Adopting AAA Rules to Govern Arbitration Proceedings May - or May Not - Allow U.S. Arbitrators to Decide Gateway Questions of Arbitrability

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Richard W. Foltz Jr. | foltzr@pepperlaw.com
Ryan R. Deroo | deroor@pepperlaw.com

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Can arbitrators determine what issues they have the power to decide? According to the U.S. Supreme Court, they can, provided there is "clear and unmistakable evidence" the parties intended to delegate threshold questions to the arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 202 L. Ed. 2d 480, 487 (U.S. 2019).

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The Construction Industry Rules of the American Arbitration Association (AAA) seem to provide that in so many words. Can it now be said with certainty that adoption of the AAA rules in a dispute resolution provision of a construction contract clearly and unmistakably delegate the question of arbitrability to the arbitrator? Or is it still unsettled whether adoption of general arbitration rules, which purport to dedicate the question to the arbitrator, is sufficient to meet the "clear and unmistakable" standard?

Henry Schein, Inc. v. Archer & White Sales, Inc.

In *Henry Schein*, the parties to a contract for distribution of dental equipment agreed that all disputes were to be resolved by binding arbitration under AAA rules — except for actions relating to intellectual property or seeking injunctive relief. 202 L. Ed. 2d at 483. When the plaintiff filed a number of antitrust claims in federal district court, including for injunctive relief, the court was called on to decide who should determine the threshold mater of arbitrability.

Because arbitration is a matter of contract, the district court turned to the plain language of the agreement. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 2016 U.S. Dist. LEXIS 169245 at *12-15 (E.D. Tex. 2016). The agreement provided as follows: "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 of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Initially, the court noted that the adoption of AAA rules has been held to be "clear and unmistakable" evidence that threshold questions are decided by the arbitrator. *Id.* at *20. However, unlike previous cases, the contract in question carved out an exclusion. *Id.* (internal citations omitted). As a result, the court determined that "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration," *e.g.,* antitrust claims for injunctive relief. *Id.* (Denying the motion to compel arbitration).

On appeal, the Fifth Circuit affirmed the decision on other grounds. Rather than determining whether the agreement was "clear and unmistakable," the court simply held that the defendant's arguments for arbitrability were "wholly groundless." *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497 (5th Cir. 2017) (finding that the contractual language is unambiguous, and there was no reading that allowed arbitration).

The Supreme Court granted certiorari to resolve a circuit split over whether the "wholly groundless" exception is inconsistent with the Federal Arbitration Act, and determined that the exception should be rejected. *Henry Schein Inc.,* 202 L. Ed. 2d at 489. And while this decision is unquestionably pro-arbitration, the Court "express[ed] no view about whether the contract at issue . . . delegated the arbitrability question to an arbitrator." *Id.*

Should Reference to the AAA Rules Delegate Threshold Questions to Arbitrators?

The AAA rules seem clear. Rule 9(a) provides "**Jurisdiction** . . . The Arbitrator shall have the power to rule on his or her own jurisdiction including any objections to the existence, scope, or validity of the arbitration agreement." A dispute resolution provision that incorporates this rule would seem to dedicate this issue to the arbitrator without any doubt.

An influential amicus brief, however, suggested that the Supreme Court should flesh out the "clear and unmistakable" test, and that the "simple provision" included in standard arbitration rules falls far short of establishing the parties' intent to withdraw from the courts entirely.[1] Based on Supreme Court precedent, it was argued that intent to withdraw the dispute from the courts entirely can only be shown by something more, such as the delegation clause in *Rent-A-Center, West Inc. v. Jackson*, where the parties agreed that the "Arbitrator, and not any federal, state or local agency, shall have *exclusive* authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement[.]" 561 U.S. 63, 66 (2010) (emphasis added). In short, to be "clear and unmistakable," the provision should (i) grant authority to the arbitrators **and** (ii) exclude decision-making power from the courts.[2]

The majority of lower courts have come to the opposite conclusion, finding that invocation of the AAA rules grants exclusive authority to the arbitrator.[3] In fact, only one circuit court has held that the AAA rules are insufficient to exclude judicial authority. None of these decisions provides thorough reasoning about what constitutes "clear and unmistakable" evidence, or why general provisions meet the threshold.[4] Perhaps this issue will be parsed out in greater detail on remand by the Fifth Circuit in *Henry Schein*, but it is yet to be seen.

Either way, the recent ALI *Restatement of the U.S. Law of International Commercial Arbitration* did not mince words. It flatly "rejects the majority line of cases," reasoning that if general AAA clauses, which do not exclude judicial authority, were deemed to constitute

"clear and unmistakable evidence," then the standard is ultimately meaningless.[5] Put simply, the ALI, an influential source for American jurisprudence, expects that it should be the exception, not the norm, that threshold questions of arbitrability are decided by domestic arbitrators.

Comparison to International Rules

In international arbitration, provisions that allow the arbitrator to determine their own jurisdiction are known as "competence-competence" clauses. Typically, these provisions are relatively simple and, like the AAA rules, merely state that the tribunal has the power to determine its own jurisdiction. U.S. discussions of competence-competence are largely from the positive perspective, allowing the arbitrator to decide only after a court has made its initial determination.[6] In contrast, international arbitration views competence-competence from the negative perspective, actively constraining a court's power to interfere. This negative approach has been adopted by the New York Convention and UNCITRAL Model Law, which have gained widespread acceptance around the globe.[7] In fact, negative competence-competence has officially been recognized by the highest courts in Switzerland, France, India and England.[8] In Germany, whichever tribunal receives the first filing is the one that decides.[9]

Constraining the power of the judicial system undoubtedly streamlines the dispute process, at least initially, and deters delay tactics. And while this may be the most efficient process for the international system, U.S. courts and legislators will have to determine whether it will be uniformly adopted as the proper way to handle domestic disputes under the Federal Arbitration Act. Indirectly, recent decisions appear to have pushed the U.S. framework towards a negative competence-competence perspective. Yet until a definitive answer is reached within the United States, parties and litigators will remain uncertain and continue to contest the issue.

Conclusion

It is still too early to tell how the recent Supreme Court decision will shape the arbitration landscape going forward. But now that the "wholly groundless" exception has been ruled out, litigators who hope to escape arbitration have an opportunity to argue that the "clear and unmistakable" standard requires more than a reference to the rules of an arbitral body. At present, the majority of courts have held that AAA rules exclude judicial authority, similar to a negative competence-competence framework. However, there is always the possibility that the trend could swing in the other direction, in accordance with the ALI restatement view, and require more than a bland invocation of AAA rules to dedicate

arbitrability issues to the arbitrator. One thing remains clear — when drafting a contract, parties should be sure to use explicit language. The ConsensusDocs form appears to address this issue by including not only a reference to AAA rules, but also a specific indication in the arbitration agreement excluding courts from deciding any issues. Without similarly definitive language, even if exceptions are carved out for certain claims, the end result may be increased litigation costs with uncertain results.

Endnotes

1 Brief for Respondent as Amicus Curiae, p. 6, *Henry Schein*, 202 L.Ed. 2d 480 (U.S. 2019).

2 *Id.* at 13.

3 *See, e.g., Oracle Am., Inc. v. Myriad Group, A.G.,* 724 F.3d 1069, 1074-1075 (9th Cir. 2013); *Green v. SuperShuttle Int'l, Inc.,* 653 F.3d 766, 769 (8th Cir. 2011); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.,* 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.,* 559 F.3d 874, 878 (8th Cir. 2009); *Conte Corp. v. Remote Solution, Co.,* 398 F.3d 205, 208 (2d Cir. 2005).

4 Brief for Respondent as Amicus Curiae, p. 9, *Henry Schein,* 202 L.Ed. 2d 480 (U.S. 2019).

5 American Law Institute, *Restatement of the Law of The U.S. Law of International Commercial Arbitration*, § 2-8 Competence of the Tribunal to Determine its Own Jurisdiction, reporter's note b(iii) (Tentative Draft No. 4, 2015).

6 John Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, at 1124.

7 *See generally* Jack Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Chapter 8 (2011).

8 Yas Banifatemi & Emmanuel Gaillard, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators*, Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, 257, 261 (2008).

9 John Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, at 1131.