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But We Didn't Agree to That!: Why Class Proceedings Should Not Be Implied from Silent or Ambiguous Arbitration Clauses After Lamps Plus, Inc. v. Varela

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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law (2021); M.A., Liberty University (2013); B.A., College of the Holy Cross (2010). The author would like to thank God for His divine mercy; her husband, Craig, for his unwavering support and patience; her parents, Serie and João, for their love and the gift of education; and Professor Antonio Fidel Perez for providing her mind with a mental workout during every feedback session. She would also like to give thanks to the editors and staff members of the *Catholic University Law Review* for their stellar work during a difficult year and for assisting in the editing of this Note.

BUT WE DIDN'T AGREE TO THAT!: WHY CLASS PROCEEDINGS SHOULD NOT BE IMPLIED FROM SILENT OR AMBIGUOUS ARBITRATION CLAUSES AFTER *LAMPS PLUS, INC. V. VARELA*

Andrea DeMelo Laprade[+]

Arbitration clauses are everywhere. Almost everyone at some point has agreed to individual arbitration in a consumer or employment contract.[1] The usage of arbitration clauses is aided by the Supreme Court's willingness to enforce the scope of the Federal Arbitration Act ("FAA"),[2] which provides that arbitration agreements are enforceable by the courts.[3] But what happens when consumers have a problem and want to proceed with arbitration as a class rather than as individuals? Then, what if the arbitration clause in the contract ostensibly does not say anything about class proceedings? The Supreme Court held that bilateral arbitration is the default mode of arbitration "envisioned by the FAA."[4] Arbitration is "a matter of contract."[5] The FAA "places arbitration agreements on an equal footing with other contracts, . . . and requires courts to enforce them according to their terms."[6] As a result, the Court's decisions support the use of arbitration agreements to arbitrate on an individual basis and

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1. *E.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; *see also* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 550 (2014) (demonstrating how arbitration clauses are used in many contexts and are "inserted in millions of contracts and are pervasive in many spheres, including banking, credit cards, home building, investment advising, cell phones, and auto dealers").

2. Federal Arbitration Act, 9 U.S.C. §§ 1–307.

3. *Id.* § 2.

4. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011). The Supreme Court also asserts that "class arbitration was not even envisioned by Congress when it passed the FAA." *Id.* at 349.

5. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

6. *Id.* (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

not in a collective proceeding unless the agreement specifically states otherwise.[7]

The purpose of this Note is to address how the *Lamps Plus v. Varela* decision created more confusion about the question of class arbitrability and to argue that the failure to address the particulars of the availability of class arbitration will perpetuate litigation on this issue. This Note suggests that the FAA's purpose supports the Court's current presumption against class arbitration if the parties do not agree to it during the contracting process and that the use of *contra proferentem* to create class arbitration is, therefore, contrary to the FAA's purpose.

Section I provides a brief overview of the FAA, *Lamps Plus*, and its preemption holding. Section II walksthrough the existing case law regarding class arbitration. Section III analyzes the usage of *contra proferentem* as procedural and substantive law to achieve class arbitration and the preemption of state law by federal law. Section IV demonstrates why courts should not imply class proceedings when an arbitration clause is silent or ambiguous. Finally, Section V concludes by making a case for the Supreme Court to clarify its stance on class arbitration and the FAA's preemptive effects so as to end confusion for practitioners and judges alike.

I. THE SUPREME COURT DECIDES ON CLASS ARBITRATION ONCE AGAIN: *LAMPS PLUS V. VARELA*, *CONTRA PROFERENTEM*, AND PREEMPTION

On April 24, 2019, the Supreme Court decided in *Lamps Plus* that shifting from individual to class arbitration "fundamentally changes the nature of the 'traditional individualized arbitration' envisioned by the FAA" when an arbitration clause is silent and is therefore ambiguous as to class arbitration.[8] Furthermore, the Court held that "an ambiguous agreement can[not] provide the necessary 'contractual basis' for compelling class arbitration" and that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis."[9]

In *Lamps Plus*, the Supreme Court considered the interaction between the FAA and California contract law, where "an agreement is ambiguous 'when it is capable of two or more constructions, both of which are reasonable.'"[10] The Court disagreed with the Ninth Circuit's decision "based on California's rule that ambiguity in a contract should be construed against the drafter, a doctrine

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7. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).

8. *Lamps Plus, 139 S. Ct.* at 1412 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)

9. *Id.* at 1415 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664 (2009).

10. *Id.* at 1415–16 (quoting Varela v. Lamps Plus, Inc., 701 F. App'x 670, 672 (9th Cir. 2017)).

known as *contra proferentem*."[11] The Court rejected the Ninth Circuit's reasoning because *contra proferentem* does not resolve the ambiguity of the party's intent, but instead the ambiguity is resolved "based on public policy factors, primarily equitable considerations about the parties' relative bargaining strength" by asking who drafted the agreement.[12] This analysis does not provide a window into the parties' consent; thus, the Court found that FAA preempted the state law, creating a scheme "inconsistent with the FAA."[13]

The arbitration community was puzzled as to why the Supreme Court wanted to review *Lamps Plus* because the Court had previously ruled on similar circumstances in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*.[14] The *Lamps Plus* majority stated that *Stolt-Nielsen's* reasoning controlled the decision.[15] In *Stolt-Nielsen*, the Court ruled that when an arbitration agreement is "silent," the question of class arbitration must be based on the arbitrator's construing of the clause after "identify[ing] the rule of law that governs in that situation."[16] Arbitrators are not to make public policy as "the task of an arbitrator is to interpret and enforce a contract."[17]

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11. *Id.* at 1417. The Court further reasoned that *contra proferentem* applies "only as a last resort" when a contract "remains ambiguous after exhausting the ordinary methods of interpretation." *Id.; see also* 5 CORBIN ON CONTRACTS § 24.27 (2021) ("The '*contra proferentem*' device is intended to aid a party whose bargaining power was less than that of the draftsperson.").

12. *Lamps Plus*, 139 S. Ct. at 1417 ("[T]he FAA provides the default rule for resolving ambiguity.").

13. *Id.* at 1418. The Court relied on precedent, stating "that courts may not rely on state contract principles to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.'" *Id.* (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).

14. *See* Henry Allen Blair, *Breaking News: SCOTUS Surprises Absolutely No One in* Lamps Plus, Inc. v. Varela, ARBITRATION NATION (Apr. 24, 2019), https://www.arbitrationnation.com/breaking-news-scotus-surprises-absolutely-no-one-in-lamps-plus-inc-v-varela/. Mr. Blair points out:

> It's not at all evident to me why SCOTUS felt the need to grant review of *Lamps Plus, Inc. v. Varela.* But it did. And the majority decision, authored by Chief Justice Roberts, did precisely what I think that everyone at the case expected: it held that the courts cannot find the necessary consent to class arbitration in an ambiguous arbitration clause.

Id.; see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

15. *Lamps Plus*, 139 S. Ct. at 1416.

16. *Stolt-Nielsen*, 559 U.S. at 673. *But see* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) ("In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter . . . includ[ing] certain gateway matters, such as whether the parties have a valid arbitration agreement.").

17. *Stolt-Nielsen*, 559 U.S. at 672. When this happens, the Court reasoned that it "must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." *Id.*

II. A WALK THROUGH THE FEDERAL ARBITRATION ACT AND AMBIGUOUS ARBITRATION CLAUSES: THE COURT EXPANDS AND THEN LIMITS CLASS ARBITRATION

The FAA was enacted in 1925 to enforce arbitration agreements after observing "widespread judicial hostility to arbitration agreements."[18] The FAA states that "[a] written provision in . . . a contract evidencing a transaction . . . to settle by arbitration, a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."[19] The following clause is colloquially known as the savings clause, which states that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[20] Since its enactment, the Supreme Court has demonstrated a policy favoring arbitration.[21] Since the 1980s, the Court has characterized the FAA as a "liberal federal policy favoring arbitration agreements."[22] Despite this pro-arbitration viewpoint, the Court has imposed limitations on how arbitration should proceed, particularly when arbitration clauses are silent or ambiguous.[23]

A. AT&T Technologies*: Arbitrating Arbitrability*

In *AT&T Technologies, Inc. v. Communications Workers of America*, a union sought to compel arbitration in a labor dispute regarding a grievance under the terms of their collective bargaining agreement against an employer pursuant to the Labor Management Relations Act.[24] The Communications Workers of America filed a grievance against AT&T when they laid off seventy-nine workers in Chicago, claiming that it would violate their agreement.[25] The relevant arbitration clause was found in Article 8 of their agreement and stated that "'differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder' must be referred to a mutually agreeable arbitrator upon the written demand of either party."[26]

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18. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

19. 9 U.S.C. § 2.

20. *Id.*

21. *E.g.*, Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 57 (1995). The Court states here that the "FAA's pro[-]arbitration policy does not operate without regard to the wishes of the contracting parties." *Id.; see also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract.").

22. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019) (interpreting the FAA to require arbitration clause interpretation to favor arbitration).

23. *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) ("[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.").

24. AT&T Techs. v. Commc'ns. Workers of Am., 475 U.S. 643, 644–46 (1986).

25. *Id.* at 645–46.

26. *Id.* at 644–45. The Court highlights other relevant provisions in the bargaining agreement:

AT&T did not submit the grievance to arbitration because "the Company's decision to lay off workers when it determine[d] that a lack of work exists in a facility [wa]s not arbitrable."[27] The union subsequently filed suit in federal court to compel arbitration and the district court, ruling on cross-motions for summary judgment, found "that the 'union's interpretation . . . was at least "arguable,"' . . . [and] that it was 'for the arbitrator, not the court to decide whether the union's interpretation has merit.'"[28] The district court ordered AT&T to arbitrate.[29] On appeal, the Seventh Circuit affirmed the lower court.[30] AT&T appealed to the Supreme Court to answer "whether a collective-bargaining agreement create[d] a duty for the parties to arbitrate the particular grievance," and the Court reversed the Court of Appeals' decision.[31]

Justice White wrote for a unanimous court and held that the Seventh Circuit was incorrect to order the parties to arbitrate the arbitrability question because that question was "undeniably an issue for judicial determination."[32] It noted that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[33] The Court later reasoned:

> It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.[34]

> Article 9 provides that, "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause," AT&T is free to exercise certain management functions, including the hiring and placement of employees and the termination of employment. "When lack of work necessitates Layoff," Article 20 prescribes the order in which employees are to be laid off.

Id. at 645 (footnotes omitted).

27. *Id.* at 646.

28. *Id.* at 647.

29. *Id.*

30. *Id.*; *see* Commc'ns Workers of Am. v. W. Elec. Co., 475 U.S. 643 (1986). Here, the Court notes that the Seventh Circuit "acknowledged the 'general rule' that the issue of arbitrability is for the courts to decide unless the parties stipulate otherwise, but noted that this Court's decisions . . . caution courts to avoid becoming entangled in the merits of a labor dispute under the guise of deciding arbitrability." *Id.* at 647 (first citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and then citing Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960)).

31. *Id.* at 648–49.

32. *Id.*

33. *Id.* at 649.

34. *Id.* at 651.

The Court further explained that "where the contract contains an arbitration clause, there is a presumption of arbitrability . . . 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute . . . . [But d]oubts should be resolved in favor of coverage.'"[35]

Justice Brennan wrote a concurrence to "supplement what has been said in order to avoid any misunderstandings on remand and in future cases."[36] He reasoned that "[t]he Seventh Circuit misunderstood these rules of contract construction" and performed its analysis contrary to precedent because "determining arbitrability does not require the court even to consider which party is correct with respect to the meaning of [an arbitration clause]."[37] Although Justice Brennan attempted to clarify any misunderstandings on remand and for future cases, the misunderstandings and confusion remain today.

B. First Options*: No Clear Agreement About Arbitrability Means That the Court May Review the Dispute*

In *First Options of Chicago, Inc. v. Kaplan*, a couple was required to pay the entire debt of their wholly-owned investment company and their stock trading clearinghouse after the October 1987 stock market crash.[38] The Kaplans, their company, MKI, and the clearinghouse, First Options, entered into a "workout" agreement to pay the debts owed to First Options due to the crash.[39] First Options demanded the MKI debt, insisted that the Kaplans pay any deficiency, and when that did not work, First Options went to arbitration.[40] The workout plan consisted of four documents, only one of which contained an arbitration clause.[41] MKI signed that document, but the Kaplans did not.[42] Since MKI signed the document containing the arbitration clause, MKI accepted arbitration.[43] However, the Kaplans denied that their disagreement was arbitrable and filed written objections to the arbitration panel.[44] Ultimately, the arbitration panel decided that they had the power to arbitrate and ruled in First Options' favor.[45]

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35. *Id.* at 650 (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83).

36. *Id.* at 652.

37. *Id.* at 654–55. Justice Brennan further explaind in his concurrence that "because the parties have submitted to us only fragmentary pieces of the bargaining history, we are not in a position properly to evaluate whether there is 'the most forceful evidence' that the parties did not intend for this dispute to be arbitrable." *Id.* at 655–56.

38. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 940 (1995).

39. *Id.* at 941.

40. *Id.* at 940.

41. *Id.* at 941.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* The arbitration panel concluded that "they had the power to rule on the merits of the parties' dispute." *Id.*

Both parties petitioned the federal district court; the Kaplans asked the court to vacate the arbitration award, whereas First Options requested confirmation.[46] The District Court confirmed First Options' award, but the Third Circuit Court of Appeals reversed the District Court.[47] The Third Circuit agreed with the Kaplans that their dispute was, in fact, not arbitrable.[48] First Options then appealed to the Supreme Court to review the arbitrability determination.[49]

Here, a unanimous Supreme Court held that "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'"[50] The Court reasoned that because there was not a clear agreement between the Kaplans and First Options, it affirmed the Third Circuit "in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts."[51]

C. Bazzle*: Is Class Arbitration Forbidden or Is the Contract Silent?*

When a couple asked a South Carolina court to certify their claim as a class action against a loan provider in *Green Tree Financial Corporation v. Bazzle*, they objected to the loan company's failure to provide them with a required form.[52] This form would have allowed them to name their own lawyers and insurance agents during their loan transactions.[53] The arbitration clause included in the contract between the Bazzles and Green Tree Financial Corporation stated the following:

> ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.* This arbitration contract is made

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 944–45 (emphasis in original); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24) ("[T]he first task of a court asked to compel arbitration of a dispute to is determine whether the parties agreed to arbitrate that dispute . . . . [B]y applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'").

51. *First Options*, 514 U.S. at 947. The Court refuted First Options' argument that the FAA "requires a presumption that the Kaplans agreed to be bound by the arbitrators' decision, not the contrary." *Id.* at 946. The Court reasoned that "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, 'are enforced' . . . according to the intentions of the parties." *Id.* at 947 (citations omitted).

52. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447–48 (2003).

53. *Id.* at 448.

> pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1 [9 U.S.C.S. § 1] . . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN) . . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.[54]

The South Carolina trial court certified a class action and entered an order compelling arbitration.[55] The arbitrator administered the subsequent proceedings as a class arbitration and awarded the class with statutory damages and attorney's fees.[56] The trial court confirmed this award and was then appealed.[57] Green Tree's argument was that class arbitration was "legally impermissible," but the South Carolina Supreme Court withdrew the case from the Court of Appeals and subsequently held that "the contracts were silent in respect to class arbitration, . . . authorized class arbitration, and that arbitration had properly taken that form."[58]

In a 5–4 decision authored by Justice Breyer, the Court considered if the South Carolina Supreme Court's decision was consistent with the FAA.[59] The Court reasoned that contrary to the South Carolina Trial Court's decision, it did not think that the contract's language clearly authorized class arbitration.[60] The Court explained that it could not "automatically accept the South Carolina Supreme Court's resolution of this contract-interpretation question" and that it was for the arbitrator to resolve, not a court.[61]

After performing an analysis of the contract and the parties' agreement, the Court concluded that because the arbitration contract issue was a dispute "'relating to this contract' and the resulting 'relationships,'" then the parties

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54. *Id.*

55. *Id.* at 449.

56. *Id.*

57. *Id.* at 450.

58. *Id.* at 449–50. The Court observed the difference between an individual and bilateral arbitration, noting that "class arbitration involves an arbitration, not simply between Green Tree and a *named customer*, but also between Green Tree and *other* (represented) customers, all taking place before the arbitrator chosen to arbitrate the initial, *named customer's* dispute." *Id.* at 450–51.

59. *Id.* at 450.

60. *Id.* at 453–54.

61. *Id.* at 451. The Court initially asked whether "the contracts [were] in fact silent, or . . . [if] they forb[ade] class arbitration," and reasoned that although it was "important to resolve that question . . . [it could not] do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide." *Id.* at 447.

ostensibly had "agreed that an arbitrator, not a judge, would answer the relevant question."[62] The majority distinguished the case from *First Options*, stating that "[u]nlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter* . . . . Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to."[63] The Court further highlighted the broad language in the contract at issue which dictated that "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result[ed] from [it]," and concluded that the issue was not a question of arbitrability, but an issue concerning contract interpretation and arbitration procedures.[64]

While the majority in *Bazzle* was clear that the issue was for the arbitrator to decide, the dissent, written by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy, maintained that the question was for the courts, not the arbitrator, to determine if the arbitration as agreed to could proceed as a class arbitration.[65] This dissent also contends that "the holding of the Supreme Court of South Carolina contravenes the terms of the contract and is therefore pre-empted by the FAA."[66] In the second dissent, written by Justice Thomas, he noted that the FAA "does not apply to proceedings in state courts" and therefore "cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement."[67] Justice Thomas would express his disagreement with the Court's application of preemption law in subsequent cases.[68]

D. Stolt-Nielsen*: A Contractual Basis is Required to Compel Class Arbitration under the FAA*

In the Supreme Court's decision preceding *Lamps Plus*, *Stolt-Nielsen*, the petitioners were shipping companies that disputed "a standard contract known in the maritime world as a 'charter party,'" with one of their customers, AnimalFeeds.[69] The charter party used by AnimalFeeds is known as the "Vegilvoy" and contained the following arbitration clause:

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62. *Id.* at 451–52. Furthermore, the Court here distinguished *Bazzle* from *First Options*, reasoning that "[t]he question here . . . concern[ed] neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Id.* at 452.

63. *Id.* (citation omitted).

64. *Id.* at 456 (Rehnquist, J., dissenting).

65. *Id.* at 455–56 (Rehnquist, J., dissenting).

66. *Id.* at 455 (Rehnquist, J., dissenting).

67. *Id.* at 460 (Thomas, J., dissenting).

68. *see, e.g.*, Bates v. Dow Agrosciences LLC, 544 U.S. 431, 459 (2005) (Thomas, J., dissenting) (stating that he has become "increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption."); Pharmaceutical Rsch. and Mfrs. Of Am. v. Walsh, 538 U.S. 644, 678 (2003) (Thomas, J. concurring) (explaining that there is a "concomitant danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others.").

69. Stolt-Nielsen S.A. v. AnimalFeeds Intl'l Corp., 559 U.S. 662, 666–67 (2010).

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.[70]

In 2003, Stolt-Nielsen was found in a Department of Justice criminal investigation to have engaged in an "illegal price-fixing conspiracy."[71] AnimalFeeds, on behalf of a class of similarly-situated plaintiffs, filed suit in the District Court for the Eastern District of Pennsylvania, "asserting antitrust claims for supracompetitive prices" that Stolt-Nielsen had allegedly charged their customers.[72] Other charterers brought suits in other federal courts, and in the District Court for the District of Connecticut, the court held that the claims were not subject to arbitration, but the Second Circuit subsequently reversed.[73] Soon after, the Judicial Panel on Multidistrict Litigation consolidated all of the actions against Stolt-Nielsen, which included the AnimalFeeds suit.[74] It was undisputed between the parties that after the federal court judgments and orders, AnimalFeeds and the other charterers "must arbitrate their antitrust dispute."[75]

In 2005, Stolt-Nielsen was served a demand for class arbitration by AnimalFeeds.[76] Then "[t]he parties entered into a supplemental agreement," which agreed to submit the question of class arbitration "to a panel of three arbitrators."[77] Both Stolt-Nielsen and AnimalFeeds "stipulated that the arbitration clause was 'silent' with respect to class arbitration," and AnimalFeeds argued, "that the term 'silent' did not simply mean that the clause made no express reference to class arbitration . . . . [But] the parties agree that

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70. *Id.* The Court explained that Stolt-Nielsen "assert[ed], without contradiction, that charterers like AnimalFeeds, or their agents—not the shipowners—typically select the particular charter party that governs their shipments." *Id.*

71. *Id.* at 667.

72. *Id.*

73. *Id.*; *see* JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163 (2d Cir. 2004).

74. *Stolt-Nielsen*, 559 U.S. at 668; *see In re* Parcel Tanker Shipping Servs. Antitrust Litig., 296 F. Supp. 2d 1370 (J.P.M.L. 2003).

75. *Stolt-Nielsen*, 559 U.S. at 668.

76. *Id.* AnimalFeeds sought to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1988, to November 30, 2002." *Id.* (quoting Stolt-Nielsen SA v. AnimalFeeds Int'l Corp, 548 F.3d 85, 87 (2d Cir. 2008), *rev'd*, 559 U.S. 662 (2010)) (alteration in original).

77. *Id.* The agreement stipulated that the arbitration panel was to "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations." *Id.*

when a contract is silent on an issue there's been no agreement that has been reached on that issue."[78]

The arbitrators, relying on the *Bazzle* decision and the fact that "other arbitrators ruling after *Bazzle* had construed 'a wide variety of clauses in a wide variety of settings as allowing for class arbitration,'" concluded that the arbitration clause in the case at hand allowed for class arbitration.[79] Furthermore, the arbitrators reasoned that Stolt-Nielsen did not "show an 'inten[t] to preclude class arbitration.'"[80]

The parties sought judicial review, and Stolt-Nielsen filed an application to vacate the arbitrator's award in the District Court for the Southern District of New York.[81] The District Court vacated the award, reasoning that "the arbitrators' decision was made in 'manifest disregard' of the law insofar as the arbitrators failed to conduct a choice-of-law analysis."[82] The court held that the arbitrators would have "applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage" if the arbitrators had conducted the analysis.[83] AnimalFeeds appealed this to the Second Circuit Court of Appeals, which reversed on the grounds that Stolt-Nielsen had not cited any federal maritime rule of custom and usage against class arbitration.[84]

Upon review, the Supreme Court majority held that even though there is a deferential standard applicable to judicial review of arbitrator's decisions, the arbitration panel "exceeded [its] powers" by imposing its own policy choice on the issue of class arbitration availability.[85] The majority also commented that the reliance on *Bazzle* was perhaps ineffective since "only the plurality" had decided that "an arbitrator, not a court, [should] decide whether a contract permits arbitration" but declined to revisit the question since Stolt-Nielsen and AnimalFeeds explicitly requested the arbitrator to determine whether class action was permitted.[86] The Court concluded that because there was no agreement on the question of class arbitration, finding an implicit agreement where a provision was otherwise silent on the issue was not advisable due to the fundamental differences between individual and class arbitration.[87]

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78. *Id.* at 668–69.

79. *Id.* at 669. However, the panel noted that "none of these decisions was 'exactly comparable' to the present dispute." *Id.*

80. *Id.* (alteration in original).

81. *Id.*

82. *Id.*

83. *Id.* at 670.

84. *Id.* at 667, 670.

85. *Id.* at 671–72.

86. *Id.* at 680.

87. *Id.* at 685–87.

E. Write What You Mean: Contract Silence and Ambiguity Toward Class Arbitration Precludes Its Availability in Lamps Plus

Lamps Plus added to the growing line of class arbitration cases.[88] This time, the issue focused on the FAA and its potential foreclosure of a state law arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.[89]

Lamps Plus is a seller of light fixtures and related products.[90] In 2016, a hacker gained access to a Lamps Plus computer system and obtained "the tax information of approximately 1,300 other employees."[91] As a result, a fraudulent tax return was filed in a Lamps Plus employee's name, Frank Varela, and Varela filed legal action against Lamps Plus.[92]

Varela filed a class action complaint against Lamps Plus on March 29, 2016.[93] Lamps Plus responded by filing a Motion to Compel Arbitration on an individual basis because, as a condition of employment, Varela signed various documents, including an arbitration agreement.[94] The arbitration agreement stated:

> 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.[95]

Varela did not contest that he signed these documents, including the arbitration agreement.[96] However, he contended that he "d[id] not remember signing this document or having its contents explained to him," and that he "d[id] not remember being advised by anyone from Lamps Plus to consult an attorney prior to signing the arbitration provision."[97]

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88. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019).

89. *Id.* at 1415.

90. *Id.* at 1412.

91. *Id.*

92. *Id.* at 1412–13.

93. Varela v. Lamps Plus, Inc., CV 16-577-DMG (KSx), 2016 U.S. Dist. LEXIS 189521, at *1 (C.D. Cal. Jul. 7, 2016), *rev'd*, 771 F. App'x. 418 (9th Cir. 2019) (Mem).

94. *Id.* at *2–3 ("The [Lamps Plus] Arbitration Agreement states that part of its 'employment practice is agreeing to abide by the terms in the Arbitration Agreement,'" and [that] "an employee should therefore, 'read this agreement and be willing to sign it if an employment offer is made.'").

95. *Id.* at *3–4 ("The Agreement further state[d], in all capital letters: '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.'").

96. *Id.* at *2–3.

97. *Id.* at *3.

The district court evaluated Varela's arguments to invalidate the agreement due to unconscionability, which is outside the scope of this paper.[98] However, it is worth noting the district court ruled that "[t]he Arbitration Agreement [wa]s not substantively unconscionable, and raise[d] only the most minimal concerns about procedural unconscionability . . . . [And] it w[ould] therefore not be invalidated on this basis."[99] As to the evaluation of the arbitration agreement, the court stated that "'[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate[.]'"[100] The court cited to a Ninth Circuit opinion which stated that "[w]e interpret the contract by applying general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration."[101]

The District Court relied on *Stolt-Nielsen*'s holding and recognized that when a clause is "'silent' as to class arbitration, 'the parties cannot be compelled to submit their dispute to class arbitration.'"[102] However, the court distinguished *Lamps Plus* from *Stolt-Nielsen* because the parties in *Stolt-Nielsen* themselves expressly stipulated that there was "no agreement" as to class arbitration.[103] The court further observed that that "[c]ourts have therefore limited *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."[104] The court agreed with Varela that the agreement's language was ambiguous as to class claims, and the court employed the doctrine of *contra proferentem* to the agreement according to the court's application of California precedent, which states that "the drafter of an adhesion contract must be held responsible for any ambiguity in the agreement."[105]

The Supreme Court held that ambiguous agreements cannot compel class arbitration under the FAA.[106] The Court reinforced the principle in prior cases that "class arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA,"[107] and that "courts may not rely on

98. *See id.* at *10–17.

99. *Id.* at *17.

100. *Id.* at *8 (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am. 475 U.S. 643, 651 (1986)) (alteration in original).

101. *Id.* at *8–9 (quoting Wagner v. Stratton Oakmont, Inc. 83 F.3d 1046, 1049 (9th Cir. 1996)).

102. *Id.* at *18 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010)).

103. *Id.* at *18–19.

104. *Id.* at *18 (quoting Yahoo! Inc. v. Iversen, 836 F. Supp. 2d 1007, 1011 (N.D. Cal. 2011)) (some alterations in original).

105. *Id.* at *19 (citing Jacobs v. Fire Ins. Exch., 42 Cal. Rptr. 2d 906, 921 (Cal. Ct. App. 1995)).

106. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019).

107. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

state contract principles to 'reshape traditional individual arbitration by mandating classwide arbitration procedures without the parties' consent.'"[108]

Furthermore, the Court scolded the lower court's application of *contra proferentem* because it "require[ed] 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.'"[109] As a result, the state law was preempted because it stood "'as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA."[110]

Justice Thomas filed a concurrence in this case because he disagreed with the majority's reasoning. He wrote from a textualist perspective that "the arbitration agreement between Varela and Lamps Plus is silent as to class arbitration. If anything, the agreement suggests that the parties contemplated only bilateral arbitration."[111] Accordingly, Justice Thomas would have reversed the lower courts on the basis that there was "no 'contractual basis' for concluding that the parties agreed to class arbitration."[112] He voiced his concern about the majority's application of implied preemption precedent and its decision to reverse based on California's *contra proferentem* rule but joined in the opinion "because it correctly applies [the] FAA precedents."[113]

IV. THE COURT MUST DECIDE WHETHER THE USAGE OF *CONTRA PROFERENTEM* IS PROCEDURAL OR SUBSTANTIVE AND IF THE FAA DISALLOWS ITS USE

Jurisdictions are split over the question of whether clause construction is a matter of procedural or substantive arbitrability.[114] "[T]he Second and Ninth Circuits have held that *Bazzle* remains good law; . . . [and] they . . . allocate clause construction to the arbitrator."[115] However, "the Third, Fourth, Sixth, Seventh, and Eighth Circuits have predicted that the Court is just 'a short step away from the conclusion that whether an arbitration agreement authorizes class arbitration . . . requires judicial review.'"[116] While examining intent, these circuits "reason[ed] that judges, not arbitrators, should decide . . . whether a

108. *Lamps Plus*, 139 S. Ct. at 1418 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).

109. *Id.* (quoting 3 CORBIN ON CONTRACTS § 559, 269–70 (1960)).

110. *Id.* at 1415 (quoting *Concepcion*, 563 U.S. at 352).

111. *Id.* at 1419 (Thomas, J., concurring).

112. *Id.* at 1419–20.

113. *Id.* at 1420.

114. David Horton, *Clause Construction: A Glimpse Into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1355 (2019).

115. *Id.*

116. *Id.* at 1356 (quoting Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 507 (7th Cir. 2018)) (alteration in original).

silent arbitration clause allows class procedures."[117] *Lamps Plus* did not provide the answer to this question.

Clause construction is difficult to classify as either a matter of substantive or procedural arbitrability.[118] According to Corbin on Contracts, "[t]hrough 'interpretation' of a contract, a court determines what meanings the parties, when contracting, gave to the language used. Through 'construction' of a contract, a court determines the legal operation of the contract—its effect upon the rights and duties of the parties."[119]

The Court has used several approaches to distinguish the two. By highlighting one of the FAA's major goals to "move the parties to an arbitrable dispute out of court and into arbitration as quickly as possible," this would lead to the presumption that the arbitrator should perform this task. Arguably, having an arbitrator interpret an arbitration agreement allows disputes to take place in one forum.[120] On the other hand, "the Court has [also] suggested that arbitrators should hear matters that they are better equipped than judges to decide."[121] In *Bazzle*, the Court relied on the expertise of the adjudicators.[122] The Court observed that arbitrators are "experts in 'contract interpretation and arbitration procedures.'"[123] Since *Bazzle*, "several courts have deemed clause construction to be a matter of procedural arbitrability on the grounds that arbitrators excel at determining the parties' intent."[124]

Party intent is another factor influencing whether a question is for the courts or the arbitrators.[125] There is inconsistency among the courts when interpreting silent arbitration clauses. While some "federal appellate courts have found that interpreting a silent arbitration clause is crucial because there is a 'fundamental difference' between two-party and class arbitration,"[126] other courts view class actions as "a mere procedural device that leaves the 'parties' legal rights and duties intact and the rules of decision unchanged.'"[127] Therefore, the class procedure does not allow the application of intent to clause construction, further muddling the answer to this question.

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117. *Id.*

118. *See* 5 CORBIN ON CONTRACTS § 24.3 (2021) ("Although these two words are most often used synonymously, a distinction between them does exist.").

119. *Id.*

120. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983).

121. *See* Horton, *supra* note 114, at 1369. *See also* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003) (explaining that "[a]rbitrators are well situated to" resolve questions of contract interpretation).

122. *See Bazzle*, 539 U.S. at 454.

123. Horton, *supra* note 114, at 1369 (quoting *Bazzle*, 539 U.S. at 453).

124. *Id.*

125. *E.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

126. Horton, *supra* note 114, at 1370 (quoting Dell Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 876 (4th Cir. 2016)).

127. *Id.* at 1370–71 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., 559 U.S. 393, 408 (2010)).

A. Contra Proferentem*:Punishing the Drafter to Protect the "Underdog"*

In *Lamps Plus* and *Stolt-Nielsen*, the courts invoked the doctrine of *contra proferentem* to construe silence in a contract against the draftsman.[128] However, *contra proferentem*'s "application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used."[129] Commentators and judges have stated that *contra proferentem* is "a policy-driven attempt to 'favor[] the underdog.'"[130]

In *Lamps Plus*, the arbitration clause was ambiguous.[131] The Court's analysis considered the nature of arbitration and the purpose of the FAA, as well as the Ninth Circuit's application of the state law *contra proferentem* doctrine to reach this conclusion.[132] Notably, the *Lamps Plus* court rejected the lower court's application of the contract doctrine.[133] The open question for the Court, then, is how to reconcile the different state contract law views of *contra proferentem* throughout the country, as well as whether its usage when evaluating an arbitration clause that is silent or ambiguous on class proceedings. Do these principles mean that *contra proferentem* should never be used because the FAA forbids it? If these lines of cases hold that *contra proferentem* is an impermissible doctrine to use in cases invoking the FAA, the Court must clarify this.

B. The Federal Arbitration Act and Individualized Versus Class Arbitration

The FAA was enacted in 1925 to enforce arbitration agreements after observing "widespread judicial hostility to arbitration agreements."[134] Since its enactment, the Supreme Court has demonstrated a policy favoring arbitration.[135] Court precedent states that the FAA requires courts to enforce arbitration

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128. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010). In general, *contra proferentem* applies with special force to adhesion contracts. *See* David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 440–46 (2009) (collecting pre-*Stolt-Nielsen* cases invoking *contra proferentem*); *see, e.g.*, Tahoe Nat'l Bank v. Phillips, 480 P.2d 320, 327 (Cal. 1971) ("Since the alleged ambiguities appear in a standardized contract, drafted and selected by the bank, which occupies the superior bargaining position, those ambiguities must be interpreted against the bank.").

129. 5 CORBIN ON CONTRACTS § 24.27 (2021).

130. Horton, *supra* note 114, at 1376 (quoting 5 CORBIN ON CONTRACTS § 24.27 (1998)) (alteration in original).

131. *Lamps Plus*, 139 S. Ct. at 1412.

132. *Id.* at 1417.

133. *Id.* at 1417.

134. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

135. *See* Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 57 (1995). The Court states here "that the FAA's pro[-]arbitration policy does not operate without regard to the wishes of the contracting parties." *Id.*; *see also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) (The FAA reflects the fundamental principle that arbitration is a matter of contract").

agreements according to their terms, but if the terms of an arbitration agreement are silent as to the availability of class arbitration, then courts may not compel parties to submit to class arbitration.[136] The Court did not shut the door to class arbitration, but it maintained that parties should "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."[137] The FAA envisioned "traditional individualized arbitration,"[138] and defaulting to class arbitration when an agreement is ambiguous or silent would go against the FAA's intent.[139] The Court expanded on this characterization, stating that "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[140]

C. Lamps Plus *and* Contra Proferentem

The doctrine of *contra proferentem*, or interpretation against that draftsman, is defined in the Restatement (Second) of Contracts section 206 in the following manner: "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."[141] It is employed by courts as a last resort when searching for the parties' intended meaning in situations where agreements are silent or ambiguous, and normally is applied after examining other factors such as "general, local, technical and trade usages and custom, and including the evidence of relevant circumstances which must be admitted and weighed."[142]

Contra proferentem is more often than not utilized as a device to equalize bargaining power between parties, particularly "to aid a party whose bargaining power was less than that of the draftsperson,"[143] like Varela in *Lamps Plus.*[144] Varela and his co-workers signed an arbitration agreement in their employment contract as a condition of employment.[145] Like many employment contracts, the *Lamps Plus* contract was an example of a standard-form agreement, or an adhesion contract, which is "prepared by one party, to be signed by another party in a weaker position . . . who adheres to the contract with little choice about the

136. *Stolt-Nielsen*, 559 U.S. at 684.

137. *Id.* (emphasis in original).

138. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019).

139. *Id.* at 1417, 1419.

140. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011). The Supreme Court also asserted that "class arbitration was not even envisioned by Congress when it passed the FAA." *Id.* at 349.

141. *Restatement (Second) of Contracts § 206 (Am. Law Inst. 1981).*

142. 5 CORBIN ON CONTRACTS § 24.27 (2021).

143. *Id.*

144. *Lamps Plus*, 139 S. Ct. at 1412–13.

145. *Id.* at 1413.

terms."[146] Prior to *Lamps Plus*, the state and lower courts applied California law based on another arbitration case, S*andquist v. Lebo Automotive, Inc.*, which concluded that ambiguity is construed against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion."[147] Before the Supreme Court granted certiorari, the Ninth Circuit affirmed the District Court in *Lamps Plus* "[b]ecause the Agreement [wa]s capable of two reasonable constructions, [and therefore] the district court correctly found ambiguity."[148] Thus, when applying California state law, the interpretation would be against Lamps Plus because it drafted the agreement.[149]

The Court criticized the California usage of *contra proferentem* because "[u]nlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties."[150] The majority further described the doctrine as providing "a default rule based on public policy," which would ultimately not reveal the parties' intent and therefore cannot be used as proof of consent under the FAA.[151]

Contract law, like property and tort law, is generally governed by state laws. *Contra proferentem* is a doctrine of contract law, and the states are free to apply it as they wish. Contract law involves the study of interpretation and construction.[152] "Interpretation" of a contract is when "a court determines what meanings the parties, when contracting, gave to the language used."[153] "Construction" of a contract is when "a court determines the legal operation of the contract—its effect upon the rights and duties of the parties."[154] Construction of a contract includes the interpretation of language, while interpretation does not determine party relationships.[155] States are not on the same page when it comes to classifying to which category *contra proferentem* belongs, and this fact illustrates the variations of contract law in each state.[156]

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146. *Adhesion Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

147. Sandquist v. Lebo Auto., Inc., 376 P.3d 506, 514 (Cal. 2016) (quoting Graham v. Scissor-Tail, Inc. 623 P.2d 165, 172 n.16 (Cal. 1981) (en banc)). The California Supreme Court held in this case that an employment-related arbitration provision that was silent as to whether the availability of class arbitration was to be resolved by a court or an arbitrator had to be interpreted against the employer as the drafter pursuant to California Civil Code, Section 1654, when an employee argued that the issue was for the arbitrator. *Id.*

148. Varela v. Lamps Plus, Inc., 701 F. App'x 670, 673 (9th Cir. 2017), *vacated*, 771 F. App'x 418 (Mem) (2019).

149. *Id.*

150. *Lamps Plus*, 139 S. Ct. at 1417 (emphasis in original).

151. *Id.*

152. *See* 5 CORBIN ON CONTRACTS § 24.23 (2021).

153. *Id.* at § 24.3.

154. *Id.*

155. *Id.*

156. *See e.g.*, *Id.* at § 24.27.

For example, in New Jersey, *contra proferentem* is a rule of contract interpretation, whereas in New York, it is a rule of contract construction.[157]

D. Preemption of Contra Proferentem

The Constitution's Supremacy Clause is the foundation for federal preemption in which federal law supersedes conflicting state laws.[158] One commentator remarked that "[w]hile the supremacy clause's mandate rings clear, preemption issues are not always obvious or easily resolved."[159] There are several ways in which federal law may preempt state law. Preemption is unequivocal "where federal law explicitly says that it preempts state law."[160] It is inferred when "one can imply a clear congressional intent to preempt state or local law."[161]

There are two types of implied preemption: "field preemption" and "conflict preemption."[162] Field preemption occurs when "the federal regulatory scheme is so pervasive that it supports the reasonable inference that Congress intended that the states could not supplement it."[163] Conflict preemption, also known as obstacle preemption, occurs when "a regulated entity cannot physically comply with both federal and state regulations or 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'"[164] In *Lamps Plus*, the Court rejected the usage of *contra proferentem* because it was an obstacle to Congress's purpose and objectives of the FAA.[165]

Generally, "courts start with a presumption *against* preemption—in recognition of the limited power of the federal government and the primary authority of the states."[166] "In its obstacle preemption cases, the Court has held that state law can interfere with federal goals by frustrating Congress's goal . . . of establishing a regulatory 'ceiling' for certain products or activities, or by

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157. *See* Caitlin Specialty Ins. Co. v. QA3 Fin. Corp., 36 F. Supp. 3d 336, 342 (S.D.N.Y. 2014) (quoting 5 CORBIN ON CONTRACTS § 24.27 (1998)) (finding under New York state common law that *contra proferentem* "'is not actually [a rule] of interpretation' as 'its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used'"). *Cf.* Pacifico v. Pacifico, 920 A.2d 73 (N.J. 2007) (illustrating that, in New Jersey, the "rule of [ambiguous] contract interpretation requires a court to adopt the meaning that is most favorable to the non-drafting party").

158. U.S. CONST. art. VI, cl. 2.

159. LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 702 (2nd ed. 2018).

160. *Id.* at 703.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (quoting Gade v. Nat'l Solid Waste Mgmt., 505 U.S. 88, 98 (1992)).

165. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417–18 (2019).

166. Little, *supra* note 159, at 703 (emphasis in original).

impeding the vindication of a federal right."[167] The Court has also warned that "obstacle preemption does not justify a 'freewheeling judicial inquiry' into whether state laws are 'in tension' with federal objectives, as such a standard would undermine the principle that 'it is Congress rather than the courts that preempts state law.'"[168]

In *Lamps Plus*, Justice Thomas concurred in the opinion's application of FAA precedents but voiced skepticism of obstacle preemption, stating, "I remain skeptical of this Court's implied pre-emption precedents."[169] Notably, Justice Thomas has "criticiz[ed] the Court for 'routinely invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.'"[170] Regardless of how the Court is currently composed, as it stands in *Lamps Plus*, the FAA preempts the use of *contra proferentem* in a silent or ambiguous arbitration clause through obstacle preemption.[171]

V. CONCLUSION

This Note hopes to demonstrate that the Supreme Court should clarify its stance on class arbitrability and preemptive effects of the FAA on state law when applied to determine if class arbitrability is available. If it does not take a clear stance, the Court will continue to grant certiorari to cases asking similar questions and will issue similarly vague guidance that the lower courts will struggle to apply.

The author hopes that the Court's future decisions do not mar the freedom of contract on this subject and that it will strive to maintain the integrity of a contract's contents as much as possible. For the Court to interfere with the intentions of contracting parties is to interfere with the longstanding American legal principle of contract party autonomy and should only be contradicted in extraordinary circumstances.

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167. JAY SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 25 (2019).

168. *Id. at 26* (quoting Chamber of Com. v. Whiting, 563 U.S. 582, 607 (2011)).

169. *Lamps Plus*, 139 S. Ct. at 1420 (Thomas, J. concurring).

170. JAY SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 28 (2019) (quoting Wyeth v Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring)) (some alterations in original).

171. *Lamps Plus*, 139 S. Ct. at 1415.