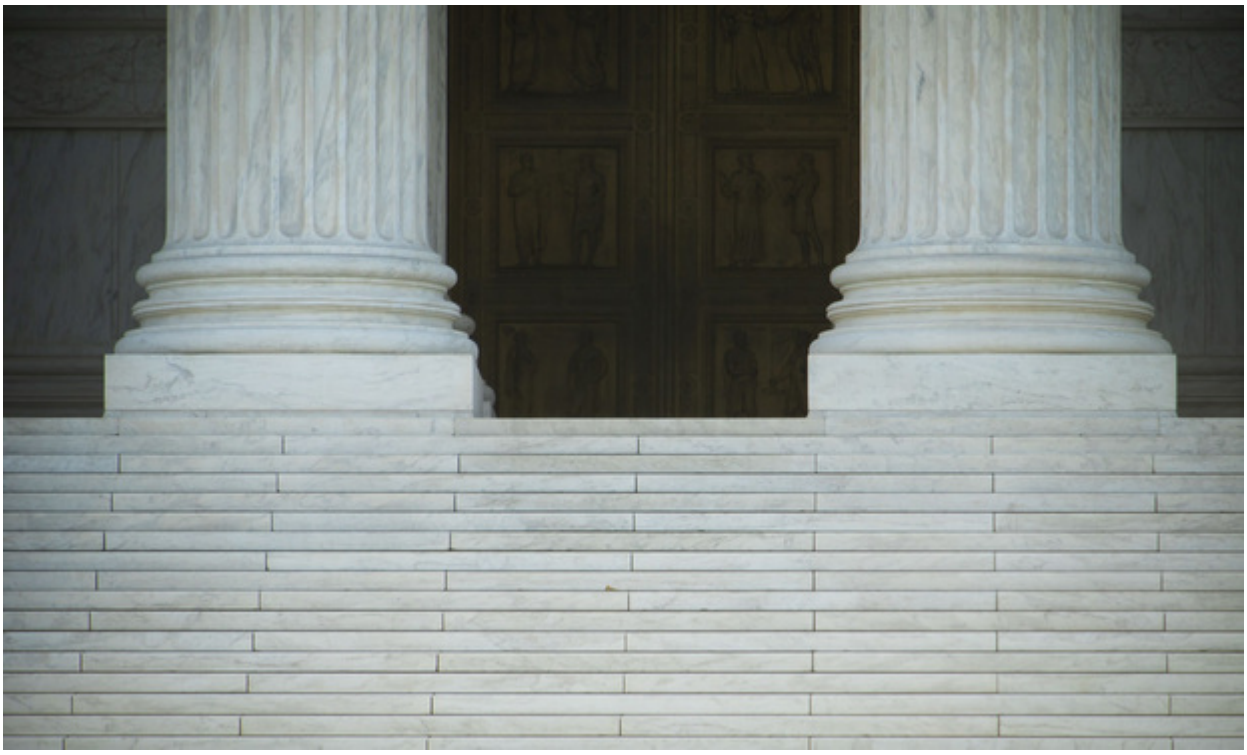
The Changing Scope of Arbitrability and Appealability

In its recent Henry Schein v. Archer and White Sales and Lamps Plus v. Varela decisions, the U.S. Supreme Court moved the goalposts in opposite directions on the questions of who decides whether a dispute is arbitrable and when a court's decision about arbitrability may be appealed.

By **Paul S. Chan and Gopi K. Panchapakesan** | August 28, 2019



The U.S. Supreme Court building in Washington, D.C. July 22, 2019.

Companies and employers have long favored arbitration as a means to reduce litigation costs and mitigate the threat of a "runaway jury." But the law continues to shift when it comes to the questions of who decides whether a dispute is arbitrable and when a court's decision about arbitrability may be appealed. In its recent *Henry Schein v. Archer and White Sales* and *Lamps Plus v. Varela* decisions, the U.S. Supreme Court moved the goalposts in opposite directions on these related questions.

In *Schein*, the Court expanded the scope of arbitrable matters by finding that even "wholly groundless" motions to compel arbitration should be decided in the first instance by arbitrators, not courts, where the parties' agreement delegates the question of arbitrability to the arbitrator. In *Schein*, the plaintiff sought injunctive and other relief in connection with alleged antitrust violations. The defendant moved to compel arbitration under the parties' agreement, which incorporated an AAA rule authorizing the arbitrator to decide the question of arbitrability. The district court denied the motion, finding that it was "wholly groundless" because the agreement precluded arbitration of injunctive claims. After the Fifth Circuit affirmed, the Supreme Court granted certiorari to resolve a circuit split about whether the "wholly groundless" exception runs afoul of the Federal Arbitration Act.

The Supreme Court unanimously reversed, holding that the exception is "inconsistent with the text of the [FAA] and with our precedent." Without addressing whether the agreement at issue delegated the question of arbitrability to the arbitrator by "clear and unmistakable" evidence, the Court held that where a contract does so, "a court may not override the contract" and "possesses no power to decide the arbitrability issue."

Schein effectively forecloses courts from taking the question of arbitrability out of the hands of the arbitrator, where that question is properly delegated to the arbitrator. The decision therefore incentivizes parties to insist that this threshold question be decided by the arbitrator, not the court—even where the basis for arbitration is specious.

By contrast, in *Lamps Plus*, the Supreme Court expanded the scope of matters subject to judicial appellate review, to include even orders granting arbitration. *Lamps Plus* involved a putative class action brought against the company by an employee whose personal data, along with that of other employees, was hacked. Based on the employee's employment agreement, *Lamps Plus* moved to compel arbitration on an individual basis. The district court granted the motion and dismissed the employee's claims, but ordered the arbitration to be conducted on a classwide basis. The employer appealed, but the Ninth Circuit affirmed, reasoning that because the agreement was "ambiguous on the issue of class arbitration," California law required the ambiguity to be construed against the employer as the drafter.

The Supreme Court granted certiorari to address two questions: whether the Ninth Circuit had jurisdiction to hear the appeal under the FAA, and whether an ambiguous arbitration agreement can be construed to require a defendant to submit to class arbitration. On the second question, a divided Court reversed the Ninth Circuit, holding that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." The Court's decision on this question was consistent with prior decisions—beginning with *AT&T Mobility v. Concepcion*—holding that class arbitration is fundamentally incompatible with the individualized arbitration contemplated by the FAA.

More surprising was the Supreme Court's answer to the first question—that an order granting a motion to compel arbitration is immediately appealable by the moving party under certain circumstances. Although the FAA precludes the appeal of an interlocutory order "directing arbitration to proceed," the Supreme Court held that the district court's ruling here was immediately appealable because the district court dismissed—rather than stayed—the plaintiff's claims and the employer "did not secure the relief it requested," i.e., an order compelling arbitration on an individual basis.

As U.S. Supreme Court Justice Stephen Breyer observed in dissent, the Court's ruling arguably conflicts with the FAA's "proarbitration appellate scheme," which reflects a policy determination that "if a district court determines that arbitration of a claim is

called for, there should be no appellate interference with the arbitral process unless and until that process has run its course."

It also opens the door to potential gamesmanship by companies moving to compel arbitration. If a district court orders arbitration but dismisses the underlying action, parties can now appeal such an order if it "incorporates some ruling that one party dislikes." Therefore, to the extent a company is ordered to arbitrate on unfavorable terms, it would benefit the company also to seek a dismissal so that it can immediately appeal the order.

Conversely, if a company secures the exact relief it seeks, then a stay of the underlying action would foreclose the appellate rights of the plaintiff. *Lamps Plus* thus provides companies with another tool to force arbitration on their preferred terms, and to delay a plaintiff's ability to prosecute its case should a court require arbitration on unfavorable terms.

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