Filed 1/7/13; pub. and mod. order 2/5/13 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GABRIEL NATALINI, **Plaintiff and Respondent,** **v.** **IMPORT MOTORS, INC.,** **Defendant and Appellant.**	**A133236** **(San Mateo County Super. Ct. No. CIV500678)**

Plaintiff and respondent Gabriel Natalini (respondent), a car buyer, filed this action alleging individual and class claims against defendant and appellant Import Motors, Inc. (appellant), a car dealer. Appellant filed a petition to compel arbitration pursuant to a provision in the car sales contract, but the trial court denied the petition because it concluded the arbitration provision was unconscionable. We affirm.

BACKGROUND

In November 2010, respondent filed a complaint alleging eight causes of action against appellant arising out of his purchase of a car. Respondent asserted individual claims for negligent misrepresentation, violation of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and violation of the Rees-Levering Motor Vehicle Sales and Finance Act (Civ. Code, § 2981 et seq.; hereafter the Rees-Levering Act). Appellant alleged the car and tires were sold as new when in fact they were used. Respondent asserted class claims for violation of the CLRA, violation of the Rees-Levering Act, unfair business practices (Bus. & Prof. Code, § 17200 et seq.), false or

misleading advertisements (Bus. & Prof. Code, § 17500 et seq.), and declaratory relief. Respondent alleged that appellant's practices relating to consumer car trade-ins were unlawful.

Attached to the complaint as exhibit 1 is a copy of a California Motor Vehicle Retail Installment Contract (Sales Contract). Paragraph 20 of the Sales Contract, which appears on the backside of the contract, has the header "ARBITRATION CLAUSE" and the warning "PLEASE REVIEW - IMPORTANT - AFFECTS MY LEGAL RIGHTS." The arbitration provision states in part, "Either you or I may choose to have any dispute between us decided by arbitration and not in a court or by jury trial. If a dispute is arbitrated, I will give up my right to participate as a class representative or class member on any class claim I may have against you including any right to class arbitration or any consolidation of individual arbitrations. . . . [¶] Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute,) between me and you or your employees, agents, successors or assigns, which arise out of or relate to my credit application, purchase or condition of this Vehicle, this Contract or any resulting transaction or relationship . . . shall, at your or my election, be resolved by neutral, binding arbitration and not by a court action. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action or other mass action. I expressly waive any right I may have to arbitrate a class action. . . ." Self-help remedies are exempted from the arbitration requirement: "You and I may retain any rights to self-help remedies, such as repossession. Neither you nor I waive the right to arbitrate by using self-help remedies or filing suit." The arbitration provision also states, "The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel." The provision also contains clauses relating to selection of the arbitrator, arbitration costs, and other matters.

Appellant argues on appeal that, at the time the complaint was filed, the arbitration provision in the Sales Contract was unenforceable under *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), which held that many arbitration provisions in consumer contracts prohibiting classwide arbitration are unconscionable. In April 2011, the United States Supreme Court decided the case of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*), expressly overruling *Discover Bank*. In May 2011, appellant sent a letter to respondent demanding arbitration. When no response was received, appellant filed a petition to compel arbitration. In September 2011, the trial court denied the petition on several grounds, including the unconscionability of the arbitration provision. This appeal followed.

DISCUSSION

I. *Legal Background*

" ' "Whether an arbitration provision is unconscionable is ultimately a question of law." ' [Citations.] 'On appeal, when the extrinsic evidence is undisputed . . . , we review the contract de novo to determine unconscionability.' [Citations.]" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511-1512.) "Where the trial court's determination of unconscionability is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence. [Citation.]" (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89 (*Gutierrez*).) The trial court's ruling on severance is reviewed for abuse of discretion. (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144.)

As explained in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), "In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. [Citation.] As section 1670.5, subdivision (a) states: 'If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it

may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which . . . provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' " (*Id*. at p. 114.)

"Unconscionability has a procedural and a substantive element; the procedural element focuses on the existence of oppression or surprise and the substantive element focuses on overly harsh or one-sided results. [Citations.] To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree. [Citations.] The analysis employs a sliding scale: 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citations.]" (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 579 (*Gatton*).)

In *Discover Bank*, *supra*, 36 Cal.4th 148, the California Supreme Court considered an unconscionability challenge to an arbitration provision prohibiting classwide arbitration in an agreement between a credit card company and its cardholders. (*Id.* at p. 152.) The court held that, when a waiver of classwide relief "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Id.* at pp. 162-163.)

The United States Supreme Court overruled *Discover Bank* in *Concepcion*, *supra*, 131 S.Ct. 1740. In *Concepcion*, the high court held that the *Discover Bank* rule, which classified "most collective-arbitration waivers in consumer contracts as unconscionable[,]" was preempted by the Federal Arbitration Act (FAA). (*Concepcion*, at p. 1746.) The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) *Concepcion* reasoned that *Discover Bank* essentially "allows any party to a consumer contract to demand" classwide arbitration (*Concepcion*, at p. 1750), and concluded that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" (*Concepcion*, at p. 1748). *Concepcion* further held *Discover Bank* was inconsistent with the FAA because it imposed classwide arbitration without both parties' consent. (*Concepcion*, at pp. 1750-1751.) *Concepcion* "also discussed at length the substantial and material changes brought about by the shift from individual to class arbitration [citation], and observed that '[a]rbitration is poorly suited to the higher stakes of class litigation' [citation]." (*Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 504 (*Truly Nolen*).)

Appellant contends that *Concepcion* broadly restricts the application of the unconscionability doctrine to arbitration provisions.[1] However, "*Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved. Rather, the [c]ourt reaffirmed that the [FAA's] savings clause preserves generally applicable contract defenses such as unconscionability, so long as

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[1] As explained previously, appellant filed its petition to compel arbitration shortly after the *Concepcion* decision came out. The trial court found that, despite the change in law resulting from *Concepcion*, appellant had waived its right to enforce the arbitration provision by failing to seek to enforce it earlier. On appeal, appellant contends it would have been futile to file the petition before *Concepcion*, because the provision was unenforceable under *Discover Bank*. Respondent argues it was not clear that *Discover Bank* applied. Because we conclude the provision is unconscionable, we need not reach the waiver issue. Neither need we address respondent's contention that appellant failed to demonstrate the existence of the arbitration agreement.

those doctrines are not 'applied in a fashion that disfavors arbitration.' " (*Kilgore v. KeyBank, Nat. Assn.* (9th Cir. 2012) 673 F.3d 947, 963, quoting *Concepcion, supra,* 131 S.Ct. at p. 1747; see also *Truly Nolen, supra,* 208 Cal.App.4th at p. 506.) Appellant argues that an unconscionability analysis that focuses on the lack of mutuality or bilaterality in an arbitration provision is "an example of applying a generally applicable contract defense in a manner which disfavors arbitration." Recent California and federal district court decisions addressing arbitration provisions very similar to that in the present case and in the identical car purchase context have not read *Concepcion* so broadly. (See *Trompeter v. Ally Financial, Inc.* (N.D.Cal., June 1, 2012, No. C-12-00392 CW) 2012 WL 1980894 [p. *8] [nonpub. opn.] (*Trompeter*); *Smith v. Americredit Financial Services, Inc.* (S.D.Cal., Mar. 12, 2012, No. 09cv1076 DMS (BLM)) 2012 WL 834784 [pp. *2-*4] (*Smith*); *Lau v. Mercedes-Benz USA, LLC* (N.D.Cal., Jan. 31, 2012, No. CV 11–1940 MEJ) 2012 WL 370557 [pp. *6-*7] (*Lau*); see also *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 804, fn. 18.) A conclusion that an adhesive arbitration provision is unconscionable because it is crafted overly in favor of the drafter does not rely on any "judicial policy judgment" disfavoring arbitration. (*Truly Nolen, supra,* 208 Cal.App.4th at p. 506.)

In any event, the impact of *Concepcion* is before the California Supreme Court in another car purchase agreement arbitration provision case, *Sanchez v. Valencia Holding Company* (S199119). The issue presented in that case is "Does the Federal Arbitration Act (9 U.S.C. § 2), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. ___ [131 S.Ct. 1740], preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable?"[2] Pending the Supreme Court's ruling on the issue, we find persuasive the decisions in *Trompeter, Smith,* and *Lau,* as well as prior California Court of Appeal and Supreme

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[2] On December 19, 2012, the Supreme Court granted review in *Goodridge v. KDF Automotive Group, Inc.*, S206153, another car purchase agreement arbitration provision case. Briefing in that case is deferred pending the decision in *Sanchez v. Valencia Holding Co.*, S199119.

Court decisions analyzing similar claims of substantive unconscionability. (See *Truly Nolen, supra,* 208 Cal.App.4th at p. 507 [adhering to prior Supreme Court authority on issue not "directly address[ed]" in *Concepcion*].)

II. *Application of Unconscionability Doctrine in the Present Case*

A. *Procedural Unconscionability*

"The procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.] The element focuses on oppression or surprise. [Citation.] 'Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.' [Citation.] Surprise is defined as ' "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." ' [Citation.]" (*Gatton, supra,* 152 Cal.App.4th at p. 581, fn. omitted.)

Both aspects of procedural unconscionability are present in this case. Respondent submitted a declaration in support of his opposition to appellant's petition to compel arbitration averring that he was not permitted to negotiate the terms of the Sales Contract. The fact that the Sales Contract is adhesive alone demonstrates "a minimal degree of procedural unconscionability." (*Gatton, supra,* 152 Cal.App.4th at p. 586; see also *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100 ["When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present."].)

Furthermore, the evidence supports the trial court's implied finding that some degree of surprise is present. Respondent averred in his declaration that appellant's employees "spent only enough time on the contract to point out where to sign," he was "not allowed to read the back of the contract," he and appellant's employees "did not discuss anything on the back of the contract," and he was "not aware of any arbitration clause or waiver of rights at or before the purchase." In finding an arbitration clause in an automobile lease procedurally unconscionable, *Gutierrez* emphasized considerations

similar to those in this case: "The arbitration clause was particularly inconspicuous, printed in eight-point typeface on the opposite side of the signature page of the lease. Gutierrez was never informed that the lease contained an arbitration clause, much less offered an opportunity to negotiate its inclusion within the lease or to agree upon its specific terms. He was not required to initial the arbitration clause. [Citation.]" (*Gutierrez, supra,* 114 Cal.App.4th at p. 89.) As *Lau* pointed out in discussing a similar form, "The location of an arbitration clause on the back of a dense pre-printed form where the purchaser is not required to sign does relatively little to notify the consumer that such clause exists." (*Lau, supra,* 2012 WL 370557 [p. *8]; see also *Trompeter, supra,* 2012 WL 1980894 [pp. *3-*4].)

B. *Substantive Unconscionability*

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*)*, LLC* (2012) 55 Cal.4th 223, 246.) "Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (*Gutierrez, supra,* 114 Cal.App.4th at p. 88.) We focus on the practical effect of a provision, not whether the one-sidedness is apparent on the face of the provision. (*Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1079-1080.)

We conclude that the arbitration provision in the present case is substantively unconscionable because it is designed in several ways to systematically favor the car dealer. First, the provision authorizes an appeal resulting in a new arbitration before a three-arbitrator panel only for an award of $0 or in excess of $100,000.[3] As courts have

[3] The relevant clause states, "The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party

recognized, this type of provision, though neutral on its face, has the effect of benefiting the party that drafted the contract, here, the car dealer. In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*), an employment case, the arbitration provision allowed either party to appeal an initial award to a second arbitrator if it exceeded $50,000. The Supreme Court found the provision unconscionable, stating: The employer and its amici curiae "claim that the arbitration appeal provision applied evenhandedly to both parties and that . . . there is at least the possibility that an employer may be the plaintiff, for example in cases of misappropriation of trade secrets. [Citation.] But if that is the case, they fail to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that [the employer] was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant." (*Little*, at p. 1073.) The court continued, "Although parties may justify an asymmetrical arbitration agreement when there is a 'legitimate commercial need' [citation], that need must be 'other than the employer's desire to maximize its advantage' in the arbitration process. [Citation.] There is no such justification for the $50,000 threshold." (*Ibid.*)

The same analysis applies here. The buyer will rarely benefit from the clause permitting an appeal of an award exceeding $100,000 because the buyer, not the dealer, is more likely to recover an award of that size. Under the Sale Contract, respondent is obligated to make monthly payments on a car purchase price of $63,650, with payments

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may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel."

ultimately totaling $92,000, factoring in the financing. In contrast, appellant's obligations under the Sale Contract and California law are to sell a vehicle in working condition, to avoid misleading or false representations, and to comply with various consumer laws, the violation of which could result in substantial damages and civil penalties. A violation of the "new tire" statute alone (Pub. Res. Code, § 42885) arguably could result in civil penalties up to $125,000 if the car dealer knowingly misstated that each of the tires, including the spare, were new. In short, there is no justification for the $100,000 threshold, other than to relieve the car dealer of liability it deems excessive. (See *Trompeter, supra*, 2012 WL 1980894 [pp. *5-*6]; *Lau, supra*, 2012 WL 370557 [p. *10]; *Smith, supra*, 2012 WL 834784 [p. *3].)[4]

Second, the arbitration provision authorizes an appeal resulting in a new arbitration before a three-arbitrator panel if the award includes injunctive relief.[5] This type of clause unduly burdens the buyer because the buyer, not the car dealer, is more likely to obtain an injunction. "[I]mmediate injunctive relief [is often] essential to protect consumers against further illegal acts of the defendant." (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 20.) In litigation by consumers, "the importance of providing an effective injunctive remedy becomes manifest." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 107.) Not surprisingly, it is the buyer, not the car dealer, who would be seeking preliminary or permanent injunctive relief, primarily to enforce consumer laws like the CLRA. It is difficult to conceive of a situation where a car dealer would be requesting injunctive relief against a buyer. If an injunction is issued

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4 We need not and do not conclude that the aspect of the provision authorizing an appeal and new arbitration where the award is $0 is overly one-sided, because it is conceivable that both parties could bring claims and receive small awards from which an appeal would be precluded under the provision.

5 The relevant clause states, "The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, *or includes an award of injunctive relief against a party*, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel." (Italics added.)

against a dealer, the arbitrator has favorably reviewed the merits of the buyer's claims and determined that the interests of consumers will be irreparably injured without injunctive relief. Nevertheless, here, the arbitration provision allows the car dealer to delay the effect of an injunction by commencing a new arbitration. By authorizing appeals from injunctive relief, only the car dealer is benefited, making the clause one-sided. (See *Trompeter*, *supra*, 2012 WL 1980894 [p. *6]; *Smith*, *supra*, 2012 WL 834784 [p. *4].)

Thus, when it serves the car dealer's interests the buyer's right to appeal is greatly constrained, and the car dealer touts the benefits of mandatory arbitration: "efficient, streamlined procedures," and "the informality of arbitral proceedings . . . , reducing the cost and increasing the speed of dispute resolution." (*Concepcion*, *supra*, 131 S.Ct. at p. 1749.) But when those factors do not benefit the car dealer—if there is a large award or injunctive relief against it—then delay, complexity, and higher costs take precedence, and the buyer is subjected to an appeal and new arbitration, denying the weaker party of the benefits of the arbitration agreement.

Third and finally, the arbitration provision expressly exempts self-help remedies including repossession, which is perhaps the most significant remedy from the car dealer's perspective.[6] The buyer has no effective self-help remedies against a car dealer, and none of the buyer's remedies are exempt from arbitration. Yet one of the most important remedies to a consumer—injunctive relief—*is* subject to arbitration. In *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, the plaintiffs obtained a reverse mortgage on their home. The loan agreement contained an arbitration clause requiring the arbitration of all controversies with the exception of self-help remedies, stating: " '[T]his Section does not limit [the lender's] right to foreclose against the Property (whether judicially or non-judicially by exercising [its] right of sale or otherwise), to exercise self-help remedies such as set-off, or to obtain . . . appointment of

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6 The relevant clause provides, "You and I may retain any rights to self-help remedies, such as repossession. Neither you nor I waive the right to arbitrate by using self-help remedies or filing suit."

a receiver from any appropriate court, whether before, during or after any arbitration.' " (*Id.* at p. 850.) The plaintiffs filed suit against the lender, and the lender moved to arbitrate the case. The Court of Appeal affirmed denial of the motion, stating that "[a]s a practical matter, by reserving to itself the remedy of foreclosure, [the lender] has assured the availability of the only remedy it is likely to need." (*Id*. at p. 855.) "The clear implication is that [the lender] has attempted to maximize its advantage by avoiding arbitration of its own claims." (*Ibid.*) By exempting repossession—to which only the car dealer would resort—from arbitration, while subjecting a request for injunctive relief to arbitration, the Sale Contract creates an unduly oppressive distinction in remedies. (See *Trompeter, supra*, 2012 WL 1980894 [p. *5]; *Smith, supra*, 2012 WL 834784 [p. *4].)

In sum, the arbitration provision is substantively unconscionable. This is not because certain discrete provisions are of greater benefit to appellant; what renders the arbitration provision substantively unconscionable is the fact that the provision is systematically structured to maximize the utility of arbitration in resolving only buyer's claims, while allowing the car dealer to appeal from a large award or injunctive relief and allowing the dealer to continue to pursue its primary repossession remedy outside of arbitration. (See *Armendariz, supra,* 24 Cal.4th at p. 120 ["It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense."].)[7]

C. *Severance*

"If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any

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[7] Because we conclude the arbitration provision is substantively unconscionable for the reasons stated herein, we need not and do not address additional grounds allegedly supporting that conclusion, such as the clauses relating to cost allocation and arbitrator selection.

unconscionable result." (Civ. Code, § 1670.5, subd. (a).) We have the authority "under this statute to refuse to enforce an entire agreement if the agreement is 'permeated' by unconscionability. [Citations.] An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision . . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.' [Citations.] 'The overarching inquiry is whether " 'the interests of justice . . . would be furthered' " by severance.' [Citation.]" (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826.)

Appellant suggests that, if this court finds aspects of the arbitration provision substantively unconscionable, those clauses could be severed from the provision. Here, the arbitration provision suffers from at least three defects, all of which tilt the arbitration unfairly in favor of the car dealer. First, the dealer may appeal an adverse monetary award that only the buyer is likely to receive—an award exceeding $100,000. While the dealer may appeal such an adverse award, the buyer cannot appeal a monetary award it considers too low, other than a total loss. Second, the dealer may appeal an award of injunctive relief—a remedy only the buyer would seek. Third, the remedy of most importance to the dealer—repossession—is exempt from arbitration. These defects lead us to conclude that the arbitration provision is permeated with unconscionability. (See *Trompeter*, *supra*, 2012 WL 1980894 [p. *7].)

Accordingly, we conclude the arbitration provision is procedurally and substantively unconscionable. Because the provision is permeated with unconscionability, the trial court did not abuse its discretion in declining to sever the unconscionable aspects of the provision.

DISPOSITION

The trial court's order is affirmed. Costs on appeal are awarded to respondent.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

Filed 2/5/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GABRIEL NATALINI,

Plaintiff and Respondent,

v.

IMPORT MOTORS, INC.,

Defendant and Appellant.

A133236

(San Mateo County Super. Ct. No. CIV500678)

ORDER MODIFYING OPINION, AND CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 7, 2013, be modified as follows:

At the end of the first sentence of the first full paragraph on page 12 of the opinion, add as footnote 7, the following footnote, which will require renumbering of all subsequent footnotes:

> [7] We recognize that, following the original filing of the decision in the present case, the Second District concluded in *Flores v. West Covina Auto Group* (2013) 212 Cal.App.4th 895, that a very similar provision was not substantively unconscionable. We adhere to our analysis and conclusion.

So that the sentence and footnote read:

> In sum, the arbitration provision is substantively unconscionable.[7]
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>
> [7] We recognize that, following the original filing of the decision in the present case, the Second District concluded in *Flores v. West Covina Auto Group* (2013) 212 Cal.App.4th

895, that a very similar provision was not substantively unconscionable. We adhere to our analysis and conclusion.

There is no change in the judgment.

The opinion in the above-entitled matter filed on January 7, 2013, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

Date:_____ _____, P. J.

Superior Court of San Mateo County, No. CIV500678, Joseph C. Scott, Judge

Toschi, Sidran, Collins & Doyle, David R. Sidran and Thomas M. Crowell, for Defendant and Appellant.

Hanson Law Firm and John W. Hanson; Louis A. Liberty, for Plaintiff and Respondent.