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Kavanaugh's Views On Arbitration Could Soon Be Tested

By **Caroline Simson**

Law360 (July 25, 2018, 9:34 PM EDT) -- D.C. Circuit Judge Brett Kavanaugh's decisions give little insight into his views on international arbitration, but experts say that if he is confirmed to replace retiring Justice Anthony Kennedy on the U.S. Supreme Court, he will likely adopt views similar to his predecessor's in an upcoming high court case with implications for the practice area.

During his tenure at the D.C. Circuit, Judge Kavanaugh sat on four panels that decided on international arbitration-related cases, none of which made many waves in the practice area. But what could provide more insight into his potential views on the subject is an opinion he authored in a 2009 employment arbitration case involving two postal worker unions and the U.S. Postal Service.

In a 2-1 decision authored by Judge Kavanaugh, the D.C. Circuit panel refused to overturn an arbitral award, saying it was obligated under labor arbitration law to defer to the arbitrator's findings even though he had probably made a mistake interpreting the parties' contract. This pro-arbitration approach, which would likely spill over into the international realm, is similar to the approach taken by the Supreme Court in recent years.

So if Judge Kavanaugh, who was nominated to the high court by President Donald Trump on July 9, is confirmed by the Senate, the jurist is unlikely to rock the boat, and that could be important in an upcoming case that relates to the enforcement of an arbitration agreement.

"On the one hand, he doesn't appear to have much of a track record with regard to arbitration and international arbitration in particular ... but I think if you had to place your bets, he would follow in the [Justices Antonin] Scalia and [Samuel] Alito line of decisions, in which Justice Kennedy joined," said Mintz Levin Cohn Ferris Glovsky and Popeo PC member Gilbert A. Samberg.

The cases involving international arbitration that Judge Kavanaugh has ruled on at the D.C. Circuit related broadly to the confirmation of foreign arbitral awards. Three of these involved companies seeking confirmation of arbitral awards against various nations or state-owned entities.

In a fourth case, brought by Belize Social Development Ltd. to confirm a 38 million Belize dollar ($18.9 million) arbitration award against Belize in 2012, Judge Kavanaugh penned a dissent disagreeing with his colleagues on whether the lower court had erred when it stayed the proceeding pending the outcome of related litigation in Belize.

In the dissent, Judge Kavanaugh said he felt the majority had overstepped its authority by nixing the lower court's stay order. But, like the other opinions, the dissent doesn't say very much about Judge Kavanaugh's position on international or domestic arbitration.

"I think it tells us that he is very cautious and circumspect about the exercise of federal court jurisdiction, which is not surprising as a federal court jurist," said Dechert LLP partner Alexandre de Gramont. "But I don't think you can read anything in his dissent about arbitration."

Experts say that even though the case involving the postal worker unions related to a domestic employment arbitration, Judge Kavanaugh's holding in that case invokes principles that could be similarly applicable in the international context.

"That kind of deference applied in the international context would suggest that he is going to apply treaties like the New York Convention and statutes like the Federal Arbitration Act narrowly, and that he will afford deference to arbitral decisions," said Baker Botts LLP partner Ryan Bull.

The New York Convention, which is incorporated into the FAA, is an international agreement by which signatory nations agree to enforce international arbitral awards with only minimal review.

Such a viewpoint is unlikely to shake up the court's holdings relating to both domestic and international arbitration. The court's pro-arbitration approach has been reflected in several recent decisions, including a 2011 case brought by AT&T Mobility against Vincent and Liza Concepcion in which the court enforced an arbitration agreement even though the agreement contained a class action waiver, and the more recent **holding** this past spring in a case brought by Epic Systems Corp., in which the court held that arbitration agreements providing for individualized proceedings must be enforced.

"As a conservative jurist and strict constructionist, I think he is likely to apply the FAA in a rather strict and literal sense," said de Gramont. "Given that the FAA reflects a federal policy that is very pro-arbitration, I would expect his decisions to also be fairly pro-arbitration, very much in the way that Justice Kennedy's approach was and what we've seen over the past few years."

But if Judge Kavanaugh is confirmed before the Supreme Court's upcoming fall session, that approach could be tested in an antitrust case initiated by the dental equipment distributor Archer and White Sales Inc. against manufacturer Henry Schein Inc. The Archer and White company is seeking tens of millions of dollars in damages stemming from Henry Schein's alleged conspiracy to boycott it and its sales territories under certain distribution agreements.

Henry Schein sought to force arbitration of the dispute based on a clause in Archer and White's distribution agreements, but Archer and White argued the dispute was not arbitrable, citing a carveout in the agreement precluding arbitration of disputes seeking injunctive relief. The district court denied the motion to force arbitration, concluding the court had the authority to rule on the question of arbitrability and that the claims at issue were not arbitrable. The Fifth Circuit affirmed in an **opinion** filed late last year.

The question presented before the Supreme Court is whether courts under the FAA may refuse to enforce an agreement stipulating that the arbitrator will decide whether certain claims can be arbitrated if the court concludes the claim of arbitrability is "wholly groundless."

In its petition, Henry Schein argues that the case raises a circuit split: four courts of appeals have held that courts may resolve disputes over arbitrability, even if the arbitration agreement delegates that question to the arbitrators, if the court determines that the underlying claim for arbitration is "wholly groundless." Two other circuit courts have held that disputes about arbitrability must be decided by an arbitrator whenever the parties have delegated that issue to an arbitrator, regardless of the court's views about the merits of the arbitrability issue.

The Supreme Court's decision in the case will have implications for enforcing international arbitration agreements as well, and Herbert Smith Freehills LLP partner Amal Bouchenaki noted that she will be watching closely to see what the court decides.

"I think in the Schein case it's going to be a matter of how the First Options rule is going to evolve within U.S. law," she said, referring to a previous case in which the Supreme Court concluded that the question of arbitrability is subject to independent review by courts unless that determination is delegated to the arbitrators. "I think it will be very interesting to see how [Judge Kavanaugh] approaches it."

--Editing by Jill Coffey and Alanna Weissman.