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DETERMINING QUESTIONS OF ARBITRABILITY: WHERE DO WE STAND AFTER SCHEIN?

by William W Russell

I. INTRODUCTION

The history of the *Henry Schein, Inc. v. Archer & White Sales, Inc.* case shows that some thresholds can be more difficult to cross than others. The parties in *Schein* spent almost a decade battling over where the battle should take place: court or arbitration. Even though the case settled prior to resolving all the issues surrounding this battle, the case law left in its wake provides a good summary of the current state of the law regarding the steps in determining arbitrability. The case also highlighted recent questions regarding the long-standing and ubiquitous understanding that incorporating most arbitration rules by reference into an arbitration agreement effectively delegates the arbitrability question to the arbitrators.

This article will discuss the necessary steps in determining the arbitrability question, including certain implicated issues such as the applicable law and the recent questions regarding the delegation of the arbitrability issue to the arbitrators.

II. BACKGROUND OF THE SCHEIN CASE

The *Schein* case involved an antitrust claim brought by Archer & White Sales, Inc. against Henry Schein, Inc. in 2012 in the Eastern District of Texas. The case went to the Fifth Circuit and the Supreme Court twice on arbitrability issues and finally settled in 2021.[1] In addition to economic damages, Archer sought injunctive relief, a fact that ultimately converted the arbitrability issue from a mere motion into an almost decade-long odyssey. The arbitration agreement in the Schein case had a split arbitration clause specifically excluding injunctive relief from its scope.[2]

The federal magistrate judge ruled that incorporating the AAA Commercial

[1] Bryan Koenig, *Dental Suppliers Settle Antitrust Dispute Ahead of Trial*, LAW360 (Apr. 26, 2021), https://www.law360.com/articles/1378719/dental-suppliers-settle-antitrust-dispute-ahead-of-trial.

[2] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017), vacated and remanded, 139 S. Ct. 524 (2019). The arbitration agreement covered in part "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief…)." *Id.*

Arbitration Rules and Mediation Procedures ("AAA Commercial Rules") in the arbitration clause meant that questions of arbitrability were to be decided by the arbitrator.[3] The district court judge disagreed, concluding that a motion to compel arbitration of an action seeking injunctive relief—the relief that was expressly excluded from the scope of the arbitration clause—was "wholly groundless" and did not need to be sent to the arbitrators.[4] The case ultimately worked its way to the Supreme Court on this issue, and the Court determined that the FAA does not contain a "wholly groundless" exception to submitting disputes to arbitration.[5] Foreshadowing the next stage of litigation, the Court made a point of expressing "no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator."[6]

On remand, the Fifth Circuit re-engaged the question of whether there was clear and unmistakable evidence of a delegation of the arbitrability issue based on the incorporation by reference of the AAA Commercial Rules. The court concluded that the standard was not met, reasoning that the AAA Commercial Rules (including the delegation found in those Rules) applied only to those claims that had not been carved out of the scope of the arbitration clause. The delegation language in the AAA Commercial Rules, therefore, did not apply to injunctive claims.[7] The Supreme Court granted certiorari on some issues, but refused to grant certiorari on the delegation question. After briefing and oral argument, the Court dismissed the second grant of certiorari as improvidently granted.[8] The case was settled shortly thereafter.[9]

[3] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-CV-572-JRG-RSP, 2013 WL 12155243, at *1 (E.D. Tex. May 28, 2013).

[4] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG, 2016 WL 7157421, at *8–9 (E.D. Tex. Dec. 7, 2016).

[5] *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

[6] *Id.* at 531.

[7] *Archer & White Sales, Inc.*, 935 F.3d 274, 282 (5th Cir. 2019).

[8] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021).

[9] Koenig, *supra* note 1.

III. WHERE DO WE STAND IN THE WAKE OF SCHEIN? ANALYTICAL STEPS FOR DETERMINING ARBITRABILITY.

The *Schein* case is the latest pronouncement in the Court's guidance over the years regarding the analytical steps for determining whether or not a dispute is subject to arbitration. The analysis draws from federal common law on arbitrability and state law on contract interpretation. Therefore, a threshold question is what law governs these questions of arbitrability, and how do they relate to each other? Next, what analytical steps should a court or arbitrator follow to make this determination?

A. *What Law Governs Arbitrability Questions?*

Navigating the arbitrability rubric requires input from both federal and state law. It is not always clear how to delineate what territory is governed by the Federal Arbitration Act and its associated common law, and what territory is governed by the state arbitration acts and common law.

1. Role of the Federal Arbitration Act and Federal Common Law

The Federal Arbitration Act ("FAA") provides the framework for determining arbitrability issues governed by the FAA. The FAA extends to any contract "affecting commerce," *i.e.*, as far as the Commerce Clause will reach.[10] Section 2 of the FAA– "the primary substantive provision of the Act"–sets forth the federal mandate that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[11] Such grounds include state-law issues regarding contract validity and formation.[12] The *Moses H. Cone* Court observed that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . . [the] effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[13]

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[10] *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

[11] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); 9 U.S.C. § 2.

[12] *Rent–A–Center, W., Inc. v. Jackson*, 561 U.S. 63, 79 (2010); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[13] *Moses H. Cone*, 460 U.S. at 24.

For arbitration agreements covered by the FAA, "the court is to make the arbitrability determination by applying the federal substantive law of arbitrability."[14] The FAA establishes that "as a matter of federal law, any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[15]

2. Role of State Arbitration Acts and State Common Law

Notwithstanding the broad scope addressed by federal arbitration law, the resolution of many arbitrability questions turn on state law.

(i) Role of State Common Law

Despite the federal presence in this field, state contract law and arbitration law play a role in making arbitrability determinations: "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below [regarding clear and unmistakable evidence of delegation]) should apply ordinary state-law principles that govern the formation of contracts."[16] The FAA does not "reflect a congressional intent to occupy the entire field of arbitration."[17] The *Volt* Court confirmed that the FAA does not prohibit the application of state arbitration acts simultaneously with the FAA, as long as the provisions of the state act do not conflict with the objectives of the FAA.[18]

The Supreme Court of Texas endeavored to delineate the metes and bounds of these bodies of law: "under the FAA, state law governs whether a litigant agreed to arbitrate, and federal law governs the scope of an arbitration clause."[19] These bodies of law exist in harmony. Texas appellate courts have observed that "because many of

[14] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *see also Moses H. Cone*, 460 U.S. at 24–25, n.31 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

[15] *Moses H. Cone*, 460 U.S. at 24–25 (emphasis added).

[16] *First Options of Chic., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

[17] *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

[18] *Id.* at 475–76.

[19] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005).

the underlying substantive principles are the same, when appropriate, we rely on both federal and state case law."[20] The US Supreme Court delineated the outer limits of the applicability of state law by explaining that while FAA Section 2's "saving clause[21] preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[22]

Federal law certainly has occupied some of this state-law territory. For example, the "clear and unmistakable" evidence standard for delegating the issue of arbitrability to the arbitrator is a federal edict on contract interpretation rules. The Supreme Court explained that "it is an 'interpretive rule,' based on an assumption about the parties' expectations."[23] The *Volt* Court also illustrated how the federal presumption favoring arbitration meshes with state contract law:

> [I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.[24]

The delineation between state and federal law is not always clear.[25] For example, the Supreme Court of Texas struggled with this issue in the context of non-signatories observing that "it is not entirely clear what substantive law governs whether a nonparty must arbitrate."[26] Regarding procedural issues, the court explained: "[w]hen Texas courts are called on to decide if disputed claims fall within

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[20] *Hous. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 906 (Tex. App. 2019, pet. denied); *see also Weekley Homes*, 180 S.W.3d at 131 (applying "state law while endeavoring to keep it as consistent as possible with federal law").

[21] Section 2's savings clause provides in relevant part: "… save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[22] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (finding a California law making class arbitration waivers unconscionable to be in conflict with the FAA, and therefore, preempted); *see also Rent–A–Center*, 561 U.S. at 72 (upholding delegation clause against unconscionability challenge under Nevada law).

[23] *Rent–A–Center*, 561 U.S. at 79, n.1 (discussing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

[24] *Volt Info. Scis.*, 489 U.S. at 476.

[25] *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (noting that whether state or federal law of arbitrability applies "is often an uncertain question").

[26] *In re Weekley Homes*, 180 S.W.3d at 130–31.

the scope of an arbitration clause under the [FAA], Texas procedure controls that determination."[27]

The FAA and the associated federal case law create a body of federal substantive law on these arbitrability issues.[28] Nonetheless, analysis of issues of contract formation, validity, and grounds for revocation as referenced in Section 2's savings clause draw from state-law principles that govern the formation of contracts.[29] As summarized in generalities by the Supreme Court of Texas, state law governs whether the parties agreed to arbitrate, and federal law governs the scope of an arbitration agreement.[30] These state-law contract interpretation principles, however, are subject to being overwritten by federal arbitration substantive law.[31]

(ii) Role of State Arbitration Acts

In *Volt*, the Supreme Court confirmed that application of state arbitration acts simultaneously with the FAA is permitted, as long as the provisions of the state acts do not conflict with the objectives of the FAA.[32] Under *Volt* and *Mastrobuono*, if the parties elect to proceed under a state arbitration act instead of the FAA, that decision will be respected to the extent those acts are not in conflict with the FAA. If the parties do not make such an express selection, the application of state arbitration acts is less clear.

In the international arbitration field, it is relatively well accepted that selection of the seat of arbitration activates that country's arbitration act as the procedural law of the arbitration, referred to as the *Lex Arbitri* or curial law. As recognized by multiple federal courts, "[u]nder the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies

[27] *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992).

[28] *Moses H. Cone*, 460 U.S. at 24.

[29] *First Options*, 514 U.S. at 944.

[30] *Weekley Homes*, 180 S.W.3d at 130.

[31] *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

[32] *Volt Info. Scis.*, 489 U.S. at 475–76; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

to the arbitration."[33]

In fact, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (commonly referred to as the "New York Convention") establishes the seat of arbitration as the "primary jurisdiction:" "[u]nder the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award."[34]

For US arbitrations covered by Chapter 2 or 3 of the FAA (implementing the New York Convention and the related Panama Convention respectively), the FAA is likely to be the applicable arbitration law. The drafting committee of the Revised Uniform Arbitration Act set forth its view on the limited application of state arbitration acts in the international context:

> There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under Chapter 2 of Title 9 and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention.[35]

There is very little authority discussing whether the seat determines the procedural law of arbitration in the domestic arbitration context. Nonetheless, for proceedings in Texas state courts, courts will look to the Texas General Arbitration Act.[36] If the arbitration is also covered by the FAA, Texas courts have provided practical guidance:

> We note that the FAA and the TAA are not mutually exclusive. Even where the FAA applies to substantive issues, we apply Texas law to procedural issues in

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[33] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan*, 364 F.3d 274, 291 (5th Cir. 2004); *see also Balkan Energy Ltd. v. Republic of Ghana*, 302 F.Supp.3d 144, 152–53 (D.D.C. 2018) ("In this case, because the parties designated in the arbitral clause that The Hague, Netherlands was to serve as the seat of arbitration, Dutch law supplied the law applicable to the arbitration agreement."), appeal dismissed, 2018 WL 5115571 (D.C. Cir. Oct. 12, 2018).

[34] *Karaha Bodas Co.*, 364 F.3d at 287 (citing Art. V of the New York Convention, insertions in original).

[35] UNIF. ARB. ACT, Prefatory Note, at 6 (NAT'L CONF. COMM'RS 2000), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af.

[36] Texas Alternate Methods of Dispute Resolution, General Arbitration Act, CIV. PRAC. & REM. CODE § 171; *see also* Texas Arbitration and Conciliation of International Commercial Disputes Act, CIV. PRAC. CODE & REM. § 172.

> arbitration proceedings. Here, we need not determine whether confirmation of an award is procedural or substantive or which act applies because our conclusion would be the same under either act.[37]

Accordingly, the application of the Texas Arbitration Act ("TAA") in disputes which are also governed by the FAA is not clearly defined. Some guiding principles include that courts should endeavor to read the acts in harmony, and at least in Texas courts, procedural issues can be controlled by the TAA while substantive issues can be controlled by the FAA.

B. *Steps to Determine Arbitrability*

The *Schein* case and its Supreme Court predecessors laid out several steps and presumptions for the determination of whether a dispute is arbitrable. The threshold questions are (i) whether there is an agreement to arbitrate between the parties; and (ii) whether the agreement covers the dispute [38] The Supreme Court has also recognized that the arbitrability question can be delegated to an arbitrator if "the parties clearly and unmistakably provide" for such delegation to the arbitrator.[39]

1. Question 1: Is there an Agreement to Arbitrate?

The first step is to determine "whether the parties entered into any arbitration agreement at all."[40] The *Rent–A–Center* Court confirmed that the "FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms."[41] The Supreme Court has repeatedly pointed out that this is a question for the court: "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."[42]

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[37] *Cambridge Legacy Grp., Inc. v. Jain*, 407 S.W.3d 443, 448 (Tex. App. 2013, pet. denied) (citations omitted); *see also Hou. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 906 n.6 (Tex. App. 2019, pet. denied) ("[B]ecause many of the underlying substantive principles are the same, when appropriate, we rely on both federal and state case law."); *In re Weekley Homes*, 180 S.W.3d at 131 (applying "state law while endeavoring to keep it as consistent as possible with federal law").

[38] *Howsam*, 537 U.S. at 84.

[39] *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *see also First Options*, 514 U.S. at 944.

[40] *Archer & White Sales*, 935 F.3d at 278 (citation and emphasis omitted).

[41] *Rent–A–Center*, 561 U.S. at 67–68.

[42] *Schein*, 139 S. Ct. at 530.

2. Question 2(A): Who Determines Arbitrability?

(i) Default: Court Decision

If a valid arbitration agreement exists, the next question is whether the dispute falls within the scope of that agreement. A threshold question is who decides this question of arbitrability?[43] The general rule is that "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[44]

The Supreme Court has made clear that the presumption in favor of arbitration does *not* apply to the question of "whether the parties have submitted a particular dispute to arbitration."[45] To the contrary, the Supreme Court has created a presumption in favor of judicial determination of whether the dispute is arbitrable, which can only be overcome with clear and unmistakable evidence to the contrary.[46]

(ii) Delegation to Arbitrator: Clear and Unmistakable Evidence

AT&T and its progeny make clear that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."[47] The "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."[48]

The Supreme Court in Schein summarized the reasoning in *First Options* and *Rent-A-Center* as follows:

> Under the [Federal Arbitration] Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. Applying

[43] The scope of "arbitrability" includes several components. For example, it includes questions of "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Schein*, 139 S. Ct. at 529; *see also Rent--A-Center*, 561 U.S. at 69.

[44] *AT&T Techs.*, 475 U.S. at 649 (emphasis added).

[45] *Howsam*, 537 U.S. at 83.

[46] *Id.*; *see also AT&T Techs.*, 475 U.S. at 649.

[47] *See Schein*, 139 S. Ct. at 530; *AT&T Techs.*, 475 U.S. at 649; *First Options*, 514 U.S. at 944; *Rent-A-Center*, 561 U.S. at 69 n.1.

[48] *Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70).

> the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. We have explained that an agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.[49]

Overcoming the presumption that arbitrability questions are for the court is subject to a heightened standard: "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[50] As *First Options* explained, this reverses the presumption in favor of arbitration:

> In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"–for in respect to this latter question the law reverses the presumption.[51]

Therefore, the court must determine whether the parties displayed clear and unmistakable evidence of their intent to delegate the arbitrability issue to the arbitrators.

(iii) Clear and Unmistakable Evidence: Express Statement in the Arbitration Clause

Courts have analyzed various purported delegation scenarios under this heightened standard. Courts have held that the parties can meet this standard, of course, by including an express delegation clause in their agreement to arbitrate. For example, the arbitration clause in *Rent-A-Center* stated as follows: "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this [agreement to arbitrate]."[52] Such express language in the clause constitutes

[49] *Id.* (citations and quotation marks omitted)

[50] *First Options*, 514 U.S. at 944; *see also Rent–A–Center*, 561 U.S. at 70, n.1; *Schein*, 139 S. Ct. at 530, 531.

[51] *First Options*, 514 U.S. at 944–45 (citing *Mitsubishi Motors*, 473 U.S. at 626 for the statement regarding "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

[52] *Rent–A–Center*, 561 U.S. at 66; *see also Carson v. Giant Food, Inc.*, 175 F.3d 325, 330–31 (4th Cir. 1999) (explaining that parties "who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect").

clear and unmistakable evidence of the intent to delegate the arbitrability issues to the arbitrator.

(iv) Clear and Unmistakable Evidence: Incorporation of Arbitration Rules in the Arbitration Clause

Virtually all federal circuit courts have found that the parties can meet the clear and unmistakable evidence standard merely by incorporating by reference arbitration rules that give the arbitrator jurisdiction to determine its own jurisdiction.[53] In international arbitration circles, this is often referred to as "competence-competence" language. For example, Rule 7(a) of the AAA Commercial Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[54]

The Fifth Circuit has held that "stipulating that the AAA Rules will govern the arbitration of disputes constitutes such 'clear and unmistakable' evidence."[55] Virtually every federal circuit is in accord.[56] Such delegation clauses are common throughout the major administrative bodies' domestic[57] and international[58]

[53] *See infra* note 56.

[54] AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule 7(a) [hereinafter "AAA Rules"].

[55] *Arnold v. HomeAway, Inc.*, 890 F.3d 546, 552 (5th Cir. 2018); *see also Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012).

[56] *See, e.g.*, *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (ICC Rules); *Emilio v. Sprint Spectrum L.P.*, 508 Fed.Appx. 3 (2d Cir. 2013) (JAMS Rules); *Richardson v. Coverall N. Am.*, Inc., 2020 U.S. App. LEXIS 13568 (3d Cir. 2020) (AAA Rules); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 530 (4th Cir. 2017) (JAMS Rules); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 851 (6th Cir. 2020) (AAA Rules); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009) (AAA Rules); *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015) (AAA Rules); *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017) (JAMS Rules); *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018) (AAA Rules); *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015) (UNCITRAL Rules); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (AAA Rules).

[57] *See, e.g.*, AAA Rules, *supra* note 54, Rule 7(a); CPR Administered Arbitration Rules (Mar. 1, 2019), Rule 8.1; CPR Non-Administered Arbitration Rules (Mar. 1, 2018), Rule 8.1; JAMS Comprehensive Arbitration Rules & Procedures (June 1, 2021), Rule 11(b); JAMS Engineering & Construction Arbitration Rules & Procedures (June 1, 2021), Rule 11(b).

[58] *See, e.g.*, China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (Jan. 1, 2015), Rule 6.1; CPR Administered Arbitration Rules (Mar. 1, 2019), Rule 8.1; CPR Non-Administered Arbitration Rules (Mar. 1, 2018), Rule 8.1; Dubai International Arbitration Centre Arbitration Rules (May 7, 2007), Rule 6.2; 2018 HKIAC Administered Arbitration Rules (Nov. 1, 2018), Rule 19.1; ICC Rules Arbitration

arbitration rules.

However, this ubiquitous agreement regarding the effectiveness of incorporation of arbitration rules has been questioned recently and was squarely before the Court in *Schein*. In its second trip to the Supreme Court, however, the Court refused to grant certiorari on this question. Presumably, this is due to the unanimity in the lower courts on this issue.[59]

On the other hand, some notable arbitration practitioners, thought leaders, publications, and lower courts deviate from the consensus. Most notably, the ALI's Restatement of the US Law of International Commercial and Investor-State Arbitration (the "Restatement") takes the opposite view regarding whether the incorporation of arbitration rules meets the "clear and unmistakable" evidence standard.[60] Professor George Bermann, the chief reporter for the Restatement filed an amicus brief in both *Schein* Supreme Court proceedings.[61] His argument tracked the reasoning in the Restatement. First, the incorporation by reference of arbitration rules does not constitute clear and unmistakable evidence. Second, competence-competence clauses allow tribunals to determine their authority, but they do not deprive courts of their authority. Third, competence-competence clauses are ubiquitous in arbitration rules, treating them as "clear and unmistakable evidence" would effectively undermine the elevated standard set by *First Options*. Fourth, to be truly "clear and unmistakable," the delegation belongs in an arbitration agreement

(2021), Art. 6.3; ICDR International Arbitration Rules (Mar. 1, 2021), Art. 21(1); JAMS International Arbitration Rules & Procedures (June 1, 2021), Rule 5.4; LCIA Arbitration Rules (Oct. 1, 2020), Rule 23.1; Singapore International Arbitration Centre Arbitration Rules (Aug. 1, 2016), Rule 28.2; UNCITRAL Arbitration Rules (2013), Rule 23(1); WIPO Arbitration Rules (July 1, 2021), Rule 36(a).

[59] *In re Intuniv Antitrust Litig.*, Civil Action No. 1:16-cv-12653-ADB, 2021 WL 517386, at * 4, n.3 (D. Mass. Feb. 11, 2021) (observing that the procedural history of Schein II "suggest[s] that [the Court] was not troubled by the state of the law regarding the significance of incorporating the AAA's rules").

[60] RESTATEMENT OF INT'L COM. & INV.-STATE ARB., § 2.8 cmt. B, n.b(iii) (2019) (Competence of the Tribunal to Determine its Own Jurisdiction).

[61] *See* Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent, *Schein*, 139 S. Ct. 524 (No. 19-963), http://www.supremecourt.gov/DocketPDF/19/19-963/158091/20201019132229861_Brief%20of%20Amicus%20Curiae%20Professor%20George%20A.%20Bermann.pdf (hereinafter "Bermann Brief").

itself, not buried in referenced rules of arbitral procedure.[62]

In his brief, Professor Bermann underscored the importance of judicial determination of arbitrability questions set forth in *First Options*.[63] Starting with the FAA, Section 4 authorizes a court to compel arbitration "upon being satisfied that the making of the agreement for arbitration . . . is not in issue."[64] He reasoned that these "gateway" arbitrability issues are an important component of the consent foundation upon which arbitration is built, and therefore, they directly impact the legitimacy of arbitration as a whole.[65] At the very core of arbitration is the understanding that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."[66]

He reasoned further that although incorporating arbitration rules with a competence-competence clause may provide the tribunal the power to determine its own jurisdiction, it does not deprive the courts of their important role in determining arbitrability questions.[67] This is also known as the "positive" and "negative" dimensions of competence-competence. The positive dimension confirms the tribunal's authority to determine its own jurisdiction, and the negative dimension deprives the courts of their authority to determine the arbitrability questions (prior to the arbitration).[68] Professor Bermann noted that the language of common arbitration rules grant the tribunal authority, but they do not contain language divesting the court of its jurisdiction.[69] Justice Ginsburg drew on this rationale in a

[62] *Id.* at 14.

[63] *Id.* at 24.

[64] 9 U.S.C. § 4.

[65] Bermann Brief at 3–4.

[66] *AT&T Techs.*, 475 U.S. at 648–49; *see also First Options*, 514 U.S. at 945 ("[O]ne can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.").

[67] Some have argued that the phrase "shall have the power" does not even constitute a mandatory directive, much less an unwritten exclusion of the court's power. *See Doe v. Natt*, 299 So. 3d 599 (Fla. 2d DCA 2020).

[68] Bermann Brief at 21–22.

[69] *Id.* at 15.

question in Schein I's oral argument: "why can't it be both; that is, that the arbitrator has this authority to decide questions of arbitrability, but it is not exclusive of the court?"[70] Professor Bermann and the Restatement contend that a reference only to the positive dimension is too oblique to inform parties of the negative dimension and therefore cannot meet the clear-and-unmistakable evidence standard.[71]

In response to the unanimity of the federal circuits on this issue, Professor Bermann contended that those courts "have offered no serious support for the proposition" that incorporation of the rules by reference meets the clear-and-unmistakable-evidence test.[72] He characterized these opinions as either making mere perfunctory and conclusory decisions or relying on those perfunctory conclusions.[73]

Professor Bermann and the Restatement are not alone in taking this position. In his brief, Professor Bermann cited various federal district courts and state courts following this reasoning and holding that the purported delegation does not deprive the court of its jurisdiction over such arbitrability questions.[74]

The Florida Supreme Court recently addressed this issue. The intermediate Florida court of appeals considered whether incorporation by reference of the AAA Commercial Rules in an Airbnb "clickwrap" agreement constituted clear-and-unmistakable evidence of delegation.[75] The court of appeals articulated many of the

[70] Transcript of Oral Argument at 7, *Schein*, 139 S. Ct. 524 (No. 17-1272). *See also id.* at 18 ("When the model case is this Court's Rent-a-Car decision, and there the clause said the arbitrator, not the court, has exclusive authority. And, here, we --we're missing both the arbitrator, to the exclusion of the court, and the arbitrator has exclusive authority. It's nothing like that."); Bermann Brief at 5.

[71] Bermann Brief at 24.

[72] *Id.* at 16.

[73] *Id.*

[74] *See, e.g.*, *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 789 (Cal. Ct. App. 2012) ("[T]he rule merely states that the arbitrator shall have 'the power' to determine issues of its own jurisdiction . . . . This tells the reader almost nothing, since a court also has the power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, shall determine those threshold issues, or has exclusive authority to do so . . . .") (emphasis omitted); *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016); *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016); *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005); *Fallang Fam. Ltd. P'ship v. Privcap Cos., LLC*, 316 So. 3d 344 (Fla. 4th DCA 2021).

[75] *Doe v. Natt*, 299 So. 3d 599, 605 (Fla. 2d DCA 2020).

grounds set forth by Professor Bermann and held:

> In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction.[76]

The Florida Supreme Court, however, addressed and rejected this "outlier" reasoning.[77] Regarding the argument that the delegation in the AAA Commercial Rules was not attached and only applied if an arbitration was convened, the court reasoned that the AAA Commercial Rules were incorporated into the agreement in the same fashion as various other extra-contractual policies, programs, rules, guides, and other materials were incorporated.[78] The incorporation of the AAA Commercial Rules is no less legally effective than the incorporation of these other documents and constitutes clear and unmistakable evidence of the parties' intent. The court cited the *Schein* case to dispatch the argument that the delegation provision of the AAA Commercial Rules only contained the positive dimension of competence-competence and did not contain the negative dimension, stating "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."[79]

3. Question 2(B): Determining Arbitrability

Once the existence of an agreement to arbitrate has been established, there is a recognized presumption in favor of arbitrability when determining the scope of the arbitration clause:

> [I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due

[76] *Id.* at 609.

[77] *Airbnb, Inc. v. Doe*, No. SC20-1167, 2022 Fla. Lexis 552, *12 (Fla. Mar. 31, 2022).

[78] *Id.* at *16–17.

[79] *Id.* at *17–18 (quoting *Schein*, 139 S. Ct. at 529–30.

> regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.[80]

When the presumption applies, a court should not deny arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[81]

IV. CONCLUSION

Although the threshold steps required to determine arbitrability are easy to identify, the Schein case demonstrates that sometimes they are difficult to cross. As with many arbitrability disputes, many of these problems can be avoided with careful drafting of the arbitration agreement. Nonetheless, if a party finds itself in an arbitrability dispute, it is worth the effort to carefully analyze the sequence of questions described above, applicable presumptions, and current issues in the courts relating to the determination of the arbitrability question.

WILLIAM W. RUSSELL is Counsel in the Houston office of Reed Smith LLP. Will has been practicing since 1995 representing clients primarily in litigation and international arbitration in the fields of oil & gas, energy, construction, and commercial disputes. He is an adjunct professor of International Commercial Arbitration at the University of Houston Law Center, and has served for years on the executive board of the Houston Bar Association's International Law Section, including two years as the Chair. He is a member of the firm's Energy and Natural Resources section. Will is fluent in Spanish and has handled cases throughout the energy sector, including commercial, construction, and tort claims in the upstream, midstream, downstream, and power sectors. Will serves as an arbitrator and is a member of multiple domestic and international administrative rosters of neutrals as well as the Energy Arbitrators List.

[80] *Volt Info. Scis.*, 489 U.S. at 475–76; *see also Moses H. Cone*, 460 U.S. at 24–25 ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

[81] *AT&T Techs.*, 475 U.S. at 650.

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Plano, Texas, 75024-3561
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