The US Supreme Court confirms the United States is a pro-arbitration jurisdiction

DENTONS

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In a unanimous decision on January 8, 2019 in *Henry Schein, Inc. v. Archer & White Sales, Inc. (**Henry Schein**)*, the US Supreme Court confirmed that the United States is a pro-arbitration jurisdiction that will honor parties' agreements to arbitrate. Specifically, where an arbitration clause clearly delegates the decision of arbitrability to the arbitrators, courts should have no say in the matter–even if they perceive the argument in favor of arbitration as "wholly groundless." This decision provides clarity for potential disputants and is in line with prior Court precedent prohibiting courts from reviewing the merits of a dispute when properly delegated to an arbitrator.

Kompetenz-kompetenz

Kompetenz-kompetenz is a well-established doctrine in international arbitration. It holds that an arbitral tribunal is competent to determine its own jurisdiction. Although most, if not all, modern arbitration rules incorporate this doctrine, its effectiveness in a given jurisdiction depends on the willingness of courts of that jurisdiction to allow the relevant tribunal to decide on its competence. The doctrine of *kompetenz-kompetenz* is recognized in US law, but certain federal appeal courts in the US would nevertheless allow federal courts to preempt the arbitrators' exercise of that power where they (the courts) perceived the argument in favor of arbitration to be "wholly groundless." That was the case until recently.

The decision in *Henry Schein*

The Supreme Court addressed *kompetenz-kompetenz* in its January 8, 2019 decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 US __ (2019), when it held that the parties' agreement on who decides the question of arbitrability must be honored. Under the Supreme Court's ruling, where an arbitration clause delegates that decision to the arbitrators, courts should have no say on this matter – even if they perceive the argument in favor of arbitration as "wholly groundless." The Supreme Court explained:

> "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."

The Supreme Court's reasoning

When a dispute arose, Archer & White Sales, Inc. (A&W) sued *Henry Schein, Inc. (Schein)* in Texas federal district court for antitrust violations, seeking damages and injunctive relief. Schein moved to dismiss the case and compel arbitration on the basis of the arbitration clause, which provided:

> "[a]ny 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 [Henry Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]."

A&W objected to the removal to arbitration arguing that, since it sought injunctive relief, the dispute fell outside of the scope of the arbitration agreement. The district court agreed with A&W and held that Schein's argument was "wholly groundless" and thus, under Fifth Circuit Court of Appeals precedent, the court was authorized to make the decision on arbitrability. The Fifth Circuit affirmed.

The Supreme Court granted certiorari and unanimously rejected the "wholly groundless" exception recognized in some US federal courts as inconsistent with the Federal Arbitration Act (FAA). In doing so, the Court readily disposed of A&W's four arguments:

1. A&W argued that Sections 3 and 4 of the FAA mandate that the issue of arbitrability is to be decided by the court. Section 3 provides that a court must stay litigation "upon being satisfied" that the issue is referable to arbitration, and Section 4 requires a court to compel arbitration, but only "in accordance with the terms of the agreement." The Court found that A&W's interpretation would require courts to always resolve questions of arbitrability, which is clearly not the case under the Court's precedents. Although a court must satisfy itself that a valid arbitration agreement exists before referring the dispute to arbitration, if the arbitration agreement delegates decision on arbitrability to the arbitrators, the court has no role to play in that decision.
2. A&W pointed to Section 10 of the FAA, which provides for "back-end" (i.e., post-arbitration) judicial review of an arbitrator's decision if the arbitrator has exceeded its powers. A&W posited that if a court can rule then the dispute was not arbitrable after the arbitration ends, it should also be allowed to do before it begins, i.e., so at the "front end." Reiterating that it is not the Court's place to "redesign" the FAA, the Court rejected the argument.
3. A&W maintained that it would be wasteful to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless. The Court again reiterated that the FAA contains no "wholly groundless" exception, and that the Court may not "engraft" its own exceptions onto the statutory text. The Court also disagreed with the premise that creating a "time-consuming sideshow" in court before referring the dispute to arbitration would be a more efficient to resolve disputes.
4. A&W argued that the "wholly groundless" exception is necessary to deter frivolous motions to compel arbitration. The Court considered that the potential problem was overstated and noted that it was "not aware [that] frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a 'wholly groundless' exception."

Notably, A&W also argued that no "clear and unmistakable" delegation had been achieved in that case because the *kompetenz-kompetenz* provision in the applicable arbitration rules only prescribes the positive competence of the arbitrators (i.e., authorizing the arbitrators to decide) without addressing the negative competence (i.e., barring courts from determining the competence of arbitrations at the outset of the case). Since that question had not been raised below, the Supreme Court abstained from deciding it.

Clarity and predictability

By rejecting the "wholly groundless" exception in *Henry Schein*, the Court effectively resolved a circuit split on this issue of arbitrability and provided contracting parties agreeing to arbitrate in the United States with more certainty and predictability.

Parties are advised to consult with disputes attorneys when drafting arbitration clauses for their contracts in light of the open question as to whether the requisite delegation can be achieved solely by a *kompetenz-kompetenz* provision in the applicable arbitration rules. Please reach out to our US-qualified attorneys located either in the United States or globally, if you have any questions.

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