International Arbitration Focus Team

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Arbitration Focus Team:

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US Supreme Court: Renewed Support for Arbitrators to Decide Arbitrability

On January 8, 2019, the United States Supreme Court issued its ruling in *Henry Schein* v. *Archer and White*. The Court agreed with the petitioner that **arbitral tribunals**, not courts, **are competent to evaluate whether a claim is arbitrable**, regardless of whether the basis for arbitration is "wholly groundless".

The parties' arbitration agreement incorporated the American Arbitration Association Rules, whereby arbitrability questions are to be decided by arbitrators. However, the contract also expressly excluded arbitration in case of actions seeking injunctive relief, which was the petition brought by Archer and White. A District Court in Texas and, on appeal, the Fifth Circuit denied Henry Schein's motion to compel arbitration, based on the finding that the injunction exclusion rendered the bid for arbitration "wholly groundless".

The Supreme Court reversed and rejected the availability of a "wholly groundless" exception to arbitrators' competence to entertain arbitrability questions. The Court unanimously held that "*arbitration is a matter of contract*", so a court's duty is to ensure its full enforcement pursuant to the terms of the contract. Accordingly, if the parties agreed to have arbitrability questions decided by an arbitrator, it is solely the arbitrator's role to evaluate the merits of such questions. The Justices were unmoved by Archer and White's concerns about the need for a deterrent against frivolous motions to compel arbitration.

The Court's ruling is in line with the Federal Arbitration Act, which allows the parties to entrust arbitrators with solving "threshold arbitrability questions". It is also in line with the Court's precedents and general pro-arbitration stance. US courts have traditionally proved supportive of arbitration, treading carefully along the boundaries between arbitral jurisdiction and court jurisdiction. This trend is further reinforced by *Henry Schein* v. *Archer and White*, which also offers a window on the attitude to-

ward arbitration of the newest additions to the Supreme Court bench, Justices Gorsuch and Kavanaugh (the latter delivered the Opinion).

The decision is also consistent with international practice. It is noteworthy that in continental Europe the issue at hand would not properly qualify as one of "arbitrability", which defines the set of legal matters that the parties may validly subject to an arbitration agreement, but one of competence/jurisdiction. However, this language difference does not affect the substantive outcome, as the *kompetenz-kompetenz* principle (embodied in Art. 16(1) of the UNCITRAL Model Law) would vest the arbitral tribunal with the power to decide on the existence and reach of its own jurisdiction.

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