

Not all Supreme Court arbitration decisions feature strident five-to-four splits of opinion. Such contentious cases, like *Lamps Plus* this year (see separate Analysis), deal with requirements that claimants pursue their claims alone, rather than *en masse*. When it comes to arbitration procedure, however, the Court generated unanimous opinions in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) and *Henry Schein, Inc. v. Archer & White Sales*, 139 S. Ct. 524 (2019).

Parties to contracts frequently provide that disputes arising under the contract will be resolved not through court litigation, but by the alternative method of arbitration. Such contracts routinely set out details about how the arbitrator is to be appointed and the procedures to be followed. The Federal Arbitration Act (FAA) requires courts to enforce such clauses. Thus, if one party to the contract sues the other in court, the defendant will petition the court to stay or dismiss the case and order the parties to arbitration. One interesting question, however, is whether the court should resolve any issues before sending the parties to arbitration.

Of course, the parties to an arbitration clause want the arbitrator to decide the merits of the underlying dispute, such as whether one party breached the agreement and, if so, what harm was caused. But what about antecedent issues relating to whether the dispute should be sent to arbitration at all? Such “gateway” issues of “arbitrability” – whether the clause at hand covers the present controversy between the parties – ordinarily are decided by the court. But the parties may agree that such issues are for the arbitrator. When they do so, the court sends the dispute to the arbitrator for resolution of the arbitrability questions and, if appropriate, a decision on the merits. Both *New Prime* and *Henry Schein* involved clauses requiring the arbitrator to decide the question of arbitrability.

In *Henry Schein*, the parties agreed that “[a]ny dispute arising under or related to” their agreement would be subject to arbitration, “except for actions seeking injunctive relief . . .” One of the parties sued the other in federal court, alleging violations of federal antitrust law and seeking an injunction (in addition to other relief). The plaintiff argued that the arbitration clause – on its face – did not apply, because it was suing for injunctive relief. The lower federal courts agreed: when the argument for arbitration was “wholly groundless” in the court’s view, it may deny arbitration. The courts of appeals had split on whether to recognize this “wholly groundless” doctrine.

The Court resolved the split by reversing unanimously (in Justice Kavanaugh’s first opinion as a Justice). If the parties agree that arbitrability must be decided by the arbitrator, the arbitrator must decide it – even if, on the face of the agreement, it appears that the argument of arbitrability is baseless. As a statutory matter, the FAA contains no “wholly groundless” exception. As a matter of policy, allowing a court to engage the question will in many cases result in wasteful satellite litigation over whether the dispute is subject to arbitration. The arbitrator must make the decision. One of the few bases for judicial review of an arbitration decision is that the arbitrator exceeded her powers under the contract, so an improper assumption of arbitral power can be fixed at the back end of the case.

New Prime concerned a different issue. Section 1 of the FAA provides that the Act does not apply to “contracts of employment of . . . workers engaged in foreign or interstate commerce.” The parties’ arbitration agreement was extremely broad, and clearly included the

question of arbitrability. The issue of whether the FAA applies, however, presents a question of law, which must be decided by the court.

The plaintiff in *New Prime* was a driver for an interstate trucking firm. His contract labelled him an independent contractor rather than an employee. The trucking firm argued that the dispute therefore did not involve a contract of “employment” and was subject to arbitration. The Court rejected this interpretation and engaged in an etymological analysis of “employment.” It concluded that the word should be interpreted as it was understood in 1925, when the FAA was passed. In that context, the word was broader than the present understanding, and was intended to connote that the contract involved one who works in foreign or interstate commerce. The plaintiff clearly did, and thus the FAA did not apply. The driver’s claims, then, were not subject to arbitration.

In sum, these two decisions afford clear guidance: courts are to decide whether the FAA applies in the first instance; if it does, and the parties have delegated to the arbitrator the question of arbitrability, the court must not judge that question, but must allow the arbitrator to decide it.

Richard D. Freer, *Charles Howard Candler Professor of Law*