

## Outside Counsel

# Supreme Court Illuminates Enforceability of Arbitration Agreements

As the centennial of the Federal Arbitration Act (the FAA), 9 U.S.C. §1, et seq. approaches, the efficacy of that statutory regime has never been stronger. Reinforced by a plenitude of Supreme Court decisions, some of them quite recent, this federal law assuring the enforceability of agreements to arbitrate remains indefatigable. Indeed, in these very pages only a year ago, we had occasion to expound upon the aptly named *Epic Systems v. Lewis*, 584 U.S. \_\_\_ (2018), at the time the high court's latest confirmation that arbitral accords shall be upheld by the federal courts. See Michael A. Sabino and Anthony M. Sabino, "Epic' Decision by Supreme Court Orders Arbitration, Prohibits Class Action," 259 N.Y.L.J. at p. 4, cl. 4 (June 6, 2018); see also *New Prime v. Oliveira*, 586 U.S. \_\_\_, \_\_\_ slip op. at 1 (No. 17-340) (Jan. 15, 2019) (Gorsuch, J.) ("The Federal Arbitration Act requires courts to enforce private arbitration agreements").

To this sturdy line of precedence upholding the strong federal policy favoring arbitration, we now add *Lamps Plus v. Varela*, 587 U.S. \_\_\_ (No. 17-988) (April 24, 2019). To be sure, some view this newest ruling as no more than a rejection of class arbitration. But that is too narrow an interpretation. Viewed correctly, *Lamps Plus* is a robust exemplification of fidelity to the plain text of the FAA, adherence to the statutory mandate decreeing that agreements to arbitrate are valid, irrevocable, and enforceable, and, finally, that agreements to arbitrate shall be enforced wherever there is unquestioned consent, not only to proceeding by arbitration, but equally cogent assent to the means by which the parties shall arbitrate their controversy.

Our analysis commences with *Lamps Plus*' pertinent facts, which are few and straightforward. A data breach at the company resulted

By  
**Anthony  
Michael  
Sabino**



in a fraudulent tax return being filed in the name of employee Frank Varela. Like his fellows, Varela had agreed to arbitrate any and all disputes arising out of his employment. Eschewing the limitations of that accord, Varela commenced a class action in federal district court on behalf of himself and co-workers impacted by the data theft. *Lamps Plus*, quite naturally, sought to compel enforcement of the arbitral pact, and, moreover, the arbitration of Varela's claim on a one-to-one basis.

The proceedings below yielded a decidedly mixed result. While

---

In reviewing 'Lamps Plus', our foremost observation is that this newly minted decision stands on solid ground.

agreeing that arbitration was required, the lower courts nonetheless concluded that the terms of the arbitral accord were capacious enough to permit Varela to arbitrate on behalf of a class. In short, arbitration, yes, but, more precisely, class arbitration. Given that the courts below had relied upon a device of state contract law to reach this outcome, the controversy placed before the Supreme Court came down to an issue of the proper interpretation of the FAA. Slip op. at 3.

## Ambiguity Is Not Consent to Class Arbitration

Writing for the majority, Chief Justice John Roberts Jr. posited the question at hand as whether, consistent with the FAA, an ambiguous arbitral accord provides contractual consent sufficient to compel class arbitration. Slip op. at 6. Fram-

ing the issue as such highlighted the salient difference between the case at bar and *Stolt-Nielsen S.A. v. AnimalFeeds International*, 559 U.S. 662 (2010), the landmark which postulated the bedrock precept that arbitration is a matter of consent, not coercion. Id. at 681, quoting *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) (quotations omitted); see also *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995). In accord with that principle, *Stolt-Nielsen* had proclaimed that silence in an arbitral pact can never signify assent to class, as opposed to one-to-one, arbitration.

Unsurprisingly, the Supreme Court similarly refused to authorize classwide arbitration in the instant case. Announcing that its present day decision "follows directly" from the maxims espoused in *Stolt-Nielsen*, it relied upon *Stolt-Nielsen* and its brethren for the fundamental precept that the courts' sole function is to enforce arbitration agreements according to their terms. *Lamps Plus*, slip op. at 6, quoting *Epic*, slip op. at 5. Much as it had treated silence nearly a decade previously, the high court now decreed that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." Id. at 6. In sum, it is impermissible for courts to find consent to class arbitration "absent an affirmative 'contractual basis for concluding that the party agreed to do so.'" *Lamps Plus*, slip op. at 8, quoting *Stolt-Nielsen*, 559 U.S. at 684 (emphasis in the original).

The next major point of decision for *Lamps Plus* conjoined the foregoing with *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), a proceeding where the high court confronted a state court-created doctrine which simultaneously nullified agreements to arbitrate, and replaced them with rights to class litigation. *Concepcion* set aside such dogma as antithetical to the text of the FAA, and contradictory to the strong federal policy favoring the enforcement of » Page 8

---

ANTHONY MICHAEL SABINO, partner, Sabino & Sabino, P.C., is also a Professor of Law, Tobin College of Business, St. John's University. He can be reached at Anthony.Sabino@sabinolaw.com.

# Arbitration

«Continued from page 4

arbitral accords. *Id.* at 340. Relevant to the matter at hand was *Concepcion's* remonstrance that class arbitration introduces new risks and costs to all sides, and raises serious due process concerns for absent, i.e., non-consenting, parties. *Id.* at 349.

Invoking *Concepcion's* stern yet pragmatic warnings, the *Lamps Plus* court ruled once more that “[I]f silence, ambiguity does not provide a sufficient basis” to infer that signatories to an arbitration agreement had positively committed to forgo the established norms of individual arbitration, and replace its “principal advantage[s]” with the litigation risks and due process concerns attendant to arbitration as or against a class. *Lamps Plus*, slip op. at 8, quoting *Concepcion*, 563 U.S. at 348 and 349; see also *Lamps Plus*, slip op. at 9, citing *First Options of Chicago v. Kaplan*, 514 U.S. 938, 945 (neither silence nor ambiguity are grounds to force parties to arbitrate in a manner they could not reasonably foresee).

## Contra Proferentem Not a Substitute for Consent

The final linchpin of the Supreme Court’s decision in *Lamps Plus* addressed contra proferentem, the rule by which any ambiguity in a contract is to be construed against the drafter. Since the courts below had rationalized that contra profe-

rentem was a valid substitute for actual consent to classwide arbitration of the underlying controversy, the high court was compelled to examine such thinking.

The Supreme Court wholeheartedly rejected such reasoning as “flatly inconsistent with the foundational FAA principle that arbitration is a matter of consent.” *Lamps Plus*, slip op. at 11, quoting *Stolt-Nielsen*, 559 U.S. at 684. While contra proferentem “enjoys a place in every hornbook and treatise on contracts,” opined Chief Justice Roberts, the doctrine is nevertheless unrevealing of precisely what the contracting parties actually agreed to in an arbitral accord. *Lamps Plus*, slip op. at 10. To be sure, noted the majority, this holding is consistent with a legion of high court precedents declaring that it is the FAA, not state law contract principles, which “provides the default rule for resolving certain ambiguities in arbitration agreements.” *Id.*, slip op. at 12; see *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) (in an arbitration agreement, the parties’ intentions control, as they would with any other contract).

To be sure, contra proferentem was duly invoked in the learned dissents, foremost by Justice Elena Kagan. Arguing in favor of class arbitration in the instant case, the *Lamps Plus* dissents handily extrapolated consent to classwide arbitration by means of the aforementioned common law doctrine. *Lamps Plus*, slip op. at 1 (Kagan, J., dissenting) (joined by Ginsburg, J.

and Breyer, J., and joined, in part, by Sotomayor, J.). While that interpretation of the FAA did not carry the day, it does allude to a point further discussed in the analysis which follows.

*Lamps Plus*' penultimate assertion was that today's rulings were consistent with both the strong federal policy favoring arbitration, and the high court's long line of precedence upholding the enforceability of agreements to arbitrate. *Lamps Plus*, slip op. at 12. The majority's

principle espoused in *Stolt-Nielsen*, to wit, that arbitration is a matter of consent, not coercion. Just as the latter declared that silence in an arbitral accord does not constitute consent, *Lamps Plus* now extends that sound logic to the similar circumstance of ambiguity, finding it equally untrustworthy when endeavoring to establish the parties' consent to specific modes of arbitration.

Second, *Lamps Plus* stays true to *Concepcion*. That auspicious rul-

---

The court's jurisprudence is based upon the firmest of grounds: the robustness and clarity of a statutory regime that unequivocally favors arbitration, and unmistakably mandates the enforcement of arbitral accords.

final declaration was "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis," and state law rules, such as contra proferentem, can never take the place of clear assent to arbitrate in a certain manner. *Id.* at 12-13. That stated, *Lamps Plus* took its place as the newest Supreme Court arbitration landmark.

#### **Analysis: 'Lamps Plus' Grounded in Precedent**

In reviewing *Lamps Plus*, our foremost observation is that this newly minted decision stands on solid ground. This latest proclamation from the high court is wholly consistent with the fundamental

ing took care in expounding how class arbitration is inapposite to individualized alternative dispute resolution, deprives the parties of arbitration's nominal efficiencies, and, most critical of all, raises a host of due process concerns. *Lamps Plus* does nothing more than adhere to *Concepcion*'s basic tenet that any arbitral accord must contain explicit consent to the making of such sacrifices before class arbitration can be compelled.

Finally, the high court correctly gave paramountcy to the plain text and established policy of the FAA in matters of resolving ambiguities found within agreements to arbitrate, and rightly assigned a subsidiary role, if any at all, to ordinary state law rules of contract interpre-

tation when deciding such issues. The supremacy of federal law in this domain, and the integrity of the FAA, required nothing less.

### **Petition Congress, Not the Supreme Court**

To be sure, *Lamps Plus* is not a condemnation of class arbitration. Rather, its overarching point is that the plain text of the FAA is not permissive of ambiguity as a substitute for actual consent to arbitrate claims made on behalf of a class. This latest pronouncement of the high court can just as easily be read as supportive of class claims in arbitration, providing that consent to such procedures is explicit made by the signatories to the arbitral pact.

To be sure, we have the utmost respect for those voices critical of the results obtained in *Lamps Plus*, most especially the learned dissents contained therein. But we respectfully contend their criticisms are misdirected. We urge them to seek relief elsewhere, specifically from the progenitors of the FAA itself.

For those advocating for the wider acceptance (or even imposition) of classwide arbitration, it does little good to criticize the Supreme Court. Its arbitration jurisprudence, especially of the past decade, has been nothing more than a straightforward application of the statutory regime's plain text.

Only Congress has the power to make real change to this nearly 100-year-old law. Those who wish,

for instance, to assure consumer claims are beyond the purview of arbitration or, alternatively, are arbitrated on a classwide basis, would do far better to petition the successors to those that crafted the FAA in the first place. As long as the statutory regime remains in its present form, *Lamps Plus* and its fellows shall not only stand, they shall continue as unequivocally correct applications of the statutory text.

### **Conclusion**

At the end of the day, *Lamps Plus* and other recent Supreme Court landmarks confirm that the enforceability of agreements to arbitrate is nearly beyond question, provided that the parties' consent to arbitration and its protocols is self-evident. The court's jurisprudence is based upon the firmest of grounds: the robustness and clarity of a statutory regime that unequivocally favors arbitration, and unmistakably mandates the enforcement of arbitral accords.

Those displeased with the high bench's recent jurisprudence should not criticize the Justices for doing the job assigned them by the Constitution. Rather, they should direct their energies to the Legislative Branch, if they truly wish to provoke substantial change to the present state of arbitration in America.

For the present, *Lamps Plus* and its companions shall remain secure within the pantheon of Supreme Court jurisprudence.