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Supreme Court Rings in the New Year with Two Arbitration Decisions

In January, the Supreme Court of the United States issued two decisions affecting workplace arbitration agreements. Specifically, the decisions address whether it should be a court or an arbitrator who decides if a claim should be heard in arbitration, as well as the scope of the Federal Arbitration Act ("FAA") as it concerns contracts with transportation workers. The opinions, *Henry Schein, Inc. v. Archer & White Sales, Inc.* and *New Prime Inc. v. Oliveira*, are reviewed below.

Contracts May Dictate Who Decides Whether a Matter is Arbitrable

In his first opinion as a Supreme Court Justice, Justice Kavanaugh, writing for a unanimous court, upheld the right of parties to agree by contract that an arbitrator, rather than a court, will decide threshold questions of arbitrability.

In *Henry Schein*, Archer & White sought monetary damages and injunctive relief due to purported violations of federal and state antitrust law by Henry Schein, Inc. The contract between the parties provided for binding arbitration of disputes under the rules of the American Arbitration Association ("AAA"), except for actions seeking injunctive relief. Schein sought to compel arbitration. Archer objected that arbitration was unavailable under the contract because of the request for injunctive relief.

The question then arose over whether a court, rather than an arbitrator, should decide whether the underlying case was covered by the arbitration agreement. Although the AAA rules reserve this authority to arbitrators, Archer cited cases holding that because (in its view) Schein's request to arbitrate was "wholly groundless", the court should determine the threshold question of arbitrability. The District Court and the Fifth Circuit agreed, denying Schein's motion to compel arbitration as "wholly groundless."

The Supreme Court reversed, finding that the parties' contract assigned the determination of arbitrability to the arbitrator. The court explained that it could not override the contract's express designation of such authority to the arbitrator, even if it considered it obvious that a particular suit is not subject to the terms of the arbitration

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agreement. In so holding, the Court rejected the line of cases that had emerged in some jurisdictions providing a "wholly groundless" exception to the FAA, and cited its own precedent that parties could delegate the arbitrability question to the arbitrator, so long as the agreement did so by "clear and unmistakable evidence". The Court remanded the case to the Fifth Circuit to decide whether the parties' agreement that the AAA rules apply to their disputes "clear[ly] and unmistakabl[y]" assigned the arbitrability issue to the arbitrator in this instance.

The FAA Does Not Apply to Agreements with Certain Transportation Workers, Including Independent Contractors

In *New Prime*, a unanimous opinion[1] delivered by Justice Gorsuch, the Court held that Section 1 of the FAA, which exempts "contracts of employment" of certain transportation workers from the Act's coverage, applies to contracts with independent contractors as well as with employees.

Interstate trucking company, New Prime, entered into an agreement with Dominic Oliveira under which Oliveira agreed to drive trucks as an independent contractor. Oliveira later filed a lawsuit, claiming that he should have been classified as an employee and paid at least minimum wage. The agreement between New Prime and Oliveira contained an arbitration clause, and authorized the arbitrator to decide any questions of arbitrability. New Prime sought to compel arbitration. The Court of Appeals for the First Circuit found that, despite the agreement reserving questions of arbitrability for the arbitrator, it was nonetheless the responsibility of the court to determine whether the Section 1 exclusion for transportation workers applied in the first instance. The Court of Appeals concluded that the Section 1 exclusion applied both to employer-employee contracts and contracts with independent contractors, and therefore the court could not compel arbitration; Oliveira was free to bring his case in court.

The Supreme Court agreed. Notwithstanding its earlier holding in *Henry Schein*, the Court concluded that there are certain statutory provisions which limit the scope of the FAA and require preliminary analysis by the court: for example, Section 2 of the Act provides that the FAA only applies to written provisions in maritime transactions or contracts evidencing a transaction involving commerce. Further, Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the scope of the FAA. Therefore, before relying on later sections of the FAA to stay litigation and enforce even the most clearly drafted arbitration agreement, a court must determine whether the FAA empowered it to do so. Specifically, the Court found that Sections "1 and 2 define the field in which Congress was legislating, and §§3 and 4 apply only to contracts covered by those provisions." (internal quotations omitted).

The Court then turned to the meaning of the term "contracts of employment" under Section 1 of the FAA. In holding that "contracts of employment" encompassed both independent contractor and traditional employment relationships, the Court

[1] Justice Kavanaugh did not participate in the decision, and Justice Ginsburg filed a concurrence.

examined the meaning of these words at the time the FAA was enacted in 1925. Citing dictionaries from that era, as well as early 20th-century case law using the phrase, the Court found that in 1925 the phrase "contract of employment" meant only "an agreement to perform work" and would have been understood to include both agreements between employers and employees and agreements with independent contractors. The Court also found significance in Section 1 of the FAA's reference to "any . . . class of *workers* engaged in foreign or interstate commerce" rather than any class of "employees". Therefore, because the agreement between Oliveira and New Prime fell within the exception under Section 1 of the FAA, the Court of Appeals correctly found that it lacked authority to order arbitration.

Key Takeaways

Employers who use arbitration agreements should review the terms of such agreements, as well as the rules of any agency sponsoring the arbitration, to ensure the agreements clearly specify whether the court or an arbitral body determines the issue of arbitrability. To the extent the contract does not provide clear guidance, the employer should consider revising the agreement, and should consult with counsel on any further questions. Employers in the transportation industry should take note of the Court's *New Prime* decision and review their agreements with independent contractors accordingly to determine whether to include arbitration clauses.

If you have any questions, please contact Tina Grimshaw or any other attorney at the Firm at (212) 758-7600.