated the judgment and remanded for further proceedings. All told, the opinion covered just eight pages and is highly readable.

What it Means for Your Business

Henry Schein is another indication that the Court takes agreements to arbitrate seriously and will enforce them as written. It made short (yet effective) work of the arguments the distributor made for why the "wholly groundless" exception was actually consistent with the FAA. These were serious arguments and forcefully made. The Court's response should be good news for those who rely on arbitration agreements and expect courts to enforce them.

The decision also offers a potential preview of things to come—and a lesson. The case is relevant only where the parties have delegated to the arbitrator the job of deciding whether a particular dispute falls within what the parties agreed to arbitrate. According to nearly every federal court of appeals to have addressed the issue, a statement in the parties' agreement that any arbitration will proceed under certain arbitral rules (for example, AAA, JAMS, FINRA, or UNCITRAL) delegates arbitrability, since these rules expressly authorize the arbitrator to decide their own

jurisdiction. A “friend of the court” brief (submitted by a lawyer representing neither party) persuasively challenged that understanding. The Court flagged but did not decide the question, and said the Fifth Circuit could address it on remand. This is significant, given the nearly unanimous approach taken by the courts of appeals on the issue. It seems it will not be long before the Court addresses this important question.

For that reason, companies drafting arbitration agreements that seek to delegate arbitrability to the arbitrator may wish to no longer simply reference arbitral rules in the agreement. Instead, be explicit. Delegating the arbitrability question requires “clear and unmistakable” language to that effect. And in light of renewed interest by the Court on the issue, lower courts may feel at liberty to reconsider their past approaches. To be sure, there may be good reasons *not* to delegate arbitrability (the inability to obtain immediate review of a decision by an arbitrator who mistakenly decides the question, for one), but if the goal is for courts to enforce the delegation by not deciding arbitrability, it’s best to be “clear and unmistakable” about it in the contract.