

An Unusual Arbitration Issue Emerges After Henry Schein

By **Brian Mead**

Henry Schein Inc. v. Archer and White Sales Inc.[1] is a unanimous and seemingly uncontroversial U.S. Supreme Court decision on arbitration agreements. There, when the plaintiff sought injunctive relief in court, the parties disagreed whether that request could proceed in court when there was an underlying arbitration agreement.

This case raised a threshold arbitrability question; i.e., whether the parties' arbitration agreement applies to the request for injunctive relief. But, that triggers an a priori issue: Who decides that threshold arbitrability question?[2] The lower courts said that was for the courts, but the Supreme Court disagreed because the arbitration agreement contained a delegation clause.



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What's a delegation clause? It is the provision often found in arbitration agreements providing that the arbitrator alone will decide what is or is not arbitrable. It is valid because the Federal Arbitration Act "allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." [3]

Lower courts had held that even with a delegation clause, a court could still decide the arbitrability question if the argument that the arbitration agreement applies to that issue was "wholly groundless." This wholly groundless rule is what the unanimous decision in Henry Schein rejected, making delegation clauses dominant:

When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.[4]

Under Henry Schein, a contract that delegates arbitrability to the arbitrator must have that issue decided by the arbitrator. That simple mandate, particularly in cases with both delegation clauses and carve-out clauses — i.e., clauses allowing for certain issues to be decided in court — has produced results in lower courts that upend the expectations of the drafters of such agreements.

Consider how this plays out in a post-Henry Schein case:

	<i>Manlove v. Volkswagen Aktiengesellschaft</i> [5]
What disputes were subject to arbitration?	"Any and all disputes which involve or relate in any way to Employee's employment (or termination of employment) with [VW America], whether initiated by Employee or by [VW America], shall be submitted to and resolved by final and binding arbitration."
Was there a carve-out for injunctive relief?	Yes. "Nothing in this agreement shall be interpreted to prevent or restrict either party from seeking provisional injunctive relief, where appropriate, in a court of competent jurisdiction. Injunctive relief includes, but is not limited to, temporary and/or permanent injunctions or restraining orders."
Was there delegation of arbitrability to the arbitrator?	Yes. "The arbitrator shall have exclusive authority to resolve any Claims, including, but not limited to, a dispute relating to the interpretation, applicability, enforceability or formation of this Agreement."

In *Manlove v. Volkswagen AG*, the plaintiff sought "only injunctive relief."^[6] The defendant Volkswagen moved to compel arbitration under *Henry Schein* on the basis that the arbitrator had to rule on the threshold issue of arbitrability of the claim for injunctive relief. The district court granted the defendants' motion to compel arbitration, deferring any decision on injunctive relief until the arbitrator resolved the court's authority to do so.

Manlove is not alone in taking this approach. *Vertiv Corp. v. Svo Building One LLC*^[7] likewise compelled arbitration and refused to rule on requests for injunction relief due to a delegation clause: "I am entirely without authority to resolve whether I have authority to resolve Plaintiff's request for a preliminary injunction. That issue is for the arbitrator."

But, delegation clauses are not always so honored. In *Wilson v. Starbucks Corp.*,^[8] a delegation clause gave the arbitrator "exclusive authority to resolve any dispute regarding the formation, interpretation, applicability, enforceability, or implementation of this Agreement."^[9] There was also a carve-out, this time for actions to enforce the agreement or to compel arbitration.

Unlike *Manlove* or *Vertiv*, the district court in *Starbucks* held that "[t]he delegation clause and the exclusion clause [carve-outs for actions to enforce arbitration] contradict one another." As a result, there wasn't "unmistakable evidence" that the parties intended the arbitrator to decide gateway issues (such as the controversy here on whether Kentucky law forbid employers from making arbitration a condition of employment).^[10]

Does that all seem strange? Like Mike's visit to the Upside Down in "Stranger Things"?

Each of these judges took the view that everything was done entirely in accord with *Henry Schein* in construing arbitration agreements written before that Supreme Court decision was issued. Like Mike and his friends, it is now time for employers to reconsider how to deal with the upside-down impact when delegation clauses intersect with carve-outs from arbitration clauses:

- *Schein* (as well as *Manlove* and *Vertiv*) involved efforts to put injunctive relief in court rather than in arbitration. Perhaps, it is time to ask why. American Arbitration Association employment arbitration rules permit emergency injunctive relief before an arbitrator as well as near-overnight appointment of that arbitrator.^[11] Is there still a need to be so court-obsessed?
- Employers should examine their current arbitration agreements to determine whether there is a delegation clause and, if so, whether that clause remains desirable. If the arbitrator decides arbitrability, then any dispute about the agreement (including the availability of injunctive relief in court) could ultimately be sent to the arbitrator for a ruling. There is now a cost-benefit calculus to the inclusion of delegation clauses.
- If a delegation clause is desired, is it desired enough to eliminate the traditional carve-outs? Problems occur when employers attempt to have both types of clauses. Whether a carve-out for injunctive relief, a carve-out for class or collective action issues, or a carve-out for enforcement, such clauses bump up against the delegation clause and risk results like those in *Starbucks*: being forced to litigate an issue unexpectedly and in an unchosen forum.

- Employers who desire both a delegation clause and a carve-out clause will require careful, precise drafting in the delegation clause (which pre-Henry Schein no one thought about). For example, a delegation clause that explicitly divides what is for the court and what is for the arbitrator and grants to the court the exclusive authority to construe that allocation could be utilized.
- Be wary also of how employment arbitration agreements are executed. Another recent case, *Shockley v. PrimeLending Inc.*, sidestepped the delegation clause because there was no valid contract; the arbitration agreement was maintained online with a "subsequent system-generated acknowledgment" which was insufficient to prove "unequivocal acceptance."^[12]

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[1] 139 S.Ct. 524 (2019).

[2] *Id.* at 527.

[3] *Id.*

[4] *Id.* at 529.

[5] 2019 WL 2291890 (E.D. Tenn. 2019).

[6] *Id.* at *3.

[7] 2019 WL 1454953, at *3 (D. Del. Apr. 2, 2019).

[8] 385 F.Supp.3d 557 (E.D. Ky. 2019).

[9] *Id.* at 560.

[10] *Id.* at 561.

[11] See AAA Employment Arbitration Rules and Mediation Procedures Optional Rules (requiring appointment of an emergency arbitrator within one business day and a schedule for emergency relief within two business days of that appointment).

[12] See *Shockley v. PrimeLending* , 929 F.3d 1012, 1019 (8th Cir. 2019).