CLASS ARBITRATION: A CREATURE OF CLEAR CONTRACTUAL CONSENT

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International Arbitration Alert

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On April 24, 2019, in the case of *Lamps Plus, Inc. v. Varela*, the United States Supreme Court issued its latest decision regarding the availability of class arbitration. [1] In doing so, the 5-4 majority of the Court extended the rationale of its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* [2] and held that, pursuant to the Federal Arbitration Act ("FAA"), an arbitration agreement that is ambiguous as to whether it extends to class claims provides an insufficient contractual basis upon which to find that the parties agreed to class arbitration. "Arbitration is strictly a matter of consent," and courts are not to infer consent absent clear contractual language to that effect. [3]

The parties' dispute in *Lamps Plus* arose out of a hacking incident that led to the disclosure of employee tax information which prompted Lamps Plus employee Frank Varela to commence a putative class action in federal court in California. [4] In response, and on the basis of an arbitration agreement executed by the parties when Mr. Varela commenced his employment, Lamps Plus moved to compel arbitration on an individual, as opposed to class, basis and to dismiss the suit. [5] The United States District Court for the Central District of California granted the motion to compel arbitration but found that the arbitration could proceed on a class basis. [6] Lamps Plus appealed that order to the Ninth Circuit, which affirmed. [7] In doing so, the Ninth Circuit determined, as had the District Court, that the arbitration agreement was ambiguous as to whether it permitted class arbitration and, further, that California state law principles of contract construction supported interpretation of the ambiguous arbitration agreement against Lamp Plus as the drafter of the agreement. [8] Accordingly, pursuant to those principles, the Ninth Circuit held that the parties' arbitration agreement provided the necessary contractual basis for finding an agreement to class arbitration. [9]

Before analyzing the Supreme Court's reversal of the Ninth Circuit's decision, it is important to note a critical issue not addressed by the Court in *Lamps Plus*. As noted by the Court itself, it had "no occasion to address [the arbitrability] question here because the parties agreed that a court, not an arbitrator, should resolve the question about class arbitration." [10] This arbitrability question is one over which there is a split of opinion among the Circuit Courts, [11] and yet the Supreme Court recently declined two opportunities to take up the issue. [12] If the parties in *Lamps Plus* had not agreed to have a court, as opposed to an arbitrator, decide this issue, it would, arguably, have been a gateway issue in this case as well.

It is also notable that, in a decision that refers repeatedly to the importance of the parties' arbitration contract as a reflection of the parties' intent, the *Lamps Plus* Court's majority opinion provides scant reference to the text of any portion of the parties' agreement. In lieu of a careful examination of the parties' arbitration agreement, the Court accepted the determination by the lower court that the agreement was ambiguous on the question whether it extended to class arbitration: "Following our normal practice, we defer to the Ninth Circuit's interpretation and

application of state law and thus accept that the agreement should be regarded as ambiguous." [13] In its 2010 decision in *Stolt-Nielsen*, the Supreme Court held that, where the parties had stipulated that there was no agreement between them on the issue of class arbitration, i.e., the agreement was silent on the issue, the FAA does not allow for the imposition of class arbitration. [14] "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." [15]

In *Lamps Plus*, the Court was required to take its analysis a step further and consider whether an agreement that was not silent but, rather, one that was ambiguous "can provide the necessary 'contractual basis' for compelling class arbitration." [16] The Court, relying on *Stolt-Nielsen*, concluded that it cannot. [17] It did so also in reliance on the "first principle" that "[a]rbitration is strictly a matter of consent." [18]

The Supreme Court also criticized, and rejected, the Ninth Circuit's application of standard state law rules of contract interpretation, in particular the rule of *contra proferentem*, to reach a contrary result. The Court found this approach "flatly inconsistent with 'the foundational FAA principle that arbitration is a matter of consent.'" [19] The Court was also persuaded by the benefits of individual arbitration envisioned by the FAA, e.g., lower costs, greater efficiency and speed, and the ability to select arbitrators, and how class arbitration could disrupt and potentially eliminate those benefits. [20] "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice [ ] the principal advantage of arbitration.'" [21]

One might conclude from reading the *Lamps Plus* majority decision that nothing short of an arbitration agreement that explicitly refers to "class arbitration" will satisfy the Supreme Court's notion of an unambiguous expression of the parties' contractual intent and consent to a form of arbitration — class arbitration — that the Court views as antithetical to arbitration as envisioned by the FAA. This would be a prudent conclusion. This is especially true when one takes into account the detail and specificity of the arbitration agreement between Lamps Plus and Frank Varela — which nonetheless proved to be an insufficient indicator of the parties' intent. The arbitration agreement between the parties was two pages in length and was further accompanied by a two-page set of "Lamps Plus Employment Arbitration Rules and Procedures." The arbitration agreement included, *inter alia*, the following provisions:

- "[T]he parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement . . . that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy."
- "I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."
- "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 . . . ."
- "The only claims that are arbitrable are those that, in the absence of this Agreement, would have been available to the parties by law. The claims covered by this Agreement include, but are not limited to, claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability . . . ."

- "Either party may commence the arbitration process by filing a written demand for arbitration with J.A.M.S./ENDISPUTE ("J.A.M.S.") or the American Arbitration Association ("AAA"). . . ."
- "[T]he arbitration shall be in accordance with the AAA's then-current National Rules for the Resolution of Employment Disputes (if AAA is designated) or the then-current J.A.M.S. Arbitration Rules and Procedures for Employment Disputes (if J.A.M.S. is designated)."
- "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."

To the extent that the parties' arbitration agreement called for arbitration pursuant to the AAA or JAMS Rules, it is further notable that both of these arbitral institutions have unique sets of rules or procedures applicable to class arbitrations, i.e., they hold themselves out as equipped to handle class claims. [22]

These arguably broad contractual arbitration provisions between the parties in *Lamps Plus* were insufficient to establish consent to class arbitration. These contractual provisions were found by the Ninth Circuit, and accepted by the Supreme Court, as ambiguous on the question whether the parties had consented to class arbitration. Accordingly, parties who intend to submit any and all disputes, including class claims, to arbitration, should consider explicitly referencing "class claims" "class action," and/or "class arbitration" in their arbitration agreements if they are to be assured of such a result.

NOTES

[1] No. 17-988, 2019 WL 1780275 (U.S. Apr. 24, 2019).

[2] 559 U.S. 662 (2010).

[3] 2019 WL 1780275, at *5.

[4] *Id.* at *2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Varela v. Lamps Plus, Inc., 701 F. App'x 670, 672-73 (9th Cir. 2017).

[9] *Id.*

[10] 2019 WL 1780275, at *6 n. 4.

[11] A.C. Glass, R.W. Sparkes, E. Delic, R.L. Smerage, *Expounding on Arbitrability: The Seventh Circuit Joins the Growing Ranks of Circuit Courts Finding that Courts Presumptively Decide the Availability of Class Arbitration*, K&L GATES CONSUMER FINANCIAL SERVICES ALERT, Nov. 8, 2018.

[12] On March 18, 2019, the Supreme Court denied a petition for a writ of certiorari in *Spirit Airlines Inc. v. Steven Maizes et al.*, case no. 18-617, to review an Eleventh Circuit decision that an arbitrator, rather than a court, should

determine whether the arbitration agreement between the parties allowed for class arbitration. And on April 15, 2019, the Supreme Court again declined to hear a challenge to a similar ruling by the Eleventh Circuit in *JPay Inc. v. Kobel et al.*, case no. 18-811.

[13] *Id.* at *4; Two of the dissenting justices, Justice Sotomayor and Justice Kagan, questioned whether the parties' agreement was ambiguous regarding class arbitration. *Id.* at *15 and *16-17.

[14] 559 U.S. at 687.

[15] *Id.* at 684 (emphasis in original).

[16] 2019 WL 1780275, at *4.

[17] *Id.*

[18] *Id.* at *5.

[19] *Id.* at *7 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

[20] *Id.* at *5–6.

[21] *Id.* at *6 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

[22] For class arbitrations administered by the AAA, the applicable AAA rules include the "Supplementary Rules for Class Arbitrations," and for class arbitrations administered by JAMS, "Class Action Procedures" exist.

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