Bowman and Brooke LLP

WHITE PAPER

To: Parties Seeking to Enforce Arbitration Clauses that Provide the Arbitrator Shall Determine the Issue of Arbitrability

Date: January 10, 2019

Re: U.S. Supreme Court's Recent Decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 2019 WL 122164 (U.S. Jan. 8, 2019)

WHITE PAPER: BASIC PRINCIPLES REGARDING WHO DETERMINES THE ISSUE OF ARBITRABILITY

INTRODUCTION

One of the basic principles of arbitration is that the Arbitrator, not the Court, determines all issues within the scope of the parties' Arbitration Agreement. Until the U.S. Supreme Court's decision on January 8, 2019, a deep divide existed among the circuit courts regarding whether courts could determine the issue of arbitrability in cases where the asserted claims were "wholly groundless"—rather than referring that issue to the Arbitrator as directed in applicable Arbitration Agreements. Several circuit courts of appeal recognized this "Wholly Groundless Exception."

In a unanimous decision authored by Justice Kavanaugh, the U.S. Supreme Court applied the plain language of the Federal Arbitration Act ("FAA") and Supreme Court precedent to hold that so long as the parties' Arbitration Agreement provides "clear and unmistakable" evidence that the issue of arbitrability was delegated to the Arbitrator, issues of arbitrability must be referred to the Arbitrator. ***In so holding, the Supreme Court expressly rejected the Wholly Groundless Exception.***

GUIDING LEGAL PRINCIPLES

1. **Under the FAA, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.** *See Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63, 67 (2010); 9 U. S. C. § 2.

2. **The FAA allows parties to agree by contract that an Arbitrator, rather than a court, will resolve gateway questions of arbitrability—such as whether the parties agreed to arbitrate or whether the scope of an Arbitration Agreement covers a particular controversy—as well as underlying merits disputes.** *Rent-A-Center*, 561 U. S. at 68–70; *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 943–944 (1995). This is true even when the Arbitration Agreement is silent on the issue, but incorporates by reference the rules of a third-party arbitration administrator that provides for issues of arbitrability to be determined by the Arbitrator. However, the parties' Arbitration Agreement must delegate the issue of arbitrability to the Arbitrator by "clear and unmistakable" evidence. *First Options*, 514 U. S., at 944; *see also Rent-A-Center*, 561 U. S., at 69, n. 1.

3. **A court may not "rule on the potential merits of [an] underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous."** *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 649–650 (1986).

The Supreme Court determined, based on these established principles and the express language of the FAA, that a court may not decide an arbitrability question that the parties delegated to an arbitrator—even when the issue of arbitrability is "wholly groundless." Simply put, "a court may not override the [parties'] contract."

The Court also explained that the FAA "contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text," before admonishing that courts have "'no business weighing the merits of [a] grievance'" when the parties' Arbitration "'[A]greement is to submit all grievances to arbitration, not merely those which the court . . . deem[s] meritorious.'"

The Court unequivocally instructed lower courts that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."

THE SIGNIFICANCE OF THIS DECISION GENERALLY

The Supreme Court's decision in *Henry Schein, Inc. v. Archer and White Sales, Inc.* is significant for three (3) reasons. First, it placed great emphasis and respect on the contractual agreement entered into by parties. The Supreme Court upheld the freedom of contract and demonstrated a desire to enforce contracts according to their express terms.

Second, the Court relied on the express terms of the FAA. The Court refused to engraft its own expectations into how it applied the FAA. Instead, it stayed true to the original 1925 text of the FAA, explaining "we are not at liberty to rewrite the statute passed by Congress and signed by . . . President [Coolidge]." Judicial activism was rejected.

And third, the Court's decision was squarely based on established Supreme Court precedent. Other than acknowledging a number of circuit courts recognized the Wholly Groundless Exception, the Court relied on its own precedent rather than using case decisions from inferior courts to support a break from the Supreme Court's prior holdings.

Does this decision, the first authored by Justice Kavanaugh as a U.S. Supreme Court Justice, represent a new direction for the U.S. Supreme Court? Time will tell.

PRACTICAL ASPECT OF THIS DECISION

The Court was clear in its remand instructions. It "express[ed] no view about whether the contract at issue . . . in fact delegated the arbitrability question to an arbitrator." That issue must be resolved by the trial court in light of existing case law providing that delegation of threshold issues concerning arbitrability must be demonstrated by ***clear and unmistakable evidence*** in the parties' contract.

Accordingly, if you want an arbitrator to determine threshold issues of arbitrability—rather than a trial court judge—then you must review your Arbitration Agreements to ensure they satisfy the standard of clear and unmistakable evidence.

If you have questions or would like to speak with someone about this White Paper, please contact:

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