

The Supreme Court and Evolving Arbitration Jurisprudence

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09 / 26 / 19

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The U.S. Supreme Court's 2018 term was a busy one for arbitration, with the Court issuing rulings in three cases addressing questions of the reach and interpretation of the Federal Arbitration Act (FAA). The Court has already accepted one arbitration case for the 2019 term: to consider when a party may compel arbitration even though it is not a signatory to the arbitration agreement.

The Court's arbitration decisions impact whether and when a party may resolve disputes in the arbitral forum and provide guidance on how to draft effective arbitration provisions to avoid prolonged litigation on issues of arbitrability — *i.e.*, whether a particular dispute or type of dispute falls under the jurisdiction of the arbitrator (or arbitrators) appointed by the parties.

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

Under long-standing Supreme Court jurisprudence, contracting parties can agree to submit gateway questions of arbitrability to arbitrator(s) rather than a court. In *Henry Schein, Inc. v. Archer and White Sales, Inc.*, decided on January 8, 2019, the Supreme Court reviewed a decision by the U.S. Court of Appeals for the Fifth Circuit that permitted the district court to settle questions of arbitrability rather than reserve them for the arbitrator, notwithstanding the parties' contractual agreement, because the court concluded that the claim of arbitrability was "wholly groundless." A unanimous Supreme Court reversed.

In the first opinion authored by Justice Brett M. Kavanaugh, the Court noted that the FAA must be interpreted "as written" — and the same is required of contracts. The FAA includes no "wholly groundless" exception, and the Court is not "at liberty to rewrite the statute passed by Congress and signed by the President." The court held that if there is "clear and unmistakable evidence" that the parties agreed to arbitrate questions of arbitrability, courts must respect that choice.

On remand, the Fifth Circuit considered the arbitration clause "anew" but found that the parties had not "clearly and unmistakably delegated the question of arbitrability to an arbitrator." The contract specifically excluded "actions seeking injunctive relief" from the provision requiring arbitration, and the Fifth Circuit emphasized that the placement of this carve-out, and the absence of any qualifier, meant that any claim including a request for injunctive relief was excluded from the arbitration provision. Because injunctive relief was sought in addition to damages, the court found that the dispute was not subject to the arbitration clause at all, and, therefore, rules delegating arbitrability to an arbitrator did not apply.

The Fifth Circuit's decision on remand is instructive, as are other subsequent decisions narrowly interpreting the holding of *Henry Schein*. They include the 2019 case *Metro. Life Ins. Co. v. Bucsek*, in which the U.S. Court of Appeals for the Second Circuit refused to apply *Henry Schein* where parties did not clearly and unmistakably delegate arbitrability to arbitrators, and *Lloyd's Syndicate 457 v. FloaTEC, LLC*, also from 2019, in which the Fifth Circuit ruled that *Henry Schein* "did not change — to the contrary, it reaffirmed — the rule that courts must first decide whether an arbitration agreement exists at all."

Given the requirement of "clear and unmistakable evidence," contracting parties that intend to submit arbitrability questions to arbitrators should carefully and deliberately state so in their agreement.

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New Prime Inc. v. Oliveira

The Court addressed another gateway arbitrability issue in *New Prime, Inc. v. Oliveira*: whether the applicability of an exclusion in the FAA for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” is a question of arbitrability that can be delegated to an arbitrator. The Court also considered whether independent contractors are included in the exemption.

In a January 15, 2019, opinion by Justice Neil M. Gorsuch, the Court unanimously ruled that courts should decide whether a contract falls within this FAA exemption before ordering arbitration, even if the parties have delegated arbitrability questions to the arbitrator. It reasoned that to arbitrate under the FAA, the parties’ contract must actually trigger the FAA — and courts must decide whether it does so.

The Court also determined that the phrase “contracts of employment” includes independent contractors, making them eligible for the exemption in the same manner as ordinary employees. The Court analyzed the meaning of the words “contract of employment” as understood in 1925, the year of the FAA’s passage, and found that the phrase usually meant “nothing more than an agreement to perform work.” The term cast a broad net then, and the Supreme Court held that it continues to do so now, at least in the context of the FAA.

One area where *New Prime* is a hot topic is the so-called “gig economy.” Drivers for ride-hailing companies like Uber and Lyft, classified as independent contractors, are already claiming the same FAA exemption for themselves, but federal courts appear skeptical. In a June 13, 2019, decision in *Scaccia v. Uber Techs., Inc.*, the U.S. District Court for the Southern District of Ohio refused to extend *New Prime* to Uber drivers, who are not “actually engaged in the movement of goods in interstate commerce.” The U.S. District Court for the Northern District of Illinois reached the same conclusion in *Wallace v. Grubhub Holdings Inc.* on March 28, 2019.

Lamps Plus, Inc. v. Varela

The third and final arbitration decision from the 2018 term was the latest in a string of class arbitration cases the Supreme Court has heard over the last decade. In its April 24, 2019, decision in *Lamps Plus, Inc. v. Varela*, the Court considered whether an arbitration agreement that contains broad general language common to many commercial contracts authorizes a plaintiff to commence a class action in arbitration.

Unlike the first two unanimous arbitration decisions, the Court split 5-4 in *Lamps Plus*. Chief Justice John G. Roberts, Jr. delivered the Court’s opinion, holding that under the FAA, an ambiguous agreement cannot provide the necessary “contractual basis” for concluding that the parties agreed to submit to class arbitration.

The Court emphasized, as it has often done before, that arbitration is a matter of consent, and that there are “fundamental” differences between individual arbitration and class arbitration, the latter of which sacrifices some of the principal advantages of arbitration. The Court thus concluded that consent to class arbitration may not be inferred absent an affirmative contractual basis because “[n]either silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.” In dissent, Justice Ruth Bader Ginsburg argued that the majority “hobbled the capacity of employees and consumers to band together in a judicial or arbitral forum.” Justices Elena Kagan, Sonia Sotomayor and Stephen G. Breyer also filed dissenting opinions.

On the heels of *Lamps Plus*, courts are rejecting attempts to infer consent to class arbitration from ambiguous agreements. For example, in its July 29, 2019, decision in *Cervantes v. Voortman Cookies Ltd.*, the U.S. District Court for the Southern District of California stated: “Based on the Supreme Court’s recent decision in *Lamps Plus*,” classwide arbitration was not available where disputed arbitration clauses were “silent on whether class-wide arbitration is permitted.” Because clear drafting is essential, parties should expressly exclude class arbitration in their arbitration clause if that is their intent.

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC

The lone arbitration case to have made the Supreme Court’s 2019-20 docket so far presents the question of whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as codified in Chapter 2 of the FAA, permits a party that did not sign an arbitration agreement to compel signatories to the agreement to arbitrate against it.

Under the Convention, a party ordinarily is entitled to compel arbitration if, among other things, there is an agreement in writing providing for arbitration. In this case, the arbitration agreement as drafted extended to potential subcontractors of the contracting parties, and a subcontractor later attempted to

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compel arbitration. The district court compelled arbitration, but the U.S. Court of Appeals for the Eleventh Circuit reversed, holding that “to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court.”

The Eleventh Circuit noted that Chapter 1 of the FAA allows nonsignatories to compel arbitration in certain circumstances, but it found that the New York Convention restricts arbitration to

the “specific parties to the agreement ... and Congress has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict.”

The arbitration community will be closely watching to see whether the Supreme Court agrees with the Eleventh Circuit and whether it grants *certiorari* in any more arbitration cases this term.