What's Left of Class Arbitration After *Lamps Plus, Inc. v. Varela*?

By Steven C. Bennett

In *Lamps Plus, Inc. v. Varela*,[1] the U.S. Supreme Court held that "ambiguity" in an arbitration clause, like "silence" on the question whether an arbitration clause authorizes class action arbitration, "does not provide a sufficient basis" to conclude that parties to a contract "agreed to sacrifice the principal advantage of arbitration" (informality) in favor of the "new risks and costs" and "due process concerns" attendant to class action arbitration.[2] The Court, noting the "fundamental" difference between class arbitration and individual arbitration, "refus[ed] to infer consent" to class arbitration from an "ambiguous" arbitration clause.[3] The Court reinforced its view, stated in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[4] that "courts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so."[5]

Is *Lamps Plus* the death knell for class arbitration? Given the legal and political forces at play, perhaps not. As outlined below, other forms of class-action-like procedures may be available to claimants in arbitration, and there may be reasons for respondents (even large institutions) to agree to class arbitration, under certain circumstances. In the arena of consumer and employee rights, moreover, political forces are afoot, which may lead to new legislation (perhaps even modifications to the Federal Arbitration Act itself) that could affect the use of such procedures.

The *Lamps Plus* Case

The *Lamps Plus* case arose out of a data breach. Plaintiff Frank Varela filed a class action complaint against his employer, Lamps Plus, Inc., on behalf of himself and approximately 1,300 other employees whose financial information had been exposed, after the company was tricked into disclosing their tax information. In response to the complaint, the company moved to compel arbitration, based on an arbitration agreement Varela signed, as a condition of employment. The district court granted the motion to compel arbitration, but expressly stated that the arbitration could proceed on a class-wide basis.[6] The company opposed class arbitration because the agreement said nothing about such a system. The district court, however, noted that "lack of an explicit mention of class arbitration" does not mean that the parties "affirmatively agree[d] to a waiver of class claims in arbitration." Further, the court opined that, although *Stolt-Nielsen* stated that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so,"[7] "failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in Stolt-Nielsen."[8]

Thereafter, plaintiff Varela filed a demand for class-wide arbitration with the American Arbitration Association. The company moved to stay class arbitration, pending an appeal. The district court rejected the stay, suggesting that "the issue is one of simple contract interpretation[.]"[9]

The Ninth Circuit Court of Appeals affirmed, noting that the agreement was "capable of two reasonable constructions" (one supporting class arbitration; one not).[10] Given that ambiguity, the court opined that "State contract principles require construction against [the company], the drafter of the adhesive Agreement."[11] Thus, the appeals court held, the district court properly concluded that the "ambiguous Agreement permits class arbitration," and satisfies the requirements of *Stolt-Nielsen* for a "contractual basis for agreement to class arbitration."[12] A brief dissenting opinion concluded that the arbitration agreement was "not ambiguous," and suggested that "we should not allow [plaintiff] to enlist us in this palpable evasion of Stolt-Nielsen[.]"[13]

The Supreme Court Decision

In a 5-4 decision, the U.S. Supreme Court in *Lamps Plus* reversed the Ninth Circuit decision, and remanded for further proceedings consistent with the opinion.[14] The majority opinion, written by Chief Justice Roberts, held that ambiguity in an arbitration agreement regarding the availability of class arbitration, like the "silence" on the issue evident in *Stolt-Nielsen*, does not sufficiently evidence consent to such a procedure, given that class arbitration is "markedly different from the traditional individualized arbitration contemplated by the FAA," and that it "undermines the most important benefits of that familiar form of arbitration."[15] Because consent is "foundational" to arbitration, and because of the "crucial differences" between class and individual arbitration, courts may not "infer consent" to such a procedure, absent an "affirmative contractual basis," and ambiguity, like silence, "does

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not provide a sufficient basis to conclude that parties to an arbitration agreed to sacrifice the principal advantage of arbitration."[16]

The majority opinion specifically addressed a state law principle of contract interpretation, *contra proferentem*, on which the Ninth Circuit opinion relied. The Court deferred to the Ninth Circuit's view that the agreement at issue was ambiguous on the question of class arbitration.[17] As the Court saw *contra proferentem*, however, the doctrine applies "as a last resort," when a court "*cannot* discern the intent of the parties," and instead rules, "based on public policy," that an ambiguity should be resolved against the drafter of the agreement.[18] Thus, in the Court's view, the *contra proferentem* rule "seeks ends other than the intent of the parties."[19] The Court rejected the view that the rule is "nondiscriminatory," in that it does not specifically target arbitration agreements, because the rule, as applied, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[20]

Aftermath of the Decision

The majority opinion in *Lamps Plus* emphasized the view that "[o]ur opinion today is far from the watershed" claimed by the dissent.[21] Indeed, the trend in recent years has been for the Court to express deep skepticism over the concept of class action in arbitration. As Justice Kagan observed, dissenting: "The heart of the majority's opinion lies in its cataloging of class arbitration's many sins. In that respect, the opinion comes from the same place as (though goes a step beyond) this Court's prior arbitration decisions."[22] Justice Ginsburg, dissenting, went further, suggesting that "[i]n relatively recent years, [the Court] has routinely deployed the law to deny to employees and consumers effective relief against powerful economic entities."[23]

Public reaction to the Court's views on so-called "mandatory" arbitration clauses (contracts of adhesion that include provisions for arbitration, as a condition for employment, or as a condition for purchase of goods or services by a consumer) has been strong.[24] As Justice Ginsburg noted, "[r]ecent developments outside the judicial arena" may "ameliorate some of the harm this Court's decisions have occasioned," including private efforts to change corporate policies regarding arbitration.[25] Efforts at the state level, moreover, may yield changes in the law,[26] although the question of preemption looms large in such efforts.[27] Involvement of state governments themselves might offer another solution.[28]

Justice Ginsburg, however, looked to the broadest potential solution in the area, reform of the FAA itself: "Congressional correction of the Court's elevation of the FAA over the rights of employees to act in concert remains urgently in order."[29] Calls for revision of arbitration law at the congressional level have been sharp and persistent.[30] The *Lamps Plus* decision will certainly add to public pressure in that direction, but the prospect for bipartisan congressional support for revision of the FAA remains doubtful.[31] Restrictions on arbitration might also be imposed by federal regulation, but here too politics may intervene.[32]

Perhaps of most interest, given the legal and political developments that may preclude progress toward wide use of class arbitration (or limitations on the use of so-called "mandatory" arbitration clauses with class action waivers), is the adjustment that plaintiffs and their lawyers may make in response to restricted access to the class action device. In recent years, some plaintiff-side attorneys have begun to file "masses" of individual arbitrations, essentially "recreating class actions in a different form."[33] Such mass actions can be costly for corporations, providing leverage toward settlement, while remaining "surprisingly affordable" for plaintiffs (largely due to minimum due process standards adopted by arbitration-sponsoring organizations, such as the AAA and JAMS, plus cost limitations imposed by the companies themselves, in order to avoid court decisions rendering arbitration clauses unenforceable, as unconscionable).[34] Individual arbitrations, moreover, may present greater risks for corporations seeking to resolve claims on a broad basis, which is difficult, absent the mechanism of a class action settlement.[35] Thus, although the conventional wisdom may be that arbitration favors "repeat players" (mainly, corporations), available data may suggest that arbitration actually "favors repeat players on both sides," so long as, on the plaintiffs' side, a "serially arbitrating" plaintiffs law firm is involved.[36]

Data regarding the effectiveness of arbitration in providing fair and effective relief in small-value consumer claims (especially those involving *pro se* claimants), [37] and in employee rights cases,[38] remains elusive. Yet, if limits on class action (in and out of arbitration) have "effectively barred" some small claims from proceeding,[39] and that reality is not likely to change in the current legal and political climate, a further question emerges. Are there additional (or new) procedures, such as On-Line Dispute Resolution (ODR) that may change the calculus, at least in part?[40] In theory, companies and consumers (or employees) should share an interest in fair and efficient dispute resolution.[41] Reducing the cost of arbitration (for both company and individual), while maintaining a fair system for all parties, may offer a practical (and more widely accepted) solution than the current dichotomy between arbitration "doves" and "hawks," who perceive the choices as entirely binary. And a more efficient arbitration system could benefit all parties, including those who have no contact with dispute resolution systems.[42] Development of such systems cannot offer a panacea; but it would, at least, offer some hope of improvement.

Endnotes

1. ___ S. Ct. ___, 2019 WL 1780275 (Apr. 24, 2019).
2. *Id.* at *5-6 (quotations omitted).
3. *Id.* at *6 (quotation omitted).
4. 559 U.S. 662 (2010).
5. *Lamps Plus*, 2019 WL 1780275 at *6 (quoting *Stolt-Nielsen*).
6. *See Varela v. Lamps Plus, Inc.*, 2016 WL 9110161 at *6-7 (C.D. Cal. July 7, 2016).
7. *Id.* at *6 (quoting *Stolt-Nielsen*, 559 U.S. at 684).
8. *Id.* (quotation omitted).
9. *See Varela v. Lamps Plus, Inc.*, 2016 WL 9211655 at *2 (C.D. Cal. Dec. 12, 2016).
10. *See Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670, 673 (9th Cir. Aug. 3, 2017).
11. *Id.*
12. *Id.* (citation omitted).
13. *Id.* at 673.
14. *Lamps Plus*, 2019 WL 1780275 at *8.
15. *Id.* at *4 (quoting Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).
16. *See id.* at *5-6 (quotations omitted).
17. *See id.* at *4. Justice Thomas, concurring, would have held that the language of the agreement was not ambiguous, in that the terms of the agreement were repeatedly stated in the singular. *See id.* at *8 (Thomas, J., concurring) (citing provisions including waiver of "any right *I* may have to file a lawsuit," and statement that "*the Company and I* mutually consent" to arbitration) (emphasis in original). Justice Kagan, dissenting, pointed to language suggesting the "opposite conclusion." *Id.* at *17 (noting remedial and procedural terms calling for resolution by arbitration of "all claims or controversies"); *see id.* at *16 (citing language that arbitration "shall be in lieu of any and all lawsuits"). As Justice Kagan saw it, the arbitration agreement contained "no hint of consent to surrender altogether—in arbitration as well as in court—the ability to bring a class proceeding." *Id.* at *16.
18. *Id.* at *6-7 (majority opinion).
19. *Id.* at *7.
20. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).
21. *Id.* at *8 (referring to dissenting opinion of Kagan, J.).
22. *Id.* at *21 (Kagan, J., dissenting). Justice Kagan further observed: "The [majority] opinion likewise has more than a little in common with this Court's effort to pare back class litigation." *Id.* (citing *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).
23. *Id.* at *9 (Ginsburg, J., dissenting).
24. See Stephen J. Ware, *A Short Defense of Southland, Casarotto and Other Long-Controversial Arbitration Decisions*, 303, 303 (2018) (noting that "scalding" criticism of Supreme Court arbitration decisions "appeared in the 1990s and is now widespread"); *see also* Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 Fordham L. Rev. 2119, 2120 (2017) (experimental data reveals that "the more the public learns about predispute binding arbitration clauses, the more they believe this dispute-resolution procedure is unjust and illegitimate"); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negot. L. Rev. 29, 32 (2017) (suggesting that "the political center on consumer law has moved somewhat to the left while the Supreme Court's decision on adhesive arbitration law have moved further right, resulting in governing decisions that sometimes diverge from the political mainstream").
25. *See id.* at *10 ("some companies have ceased requiring employees to arbitrate sexual harassment claims, or have extended their no-forced-arbitration policy to a broader range of claims") (citations omitted); see also Lorelei Laird, *ABA House Urges Legal Employers Not to Require Mandatory Arbitration of Sexual Harassment Claims*, Aug. 7, 2018, www.abajournal.com (reporting on ABA House of Delegates Resolution 300); Amanda Robert, *ABA House Urges Legal Employers Not To Require Mandatory Arbitration in an Expanded Variety of Claims*, Jan. 28, 2019, www.abajournal.com (reporting on ABA House of Delegates Resolution 107B).
26. *See Lamps Plus*, 2019 WL 1780275 at *10 (Ginsburg, J., dissenting) (noting that "some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court;" citing N.Y. CPLR 7515, "rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims"); *see also* Ramit Mizrahit, *Sexual Harassment Law After Looking To California #MeToo:as a Model*, June 18, 2018, www.yalelawjournal.org (summarizing California proposals for statutory revisions, including revisions affecting "forced arbitrations").
27. There may nevertheless be mechanisms, at the state level, that could avoid the preemption effects of the FAA. *See* Sarath Sanders, *A New Strategy For Regulating Arbitration*, 113 N.W. Univ. L. Rev. 1121, 1121-22 (2019) (suggesting state laws that "prohibit sexual harassment as a subject matter for employment contracts," which "would not be preempted because they do not derive their meaning from the fact that an agreement to arbitrate is at issue").
28. *See id.* at 1122 (suggesting that states could level fines against employers for certain actions, and that the state "a third party" would not be "subject to the arbitration agreement"); *see also* Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 Fordham L. Rev. 2223, 2226-27 (2018) (proposing *parens patriae* actions, attorney general enforcement proceedings, and private attorney general mechanisms as solutions that are "not baldly preempted" by the FAA).
29. *See Lamps Plus*, 2019 WL 1780275 at *11 (quotation omitted).
30. *See* Vincent Sauvet, *New Push Coming For Familiar Arbitration Bills?*, Apr. 3, 2019, www.blog.cpradr.org (noting "long-running efforts, some dating back to the 1990s" seeking to limit arbitration processes that limit the ability of consumers and employees to file suits, "especially those that targeted class actions").
31. *See id.* (summarizing recent legislative proposals, and suggesting that "[t]hese moves, collectively, provide at least some momentum," but suggesting that "more-specific bills—those providing small incremental changes" with "more potential for bipartisan support" are "more likely to succeed"); *see generally* Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems and Alternatives*, 67 Disp. Resol. J. 32 (2012) (noting difficulties in enacting arbitration reform legislation).
32. *See* John Heltman, *Trump Signs Resolution Killing CFPB Arbitration Rule*, Nov. 1, 2017, www.americanbanker.com; Renae Merle, *Treasury Department* Sides *With Wall Street, Against Federal Consumer Watchdog Agency on Arbitration Rule*, Oct. 23, 2017, www.washingtonpost.com.
33. Alison Frankel, *Sweeping New Arbitration Study: "Enterprising" Plaintiffs' Lawyers Adapt*, Sept. 12, 2018, www.reuters.com (quoting David Horton, U.C.-Davis Professor of Law); see David Horton & Andrea Cann Chandrasekher, *After The Revolution: An Empirical Study of Consumer Arbitration*, 57, 63 (2015) ("some plaintiffs' lawyers, whom we call 'arbitration entrepreneurs,' have tried to overcome their inability to aggregate disputes by bringing scores of discrete proceedings against the same company").
34. *See id.* (quotations omitted).
35. See Alison Frankel, From The 11th Circuit, A Cautionary Tale For Employers Imposing Arbitration On Workers, Aug. 9, 2018, www.reuters.com.

36. *See* Andrea Can Chandrasekher & David Horton, *Arbitration Nation: Data From Four Providers*, 107 Cal. L. Rev. 1, 9 (2019) (summarizing data from more than 40,000 consumer, employment, and medical malpractice arbitrations).

37. *See* Terry F. Mortiz, *Can Consumers' Rights Effectively Be Vindicated In The Post-AT&T Mobility World?*, 30 Loyola Consumer L. Rev. 32, 34 (2017) (noting "little empirical evidence" to support "definitive" response to question: "Is the risk that many small-dollar claims will go unresolved due to the costs associated with pursuing individual consumer claims a sufficient reason to either preclude arbitration of those claims or allow consumer class claims in an arbitration process?").

38. *See* Christopher Murrary, *No Longer Silent: How Accurate Are Recent Criticisms Of Employment Arbitration?*, Alternatives to the High Cost of Litig., www.cpradr.org (May 2018) (suggesting that claims that employment arbitration agreements "generally silence employees in their attempts to protest unlawful workplace conduct and vindicate their rights" are "unsubstantiated").

39. *See id.* at 46.

40. ODR systems, in reality, are not "new." Courts, administrative agencies, companies and ADR service providers have used such systems for roughly the past 20 years. *See* Ayelet Sela, *The Effect Of Online Technologies On Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 Lewis & Clark L. Rev. 633 (2017) (summarizing developments in development and use of ODR technologies); Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenge of Pro Se Litigation*, 26 Cornell J. of L. & Pub. Policy 331, 333 (2016) (ODR technologies "have been honed and vetted for almost twenty years in both private and public settings. They are an economic and effective means to positively impact a large constituency, introduce institutional efficiencies and improve the accessibility of services.").

41. *See* Amy J. Schmitz, *A Blueprint for Online Dispute Resolution System Design*, J. of Internet Law at 3 (Jan. 2018) ("consumers and companies enjoy more commonalities than contradictions;" both benefit from resolving disputes "quickly and cheaply").

42. *See* Andreas von Goldbeck, *Consumer Arbitrations in the European Union*, 18 Pepperdine Disp. Resol. J. 263 266 (2018) (arguing that consumer protection, *including dispute* resolution, comes at a cost, which consumers pay in the form of higher prices for goods and services, and that development of more cost-efficient dispute resolution systems should benefit all consumers, by lowering company costs, and thus reducing prices).

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