Kluwer Arbitration Blog

Schein, Inc. v. Archer & White Sales, Inc.: Upholding Principles of Arbitration, but Leaving Open Question Regarding Competence-Competence in Arbitral Rules as "Clear and Unmistakable" Evidence that Parties Agreed to Arbitrate Arbitrability

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1. The Holding in *Schein, Inc. v. Archer & White Sales, Inc*. Maintains Principles of Arbitration

In a recent unanimous decision dated 8 January 2019, Justice Kavanaugh delivered his first opinion of the United States Supreme Court (the "Court") in *Henry Schein, Inc. v. Archer and White Sales, Inc.* As set-out below, the Court's decision in *Schein* is in line with principles of international arbitration – namely that courts must respect the terms of the arbitration agreement as written and that, if the parties agreed, an arbitral tribunal has the power to decide threshold questions of arbitrability.

In *Schein*, Archer and White brought suit in the United States District Court for the Eastern District of Texas alleging violations of federal and state antitrust law, seeking monetary damages and injunctive relief. The contract's arbitration agreement in part stated:

> 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 [(AAA)] …

The issue before the Court was whether there was a "wholly groundless" exception to the widely-established principle that an arbitral tribunal and not a court has the power to decide "threshold" questions of arbitrability. Previously, the Fifth, Sixth, and other Federal Circuits had upheld an exception when the notion that a claim is subject to the arbitration agreement is "wholly groundless." The Court granted certiorari to address the disagreement among circuit courts over whether a "wholly groundless" exception comports with the FAA and Court precedent.

The Court held that the "wholly groundless" exception was inconsistent with the Federal Arbitration Act (the "FAA") and that the Court was "not at liberty to rewrite the statute passed by

Congress and signed by [then-President Coolidge in 1925]." The Court further reasoned that "the courts must respect the parties' decision as embodied in the contract." Relying upon the text of the FAA, the Court stated that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." With that in mind, and relying upon *First Options* (514 U.S. 938, 943 (1995)), the Court stated that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway questions of arbitrability, such as whether their agreement covers a particular controversy.'"

The Court also noted precedent in *AT&T Technologies* (475 U.S. 643, 649-650 (1986)) "that a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator, 'even if it appears to the court to be frivolous.'" The Court stated that this "principle applies with equal force to the threshold issue of arbitrability." The Court thus held that "when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless." With that, the Court struck down the "wholly groundless" exception.

2. The Court Leaves Open the Question Regarding Whether Competence-Competence in Arbitral Rules is "Clear and Unmistakable" Evidence that Parties Agreed to Arbitrate Arbitrability

In rejecting the "wholly groundless" exception, the Court declined to conclude that "the contract at issue in this case in fact delegated the arbitrability question to an arbitrator." Instead, the Court restated its holding in *First Options* that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." 514 U.S., at 944. For those not accustomed to U.S. arbitration law, the court even asking this question may seem at odds with other jurisdictions, such as France, where a court will decline jurisdiction and will allow an arbitral tribunal to decide validity, existence and scope questions if it has already been seized of the matter.[1)]

In any event, in declining to rule on the issue, the Court did not address an important arbitrability issue, stated by Professor George A. Bermann in his amicus brief in support of Respondent in *Schein* as "whether the incorporation in a contract of arbitral rules containing a provision empowering a tribunal to determine its own jurisdiction satisfies the 'clear and unmistakable' evidence test." Such incorporation is known as "competence-competence"

While the majority of courts in the U.S. have held that the incorporation of arbitral rules that maintain the principle of competence-competence satisfies the "clear and unmistakable" test, Professor Bermann states the issue is not so clear cut, as "the [American Law Institute (the "ALI")] Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has concluded, after extended debate, that these cases were incorrectly decided because incorporation of such rules cannot be regarded as manifesting the 'clear and unmistakable' intention that First Options requires."

In his amicus brief, Professor Bermann considered the ALI's position that the courts have not offered any rationale for their holdings. As an example, Professor Bermann cited *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010) to demonstrate the manifest intent necessary to satisfy the "clear and unmistakable" test. In *Rent-A-Center*, the parties agreed that "the Arbitrator,

and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement."

Whereas the delegation of authority in *Rent-A-Center* was clear and unmistakable, Professor Bermann noted that the language in *First Options* was "dramatically different". In *First Options*, the arbitration clause provided for binding arbitration "in accordance with the arbitration rules of the American Arbitration Association." Rule 6 of the Commercial Arbitration Rules of the AAA has a competence-competence provision, stating the "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."

Professor Bermann noted that Rule 6 does not by itself divest courts of the power to determine arbitrability and stated several reasons why courts are incorrect in holding otherwise. First, he reiterated that competence-competence does not strip a court's ability to determine arbitrability. Second, he noted that *First Options* explicitly held that reserving courts' authority to determine arbitrability is the rule, and that divesting such power is the exception. Because competence-competence clauses have become "ubiquitous" and "boilerplate", such a rule could no longer stand under the courts' interpretation.

Based on the above reasons, the ALI was not in favor of applying the reasoning set-out in the majority line of cases. Although Professor Bermann adopted the ALI's reasoning and conclusion in his amicus brief in *Schein*, the Court did not consider this argument. Therefore, although the ALI's arguments may be sound, its conclusion is not yet law, and the courts' view that competence-competence clauses satisfy the "clear and unmistakable" standard is the law in jurisdictions where Courts of Appeals have ruled in this manner. It will be interesting to see if the Court considers this issue in the future.

References

?1 *See* French Code of Civil Procedure, Article 1448; *see also* Varady, Barcelo, von Mehren, *International Commercial Arbitration*, at 103 (4th ed.).

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