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The Language of Arbitration Agreements and Availability of Class Arbitration: Focusing on the U.S. Supreme Court's *Lamps Plus, Inc. v. Varela* Decision

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Arbitration is an alternative dispute resolution mechanism based on the parties' agreement to resolve any disputes parties may have by arbitration rather than litigation in court. Parties' consent to arbitrate, which must be manifest in the parties' arbitration clause or agreement, is the foundation for arbitration; thus, the language of an arbitration agreement is often of utmost importance in determining the intent of the parties regarding many aspects of arbitration proceedings, such as, the scope of arbitral proceedings, arbitral seat, and authority of arbitral tribunals, among others. Recently, the U.S. Supreme Court held in Lamps Plus, Inc. v. Varela (2019) that ambiguity in arbitration agreement as to availability of class arbitration should be resolved in favor of individual arbitration, and therefore, class arbitration would be precluded. Such holding was met with criticism by four separate dissenting opinions, in which the dissenting Justices have disagreed with the majority's interpretation of the arbitration agreement at issue, as well as, its rejection of application of state law in resolving contractual ambiguity.

This article analyzes the Supreme Court's decision and reviews the Court's approach in construction of the arbitration agreement. Nevertheless, because the Supreme Court declined to provide clear guidelines as to precisely what contractual basis is required to permit class arbitration, either silence or ambiguity in arbitration agreements will be resolved by disallowing class arbitration.

Key Words : Arbitration Clause, Arbitration Agreement, Class Arbitration, The U.S. Supreme Court, Ambiguity in Arbitration Agreement.

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Ⅰ. Introduction

Arbitration is an alternative dispute resolution mechanism widely used by parties, who have agreed to resolve their dispute(s) by having an arbitral tribunal of their choice to decide on the merits of their disputes instead of litigating in the public court system. Arbitration is based on the parties' agreement to arbitrate, manifest in dispute resolution clauses of the main contract and/or separate arbitration agreements. At times, the language of such dispute resolution clauses and/or arbitration agreements may be subject to scrutiny in order to determine what the parties had intended as to many aspects of arbitration, including allowing class claims, consolidation, and/or joinder of claims. Therefore, the actual language of an arbitration agreement plays a critical role in determining availability of class arbitration.

In 2019, the U.S. Supreme Court reversed the lower court's decision that allowed class arbitration in the absence of explicit language regarding parties' intent to submit to class arbitration in *Lamps Plus, Inc. v. Varela*.[1] The Court's holding has been controversial as it was met with four separate dissenting opinions as well as concerns raised by academics and practitioners. Therefore, the U.S. Supreme Court's decision and its approach in construction of ambiguity or silence in arbitration agreements will be examined in this article. In doing so, the relevant facts, procedural history, and the Supreme Court's decision in the case at issue will be discussed in Part II. In Part III, the Supreme Court's holding and approach in construction of the arbitration agreement at issue will be examined, focusing specifically on the Court's characterization of arbitration and its benefits, as well as, its rejection of state contract law application to resolve ambiguity in the arbitration agreement, and the concluding remarks are included in Part IV of the article.

1) *Lamps Plus, Inc. v. Varela*, 587 U.S. ___, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019).

Ⅱ. The Supreme Court's decision in *Lamps Plus, Inc. v. Varela*

In *Lamps Plus, Inc.*, the Supreme Court issued six separate opinions (one concurring and four dissenting opinions) in its 5:4 ruling on whether class arbitration should be compelled even in the absence of explicit language providing for such. Due to such differing opinions, the Court's decision should be examined with scrutiny in order to properly gauge the significance of what the Supreme Court Justices agreed on and/or disagreed upon. Prior to reviewing the Justices' opinions, the relevant facts and procedural history of the case will be discussed first.

1. Facts and procedural history

Frank Varela, an employee of Lamps Plus, Inc. for about nine years, had provided personal information to Lamps Plus, Inc. and had signed multiple documents including an arbitration agreement, as a condition of his employment at Lamps Plus, Inc. However, after a hacker tricked an employee of Lamps Plus, Inc. into disclosing tax information about 1,300 company employees, a fraudulent federal income tax was filed in Varela's name. As a result of such fraud, Varela filed a class action against Lamps Plus, Inc. on behalf of the employees whose information had been compromised in the federal district court for the Central District of California. In response, Lamps Plus, Inc. sought to compel arbitration and to dismiss the suit, relying on the arbitration agreement in Varela's employment contract.

The arbitration agreement (hereinafter the "Arbitration Agreement") within the employment contract provides in relevant part: "The Company and I mutually consent to the resolution by arbitration of all claims or controversies ('claims'), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter *arise in connection with my employment*, or any of the parties' rights and obligations arising under this Agreement."[2] The Agreement further states that "any and all disputes, claims, or controversies arising out

of or relating to this Agreement . . . shall be resolved by final and binding arbitration as the exclusive remedy . . . .[3)]

Varela argued that the motion to compel arbitration should be denied because the data breach at issue is "an administrative task ancillary to the employment relationship" falling outside of the scope of the Arbitration Agreement.[4)] The District Court held, however, that generally when the scope of the arbitration agreement is broad, the matter should be submitted to arbitration. In particular, the Arbitration Agreement states that parties agree to arbitrate "all claims or controversies" Varela may have against the Company or against its officers, directors, employees, or agents, as well as all claims that arise "in connection with [Varela's] employment." Therefore, the court concluded that such language is sufficiently broad, including all claims that Varela may have against Lamps Plus, Inc. and its officers. As a result, the court held that based on the plain language of the Arbitration Agreement, Varela's claim arose "in connection with Varela's employment" in that Lamps Plus, Inc. collected and stored his personal information due to reasons of his employment.[5)]

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2) *Varela v. Lamps Plus, Inc.*, No. CV-16-577-DMG-KSx, 2016 Lexis U.S. Dist. LEXIS 189521, at *3-4 (July 7, 2016) (emphasis added).

3) Furthermore, the Arbitration Agreement contained the following language: "I understand that I have three (3) days following the signing of this agreement to revoke this agreement and that this agreement shall not become effective or enforceable until the revocation period has expired. . . . I acknowledge that I have been advised to consult with legal counsel before signing this agreement. I understand that by signing this agreement I am giving up my right to file a lawsuit in a court of law and to have my case heard by a judge and/or jury." It should be noted that Varela did not make any objections within the specified three day period. *Id.* at *4-5. Additionally, the Agreement provided that "[t]he Arbitrator is authorized to award any remedy allowed by applicable law" and the Agreement does not "prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction. . . . The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the costs of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorneys' fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law." *Id.* at *5-6.

4) *Id.* at *9.

5) *Id.* at *9-10. Additionally, Varela had argued that the Arbitration Agreement should be held invalid based on his assertions of unconscionability. The district court found that while Varela was required to sign the Arbitration Agreement as a condition of employment, he had no meaningful opportunity to negotiate, and thus it was a contract of adhesion. However, the terms were very clear and there was no evident pressure not to read the forms or ask questions about such. Therefore, the district court only concluded that the level of procedural unconscionability was "minimal" and found no

Of particular significance to this article, Lamps Plus, Inc. argued that arbitration should be compelled on an individual basis since there was no contractual basis for finding that the parties intended to arbitrate on a class-wide basis. On the other hand, Varela contended that there was no waiver of class arbitration, and the language of the Arbitration Agreement providing that "all claims" arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims. Or, at the very least, the language is ambiguous and therefore should be construed against the drafter of such language, which is Lamps Plus, Inc. The district court cited to the U.S. Supreme Court's *Stolt-Nielsen S.A.* precedent in which the Supreme Court held that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.[6] However, the district court distinguished the case at issue from *Stolt-Nielsen* because in *Stolt-Nielsen*, the parties expressly stipulated that there was no agreement as to the issue of class arbitration, and as a result, courts have limited the Supreme Court's holding in *Stolt-Nielsen* to cases where an arbitration agreement is "silent in the sense that [the parties] had not reached any agreement on the issue of class arbitration, not simply . . . that the clause made no express reference to class arbitration."[7] The court, therefore, noted that the absence of reference of class arbitration in an arbitration agreement itself is not equivalent with the silence discussed in *Stolt-Nielsen*.[8] Consequently, the court agreed with Varela that the language of the Arbitration Agreement is at least ambiguous as to class claims. In construing such ambiguity against the drafter of the Agreement, the court concluded that the parties may proceed to arbitrate class claims,[9] and the 9th Circuit Court of Appeals affirmed.[10] Lamps Plus, Inc. petitioned a writ of certiorari arguing that the

substantive unconscionability. Consequently, the Arbitration Agreement was not invalidated based on unconscionability grounds. *Id.* at *13-14.

6) *Id.* at *18.

7) *Id. See also, Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013), in which the Supreme Court stated that the parties in *Stolt-Nielsen* had entered into "an unusual stipulation that they had never reached an agreement on class arbitration." *Id.*, 569 U.S. 571.

8) *Varela v. Lamps Plus, Inc.*, No. CV-16-577-DMG-KSx, at *19.

9) *Id.*

10) The Ninth Circuit also determined that the Arbitration Agreement was ambiguous on the issue of class arbitration. It followed California state law to construe the ambiguity against the drafter, and since Lamps Plus, Inc. had drafted the Agreement, the court adopted Varela's interpretation

Ninth Circuit's decision contravened *Stolt-Nielsen* and created a conflict among the Courts of Appeals, upon which the U.S. Supreme Court granted certiorari.

2. The Supreme Court's 5:4 decision reversing the lower court decisions

(1) The Majority opinion[11] by Chief Justice Roberts, Justices Alito, Gorsuch, and Kavanaugh, with Justice Thomas concurring

In light of its precedent in *Stolt-Nielsen*, the majority concluded that because class arbitration is "markedly different" from the traditional individual arbitration contemplated by the Federal Arbitration Act, it requires more than mere ambiguity to ensure that the parties actually agreed to arbitrate on a class-wide basis.[12] The majority reiterated the importance of parties' consent underlying arbitration and the Federal Arbitration Act, and as such, how the courts and arbitrators must strive to give effect to the parties' intent.[13] In doing so, the majority elaborated on the "fundamental" differences between class arbitration and the individualized form of arbitration. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[14] The majority noted that class arbitration, on the other hand, lacked such benefits as they "sacrific[e] the principal advantage of arbitration – its informality – and made the process slower, more costly, and more likely to general procedural morass than final judgment."[15] The majority further explained that class arbitration introduces new risks and costs for both sides as well as raising serious due process concerns by adjudicating the rights of absent members of the plaintiff class.

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authorizing class arbitration, with Judge Fernandez dissenting. *Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670 (9th Cir. 2017).

11) While the majority begins with the issue of jurisdiction, for the purposes of this article, such is not discussed, in order to maintain focus on the issue of interpretation of arbitration clause and availability of class arbitration.

12) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1415.

13) *Id.* at 1416.

14) *Id.*

15) *Id.*

Due to these "crucial differences" between individual and class arbitration, the Supreme Court held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis" to conclude that the parties agreed to do so.[16] In so holding, the majority made clear that silence or ambiguity of parties' intent on the issue of class arbitration availability is insufficient to infer their intent to compel class arbitration, in light of such sacrifice of the principal advantages of arbitration.[17]

Also, as to the Ninth Circuit's contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter – the doctrine of *contra proferentem* – the majority stated that such principle resolves ambiguity against the drafter based on public policy factors, primarily equitable considerations about the parties' relative bargaining power.[18] The majority further noted that the principle should only be applied after a court determines that it "cannot discern the intent of the parties."[19] Therefore, the majority concluded that the principle of construing ambiguity against the drafter should not be applied to impose class arbitration in the absence of the parties' consent, as doctrine of *contra proferentem* cannot substitute for the requisite "contractual basis for concluding that the part[ies] agreed to [class arbitration]."[20] Nevertheless, the majority declined to define or explain what it meant by the required "contractual basis" to allow class arbitration.

(2) Dissenting opinions[21]

1) Dissenting opinion by Justice Ginsburg

This dissenting opinion was particularly critical of the Supreme Court's approach in straying from the principle that arbitration is based on consent and not coercion. The

16) *Id.*
17) *Id.* at 1416-17.
18) *Id.* at 1417.
19) *Id.*
20) *Id.* at 1418-19. Justice Thomas concurred, in agreement with the majority's conclusion that the parties in the instant case should not be compelled to arbitrate on a class-wide basis due to the lack of a "contractual basis" for concluding that the parties agreed to class arbitration. *Id.* at 1419-20 (Thomas, J., concurring). While Justice Thomas agreed with the majority's holding that the lower court's decision should be reversed, because he saw no need in the majority's delving into California's *contra proferentem* principle, he issued a concurring opinion. *Id.* at 1420.
21) It should be noted that of the dissenting opinions, only the relevant issues of language of arbitration agreement and availability of class arbitration will be discussed here in the article.

opinion further stated that as a result of such perception of the Court's decisions, instances of parties facing mandatory arbitration against counter-parties of much greater bargaining power, for instance, employees against employers, have increased significantly, while the Federal Arbitration Act was enacted to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes.[22] This dissent pointed out that the majority imposed individual arbitration on employees who probably would not have chosen to proceed individually. In doing so, the majority considered the significance of consent to class procedures in arbitration, while the employees' consent to the Arbitration Agreement to begin with was not considered with the possibility that they had no choice but to accept such Agreement, given the employer-employee circumstance and unequal bargaining power.[23] As a result, Justice Ginsburg criticized that the Court's decision to mandate individual arbitration continues to deny employees and consumers their right to sue in court, and to do so collectively by inserting individual arbitration-only clauses, which the parties without bargaining power cannot avoid, only exacerbates the problem.[24]

2) Justice Sotomayor's dissenting opinion

While Justice Sotomayor joined Justice Ginsburg's dissent in full and in part with Justice Kagan's dissent, she also wrote a separate opinion primarily expressing her disagreement with the Court's categorization of differences between individual arbitration and class arbitration, as she is of the opinion that a class action is merely a procedural device that allows multiple plaintiffs to aggregate their claims for convenience and to prevent a failure of justice.[25] Thus, Justice Sotomayor criticized that merely because an employee signed an arbitration agreement as a condition of employment, he/she should not be expected to realize that he/she is giving up access to class claims.

In the case at issue, the Arbitration Agreement was very encompassing and inclusiv e,[26] and therefore, Justice Sotomayor concluded that such language is at least

22) *Id.* at 1420-22 (Ginsburg, J., dissenting).
23) *Id.* at 1421-22.
24) *Id.* at 1422.
25) *Id.* at 1427 (Sotomayor, J., dissenting).

ambiguous as to whether Varela agreed that no class action procedures would be available if he or his coworkers all suffered the same harm "relating to" and "in connection with" their "employment," and therefore, the lower courts had been correct in turning to state contract law to resolve such ambiguity.[27]

3) Justice Kagan's dissenting opinion[28]

Justice Kagan criticized the majority as she believed that while the Arbitration Agreement authorized class arbitration by its plain, comprehensive, and encompassing language, the Court decided against allowing class arbitration based on their collective belief that class arbitration undermined benefits of individual arbitration. Moreover, even if the Arbitration Agreement was found to be ambiguous, as the majority found it to be, then, contract interpretation rules by the state law should apply, which would still allow class proceedings based on the rule of contract construction against the drafter of language.[29] Furthermore, Justice Kagan was critical of the majority as the Court held in *Stolt-Nielsen* that the arbitral tribunal had exceeded its authority by mandating class arbitration in the absence of a contractual basis for doing so, which is what the majority did in the instant case, except the majority has done exactly the same thing as the arbitral tribunal it heavily criticized – draw a conclusion on availability of class arbitration in the absence of a contractual basis for doing so - in order to reach its desired outcome of foreclosing class arbitration based on policy reasons.[30]

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26) Justice Sotomayor referred to the broad language "any and all disputes, claims, or controversies arising out of or relating to the employment relationship between the parties shall be resolved by final and binding arbitration." Also, she noted that the Agreement provided that the parties "consent to the resolution by arbitration of all claims that may hereafter arise in connection with [Varela's] employment."

27) *Id.* at 1427.

28) Justices Ginsburg and Breyer joined this dissenting opinion, and Justice Sotomayor joined in part.

29) *Id.* at 1428 (Kagan, J., dissenting).

30) In *Stolt-Nielsen*, the Court was critical of the panel for having exceeded its authority by "'imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation…' Substitute 'foreclosing' for 'imposing' and that is what the Court today has done." *Id.* at 1435.

Ⅲ. Review of the Supreme Court's *Lamps Plus, Inc. v. Varela* decision

1. The majority's characterization of class arbitration

The majority stated that class arbitration not only lacks certain benefits that individual arbitration offers, but in particular, informality, which according to the majority is the "principal advantage of arbitration," is lost, thereby changing the nature of arbitration greatly.[31] The Court also listed new risks and costs added for both sides as well as serious due process concerns by adjudicating the rights of absent members of the plaintiff class as some of the "crucial differences" between class arbitration and individual arbitration.[32] The Supreme Court had previously addressed the said differences of class arbitration and individual arbitration in its *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.* decision. In it, the Court had concluded that class arbitration loses the benefits of lower costs, greater efficiency and speed, and the ability to choose expert adjudicators, as well as, that it changes the nature of arbitration to such a great degree that it should not be presumed that parties consented to class arbitration simply by an agreement to submit their disputes to arbitration.[33]

However, the Court merely stated its general opinion about what distinguishes class arbitration from individual arbitration, without much justification supporting its ruling in the instant case. As a result, the Court's such general characterization has been criticized for having oversimplified arbitration as if it is a one-size-fits-all process with no complexity whatsoever.[34] Because individual arbitration proceedings can be just as

31) *Id.* at 1416 (majority opinion).

32) *Id.*

33) *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).

34) Imre S. Szalai, "The Supreme Court's Lamps Plus Arbitration Decision: A Fading Light for Class Actions," 25 Harv. Negotiation L. Rev. 1, 19 (2019). "[A]rbitration can be just as, if not more, complex, expensive, and time-consuming as court proceedings. The Supreme Court's reasoning in Lamps Plus is premised on an overly-simplified view of arbitration as a one-size-fits-all process, without taking into account the rich variety and complexity that exists in the arbitration field." *See also*, Joanna Niworowski, "Lamps Plus, Inc. v. Varela: Dark Times Ahead for Class Arbitrations," 75 U. Miami. L. Rev. 257, 280-81 (2020): "[c]lass arbitration provides the same, as well as unique, benefits to the parties. The parties are still allowed to structure the proceeding in their agreement,

complex and time-consuming as court proceedings, for the majority to have characterized efficiency, lower costs, and informality as blanket yet "crucial" benefits of individual arbitration as means of distinguishing class arbitration appear to have been an oversimplification.

Nevertheless, some positive features of arbitration may indeed be compromised or even lost in class-wide arbitration. For one, confidentiality and privacy will not be guaranteed in class arbitration due to the need of providing information to the public since relevant information should be disclosed to potential parties to provide due notice.[35] While the Supreme Court stated that presumptions of privacy and confidentiality of bilateral arbitrations would be lost in class arbitrations and thereby frustrate the parties' expectations they had at the time of signing the arbitration agreement,[36] the *Lamps Plus, Inc.* majority did not include the lack of confidentiality or privacy as "crucial" differences between class arbitration and individual arbitration.

Furthermore, by definition, class arbitration is a form of arbitration that enables one or more parties to bring a claim before an arbitral tribunal on behalf of others who are similarly situated. Therefore, additional issues, such as certification of a class, notice,[37] among others, arise in class arbitration. Some of these issues which hinge on due process rights of parties - including those of absent members of the class - may

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pick and choose which procedural rules to follow, select a specialized arbitrator, and so on. Or, just like with individual arbitration, parties can choose to forgo all of 'benefits' and make their proceedings more formal. Unfortunately, the majority of the Court continues to incorrectly restrict arbitration to the 'efficient' bilateral form without much justification."

35) Francisco Blavi and Gonzalo Vial, "Class Actions in International Commercial Arbitration," 39 Fordham Int'l L. J. 791, 811 (2016).

36) *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 686.

37) "Notice is constitutionally required whenever rights are being adjudicated, and takes on heightened importance in a class proceeding – whether in litigation or arbitration – because most of the plaintiffs are absent from the hearings. Since even the absent class members will be bound by a decision for or against them, they are required to be notified of the pending litigation so that they have an opportunity to appear on their own behalf, protect their own interests, or, in some cases, opt out of the proceedings entirely. Where class arbitration has been ordered to proceed, courts have insisted that the same notice requirements apply as in class litigation. Adequate notice is potentially more difficult to achieve in the arbitration context than in litigation, however, because of the confidential, nonpublic nature of arbitration as compared to a public court proceeding. A mass mailing or public advertisement, for example, would destroy the confidentiality of the hearing, and no public filings are available to alert potential class members to the proceeding." Joshua S. Lipshutz, "The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits," 57 Stan. L. Rev. 1677, 1691 (2005).

contribute to complexities, as well as, added time and costs of class arbitration. Hence, if the majority had distinguished class arbitration from individual arbitration based on due process grounds, or reasons of privacy and confidentiality, such may have been better justified than the aforementioned majority's overly simplified one-size-fits-all type of characterization of individual arbitration.

2. Construction of arbitration agreements that are silent or ambiguous regarding parties' consent on class arbitration

As aforementioned, while the Supreme Court held that arbitration agreements that are silent as to class arbitration should be construed against mandating class arbitratio n,[38] the Court did not affirmatively define what contractual basis or evidence of consent would be sufficient to draw a conclusion to compel class arbitration.

First and foremost, the majority's holding that class arbitration should not be permitted in the absence of a contractual basis for doing so received a fair amount of criticism, such as, that according to ordinary rules of contract interpretation including the anti-drafter rule, silence in an arbitration agreement should allow class arbitration rather than prohibit it,[39] that strict construction of arbitration agreements is inappropriate, and perhaps based on public policy, implied consent should be found in the absence of any explicit language to allow class arbitration,[40] also that while there is no reason to resort to the presumption that class arbitration should be denied, party autonomy should not get disregarded due to such presumption,[41] and that there is no clear reason why courts should disfavor class arbitration rather than favoring them, in light of federal policy of favoring arbitration,[42] among others.

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38) *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 687.

39) Lipshutz, *supra* note 37, 57 Stan. L. Rev. 1707-08.

40) S. I. Strong, "The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?" 30 Mich. J. Int'l L. 1017, 1094 (2009).

41) *See id.* at 1054-55.

42) Jean R. Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?" 42 Wm. & Mary L. Rev. 1, 88 (2000). Furthermore, it is asserted that when parties have agreed to a broad arbitration clause, it is not appropriate to exclude an entire class of disputes from arbitration, unless permitting class arbitration would violate constitutional, statutory, or contractual interests. *See id.* at 120.

Secondly, while the majority accepted the Ninth Circuit's conclusion that the Arbitration Agreement is ambiguous as to whether class arbitration should be ordered, it declined to affirmatively define what contractual basis or evidence of parties' consent would be required to compel class arbitration. Instead, it just explained that its conclusion of finding against class arbitration in interpreting silence or ambiguity in arbitration agreements was consistent with the Federal Arbitration Act, as the Act requires a contractual basis.[43] On the other hand, Justice Kagan criticized the majority that despite the plain, comprehensive, and encompassing language in the Arbitration Agreement authorizing class arbitration, the Court decided solely based on their collective belief that class arbitration undermined the benefits of individual arbitration.[44]

While the breadth of scope of arbitration agreements may not be controlling,[45] Varela's class claim likely fell within the comprehensive scope of the Arbitration Agreement in the case at issue, particularly more so as it provided that "[A]rbitration shall be in lieu of any and all lawsuits *or other civil legal proceedings relating to my employment*."[46] Moreover, the Arbitration Agreement provided that "all claims or controversies" that Varela may have against the company or against its officers, directors, among others, as well as all claims that arise in connection with Varela's employment, should be submitted to arbitration. Nevertheless, even if the Arbitration Agreement should be deemed to be ambiguous, as the majority found it to be, then, state law of contract construction should have been applied in resolving such

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43) *Cf.* Some of opposing arguments in support of the assertion that the majority's holding is rather contrary to the Federal Arbitration Act provide that the Federal Arbitration Act itself is silent on the particular procedural form that arbitration takes, and such silence has allowed arbitration to take on many different procedural forms, such as, consolidation and joinder of claims. Niworowski, *supra* note 34, 75 U. Miami L. Rev. 279-80. *See also* Szalai, *supra* note 34, 25 Harv. Negotiation L. Rev. 26 for the proposition that while the text of the Federal Arbitration Act does not contain a rule that ambiguities are resolved in favor of individual arbitration, the majority nonetheless "drafted" the Court's own default rule based on its "dislike of class proceedings."

44) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1428 (Kagan, J., dissenting). Justice Kagan stated further that, even if the majority had been correct in concluding that the Arbitration Agreement was ambiguous, class arbitration should have been allowed based on state contract law interpretation rules. *See id.*

45) Justice Ginsburg had issued a dissenting opinion in *Stolt-Nielsen*, in which she clearly stated that class arbitration should not be allowed merely by the breadth of the arbitration clause or the absence of any provision of waiving or banning class proceedings. *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 697 (Ginsburg, J., dissenting).

46) *Lamps Plus, Inc., v. Varela*, 139 S. Ct. 1429 (Kagan, J., dissenting) (emphasis added).

ambiguity, which is further discussed in the next subsection.

Lastly, the question of who should construe arbitration agreements in order to determine the availability of class arbitration still remains unresolved after the Supreme Court's decision in *Lamps Plus, Inc.* According to a recent study on judicial and arbitral clause-construction decisions, arbitral tribunals were much more likely to grant class proceedings than courts: While only 4.5 percent of judges interpreted a silent arbitration clause as permitting class claims, 54.7 percent of arbitrators reached the opposite conclusion.[47] For courts, *Stolt-Nielsen* was controlling and found that silence in the agreement regarding class arbitration would not authorize class arbitration, whereas arbitral tribunals found such holding not controlling due to the parties' stipulation that there was no agreement about class arbitration in that case, and instead, arbitral tribunals relied on the breadth of arbitration clauses and the rule against drafter of contracts in allowing class arbitration.[48] Based on such results, it was suggested that because the task of clause-construction is legal in nature, courts may be better suited to determine whether or not to compel class arbitration based on their interpretation of arbitration agreements.[49]

Moreover, some concerns as to whether arbitral tribunals are the proper decision-makers regarding allowing class arbitrations have manifested over time. For instance, some have expressed general uneasiness in having arbitrators run class proceedings as they question arbitrators' expertise in handling complex class proceedings, unlike courts, which are "substantially burdened by the responsibility of protecting the interests of absent class members, and . . . [arbitrators] may not yet have reached the point at which they are deemed equally capable of protecting individuals' critical due process rights."[50] It should be noted however that such concerns regard arbitral tribunals' competence and authority in conducting class proceedings and not exactly those required for determination of allowing or

47) While arbitral awards are generally rarely published, the American Arbitration Association requires arbitral clause-construction awards to be available to the public. Therefore, Professor David Horton analyzed a dataset of 150 recent judicial and arbitral clause-construction decisions and found that arbitrators were nearly 64 times more likely than judges to allow class proceedings. David Horton, "Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making," 68 Duke L. J. 1323 (2019).

48) *See id.* at 1362-66.

49) Horton, *supra* note 47, 68 Duke L. J. 1370.

50) Maureen A. Weston, "Universes Colliding: The Constitutional Implications of Arbitral Class Actions," 47 Wm. & Mary L. Rev. 1776.

disallowing class arbitration. Furthermore, it should be highlighted that due to a much narrower standard of judicial review of arbitral awards, if arbitrators decide the question of availability of class arbitration, such decision is more likely to be upheld. This was evident in the Supreme Court's holding in *Oxford Health Plans, LLC v. Sutter*, in which the Court held that the appropriate question for the Court was not whether the arbitral tribunal had correctly construed the parties' contract, but whether it construed it at all, due to the narrow scope of judicial review.[51)]

Additionally, if class arbitration is a procedural issue as opposed to a substantive one, as Justice Sotomayor explained that a class action is simply a procedural device that allows multiple parties to aggregate their claims for purposes of convenience and prevention of failure of justice,[52)] then there should even be more support – besides the instances where parties ask the arbitrator to decide such question – for having arbitral tribunals decide the question.

Finally on this issue, it may be noted that while judges of the public court system may not have particular incentives in allowing class arbitration, arbitrators, on the other hand, are supposedly faced with the so-called "dueling-incentives" in determination of whether to compel class arbitration - on one hand, they may have a short-term financial interest in allowing class proceedings, and on the other hand, allowing class proceedings may deter repeat appointments from presumably disappointed corporate/enterprise parties.[53)] While all arbitrators are bound by the duty to fully disclose of material financial interests in claims and/or parties and the duty to be independent and impartial, even the appearance or perception for potential external influence may weigh in on deciding whether courts or arbitral tribunals should determine the availability of class arbitration based on construction of arbitration agreements.

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51) The Supreme Court noted that the parties in *Oxford Health Plans, LLC* agreed that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration, which is what the arbitrator had done: "He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. . . . [T]he question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not 'exceed his powers,' we cannot give Oxford the relief it wants." *Oxford Health Plans, LLC v. Sutter,* 569 U.S. 573. *See also,* Szalai, *supra* note 34, 25 Harv. Negotiation L. Rev. 32.

52) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1427 (Sotomayor, J., dissenting).

53) Horton, *supra* note 47, 68 Duke L. J. 1373, fn. 310.

3. The majority's rejection of application of the doctrine of *contra proferentem* and the importance of consent of parties in arbitration

The majority explained that when a contract is ambiguous, *contra proferentem* provides a default rule based on public policy consideration, and such should be distinguished from seeking the ends meant by the parties' intent. As a result, the majority criticized the lower courts for permitting class arbitration on the basis of a doctrine that "does not help to determine the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have given to the language used," for such an approach is inconsistent with the underlying idea of the Federal Arbitration Act that arbitration is based on parties' consent.[54]

To the contrary, Justice Kagan disagreed with the majority and explained that the Federal Arbitration Act contemplates such state contract rules to control the interpretation of arbitration agreements and that there should be no exception here in interpreting the Arbitration Agreement: Lamps Plus, Inc. did not include any language barring class arbitration even despite having had the opportunity to do so since it drafted the Agreement.[55] Therefore, applying California's rule against the drafter – and like every other state in the U.S. - the drafter should not be able to avail itself of the benefit of the doubt by having left ambiguity in the agreement it drafted.[56] Also importantly, the dissenting Justices explained that if Varela or any other employee had drafted the Arbitration Agreement, then the anti-drafter rule would apply even-handedly and therefore prevent class arbitration, emphasizing the neutrality of the rule.[57]

As to parties' consent, with mandatory arbitration agreements having been commonplace for many years now, it would not be an exaggeration to say that corporations, enterprises, and the like, prefer arbitration because they are much less

54) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1417-18 (majority opinion).

55) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1430 (Kagan, J., dissenting).

56) *Id. See also*, Justice Sotomayor's dissent in which she also concluded that the Arbitration Agreement was at least ambiguous as to whether the parties agreed to class arbitration, and thus, state law should be applied to resolve such ambiguity, and the majority's conclusion to preempt the neutral principle of state contract law – California's anti-drafter rule - was incorrect. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1427-28 (Sotomayor, J., dissenting).

57) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1432 (Kagan, J., dissenting).

likely to be subject to class proceedings, where they may be vulnerable to high sums of payouts and/or liability. Moreover, ordinary consumers and employees, who are situated on the other side of the table, more likely than not, do not read the fine print of contracts. Furthermore, and needless to mention that most employees take employment contracts to be adhesive agreements, of which they do not necessarily have the option to negotiate or reject unfavorable terms. Therefore, to infer consent merely from the breadth of scope of arbitration agreements in the absence of explicit language may not be accurately executing what happened in reality of parties signing the arbitration agreements.[58)]

Ⅳ. Concluding Remarks

Following the Supreme Court's holding in *Lamps Plus*, *Inc.*, any ambiguity or issues due to silence as to whether class arbitration should be permitted would get resolved in favor of individual arbitration. Therefore, clear drafting of arbitration clauses is all the more important, especially since the Court did not define a sufficient or required contractual basis for class arbitration. Because the drafter of a dispute resolution clause would likely have greater bargaining power, it is critical to be on the look out for ambiguous or poorly-drafted arbitration clauses, particularly more so if the party has any preference and/or strategic opinions with regard to class-wide arbitration.

After the Supreme Court's *Lamps Plus, Inc*. holding, some have voiced concerns that the Supreme Court may preempt other state laws – especially without much justification and based more on the Court's collective belief or policy considerations - like it did in the instant case, increasing unpredictability in case law.[59)] Therefore, it is necessary for the Court to provide clear and consistent case law and guidelines as to what contractual basis may be sufficient or required to conclude that the parties intended or consented to allowing class arbitration, not only for the lower courts but also for the public, who are potential parties to arbitration.

58) Horton, *supra* note 47, 68 Duke L. J. 1375.
59) Niworowski, *supra* note 34, 75 U. Miami L. Rev. 293-94.

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