December 07, 2020 **PRACTICE POINTS**

Supreme Court to Decide Important Arbitration Case

What happens when an arbitration clause has a carve-out, and who should decide whether a dispute is within the carve-out—a court or an arbitrator?

By Stuart M. Riback

Share this:

—

Henry Schein, Inc. v. Archer & White, which is scheduled to be argued to the Supreme Court on December 8, 2020, probably will affect how arbitration clauses get drafted in the future and may end up giving those who agree to arbitrate some of their disputes more than they thought they were bargaining for. The issue presented is what happens when an arbitration clause has a carve-out, so that most disputes should be arbitrated but some should not be. Who should decide whether a dispute is within the carve-out—a court or an arbitrator?

The *Schein* case started as an antitrust claim that sought both injunctive relief and damages. Here is the arbitration clause, so you can get an idea of what the courts were dealing with:

> Any 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 Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

So, with a clause like that, who decides whether the antitrust case gets decided in court or in arbitration?

The Supreme Court's general rule is that courts decide whether an arbitration clause covers the issue in dispute, with one exception: if there is "clear and unmistakable evidence" that the parties agreed arbitrators should decide that issue. But the exception may have swallowed the rule. Arbitration clauses typically refer a case to arbitration before a sponsoring organization such as the American Arbitration Association (AAA) or JAMS, and the clauses typically say the arbitration will proceed under the sponsor's rules. Both the AAA and JAMS provide in their rules that arbitrators have power to decide their own jurisdiction. The bulk of authority at the court of appeals level is that the reference to sponsor rules is "clear and unmistakable evidence" that the parties elected to have arbitrators decide whether their dispute is covered by the arbitration clause.

The *Schein* case is now in the Supreme Court for a second time. The first time around, the Fifth Circuit had held that it was "wholly groundless" to say the dispute was arbitrable. Based on that, it held that there was no reason to discuss the question of who decides—the antitrust dispute obviously had to be decided in court because there was an injunction claim, which was carved out. The Supreme Court reversed. It held that there is no "wholly groundless" exception in the Federal Arbitration Act—the Fifth Circuit couldn't short-circuit the analysis no matter how clear cut the issue seemed. Instead, the Fifth Circuit should have figured out whether, under the parties' contract, the court should determine who decides the case or instead arbitrators should make that decision. The Supreme Court did not decide whether the underlying antitrust dispute had to be arbitrated; it just sent the case back to the lower courts to figure out who should decide that question.

Now *Schein* has returned to the Supreme Court a second time. The Fifth Circuit decided on remand that the carve-out of injunctive relief disputes from the arbitration clause also meant that injunctive relief cases do not have to first go to arbitrators to determine whether the carve-out applies. The Supreme Court took the case to determine whether that's right.

Oral argument in the Supreme Court will be on December 8, 2020. The outcome will affect how a large number of arbitration clauses get drafted. If the Supreme Court reverses, then attorneys who draft arbitration clauses will have one more issue to think about when they choose their wording.

Stuart M. Riback is a partner at Wilk Auslander LLP in New York, New York.
