

## **Alert | Arbitration & Mediation**



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### **The United States Supreme Court Hands Victory to Arbitration**

On Jan. 8, 2019, the United States Supreme Court issued a unanimous decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, holding that courts may not override a contract delegating to arbitrators the threshold question of arbitrability. The decision, the first to be written by Justice Brett Kavanaugh, eliminates the ability of parties to argue that a matter should remain in court if the opposing party's arbitration bid is "wholly groundless."

The parties in this case are both involved in the dental industry. Respondent, Archer & White, had initially sued Petitioner, Schein, for money damages and injunctive relief over alleged violations of federal and state antitrust law. The relevant contract between the parties provided for arbitration of any dispute arising from or related to the agreement, except for, among other things, actions seeking injunctive relief. Invoking the Federal Arbitration Act, Schein asked the district court to refer the matter to arbitration, but Archer & White argued that the dispute was not subject to arbitration because its complaint sought, in part, injunctive relief, thus making the bid for arbitration "wholly groundless." The district court agreed with Archer & White and denied Schein's motion to compel arbitration. The 5th U.S. Circuit Court of Appeals affirmed.

Prior to this case there had been a split between the circuit courts. Four federal courts of appeals had held that courts may resolve disputes over arbitrability (even where the arbitration agreement delegates the question to arbitrators) if the court determined that the underlying claim for arbitration was "wholly groundless." Conversely, two other circuit courts had held that if the agreement delegated the question of

arbitrability to arbitrators, it was the arbitrators' prerogative to decide disputes over arbitrability, regardless of the court's views about the merits of the arbitrability issue.

On Tuesday, the Supreme Court sided with the minority position, finding that the “wholly groundless” exception to arbitrability is inconsistent with the Federal Arbitration Act and th[e] Court’s precedent.” In vacating the Fifth Circuit’s decision, the Supreme Court concluded that courts do not have the authority to override a decision by the parties to delegate to an arbitrator the question of whether a dispute must be arbitrated or litigated. Instead, “courts must enforce arbitration contracts according to their terms.” Specifically, the Court noted that “parties to a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also ‘gateway’ questions of arbitrability.” Accordingly, “when the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.”

Notably, the Supreme Court did not express a view as to whether the contract at issue in this case delegated the arbitrability question to the arbitrator; instead, it invited the 5th Circuit to resolve on remand the issue of whether the parties had “clearly and unmistakably” agreed to delegate arbitrability to the arbitrator.

In general, the threshold question of arbitrability in the United States is subject to independent review by the courts unless the parties have “clearly and unmistakably” agreed to submit that question to arbitration. In its decision, the Supreme Court emphasized that courts “should **not** assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.” *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 944 (1995) (alterations omitted) (emphasis added).

Thus, the 5th Circuit will need to address in the first instance whether the arbitration clause “clearly and unmistakably” delegated the gateway question of arbitrability to the arbitrators. This inquiry will likely include the attendant question of whether incorporation in an arbitration agreement of rules containing a *Kompetenz-Kompetenz* clause suffices to meet that test, i.e., by constituting a delegation of arbitrability questions in the first place.

In sum, the Supreme Court in *Henry Schein* decided that there is no “wholly groundless” exception to an otherwise valid delegation for arbitrators to decide questions of arbitrability. In so doing, it reinforced the requirement for any such contractual delegation to be clear and explicit.

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## Authors

This GT Alert was prepared by **Nicole Y. Silver** and **Tomás Leonard**. Questions about this information can be directed to:

- **Nicole Y. Silver** | +1 202.331.3150 | [silvern@gtlaw.com](mailto:silvern@gtlaw.com)
- **Tomás Leonard** | +1 202.331.3149 | [leonardt@gtlaw.com](mailto:leonardt@gtlaw.com)
- Or your **Greenberg Traurig** attorney

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