A Summary of the Supreme Court’s Arbitration Cases – 2018-19
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Enforcement of agreements to delegate arbitrability questions to an arbitrator. In a unanimous decision issued on January 8, 2019, the Supreme Court held that when parties to an arbitration agreement have agreed to have an arbitrator decide questions of arbitrability, courts may not intervene even if any argument that the dispute is arbitrable, in the sense that is covered under the arbitration agreement, is “wholly groundless.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, Docket No. 17-1272. Although courts have the authority to decide “gateway” issues of arbitrability, including the issue of whether a particular dispute is arbitrable under the agreement, the Supreme Court had held previously that parties could delegate that authority to an arbitrator if they made a “clear and unmistakable” agreement to do so. The question in the *Henry Schein* case was whether that delegation could be ignored if the arbitration agreement clearly did not cover the dispute at issue, or, in other words, if the argument to have a matter arbitrated was “wholly groundless.”

Archer & White, a dental equipment distributor, had argued that the arbitration agreement it had with Henry Schein, an equipment manufacturer, specifically excluded and therefore did not cover the antitrust claims that Archer & White had brought against Henry Schein in a lawsuit in federal district court. Archer & White was seeking injunctive relief and money damages and the arbitration clause in its contract with Henry Schein excluded “actions seeking injunctive relief” from the requirement to arbitrate contractual disputes. Since the argument that the dispute was covered by the arbitration clause was “wholly groundless,” Archer & White argued, the court should just dismiss Henry Schein’s motion to compel arbitration and allow Archer & White’s lawsuit to proceed. The District Court agreed with Archer & White, and the Fifth Circuit Court of Appeals upheld the lower court.

Justice Brett Kavanaugh, writing for the unanimous Supreme Court, reversed the Fifth Circuit. He explained that nothing in the Federal Arbitration Act, 9 U.S.C. §§ 1-16, permitted a court to ignore the parties’ agreement to delegate arbitrability questions to an arbitrator. Therefore, even if it appeared that a party was making a “wholly groundless” argument to shoehorn a dispute into the coverage of an arbitration agreement, that determination would have to be made by the person or entity the parties’ chose to make that assessment. Absent contractual language to the contrary, a court ordinarily makes that decision. But if the parties agreed to have an arbitrator assess the coverage of the arbitration clause, then a court would have step back and let the arbitrator do his or her job.

In this Federal Arbitration Act case, Justice Kavanagh relied, in part, on labor arbitration doctrine established under § 301 of the Labor Management Relations Act in one of the Steelworkers trilogy cases, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). In that case, the Supreme Court ruled that pursuant to the arbitration agreement, it would compel arbitration of even an allegedly frivolous claim. In *Henry Schein*, Justice Kavanagh quoted, with approval, Justice Douglas’ reasoning: “the agreement is to submit all grievances to
arbitration, not merely those that a court may deem to be meritorious.” *Henry Schein* at 5, quoting *American Mfg.*, 363 U.S. at 567.

But courts still decide some arbitrability issues; and some independent contractors are excluded from FAA coverage. In *New Prime Inc. v. Oliveira* (Docket No. 17-340), issued on January 15, 2019, the U.S. Supreme Court unanimously held that only courts can decide the question of whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, applies to a particular arbitration agreement. This is true even if the arbitration agreement delegates the question of “arbitrability” to an arbitrator. The Supreme Court also held that the exemption from the FAA for all “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” applies to independent contractors as well as traditional employees.

The *New Prime* case involves a truck driver, Dominic Oliveira, who brought a class action in federal court against New Prime Inc., the trucking company for which he worked, for violations of minimum wage laws as well as for breach of contract. Mr. Oliveira had worked for New Prime as both a contractor and an employee and had signed an agreement to arbitrate all claims against New Prime and to delegate arbitrability and jurisdictional issues to the arbitrator (the “delegation clause”). New Prime moved in federal district court to compel arbitration based on the agreement to arbitrate all workplace disputes, but the district court held that it first had to decide whether the FAA even applied to the case. This was because although FAA §§ 3 and 4 authorize federal courts to enforce arbitration agreements in general, there is an exemption for some “contracts of employment” in Section 1 of the FAA, which states:

nothing [within the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

This means that the FAA does not give a federal court the authority to enforce arbitration agreements if they involve workers covered by the exemption. The Supreme Court ruled in 2001 that the FAA §1 exemption applies only to seamen, railroad employees and other similar types of transportation workers who move goods in interstate commerce, such as truck drivers. See *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). New Prime had argued that due to the delegation clause in the arbitration agreement, the arbitrator, not the court, should decide the question of whether the FAA applied to a trucker who was an independent contractor.

When the district court ruled against it, New Prime appealed to the First Circuit Court of Appeals. On the issue of the applicability of the FAA, the appeals court agreed with the lower court and decided that a court must decide the threshold of question of whether or not the FAA applied to the dispute. It agreed with the reasoning of the Ninth Circuit Court of Appeals (California) in an analogous case and held that the applicability of the FAA is not an arbitrability or jurisdictional issue that an arbitrator can decide even if the parties have delegated those questions to the arbitrator. *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011). Rather, the First Circuit Court of Appeals held, a federal court cannot compel arbitration until it has first
determined that the dispute is governed by the FAA. If it is not, the court would not have the authority to compel arbitration. In adopting this analysis, the First Circuit parted ways with the Eighth Circuit Court of Appeals, which had previously held that an arbitrator could decide the issue of the FAA’s reach when the parties to an arbitration agreement had delegated arbitrability and jurisdictional issues to the arbitrator. *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766 (8th Cir. 2011).

On the question of whether the FAA exemption in Section 1 applied to independent contractors who were transportation workers, the First Circuit found that the statutory term “contracts of employment” applied to anybody who performed work, including independent contractors. Therefore, the FAA exemption for “contracts of employment” of transportation workers applied to Mr. Oliveira and the FAA did not authorize the federal court to compel arbitration of the arbitration agreement he had signed with New Prime. The First Circuit’s decision upheld the lower court’s ruling that it did not have the authority to compel arbitration of the dispute pursuant to the FAA.

Justice Gorsuch, writing for a unanimous court (with Judge Kavanaugh not participating and Justice Ginsburg writing a short concurrence), agreed with the lower courts’ determinations that courts had to decide the initial question of FAA applicability to a dispute. The Court held that a court cannot compel arbitration until a court determines “whether the contract itself falls within or beyond the boundaries of [FAA] §§ 1 and 2.” The fact that an arbitration clause delegates jurisdictional questions to an arbitrator does not mean that a court can invoke its powers under the FAA to force the parties to have an arbitrator decide the threshold question of whether the FAA applies to the arbitration agreement. “A delegation clause is merely a specialized type of arbitration agreement,” and therefore “a court may use §§ 3 and 4 [of the FAA] to enforce a delegation clause . . . only if the contract in which the clause appears doesn’t trigger §1’s ‘contracts of employment’ exception..” the Court held.

The Court also agreed with the First Circuit Court of Appeals’ decision that the “contracts of employment” exception applied to independent contractors. Justice Gorsuch stated that the “only question in this case concerns the meaning of the term ‘contracts of employment’ in 1925,” the year in which Congress passed the FAA. (Emphasis in the original). Because in 1925 “a contract of employment did not necessarily imply the existence of an employer-employee or master-servant relationship,” the Court held that the “contracts of employment” exempted from the FAA are simply “agreements to perform work,” including work performed by people we would label today as independent contractors. Therefore, since Mr. Oliveira’s arbitration agreement was exempt from the FAA, the federal courts did not have the power to compel arbitration pursuant to that Act.

The Supreme Court did not address an issue that the appeals court’s decision had specifically left open: the question of whether New Prime could use a state statute to compel arbitration. The First Circuit had stated: “We emphasize that our holding is limited: It applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as
state law) by which a party may compel arbitration.” *Oliveira v. New Prime, Inc*, 857 F.3d 7, 24, *reh’g and reh’g en banc denied* (1st Cir. 2017). Many states have arbitration enforcement statutes that do not exempt contracts involving transportation workers. *See e.g.* NY CPLR §§ 7501-7503 (2018); Ca. Code Civ. Proc. §§ 1281, 1281.2 (2018). Whether or not those state statutes’ applicability to transportation workers is preempted by the FAA’s exemption for transportation workers is an open question.

No class actions permitted in ambiguous contracts. In *Lamps Plus Inc. v. Varela* (Docket No. 17-988), the Court considered whether the parties to an arbitration agreement agreed to permit class actions in a contract that required: 1) the parties to use arbitration “in lieu of any and all lawsuits or other civil legal proceedings;” 2) stated that claims covered by the arbitration agreement include those “that, in the absence of this Agreement, would have been available to the parties by law;” and 3) authorized the arbitrator to “award any remedy allowed by applicable law.” In this employment arbitration dispute brought pursuant to the FAA, the parties disputed the effect of the Court’s 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). In that case, the Court had held that arbitrators could not read an acceptance of class actions into an arbitration agreement unless it was clear that the parties had agreed to do so.

In the 5-4 decision issued on April 24, 2019, the five-member majority held that, under the FAA, courts cannot interpret an arbitration agreement’s ambiguous language to permit either party to bring a class or collective action. The Court held that the Ninth Circuit Court of Appeals erred when it used a California state contract rule of interpretation to construe ambiguity against the contract’s drafter (Lamps Plus) to find that class or collective actions were permissible.