New Clear and Unmistakable Outcome Exception to the Old Clear and Unmistakable Rule? (Part I)

Arbitration law is replete with presumptions and other rules that favor one outcome or another depending on whether one thing or another is or is not clear and unmistakable. Put differently, outcomes often turn on the presence or absence of contractual ambiguity.

There are three presumptions that relate specifically to questions arbitrability, that is, whether or not an arbitrator or a court gets to decide a particular issue or dispute:

The Moses Cone Presumption of Arbitrability: Ambiguities in the scope of the arbitration agreement itself must be resolved in favor of arbitration. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Rebutting this presumption requires clear and unmistakable evidence of an intent to exclude from arbitration disputes that are otherwise arguably within the scope of the agreement.The First Options Reverse Presumption of Arbitrability: Parties are presumed not to have agreed to arbitrate questions of arbitrability unless the parties clearly and unmistakably agree to submit arbitrability questions to arbitration. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-46 (1995)The Howsam/John Wiley Presumption of Arbitrability of Procedural Matters: ??[P]rocedural' questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.? Howsam v. Dean Witter Reynolds, Inc.], 537 U.S. 79, 84 (2002) (quoting John Wiley & Sons, Inc. v. Livingston], 376 U.S. 543, 557 (1964)) (internal quotation marks omitted). To rebut this presumption, the parties must clearly and unmistakably exclude the procedural issue in question from arbitration.

These presumptions usually turn solely on what the contract has to say about the arbitrability of a dispute, not on what the outcome an arbitrator or court would?or at least should?reach on the merits of the dispute.

Some U.S. Circuit Courts of Appeal, including the Fifth Circuit, recognized an exception to the First Options Reverse Presumption of Arbitrability called the ?wholly groundless exception.? Under that ?wholly groundless exception,? courts could decide ?wholly groundless? challenges to arbitrability even though the parties have clearly and unmistakably delegated arbitrability issues to the arbitrators. The apparent point of that exception was to avoid the additional time and expense associated with parties being required to arbitrate even wholly groundless arbitrability disputes, but the cost of the exception was a judicial override of the clear and unmistakable terms of the parties' agreement to arbitrate.

Earlier this year the U.S. Supreme Court in **Schein v. Archer & White Sales, Inc.**, 586 U.S. ___, slip op. at *1 (January 8, 2019) abrogated the ?wholly groundless? exception. Schein, slip op. at *2, 5, & 8. ?When,? explained the Court, ?the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.? Schein, slip op. at 2, 8. The ?wholly groundless? exception, said the Court, ?is inconsistent with the statutory text and with precedent[,]? and ?confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability.? Schein,slip op. at 8.

But since Schein both the Second and Fifth Circuits have decided First Options Reverse Presumption of Arbitrability cases by

effectively conflating the question of who gets to decide an arbitrability issue with the separate question of who should prevail on the merits of that arbitrability issue. The Courts in both cases determined whether the parties clearly and unmistakably agreed to arbitrate arbitrability questions by considering, as part of the clear and unmistakable calculus, the merits of the arbitrability question.

These two cases suggest a trend toward what might (tongue-in-cheek) be called a "Clear and Unmistakable Outcome Exception" to the First Options Reverse Presumption of Arbitrability. But the problem with that trend is that it runs directly counter to the Supreme Court's decision in Schein, and thus contravenes the Federal Arbitration Act as interpreted by Schein.

In Part I of this post we discuss the Second Circuit and Fifth Circuit decisions. In Part II we analyze and discuss how? and perhaps why ? those courts effectively made an end run around Schein.

Clear and Unmistakable Rule: The Second Circuit's Met Life Decision

We first wrote about the Second Circuit decision, Metropolitan Life Ins. Co. v. Bucsek, ___ F.3d ___, No. 17-881, slip op. (2d Cir. Mar. 22, 2019), in an April 3, 2019 post]. In Met Life the Second Circuit was faced with an unusual situation where party A sought to arbitrate against party B, a former member of the Financial Industry Regulatory Authority (?FINRA?)'s predecessor, the National Association of Securities Dealers (?NASD?), a dispute arising out of events that occurred years after party B severed its ties with the NASD.

The district court rejected A's arguments, ruling that: (a) this particular arbitrability question was for the Court to decide; and (b) the dispute was not arbitrable because it arose years after B left the NASD, and was based on events that occurred subsequent to B's departure. The Second Circuit affirmed the district court's judgment.

After the district court decision, but prior to the Second Circuit's decision, the U.S. Supreme Court decided Schein, which?as we explained earlier?held that even so-called ?wholly-groundless? arbitrability questions must be submitted to arbitration if the parties clearly and unmistakably delegate arbitrability questions to arbitration. Schein, slip op. at *2, 5, & 8.

The Second Circuit was faced a situation where a party sought to arbitrate a dispute which clearly was not arbitrable, but in circumstances under which prior precedent suggested that the parties clearly and unmistakably agreed to arbitrate arbitrability.

To give effect to the parties' probable intent not to arbitrate before the NASD (or its successor, FINRA) arbitrability questions that arose after B left the NASD, the Second Circuit apparently believed it had no choice but to distinguish and qualify its prior precedent, and to attempt to do so without falling afoul of the Supreme Court's recent pronouncement in Schein.

That required the Second Circuit to modify, to at least some extent, the contractual interpretation analysis in which courts within the Second Circuit are supposed to engage to ascertain whether parties ?clearly and unmistakably? agreed to arbitrate arbitrability in circumstance where they have not specifically agreed to arbitrate such issues.

Met Life modified
that analysis to mean that in cases where parties have not expressly agreed to arbitrate arbitrability questions, but have agreed to a very broad arbitration agreement, the question whether the parties' have nevertheless clearly and unmistakably agreed to arbitrate arbitrability questions may turn, at least in part, on an analysis of the merits of the arbitrability question presented.

Effectively articulating a new interpretative rule
necessitated by the unusual case before it, the Court said ?what the arbitration agreement says about whether a category of dispute is arbitrable can have an important bearing on whether it was the intention of the agreement to confer authority over arbitrability on the arbitrators.? Slip op. at 13-14.

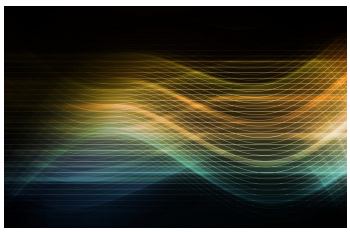
To that end, said the Court, ?broad language expressing an intention to arbitrate all aspects of all disputes supports the inference of an intention to arbitrate arbitrability, and the clearer it is from the agreement that the parties intended to arbitrate the particular dispute presented, the more logical and likely the inference that they intended to arbitrate? arbitrability questions. Slip op. at 12-13 (citations and quotations omitted).

The contrapositive, the court explained, was also true (at least conditionally): ?the clearer it is that the terms of an arbitration agreement reject arbitration of the dispute, the less likely it is that the parties intended to be bound to arbitrate the question of arbitrability, unless they included clear language so providing . . . .? Slip op. at 13. But, added the Court, ?vague provisions as to whether the dispute is arbitrable are unlikely to provide the needed clear and unmistakable inference of intent to arbitrate arbitrability.? Slip op. at 13.

What the Court appears to be saying is that where the parties have not expressly, clearly and unmistakably expressed their intent to arbitrate arbitrability questions, the strength of the inference of clear and unmistakable intent to arbitrate arbitrability is inversely proportional to how clear it is that the terms of the agreement reject arbitration of the dispute.

In other words, if the terms of the agreement strongly suggest that a court, rather than an arbitrator, should resolve the dispute on its merits, then the strength of the inference of clear and unmistakable intent to arbitrate the arbitrability of the dispute will be weaker. But, all else equal, if the terms of the agreement suggest that an arbitrator rather than a court should resolve the dispute on its merits, then the inference of clear and unmistakable intent to arbitrate arbitrability of the dispute will be stronger.

The Fifth Circuit's 20/20 Comm. Decision



A few months after Met Life was decided, on July 22, 2019, the United States Court of Appeals for the Fifth Circuit decided 20/20 Comms. Inc. v. Lennox Crawford], ___ F.3d ___, No. 18-10260 (5th Cir. July 22, 2019). Although 20/20 Comms did not cite Met Life, it engaged in what might be roughly described as a simplified version of the Second Circuit's reasoning in that case.

Hew Zhan Tze, an **International Institute for Conflict Resolution and Prevention (?CPR?)** summer intern has published? under the very able tutelage of our friend Russ Bleemer], a New York attorney who is the editor of CPR's Alternatives, an international ADR newsletter published by John Wiley & Sons, Inc.]?a well-written and insightful article about 20/20 Comm. in the CPR Speaks blog]. (A shout-out also to CPR's Tania Zamorsky], who is the blog master of CPR Speaks.)

Mr. Zhan Tze's excellent article discusses the case and quotes some commentary I provided by email to Russ about the case, as both Russ and I were quite intrigued by the decision. You can read that article in the CPR Speaks Blog here].

Zhan Tze's article thoroughly discusses the background of the case, its reasoning, and holding. (See here].) The case involved consent to class arbitration.

There were two questions before the Court: (a) whether class arbitration consent was a question of arbitrability for the Court; and (b) if so, whether the parties, under the First Options Reverse Presumption of Arbitrability, had clearly and unmistakably agreed to submit class arbitration consent questions to the arbitrator.

As to the first issue, the Court determined that consent to class arbitration was a question of arbitrability, thereby joining the Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh circuits, which have likewise concluded that class arbitration consent presents a question of arbitrability. See Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 877 (4th Cir. 2016); Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013); Herrington v. Waterstone Mortg. Corp.], 907 F.3d 502, 506-07 (7th Cir. 2018); Catamaran Corp. v. Towncrest Pharmacy], 864 F.3d 966, 972 (8th Cir. 2017); Eshagh v. Terminix Int'l Co., L.P.], 588 F. App'x 703, 704 (9th Cir. 2014) (unpublished); JPay, Inc. v. Kobel], 904 F.3d 923, 935-36 (11th Cir. 2018).

As respects the second issue?whether the parties clearly and unmistakably agreed to arbitrate class-arbitration consent issues? the Court held that the parties did not clearly and unmistakably so agree.

The parties' contract contained three provisions pertinent to arbitrability questions:

1. "If Employer and Employee disagree over issues concerning the formation or meaning of this Agreement, the arbitrator will hear and resolve these arbitrability issues."

2. "The

arbitrator selected by the parties will administer the arbitration according to the National Rules for the Resolution of Employment Disputes (or successor rules) of the American Arbitration Association ('AAA') except where such rules are inconsistent with this Agreement, in which case the terms of this Agreement will govern." (emphasis added)

3. "Except as provided below, Employee and Employer, on behalf of their affiliates, successors, heirs, and assigns, both agree that all disputes and claims between them . . . shall be determined exclusively by final and binding arbitration." (emphasis added)

But the parties' contract also contained a broad class arbitration waiver, which provided:

[T]he parties agree that this Agreement prohibits the arbitrator from consolidating the claims of others into one proceeding, to the maximum extent permitted by law. This means that an arbitrator will hear only individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. (Emphasis added.)

The Court said that the first three provisions, ?[d]ivorced from other provisions of the arbitration (most notably, the class arbitration bar). . . could arguably be construed to authorize arbitrators to decide gateway issues of arbitrability, such as class arbitration.? Slip op. at 8. As respects the second of the three, the incorporation by reference of the National Rules for the Resolution of Employment Disputes (or successor rules) of the AAA, the Court noted that ?Rule 3 of the AAA Supplementary Rules for Class Arbitration provides that the arbitrator is empowered to determine class arbitrability.? Slip op. at 8. And, according to the Court, ?the third provision states in broad terms that ?all disputes and claims between them' shall be determined by the arbitrator, language arguably capacious enough under this court's previous rulings to include disputes over class arbitrability.? Slip op. at 8.

But the Court did not decide whether those ?provisions, standing alone, clearly and unmistakably? required arbitration of the class arbitration consent issue, because the Court held that the class arbitration waiver foreclosed such a finding. Slip op. at 8, 6-7.

The court said ?that this class arbitration bar operates not only to bar class arbitrations to the maximum extent permitted by law, but also to foreclose any suggestion that the parties meant to disrupt the presumption that questions of class arbitration are decided by courts rather than arbitrators.? Slip op. at 6-7. ?[I]t is[,]? observed the Court, ?difficult for us to imagine why parties would categorically prohibit class arbitrations to the maximum extent permitted by law, only to then take the time and effort to vest the arbitrator with the authority to decide whether class arbitrations shall be available.? Slip op. at 7. ?Having closed the door to class arbitrations to the fullest extent possible,? queried the Court rhetorically, ?why would the parties then re-open the door to the

possibility of class arbitrations, by announcing specific procedures to govern how such determinations shall be made?? Slip op. at 7.

Comparing the first three provisions ?with the class arbitration bar at issue in this case, we conclude that none of them state with the requisite clear and unmistakable language that arbitrators, rather than courts, shall decide questions of class arbitrability.? Slip op. at 8.

Two of the provisions, said the Court, ?include express exception clauses. . . , which ?expressly negate any effect these provisions might have in the event they conflict with any other provision of the arbitration agreement?as they plainly do here in light of the class arbitration bar.? Slip op. at 9.

Even apart from ?the exception clauses,? none of the three provisions ?speak with any specificity to the particular matter of class arbitration.? Slip op. at 9. ?[B]]y contrast[,]? said the Court, [t]he class arbitration bar. . . specifically prohibits arbitrators from arbitrating disputes as a class action, and permits the arbitration of individual claims only.? Slip op. at 9 (citations and quotations omitted).

Those three provisions ?[a]ccordingly[]. . . do not clearly and unmistakably overcome the legal presumption?reinforced as it is here by the class arbitration bar?that courts, not arbitrators, must decide the issue of class arbitration.? Slip op. at 9.

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In our next post we'll analyze and discuss how Met Life and 20/20 Comm. effectively make an end run around Schein and what might have motivated those courts to rule as they did.

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