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### Uber Tech., Inc. v. Royz, 138 Nev. Adv. Op. 66 (Sept. 29, 2022)

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*Uber Tech., Inc. v. Royz*, 138 Nev. Adv. Op. 66 (Sept. 29, 2022)<sup>1</sup>

WHEN PARTIES AGREE TO AN ARBITRATION DELEGATION CLAUSE, THE  
ARBITRATOR DETERMINES THE THRESHOLD ISSUE OF ARBITRABILITY.

**Summary**

The Nevada Supreme Court is bound to the United States' Supreme Court decision in *Schein* regarding contacts governed by the Federal Arbitration Act (FAA). Therefore, when parties enter into an arbitration agreement that clearly and unmistakably delegates the arbitrability threshold question to the arbitrator, the district court must refer the case to arbitration even if the district court concludes the dispute is not subject to the arbitration agreement.

**Background**

Andrea Work and Megan Royz both had Uber accounts. By signing up for Uber, one agrees to an arbitration agreement that includes a delegation clause requiring the arbitrator to resolve disputes related to the arbitration agreement. Work ordered an Uber for her and Royz. On this Uber ride, their uber driver rear-ended another Uber driver. Work and Royz both filed personal injury suits against Uber.

Uber moved to compel arbitration, based on the arbitration agreement. The district court denied this motion. The district court found that the arbitration agreement focused on the terms of service, not car accidents, so the parties did not agree to submit a car accident dispute to arbitration. Additionally, the district court decided that the arbitration agreement could not be enforceable against Royz since she was not the one that used the app to get the ride. Uber moved for reconsideration. The district court denied reconsideration, finding that the delegation clause did not cover vehicle accident disputes. Uber filed an appeal.

**Discussion**

***A district court may not decline to apply a delegation clause on the ground that the arbitration agreement does not cover the dispute***

The scope of arbitration delegation clauses under *Schein* is at issue. Uber asserts that *Schein* held that a court must uphold delegation clauses even if the party's argument in favor of arbitrability is wholly groundless, and the district court's decision conflicts with *Schein*. Royz argues the delegation clause is inoperable, given the facts, because Section 2 of the FAA limits the scope of the Act to controversies "arising out of [the underlying] contract." Also, Royz claims *Schein* is distinguishable because the district court did not utilize the "wholly groundless" exception here.

The Nevada Supreme Court agrees with Uber, finding that *Schein* does apply and the Supreme Court's precedent is controlling. The Court, therefore, held that where the parties have clearly and unmistakably delegated the threshold question of arbitrability to the arbitrator, the district court may not decline to refer the case to arbitration on the ground the arbitration agreement does not cover the dispute.<sup>2</sup> The Court did instruct that a district court may decide whether the arbitration agreement is a valid contract before referring the case,<sup>3</sup> or the district

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<sup>1</sup> By Mark Mulhall.

<sup>2</sup> *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 53031 (2019).

<sup>3</sup> *Id.* at 530.

court may determine whether the delegation clause is a valid agreement if the delegation clause is severable and delegates questions of the arbitration agreement's validity or application to the arbitrator.<sup>4</sup>

***The parties clearly and unmistakably delegated threshold issues of arbitrability to the arbitrator***

The Court, then, considered whether the parties clearly and unmistakably delegated the arbitrability threshold question to the arbitrator. Uber argued that the delegation clause expressly and clearly delegates arbitrability threshold issues to the arbitrator. Royz contends the delegation clause does not clearly and unambiguously delegate all arbitrability threshold questions to the arbitrator because the delegation clause uses the arbitration agreement's terms, and the arbitration agreement only applies to claims arising out of or relating to its terms.

The Nevada Supreme Court sides with Uber. The Court held that incorporating the AAA's rules constitutes clear and unmistakable evidence of intent to submit the arbitrability question to the arbitrator,<sup>5</sup> and express delegation clauses easily establish clear and unmistakable evidence of the intent to have arbitrability decided by the arbitrator.<sup>6</sup> The Court found both to exist in Uber's arbitration agreement, and that their decision applies to Royz because, although she did not order the Uber ride, she agreed to the arbitration agreement when she created an Uber account.

**Conclusion**

The arbitration agreement between Uber and Royz was governed by the FAA and included a delegation clause clearly and unmistakably delegating the arbitrability threshold question to the arbitrator. Therefore, the district court should not have denied Uber's motion to compel arbitration on the basis that the arbitration agreement did not cover the dispute. The Court reversed the district court's order and directed the district court to refer the case to arbitration.

**Dissent**

The dissent concurs in regards to the majority's opinion pertaining to respondent Work, that the district court erred in denying Uber's motion to compel arbitration, but dissents to the majority's opinion applying to Royz. The dissent finds that the majority's interpretation of *Schein* is too rigid and has created "absurd results." The dissent notes that *Schein* focused on whether lower courts could apply the "wholly groundless" exception when determining arbitrability, but the district court, in this case, did not use the "wholly groundless" exception. In fact, the dissent determines that this case is factually distinct from *Schein* because no contract governed the interaction between Royz and Uber during the accident. Royz did not use her account or request a ride on the date of the accident, yet Uber wants the arbitrability question decided by an arbitrator even though the dispute arises out of an accident occurring during an account holder's nonuse of their account. Allowing an arbitration agreement to govern a mere passenger, with an Uber account, in an Uber vehicle is akin to the arbitration agreement applying

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<sup>4</sup> Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).

<sup>5</sup> See Brennan v. Opus Bank, 796 F.3d 1125, 113031 (9th Cir. 2015); Airbnb, Inc. v. Doe, 336 So. 3d 698, 70305 (Fla. 2022).

<sup>6</sup> See Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 120709 (9th Cir. 2016); Lee v. Uber Techs., Inc., 208 F. Supp. 3d 886, 889, 891 (N.D. Ill. 2016).

to a pedestrian, with an Uber account, that is hit by an Uber driver. Both are the epitome of absurd.