# Some Class-Action Waiver Clauses Continue to be Held Unenforceable, Even After *Concepcion*

*Christopher M P Jackson, Counsel*

In a decision dated January 7, 2013, the California Court of Appeal invalidated a mandatory arbitration and class action waiver clause in an automobile sales contract, ruling that the arbitration clause was unconscionable and rejecting the defendant's attempt to invoke the clause to compel arbitration and avoid a putative class action.

In *Natalini v. Import Motors, Inc.*, A133236, 2013 WL 64611 (Cal. App. 1 Dist. Jan. 7, 2013) (unpublished), plaintiff asserted individual and class claims based on alleged violations of state consumer protection statutes – contending that the defendant, a car dealership, sold him a used car as new. The court refused to enforce the mandatory arbitration clause in the sales contract, holding that the clause was both procedurally and substantively unconscionable and was therefore unenforceable under California law.

The arbitration clause was found to be substantively unconscionable because the terms were unfairly one-sided in their practical effect, favoring remedies likely to be pursued by the seller over those benefitting a buyer. For example, the clause provided for appeals only in cases where the seller would be the likely appellant (e.g. where an award included injunctive relief); and it exempted self-help remedies from arbitration including, notably, repossession – thereby allowing the car dealer to repossess a car in the event of alleged nonpayment without giving the purchaser the opportunity to dispute the claim in arbitration. The court also ruled that the clause was procedurally unconscionable, in part because it was a contract of adhesion (a take-it-or leave it agreement), but also because it was located on the back of a form and was not pointed out to the buyer before he signed the agreement. Because the arbitration clause contained multiple defects, the court also concluded that it was "permeated with unconscionability" under California law, *id.* at *7, and that the offending provisions therefore could not be severed. The entire clause was deemed unenforceable.

The court recognized that *Concepcion* had overturned California's *Discover Bank* rule, under which class action waivers in consumer contracts had regularly been held unconscionable. But, emphasizing the broadly one-sided nature of the clause at issue, reflected in multiple terms favoring the seller, the court nevertheless invalidated it. The court reasoned that its decision was consistent with *Concepcion* because it did not apply the doctrine of unconscionability in a way that "disfavor[ed] arbitration." *Natalini*, 2013 WL 64611 at *3. In the court's view, the "conclusion that an adhesive provision is unconscionable because it is crafted overly in favor of the drafter does not rely on any judicial policy judgment disfavoring arbitration." *Id.* (internal quotation omitted).

The message of *Natalini* is that even after *Concepcion,* courts will continue to scrutinize arbitration clauses for substantive and procedural unconscionability; and where, as in *Natalini*, the terms of an arbitration clause are found to favor the seller over the buyer in ways that go beyond the simple waiver of class claims, such a clause may still be invalidated as unconscionable -- at least in some jurisdictions. Drafters should therefore assume that an arbitration clause may be held to be substantively unconscionable, even after *Concepcion*, if (1) the clause contains provisions that operate unfairly to the disadvantage of claimants and (2) those provisions are not, as the Court put it in *Concepcion*, "fundamental attributes of arbitration" – such that an attack upon them disfavors arbitration itself. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (U.S. 2011).

Of course, the full implications of *Concepcion* are still by no means clear. The arbitration clause upheld in *Concepcion* was an extremely generous one, including cost shifting and other provisions that helped make it feasible for consumers to bring claims in arbitration. It is an open question how extensively *Concepcion* might apply to other, less consumer-friendly arbitration agreements, which might place more severe constraints on the ability to pursue even individual claims. Similarly, it remains to be determined what particular limitations or procedures might be deemed "fundamental attributes of arbitration" and thus immune to attack under *Concepcion*. The Supreme Court has granted certiorari in the Second Circuit case of *In re American Exp. Merchants' Litigation*, 667 F.3d 204, 219 (2d Cir. 2012), which concerns the viability of class action waivers for claims under federal law. The decision in that case may offer additional guidance.

For now, the emerging best practice for drafting arbitration clauses with class action waivers would seem to be as follows: (i) include clear and conspicuous language regarding the waiver, (ii) avoid one-sided rules and restrictions on the availability of arbitration and remedies, and (iii) consider including cost-shifting and other consumer-friendly provisions that help preserve the consumer's ability to bring individual claims.

## About the Author

Mr. Jackson has substantial experience in products liability and Medicaid fraud litigation, patent litigation, complex commercial litigation, and international arbitration. He has deep experience in the life sciences sector, including cases relating to product licensing, drug development, regulatory approvals, and marketing. Mr. Jackson has also handled trademark disputes and false advertising litigation. Mr. Jackson is a graduate of Columbia Law School, where he was a James Kent Scholar and a Harlan Fiske Stone Scholar. He formerly served as Law Clerk to Hon. Dickinson R. Debevoise of the U.S. District Court for the District of New Jersey. Prior to attending law school, Mr. Jackson received his M.A. in English and his B.A., *summa cum laude*, from Columbia University.

## About Cohen & Gresser

Cohen & Gresser is a boutique law firm with offices in New York and Seoul. We represent clients in complex litigation and corporate transactions throughout the world. Founded in 2002, the firm has grown to over fifty lawyers in four practice groups: Litigation and Arbitration; Corporate Law; Intellectual Property and Licensing; and White Collar Defense, Regulatory Enforcement and Internal Investigations. Our attorneys are graduates of the nation's best law schools and have exceptional credentials. We are committed to providing the efficiency and personal service of a boutique firm and the superb quality and attention to detail that are hallmarks of the top firms where we received our training.

NEW YORK | SEOUL

www.cohengresser.com info@cohengresser.com PH: +1 212 957 7600