

Arbitration in the Fifth - January 2021

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PRACTICES Litigation

January 2021 was a slow start for arbitration-related opinions, but there are opinions worth extra attention, including the application of “look through” jurisdiction in ADT LLC v. Richmond and Patrick v. Comcast Cable Commc’ns, LLC’s recognition of arbitration and delegation clauses in a contract that was terminated six years prior to the events giving rise to plaintiff’s claim. Of course, the most noteworthy event impacting the Fifth Circuit did not occur within the circuit’s geographic boundaries. On January 25, the Supreme Court of the United States dismissed the writ of certiorari in Henry Schein, Inc. v. Archer & White Sales, Inc. as improvidently granted. More on that below.

“Delegation clauses” after the dismissal of the writ of certiorari in Henry Schein, Inc. v. Archer & White Sales, Inc.

Following the U.S. Supreme Court’s January 25, 2021, dismissal of the writ of certiorari, the rule announced in Henry Schein, Inc. v. Archer & White Sales, Inc., 935 F.3d 274 (5th Cir. 2019) stands. That rule provides that parties may delegate arbitrability to the arbitrator, so long as the parties’ agreement to do so is shown by clear and unmistakable evidence. Where the parties have not unambiguously delegated arbitrability, the court will not re-write the agreement to find delegation.

In Henry Schein, the arbitration clause provided that disputes “except for actions seeking injunctive relief” were to be resolved in accordance with the American Arbitration Association Rules. Rule 7(a) allows an arbitrator to rule on his or her own jurisdiction. Under the law of the Fifth Circuit, and almost every federal circuit, incorporation of rules like the AAA Rules is considered clear and unmistakable evidence of the parties’ intent to delegate arbitrability to the arbitrator. What made the agreement in Henry Schein different was the exception and its placement within the arbitration clause. Henry Schein reasoned that the exception for injunctive relief was an exception not only to the scope of the arbitration clause, but also an exception to the scope of the delegation clause. The AAA Rules were the source of the delegation clause, and those Rules applied to all disputes other than those under the exception. Since the Rules did not apply to a case falling within the exception, neither did the delegation clause that was found within those Rules.

For transactional lawyers, Henry Schein is a lesson in drafting, though in reality a party’s strategic preference with regard to delegation may not crystalize until after a dispute arises. If the argument of the parties in Henry Schein is to be a guide, delegation is only assured where an express delegation clause and an arbitration clause are separated into two well-crafted independent sentences/clauses.

For litigators trying to avoid delegation, Henry Schein may look like an invitation to creative (and maybe sometimes frivolous) arguments trying to find an exception to an otherwise clear delegation of arbitrability.

Opinions of U.S. District Courts

Motions to Compel Arbitration

McHenry v. JPMorgan Chase Bank, N. A., 3:20-CV-00699, 2021 WL 264885 (W.D. La. Jan. 11, 2021) (Hayes, Mag. J.), report and recommendation adopted, 2021 WL 262044 (Jan. 26, 2021) (employment). Motion to compel granted. Plaintiff's contention that she did not sign or receive the arbitration agreement was overcome by metadata associated with her offer letter and the agreement. A defendant does not have a duty to notify a plaintiff of the existence of an arbitration agreement prior to plaintiff's filing a lawsuit. Timeliness of the claim may be raised as a defense and evaluated by the arbitrator.

ADT LLC v. Richmond, 4:20-CV-00759-O, 2021 WL 129150 (N.D. Tex. Jan. 8, 2021) (notice of appeal filed) (action to compel arbitration). Petition to compel arbitration dismissed without prejudice due to lack of subject matter jurisdiction. Petitioner was the defendant in a lawsuit filed in state court. Instead of removing the state court action, petitioner filed this federal action, asking the court to compel arbitration and claiming diversity jurisdiction. Applying the "look-through" approach for determining subject matter jurisdiction in a proceeding under section 4 of the Federal Arbitration Act, the court "looked through" to the state court action. The parties in that action were not entirely diverse. The court declined to limit its diversity determination to the citizenship of the parties named in the section 4 petition.

Gumenyuk v. Marlow Navigation Co., Ltd., 4:20-CV-285, 2020 WL 8083682 (S.D. Tex. Dec. 21, 2020) (Stacy, Mag. J.), report and recommendation adopted as modified, 2021 WL 65480 (Jan. 7, 2021) (notice of appeal filed) (admiralty/Jones Act). Motion to compel denied. Collective bargaining agreement between "third party ship and crew management company" and trade union did not contain agreement requiring individual seaman to arbitrate his claim.

Patrick v. Comcast Cable Commc'ns, LLC, CV H-20-2352, 2021 WL 75770 (S.D. Tex. Jan. 8, 2021) (Telephone Consumer Protection Act and Texas Debt Collection Act). Motion to compel granted. Agreement for residential cable, phone, and internet services that was canceled in 2013 contained an arbitration clause. Agreement provided that the clause "shall survive the termination" of services with the provider. The parties did not dispute that the agreement also contained a delegation clause. Question of whether claims related to conduct in 2019 were arbitrable was delegated to the arbitrator.

Motions to Confirm/Vacate

FSI Constr., Inc. v. Martin, CV H-20-3636, 2021 WL 260218 (S.D. Tex. Jan. 26, 2021) (employment agreement). Confirmation granted. Federal Arbitration Act provides the exclusive grounds on which an award may be vacated. Objection that the arbitrator exceeded her powers under Texas law is not a basis for vacatur. Manifest disregard of the law is not an independent ground for challenging an award. The absence of a transcript does not preclude enforcement of an award.

Other Arbitration-Related Decisions

Chembulk Ocean Transp. LLC v. Valero Mktg. & Supply Co., CV 20-1024, 2021 WL 276215, (S.D. Tex. Jan. 25, 2021) (admiralty). Arbitration and the forum-selection clauses in seller's contract with buyer were not relevant to buyer's third-party action "tendering" seller to buyer's customer (the plaintiff) under Fed. R. Civ. P. 14(c). Pursuant to Rule 14(c), buyer's third-party complaint demanded judgment against seller in favor of plaintiff/buyer's customer. There was no arbitration clause between seller and plaintiff.