The Arbitration Review of the Americas

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Competence-Competence and Obtaining Pre-Award Judicial Review of Arbitrability in the Americas

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Competence-Competence and Obtaining Pre-Award Judicial Review of Arbitrability in the Americas

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Summary

IN SUMMARY

This article examines the parameters of the principle of competence-competence in the Americas and the availability of judicial determinations on arbitrability prior to the issuance of a final award. The article looks generally at the current status of competence-competence and the ability to obtain pre-award judicial review of arbitrability across a number of jurisdictions in the Americas, and includes a discussion of the variations on the doctrine's scope and application in the subject countries.

DISCUSSION POINTS

- Background information and current status of the principle of competence-competence and pre-award judicial review of issues of arbitrability across the Americas

REFERENCED IN THIS ARTICLE

- 1985 UNCITRAL Model Law on International Commercial Arbitration.
- 2006 UNCITRAL Model Law on International Commercial Arbitration (Amendments)
- Argentine Law No. 27,449 on International Commercial Arbitration in Argentina
- Colombian Law No. 1563 of 2012, Statute on National and International Arbitration in Colombia
- Peruvian Arbitration Law (1 September 2008)
- Law No. 131, Panamanian Arbitration Law (31 December 2013)
- Law No. 19636, Uruguayan International Commercial Arbitration Law (26 July 2018)
- Canadian International Commercial Arbitration Acts and international arbitration law framework
- US Federal Arbitration Act (1925)
- Henry Schein, Inc v Archer & White Sales, Inc, 139 S Ct 524 (2019)

The competence-competence principle of arbitrability[1] is of central importance to the international arbitral process. Generally, it provides that international arbitral tribunals have the 'power to consider and decide disputes concerning their own jurisdiction'[2] - and encompasses 'disputes over the existence, validity, legality and scope of the parties' arbitration agreement[s]'. [3]

Historically, the doctrine was understood to mean a tribunal has the ability to decide its own jurisdiction, without judicial review, at least until the arbitration has been completed;[4] that is, if the arbitral tribunal is to have any real role in deciding its own jurisdiction – the competence-competence concept – courts must refrain from deciding jurisdiction in the first instance.[5]

Although that formulation is easy to apply, it can also lead to potential inefficiencies, such as when arbitration is invoked over an issue that may ultimately be found not to be arbitrable.

This article examines the parameters of this aspect of competence-competence in the Americas. Specifically, we examine the extent to which parties are able to obtain a judicial determination on arbitrability prior to the arbitrator issuing a final award. We will address this across a number of jurisdictions in the Americas, including several Latin American countries and Canada, all of which have largely accepted the principle, as well as in the United States, which applies a different approach. As will be discussed, while most national legal systems recognise the competence-competence doctrine, there are variations within those systems on the doctrine's scope and application.[6]

LATIN AMERICA

In this section, we provide a country-by-country review of the availability of a judicial determination of arbitrability, prior to the issuance of a final award, in selected Latin American states.

Argentina

In Argentina, the law expressly empowers an arbitration panel to rule on its own jurisdiction.[7] Generally, Argentine law provides that the existence of an arbitration agreement divests the courts of jurisdiction. However, there are two potential avenues to obtain a judicial ruling on arbitrability prior to a final award.

One avenue is for a party to a contract that contains an arbitration clause to file a complaint in court. In this event, the other party can object on the grounds that the dispute is subject to arbitration, and the court will decide whether it is.

Generally, Argentine law favours arbitration such that a court will refer the dispute to arbitration so long as there is a colourable claim that the dispute is within the scope of the arbitration clause.

On the other hand, if the court determines that the issue is clearly outside the scope of the clause, it will rule that it has authority to resolve the dispute.[8] A decision on that issue could then be subject to appeal, in which case the Court of Appeals (or, ultimately, the Supreme Court of Justice) of Argentina will render a final decision on the matter.

In international commercial arbitration, if a matter proceeds before an arbitral tribunal, the tribunal has the ability to render a preliminary ruling on the issue of jurisdiction. If a preliminary ruling is issued upholding jurisdiction, a challenging party has 30 days to appeal to the Court of Appeals at the seat of the arbitration.

A decision by the Court of Appeals would not be subject to ordinary appeal. It may be reviewable by the Supreme Court of Justice by means of an extraordinary appeal; however, there is not yet a settled interpretation of this provision under Argentina's Law on International Commercial Arbitration.

Colombia

The competence-competence doctrine is strongly enshrined in Colombian jurisprudence. In particular, article 79 of Law No. 1563 of 2012 establishes that the arbitral tribunal has sole jurisdiction to rule on its own competence.[9] It specifies that the tribunal's jurisdiction extends over 'any defenses or objections to arbitration relating to the non-existence, nullity, annulment, invalidity or ineffectiveness of the arbitration agreement . . . or any other defenses or objections which, if upheld, would prevent it from deciding on the merits of the dispute.'[10]

Accordingly, the wording of article 79 unequivocally establishes that whenever a dispute arises in relation to arbitrability, the arbitral tribunal is the sole competent authority to decide on the matter. Further, the tribunal may determine its own jurisdiction either as a preliminary matter or in the final award.[11]

Under the terms of article 109 of Law No. 1563, if the arbitral tribunal rejects any of the objections as a preliminary matter, that decision may only be challenged by a request for annulment after a final award has been issued.[12] In the event the tribunal 'declares itself incompetent' or admits that it has 'exceeded its mandate as a preliminary question,' the arbitral proceedings may still continue in respect of the other matters.[13] The decision can later be challenged by seeking an annulment after the final award. Under article 70 of the Law, should a matter that is subject to arbitration be referred to a judicial authority, the authority must refer the parties to arbitration if so requested by either of the parties.[14]

Nicaragua

Nicaraguan law empowers an arbitration panel to rule on its own jurisdiction, including issues concerning what matters have been submitted to arbitration in accordance with the arbitration agreement.[15] In addition, an arbitral tribunal has authority to decide on its jurisdiction through a preliminary ruling. If that is done and the arbitrator decides that jurisdiction exists, the decision can be appealed to the Nicaraguan Supreme Court, whose decision is final.[16]

It is also possible for a party to a contract containing an arbitration clause to file a complaint in court. In such case, the court may determine whether the matter should be sent to arbitration, either through its own interpretation of the arbitration clause or on objection by the other party.[17]

Costa Rica

In Costa Rica, arbitration clauses are interpreted restrictively. A dispute can be submitted to arbitration only if that is what the parties have agreed. A Costa Rican court will not compel parties to arbitrate unless it is convinced that the dispute falls within the scope of the arbitration clause.[18]

If an arbitral tribunal rules that a dispute that had been raised before is within the scope of its jurisdiction, the objecting party can file an appeal before the First Chamber of the Supreme Court, the decision of which will be final.

Panama

In Panama, the applicability of the competence-competence principle has historically gone through twists and turns. The principle had been included in article 17 of Panama's first arbitration law (Law Decree No. 5 of 1999);[19] however, the article was challenged before the Supreme Court of Justice in 2001 on grounds that it violated due process and was stricken as unconstitutional.

The question of arbitrability was left to judicial determination until the constitutional reform of 2004,[20] in which the principle of competence-competence was reinstated.

In 2013, Panama adopted a new arbitration law, Law No. 131, which includes the competence-competence principle in article 30.[21] Following the adoption of Law No. 131, the question of arbitrability has been left to the arbitral tribunal.

An arbitral tribunal has authority to decide its own jurisdiction via a preliminary ruling.[22] A decision affirming jurisdiction is reviewable by the Supreme Court.[23]

If a party to a contract containing an arbitration clause files a complaint in court, contending the arbitration clause is not applicable, the court will dismiss the suit without deciding whether the dispute is arbitrable. In practice, upon identifying the existence of an arbitration clause, the judge will decline jurisdiction, without need of a motion, and send the matter to arbitration.

Peru

Article 41(1) of the Peruvian Arbitration Law recognises 'the competence of the arbitrators to rule on their own jurisdiction, including challenges as to the admissibility of a claim.'[24] Under the doctrine of competence-competence, '[i]n practice and because of these rules, courts grant a stay and allow arbitrators to decide on their jurisdiction; however, if the arbitrator improperly concludes that jurisdiction exists, the award may be subject to annulment by a competent court.'[25]

Notwithstanding, a party to a contract containing an arbitration clause can file a suit in court. If the other party believes the dispute is arbitrable, it can submit a formal defence called an 'arbitration agreement exception', contending that the controversy is covered by an arbitration clause and must be resolved through arbitration.

In deciding the arbitration agreement exception, the court will interpret the arbitration agreement with a view that favours arbitration, provided that the parties unequivocally agreed to arbitrate, which can be by contract, in a specific agreement or even in the exchange of electronic communication; in other words, the court will conclude that the dispute is subject to arbitration unless it clearly is not.

Uruguay

Under Law No. 19636, which governs international arbitration, the principle of competence-competence is well-established in Uruguay.[26] A party to an arbitration can request an interim award on jurisdiction.

Article 16.3 of Law No. 19636 authorises the arbitral tribunal to resolve the dispute over jurisdiction before the final award.[27] If the arbitrator issues an interim award upholding jurisdiction, the award can be challenged before a court prior to issuance of the final award. Within 30 days of receiving a ruling, either party may request that the Appellate Court resolve the matter in no more than 60 days.[28] The decision of the court is not subject to further recourse.[29]

A party to a contract containing an arbitration clause can file a complaint in court and argue that the dispute is not arbitrable. If the counterparty raises the defence of lack of jurisdiction, the court will decide the arbitrability issue.[30] However, Uruguayan state courts interpret arbitration clauses restrictively; thus, the court will conclude that the dispute is not subject to arbitration unless it is clearly encompassed by the arbitration clause.

CANADA

In Canada, the principle of competence-competence in international commercial arbitration is established by federal legislation as well as laws enacted by Canada's provinces and territories.[31] In large measure, the laws either directly adopt or incorporate similar language to that found in article 16 of the UNCITRAL Model Law;[32] thus, '[i]t is relatively well accepted

that the competence-competence principle applies to the jurisdictional challenges regarding the applicability of the arbitration agreement.'[33]

In 2007, the Supreme Court of Canada set out a three-prong test for deciding whether, if a suit is filed in respect of a contract containing an arbitration clause and a claim is made that the dispute is subject to arbitration, the question of arbitrability should be decided by the court or an arbitral tribunal, as follows:

- the general rule is that a challenge to arbitral jurisdiction should be resolved by the arbitrator;
- a court should only depart from the rule in (1) 'if the challenge to the arbitrator's jurisdiction is based solely on a question of law'; and
- if the question for review by the court is one of mixed fact and law, then the matter should be referred to the arbitrator 'unless the questions of fact require only superficial consideration of the documentary evidence in the record'.[34]

The Supreme Court endorsed this test again in 2011.[35]

Under Canadian law, matters of contract interpretation, which includes the interpretation of arbitration agreements, are considered questions of mixed fact and law.[36] Accordingly, under Canadian law, issues of who determines arbitrability and what factual questions require only 'superficial' consideration are nuanced matters that can be determined only on a case-by-case basis.

In 2020, the Supreme Court ruled that it may be possible to depart from the general rule if the arbitrator might not actually hear the matter (eg, if the claimant is impecunious and unable to pay the costs of the arbitration). The court's rationale was that, in those instances, it would be unconscionable to uphold an arbitration agreement.[37]

This decision, while useful in carving out one distinct situation in which the general rule may not apply, sheds little light on the issue of when, in general, arbitrability can appropriately be resolved by the court, thus still leaving the issue to evaluation on a case-specific basis.

UNITED STATES

In the United States, the principle of competence-competence as it is generally understood does not apply, meaning that there is no default rule giving arbitrators the authority to decide their own jurisdiction.

As background, following the enactment of the Federal Arbitration Act in 1925, in assessing whether a given dispute falls within the scope of an arbitration clause, courts have applied a 'presumption' of arbitrability.[38] This means that courts will presume that a matter is arbitrable unless proved otherwise.[39]

However, in addressing whether the arbitrability of a dispute should be decided by a court or the arbitrator, the rule is different. Here, the presumption of arbitrability does not apply. On the contrary, the rule is that the question of whether the parties had agreed to arbitrate a given dispute is to be decided by the court, not the arbitrator, unless – and this is a very important 'unless' – there is 'clear and unmistakable' evidence that the parties agreed to have that issue decided by the arbitrator, in which case the court will leave the issue for arbitral resolution.[40]

In practical terms, in the authors' experience, the recent trend has been for courts to find that the issue of arbitrability has been delegated to the arbitrator – and thus, in the first instance, must be decided by the arbitrator. In some cases, this was because the language of the arbitration clause itself was broad enough to encompass arbitrability. In others, it was because the parties had – as is quite commonly done – agreed to have their arbitration governed by the rules of an administering organisation (such as the American Arbitration Association (AAA), the London Court of International Arbitration or the International Chamber of Commerce) that expressly provides for the arbitrator to decide his or her own jurisdiction, of which the rules are deemed to be incorporated into or otherwise part of the parties' agreement.[41]

While, as an abstract proposition, this rule seems easy to administer, complications may arise. For example, what would happen if a party claimed a right to arbitration in a case where the arbitration agreement incorporated the rules of the International Chamber of Commerce, which provide that the arbitrator shall decide his or her own jurisdiction, but the dispute at issue is, clearly and unmistakably, outside the scope of the arbitration clause? Could a court rule that the dispute is not subject to arbitration and resolve the merits of the dispute, or would the party resisting arbitration be forced to go through the process of arbitration, only to obtain the inevitable ruling that the dispute is not arbitrable, before proceeding in court?

In a 2019 decision, ***Henry Schein, Inc v Archer & White Sales, Inc*** (***Schein***), the US Supreme Court considered this issue and held that, assuming an arbitration agreement contains a clear and unmistakable delegation of authority to decide issues of arbitrability to an arbitrator, the issue of arbitrability must be decided by the arbitrator rather than a court, even if the argument for arbitrability is 'wholly groundless'.[42] In reaching its decision, it stated that when the parties' contract delegates the question of arbitrability to an arbitrator, the 'courts must respect the parties' decision as embodied in the contract'.[43]

Notwithstanding the seemingly absolutist approach taken in ***Schein***, some lower courts have found ways to effectively work around it to avoid what they perceive as unreasonable results. For example, in***Metropolitan Life Insurance Co v Bucsek,***[44] and ***20/20 Communications, Inc v Crawford,***[45] the courts focused on whether the question of arbitrability at issue had been clearly and unmistakably delegated to the arbitrator (a point that had been assumed but not decided in ***Schein***), and concluded that it had not – thus leaving the arbitrability issue open for decision by a court.

In ***Met Life***, a right to arbitration was claimed under the rules of a securities dealers' association, even though neither party had any ongoing connection with the association at the time the dispute arose. In deciding whether the question of arbitrability was to be decided by a court or an arbitrator, the Court of Appeals for the Second Circuit found that the dispute could not reasonably be found to be subject to arbitration.[46]

Although that did not per se preclude an interpretation that the question of arbitrability had been delegated to the arbitrator, it allowed the court to conclude that, considering all the evidence, including the groundlessness of the claimed right to arbitration, no clear and unmistakable delegation of the arbitrability issue had been made.[47] The court specifically distinguished its analysis from any 'wholly groundless' exception to arbitrability, which it acknowledged was precluded under Schein.

In ***20/20 Communications***, the availability of a 'class' arbitration was at issue, and the question before the court was whether the availability of such arbitration was to be decided

by a court or the arbitrator. To answer that question, the Court of Appeals for the Fifth Circuit examined the language of the agreement.

While some provisions, including the parties' selection of the rules of the AAA, which provided that the arbitrator was authorised to determine class arbitrability, could be read to support delegation,[48] other language in the contract, while not addressing the question of delegation as such, expressly excluded class arbitration.

Taking all relevant provisions together, the Court held that the requisite clear and unmistakable delegation of authority to decide arbitrability was lacking. In its words, 'it is difficult for us to imagine why parties would categorically prohibit class arbitrations to the maximum extent permitted by law, only then to take the time and effort to vest the arbitrator with the authority to decide whether class arbitrations shall be available.'[49]

Strictly speaking, the question of who decides arbitrability is different from the substantive question of whether a dispute is arbitrable, and the ***Met Life*** and ***20/20 Communications*** courts effectively made rulings on the latter to decide the former. Nonetheless, the approach embodied in those cases comports with common sense, and the authors' prediction is that it will be followed.

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Endnotes

1 This principle is also sometimes referred to as the jurisdiction-competence principle or the 'who decides' question. Gary B Born, 'Chapter 7: International Arbitration Agreements and Competence-Competence', ***International Commercial Arbitration***, 3d ed (Kluwer Law International: 2021), pp. 1141–1142. ^ Back to section

2 Born, supra n. 1 at p. 1141. ^ Back to section

3 Id. Generally, the 1985 UNCITRAL Model Law on International Commercial Arbitration, which at article 16 adopts the competence-competence principle and states that arbitral tribunals 'may rule on their own jurisdiction'. See also the UNCITRAL Model Law on International Commercial Arbitration (2005) (as amended). ^ Back to section

4 See Born, supra n. 1 at p. 1143. ^ Back to section

5 By contrast, it is well-accepted that, once a final award has been issued, a party can bring a judicial challenge to it on the grounds that the tribunal lacked jurisdiction over the matter decided by that award. ^ Back to section

6 The article will not address rules of law that explicitly preclude specific issues (eg, matter of important public policy) from arbitration or preclude certain parties (eg, minors or employees) from participating in arbitration. Back to section

7 On 26 July 2018, Law No. 27,449 on International Commercial Arbitration (LACI), was published in the Official Gazette. According to the LACI, arbitrators are competent to decide their own jurisdiction, including objections to the existence or validity of the arbitration agreement. An arbitration clause forming part of a contract shall be deemed to be an agreement independent from other provisions of the contract. A decision from the arbitral tribunal determining that the contract is null and void shall not ***ipso jure*** render the arbitration clause null and void. The Civil and Commercial Code (which regulates domestic arbitration) also follows the competence-competence principle by stating that, except for an agreement to the contrary, the arbitration agreement grants the arbitrators the power to decide their own jurisdiction, including challenges to the existence or validity of the agreement, or to any other matter that might interfere with reaching the merits. See the LACI and sections 1649 to 1665 of the Argentine Civil and Commercial Code. Back to section

8 In principle, a court will refer the parties to arbitration, provided that the defendant challenges the judicial jurisdiction and the arbitral agreement is not null and void, inoperative or incapable of being performed Generally, unless otherwise stated in an international treaty or by the parties' choice of law provisions, international commercial arbitration is governed by the LACI. Back to section

9 Article 79 of the Law No. 1563/2012, Statute on National and International Arbitration in Colombia (12 October 2012). Back to section

10 Id. Back to section

11 Id. Back to section

12 Id, article 109. Back to section

13 Id. (Translated). Back to section

14 Id, article 70. Back to section

15 Law No. 540, Mediation and Arbitration, the Republic of Nicaragua (24 June 2005), article 42. Back to section

16 Id. Back to section

17 Id, article 28. Back to section

18 Article 16, Law No. 8937 on international commercial arbitration, Costa Rica (25 May 2011). Back to section

19 Article 17 of Decree Law No. 5 of 8 July 1999, Panamanian Arbitration Law. Back to section

20 For a more detailed discussion about the 2004 law, see the Panama chapter of ***The Arbitration Review of the Americas 2021*** (Global Arbitration Review: 2020). Back to section

21 Law No. 131, Panamanian Arbitration Law (31 December 2013). Back to section

22 According to the Arbitration Law, a party that does not raise a jurisdictional objection or submit a timely motion, and instead continues with the arbitration, would be considered to have waived its right of challenge on that ground. Back to section

23 If the arbitral tribunal finds that it has jurisdiction over the matter, either party can file a challenge before the Supreme Court seeking to set aside the award within 30 days of the award. Arbitration proceedings shall not be interrupted during this period. The grounds for the challenge of the award are similar to those provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for the dismissal of a writ of exequatur, which also applies to exequatur proceedings in Panama. Back to section

24 Fernando Cantuarias Salaverry, 'National Report for Peru (2018 through 2020)' in ***ICCA International Handbook on Commercial Arbitration***, ed Lise Bosman, Supplement No. 109, February 2020 (Kluwer Law International; ICCA & Kluwer Law International: 2020), pp. 12–13. Back to section

25 The 2008 Peruvian Arbitration Law, enacted by Legislative Decree No. 1071, enacts the 2006 amended UNCITRAL Model Law and 'is considered to be even more developed and arbitration-friendly than previous arbitral legislation' for example. See Diego Martínez Villacorta and Emily Horna Rodríguez, 'Peruvian Arbitration System Before and After the Covid-19 Pandemic', in T***he Arbitration Review of the Americas 2021*** (Global Arbitration Review: 2020). Back to section

26 Law No. 19,636, Uruguayan International Commercial Arbitration Law (26 July 2018). Back to section

27 Id, article 16.3. Back to section

28 Id. Back to section

29 Id. Back to section

30 Id, article 16. Back to section

31 International Commercial Arbitration Act, RSBC 1996, c 233; International Commercial Arbitration Act, RSA 2000 c I-5; International Commercial Arbitration Act, SS 1988-89, c I-10.2; International Commercial Arbitration Act, CCSM 1986, c C151; International Commercial Arbitration Act, SO 2017, c 2, s. 5; International Commercial Arbitration Act, RSNS 1989, c 234; International Commercial Arbitration Act, RSPEI 1988, c I-5; International Commercial Arbitration Act, RSNB 2011, c 176; International Commercial Arbitration Act, RSNL 1990, C I-15; [Federally] Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp). The province of Quebec, which follows a civil law tradition, addresses competence-competence in article 632 of the Code of Civil Procedure, CQLR c C-25.01: 'Arbitrators have all the necessary powers to exercise their jurisdiction, including . . . the power to rule on their own jurisdiction'. ^ Back to section

32 See endnote 3. For example, the Alberta International Commercial Arbitration Act, RSA 2000, c I-5 directly incorporates at Schedule 2 the 1985 UNCITRAL Model Law on International Commercial Arbitration, which at article 16 adopts competence-competence. For Ontario, the International Commercial Arbitration Act, SO 2017, c 2, s 5, similarly incorporates at Schedule 2 the 2006 UNCITRAL Model Law on International Commercial Arbitration. In British Columbia, the more recently amended International Commercial Arbitration Act, RSBC 1996, Chapter 233 incorporates the Model Law directly in section 16. ^ Back to section

33 *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, at No. 165. ^ Back to section

34 *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, at Nos. 84-86. ^ Back to section

35 *Seidel v TELUS Communications Inc*, 2011 SCC 15. ^ Back to section

36 *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53. ^ Back to section

37 *Heller v Uber*, 2020 SCC 16. See also Dentons, 'Heller v Uber: The Supreme Court finds arbitration clause unconscionable and establishes new test for determining when to stay litigation in favour of arbitration' (3 July 2020). ^ Back to section

38 See, for example, *Steelworkers v American Mfg Co*, 363 US 564, 570-71 (1960). ^ Back to section

39 Id. ^ Back to section

40 *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944-45 (1995); *AT&T Technologies, Inc v Communications Workers*, 475 US 643, 649 (1986). ^ Back to section

41 As a result, one could say that, in a large number of cases, the principle of competence-competence has effectively been made the governing rule. ^ Back to section

42 *Henry Schein, Inc v Archer & White Sales, Inc*, 139 S Ct 524 (2019) (*Schein*). ^ Back to section

43 Id at 528. In *Schein*, the arbitration clause excluded arbitration over claims in which injunctive relief was sought. The claim at issue sought injunctive relief and was filed in court. The defendant argued that the claim was subject to arbitration. The lower court held that the claim to arbitration was wholly groundless and that it, therefore, had the power to rule on arbitrability, which it did, concluding that the claim was not arbitrable. The Supreme Court rejected such 'wholly groundless' exception to arbitrability. At the same time, it expressed no view on whether the arbitration agreement at issue had clearly and unmistakably delegated the question of arbitrability to the arbitrator and left that open for further proceedings below. ^ Back to section

44 *Metropolitan Life Insurance Co v Bucsek*, 919 F3d 184 (2d Cir), cert. denied, 140 S Ct 256, 205 L Ed 2d 134 (2019). ^ Back to section

45 *20/20 Communications, Inc v Crawford*, 930 F3d 715 (5th Cir 2019). ^ Back to section

46 *Met Life*, 919 F3d at 194. ^ Back to section

47 Id at 195-96. ^ Back to section

48 *20/20 Comms*, 930 F3d at 720-21. ^ Back to section

49 Id at 720. ^ Back to section

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