Who Decides The Arbitrability of The Dispute - Part II

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In July 2018, our **Construction Alert** addressed the question of who decides the arbitrability of a dispute when your contract includes an arbitration clause. Is it a court or the arbitrator? How did the ?wholly groundless? test that split the federal circuit courts factor into who decides the question of arbitrability? In January 2019, the U.S. Supreme Court resolved the split among the federal circuit courts and did away with ?wholly groundless? inquiry as a gateway issue to deciding the arbitrability of a dispute.

In summation of the Supreme Court?s decision, if your contract designates the arbitrator, expressly or impliedly, as the decider of arbitrability, the courts are not to interject themselves into the decision of arbitrability; even if the assertion of arbitrability is ?wholly groundless?.

The Supreme Court?s decision came in *Henry Schein, Inc. et. al. v. Archer and White Sales, Inc.* Supreme Court of the United States, No. 17-1272 (January 8, 2019); a dispute between a dental equipment distributor and a dental equipment manufacturer. The parties? contract contained an arbitration provision which incorporated the Rules of the American Arbitration Association (?AAA?).

The AAA Rules, like the JAMS Engineering and Construction Arbitration Rules, designate the arbitrator as the decision maker on the gateway issue of arbitrability of a dispute. As noted in our prior Construction Alert, federal circuit courts that have ruled on the issue have consistently held that incorporation of the AAA?s Rules of Arbitration or the JAMS Rules of Arbitration into the parties? arbitration agreement clearly and unmistakably evidences that the parties agreed to arbitrate arbitrability.

Prior to the Supreme Court?s decision in *Henry Schein*, however, the U.S. Courts of Appeals for the Fourth, Fifth, Sixth and Federal Circuits had adopted the ?wholly groundless? test as part of their inquiry into the arbitrability of a dispute. In essence, those courts reasoned that a court should not leave the issue of arbitrability to an arbitrator if a party?s assertion that a dispute was arbitrable was frivolous or otherwise illegitimate, i.e. ?wholly groundless?. In *Henry Schein*, however, the Supreme Court rejected the ?wholly groundless? test, as a threshold inquiry, reasoning that the Federal Arbitration Act requires courts to interpret the Federal Arbitration Act as written, and, in turn, the Federal Arbitration Act requires the courts to interpret the contract as written. Accordingly, if the parties? arbitration agreement

delegates to the arbitrator the authority to make the decision on arbitrability, the court cannot override the contract even if it appears to the court that the assertion of arbitrability is ?wholly groundless.?

Our suggestions in our prior Construction Alert remain valid today. Contracting parties wishing to ensure resolution of ?gateway? questions of arbitrability by a specific decision-maker ? whether the court or the arbitrator ? should spell out their preference as clearly as possible in the contract?s arbitration clause.

If the parties want an arbitrator to decide the arbitrability of a dispute: 1) write that into the arbitration clause (best choice), or 2) include in the arbitration clause that an arbitration organization?s rules authorizing the arbitrator to decide the arbitrability of disputes are the governing rules of arbitration (second best choice).

If, however, the parties want the court to decide all ?gateway? questions of arbitrability, then the parties should include an ?anti-delegation? provision clearly stating that a court must decide all questions regarding the scope and applicability of an arbitration clause to a dispute.

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