On June 15, 2020, the U.S. Supreme Court welcomed back a familiar case by granting certiorari in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 19-963. SCOTUS itself arguably made the case’s second visit to Washington inevitable by issuing a narrow decision in the first go round (“Schein I”) and leaving a number of related issues on the table that would have to be addressed on remand.

The issues in both *Schein I* and current *Schein II* largely concern who should decide gateway questions of arbitrability in the first instance – (a) a court, the presumptive adjudicator of such questions; or (b) an arbitrator, when the parties have “clearly and unmistakably” agreed to delegate such issues to an arbitral panel. But SCOTUS has some latitude with respect to the range of issues it will address concerning the relationships between arbitrability, delegation, arbitration clause carve-outs, and equitable estoppel.
Case History

Archer and White (“A&W”) brought suit against Henry Schein (“HS”), asserting an antitrust claim and seeking among other things injunctive relief. HS petitioned the Texas District Court to compel arbitration, but on the basis of an arbitration agreement between A&W and another party. HS therefore asserted an equitable estoppel theory as the basis to compel A&W to arbitrate under an agreement to which HS was not a party. That agreement 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 relevant AAA rules provide that an arbitrator has authority to determine his/her own jurisdiction (i.e., questions of arbitrability). Nonetheless, the District Court denied HS’s petition and the Fifth Circuit affirmed.

In Schein I, 139 S. Ct. 524, 2019 U.S. LEXIS 566 (2019), SCOTUS put to rest the so-called “wholly groundless doctrine,” which purportedly enabled a court to adjudicate gateway arbitrability questions, notwithstanding the parties’ “clear and unmistakable” manifestation of a mutual intention to delegate such issues to an arbitrator, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995), if the court determined that the arbitrability assertion in question was “wholly groundless.” SCOTUS determined in January 2019 that that doctrine itself was wholly groundless, and it remanded the case for further proceedings accordingly. (It thus remained to be determined, among other things, whether the parties had effectively delegated the arbitrability question to an arbitrator in the first instance.)

The Road Back to the Supreme Court

On remand, the Fifth Circuit affirmed in August 2019 the District Court’s denial of HS’s motion to compel arbitration, again based on the express carve-out from the arbitration agreement of claims seeking injunctive relief. It also determined -- arguably in dictum -- that the reference in that arbitration agreement to the AAA rules was in principle a sufficiently clear and unmistakable manifestation of an intention to delegate arbitrability issues to an arbitrator. However, the Fifth Circuit held that, whatever might be said about delegation concerning other matters, there was no clear and unmistakable manifestation of an intention to delegate the arbitrability of A&W’s claim seeking injunctive relief due to the carve-out in the arbitration clause.

HS petitioned for certiorari on Jan. 31, 2020, seeking resolution of the carve-out issue, asking whether an express exclusion of a type of claim from arbitration in effect negates or renders moot or makes unclear, as concerns such claims, an otherwise clear and unmistakable delegation of arbitrability issues.

A&W crossed-petitioned for certiorari on March 2, 2020, seeking resolution of additional issues: (i) whether the incorporation by reference of the AAA arbitration rules
rules was sufficient to delegate arbitrability issues to an arbitrator in the first instance (and to do so exclusively); and (ii) who decides whether a non-signatory to an arbitration agreement may invoke the terms of an arbitration clause on the basis of an equitable estoppel theory.

Finally, Prof. George Bermann (Columbia Law School) submitted a notable amicus brief on April 2, 2020, in which he reiterated the “Bermann Objection” (described below) and argued among other things that the question of whether arbitrability issues have been delegated warrants more demanding scrutiny by a court than it had been given.

**Issues Available for SCOTUS’s Consideration**

SCOTUS may, if it chooses, address the following questions.

1. **Regarding delegation**, was the incorporation by reference in the relevant arbitration agreement of the rules of the American Arbitration Association, which include a so-called competence-competence provision (R-7) that empowers the arbitrator to adjudicate arbitrability issues, a clear and unmistakable manifestation of the parties’ intention to delegate arbitrability questions to an arbitrator in the first instance? (The current consensus in the federal Circuit Courts is that it is, placing in doubt whether SCOTUS needs to address this question other than in dictum.)

2. **Regarding delegation**, if so, is such a delegation to an arbitrator exclusive, so as to divest the court of its presumptive authority to decide such issues when presented to it in first instance? Prof. Bermann maintains (the “Bermann Objection”) that the incorporation by reference of an institutional competence-competence rule does not delegate arbitrability issues exclusively to an arbitrator, but merely authorizes an arbitrator to rule on such issues when presented to him/her in the first instance. That is, Prof. Bermann argues that such an institutional rule does not divest the court of its authority to decide arbitrability issues that are presented to it in the first instance in accordance with the FAA (e.g., 9 U.S.C. § 4, petition to compel arbitration).

3. **Regarding delegation**, what effect on the analysis does a subject matter “carve-out” in the relevant arbitration agreement have? A&W had brought suit against HS asserting an antitrust claim, concerning which A&W sought injunctive relief among other things. But actions seeking injunctive relief were expressly carved out of the relevant arbitration agreement (although Henry Schein was not a party to that agreement).

   3.1 Does the express carve-out from arbitration of a class of claims preempt the delegation of arbitrability questions concerning such claims? Or vice versa? Which factor takes precedence in application? We note that the Supreme Court may have given us an indication when it reiterated in Schein I that “an ‘agreement to arbitrate a gateway issue was simply an additional antecedent agreement [that] the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.’” Schein I, 139 S.Ct. at 529 (emphasis added), citing Rent-Center West, Inc. v. Jackson, 561 U.S. 63,
If an agreement to delegate arbitrability questions in the first instance to an arbitrator is a distinct “antecedent” agreement, then it arguably should be enforced before addressing the rest of the arbitration agreement.

3.2 If not, then who should in the first instance interpret the scope and effect of a purported subject matter carve-out in an arbitration agreement?

And if all that were not enough, questions concerning the significance of the atypical relationship of the parties to the *Henry Schein* dispute are also available.

4. **Regarding delegation**, can a non-signatory enforce a delegation provision in an arbitration agreement against a signatory based on a theory of equitable estoppel? Could HS base its delegation argument on the terms of an arbitration agreement to which it was not a party? SCOTUS has held that equitable estoppel is a viable basis upon which a non-signatory can compel a signatory of an arbitration agreement to arbitrate. See *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624 (2009). But this question arguably concerns a different “additional antecedent agreement.”

5. **Regarding party arbitrability**, who decides in the first instance whether a non-signatory to an arbitration agreement can enforce a delegation provision in that agreement against a signatory based on a theory of equitable estoppel?

**Significance of the Issues**

And what is at stake in the resolution of these seemingly esoteric issues? Among other things, first, who decides gateway arbitrability issues in the first instance usually affects (a) the role of law, including *stare decisis*, in those determinations (arbitrators, unlike courts, are generally not bound by such authorities); and (b) the nature of the potential review of such decisions (great deference is given to orders and awards of arbitrators, which greatly limits review of such decisions in comparison to decisions by a court).

Second, if boilerplate incorporation by reference of institutional arbitration rules in an arbitration agreement is sufficient to delegate arbitrability questions to an arbitrator exclusively in the first instance, the significance of FAA § 4 (petition to compel arbitration) will be altered as a practical matter, with courts largely becoming gatekeepers regarding the antecedent delegation agreement rather than regarding the arbitration agreement.

Third, there are implications concerning the delegation of weighty class arbitrability issues. For example, when arbitration is sought against a signatory by a purported class of non-signatories of an arbitration agreement that provides for delegation, (a) may the class arbitrability issue be found to be delegated based on an estoppel theory, and (b) what will be a court’s standard of subsequent review of an arbitrator’s order or award in favor of or in disfavor of the non-signatory group?

Finally, If SCOTUS does not address all of the above issues in this second go round, will it eventually have to welcome a *Schein III* back to Washington, D.C.?