Cert Granted: Revisiting *Henry Schein, Inc. v. Archer and White Sales, Inc.*

By Veronica Leokadia Dunlop

June 15, 2020

Will SCOTUS decide whether a parties’ selection of arbitration rules which contain a competence-competence clause constitutes “clear and unmistakable” evidence of the parties’ intent to arbitrate arbitrability?

The relevant portion of the arbitration clause at issue states:

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 [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association…

In his [2018 Amicus Brief](https://www.supremecourt.gov/DocketPDF/17/17-1272/65270/20181001112810079_REPRINT%20Amicus-GAB.pdf) in support of Respondent, Professor George A. Bermann of Columbia University stated that a majority of courts have found that the incorporation of rules containing a competence-competence provision satisfies the “clear and unmistakable” evidence standard established by *First Options*. However, the American Law Institute’s (“ALI”) Restatement of the U.S. Law of International Commercial and Investor-State Arbitration concluded that “these cases were incorrectly decided” and the mere incorporation of such rules is not a manifestation of the parties’ “clear and unmistakable” intent to arbitrate arbitrability. Professor Bermann called upon the Supreme Court “to settle the meaning and application of the First Options test and thereby preserve the proper balance under federal law between the roles of courts and arbitrators in determining arbitrability.”

As explained in a previous Kluwer Arbitration [Blog Post](http://arbitrationblog.kluwerarbitration.com/2019/01/23/schein-inc-v-archer-white-sales-inc-upholding-principles-of-arbitration-but-leaving-open-question-regarding-competence-competence-in-arbitral-rules-as-clear-and-unmistakable/?doing_wp_cron=1592073093.4903399944305419921875), in January of 2019 the Supreme Court did not settle the meaning and application of the First Options rule. Instead, it held that “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.” By rejecting the “wholly groundless” exception, the Court avoided deciding whether “the contract at issue in this case in fact delegated the arbitrability question to an arbitrator.” Thus, the Court did not address the arbitrability question posed by Professor Bermann: “whether the incorporation in a contract of arbitral rules containing a provision empowering a tribunal to determine its own jurisdiction satisfies the ‘clear and unmistakable’ evidence test.”

This has been an ongoing debate in the arbitration world, with Professor Bermann and the ALI on one side and the majority of U.S. courts on the other. On June 15, 2020 the Supreme Court granted *certiorari* to decide “whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.” Although the Court has narrowed the issue to address only whether the exemption of specific claims from arbitration negates a “clear and unmistakable delegation of questions of arbitrability to the arbitrator,” hopefully they will also clarify whether reference to rules containing a competence-competence provision constitutes such a delegation. Thus, it seems that we may soon have an answer to Professor Bermann’s question.