December 9, 2017

NHTSA Headquarters
1200 New Jersey Ave. SE
West Building
Washington, DC 20590

Gentlemen:

In keeping with the 2014 Infinity Owner's Manual offer to provide customer feedback, enclosed is the supportive attachment I sent to my auto dealer, Infinity of San Francisco, and the Infinity Corporation requesting modification of my contract to exclude contract provisions of (1) mandatory arbitration and (2) waiver of class action rights.

These requirements comprise nothing less than contracts of adhesion, and their pervasive legally condoned use is a sad commentary on our morality and justice. And admittedly, my negligence in signing the contract. I hope your organization has the political power to overcome the entrenchment of big business in dictating contractual rights of the U. S. consumer, employee, patient, and . . . .

Very truly yours,

[redacted]

Encl.
Document

MANDATORY ARBITRATION

[redacted]

Issue: Whether the purchase contract of an Infinity Q50 from Nissan Infinity of San Francisco is a contract of adhesion justifying replacement of the clause requiring "binding arbitration" for resolution of conflict with a clause permitting arbitration by mutual agreement and secondly, elimination of the clause to "give up your right to class arbitration."

Summary

Codified and Judicial Law: The Federal Arbitration Act of 1925 provides for judicial facilitation of private dispute resolution through arbitration codified at 9 U.S.C. 1-14. It was to be applied to "maritime transactions" and "commerce" meaning commerce among several states and U. S. territories or with foreign nations. "but nothing shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 makes arbitration agreements "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contact." This savings clause permits agreements to arbitrate to be invalidated by generally applicable state contract defenses such as fraud, duress, or unconscionability but not by defenses that apply only to the issue of arbitration. *AT&T Mobility LLC v. Concepcion* (2011) 131 U.S. 1740. Relevant to my request I am applying the defenses of fraud and unconscionability as permitted by this United States Supreme court case.

In other words, while *Concepcion* preempts state law that prohibits class action waivers in consumer arbitration agreements, the U. S. Supreme Court did provide that general contract defenses such as unconscionability may provide grounds to invalidate arbitration agreements in state courts. As previously stated, I base my case on such defenses. I am not arguing the legal validity of mandatory arbitration or the waiving of class action rights.

I also rely on California Civil Code Section 1670.5 (a) which codifies the principle that if a court as a matter of law finds the contract or any clause to have been unconscionable at the time it was made, the court may refuse to enforce the contract or any clause thereof. This code also specifies that parties claiming under this defense of unconscionability "shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making a determination." I take this opportunity in the discussion that follows.

Rationale for My Request:

(a) Concerning the commercial physical setting of the contract signing, approximately ten minutes before closing, I am presented with a 4" x 28" two-page document suspiciously contrived of varying fonts and boldness of type and requiring 13 signatures.

(b) I also give specific consideration to U.S. Supreme Court case of *AT&T Mobility LLC v. Concepcion,* the holding of which in a 5-4 decision is that "courts must place arbitration

agreements on an equal footing with other contracts." That is exactly my argument in support of my case. The problem, however, is that while the Supreme Court's holding makes no reference to *mandatory* arbitration, it appears to have been interpreted -- both judicially and in the legal community -- to apply to mandatory arbitration. Therefore I include it in my discussion.

(c) Also, despite the *Concepcion* ruling that class action waivers in arbitration agreements are enforceable -- which overrides Federal and California judicial law that they are not -- I also interpret such a clause as comprising a contract of adhesion. In addition to the commonly held acceptance of this conclusion, the legislature's proposed amendments to the Federal Arbitration Act, S. 537 and H. R. 1374, also reveal agreement. The purpose of these amendments is "to invalidate arbitration agreements between parties in certain commercial contracts . . . unless the written agreement to arbitrate is entered into by both parties after the claim has arisen . . . ."

(d) In addition, I rely on facts subsequently presented in detail in support of my allegations of fraud and unconscionability.

Underlying Issue of Mandatory Arbitration: Advantage to Mandating or Mandated Party?

The main argument given by those in favor of arbitration is its savings in cost, time, and efficiency. That is true, but only for the mandating party, that is,big business, the party with the superior bargaining power. Proof for this conclusion can be found by simply referring to how auto dealerships legally avoided the mandatory arbitration in their contracts with respective auto manufacturers. A study could not have been designed with the validity and reliability this unique reality situation provided, described briefly as follows:

Auto dealerships occupied the unique position of being both the mandated and mandating parties. As the *mandated* party in contracts with their respective auto manufacturers they *combined* their strength to eliminate mandatory arbitration from their contracts. They succeeded. The result was the Motor Vehicle Franchise Contract Arbitration Fairness Act. However, as the *mandating* party they wished to take advantage of mandatory arbitration and kept it in contracts with *their auto buyers.* So now dealerships comprise big business v. the innocently vulnerable auto buyer. Unfortunately, fairness does not extend to individual unorganized customers.

The question is: How long can the U. S. Supreme Court (i.e., the Concepcion 5-member majority) keep a straight face while giving accolades to a system that survives only because it is mandated? Note should be made here that *Concepcion* is the law of arbitration as now applied in all contracts applied with limitless scope.

Conclusion: The facts of my case satisfy codified and case law therefore justifying modification of my contract re mandatory arbitration and the class action waiver, -- the Pernicious Pair. A more detailed discussion follows. However, if my contract defenses are found not to be supportive of my request, then I must take the alternative defense, i.e., the illegality of the two clauses in issue.

But prefacing this discussion, it seems appropriate to make reference to the issue of whether or not arbitration in itself, is a viable system, apart from the mandatory issue. Experience reveals it is not, at least not as presently practiced. The reason is this: Arbitrators are biased toward the party with superior bargaining power as such party represents the potential future customer, e.g. General Motors, not the single auto buyer. In fact, the general conclusion of many studies reveals advantages of courts over arbitration. See, for example, Alexander J. S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." Journal of Empirical Legal Studies 8(1): 1-23 (2011).

However, even in the absence of that power variable, there are other unresolved problems with the present operational system of arbitration. It has no structure even as to scope, and rules are uncertain. Consequently, arbitration has had a history of piecemeal solutions in its application with never-ending conflicts and unresolved questions, three of which are presently on the U. S. Supreme Court docket.

In an attempt to correct these problems of uncertain application and procedures – to say nothing of its inequities and questionable legalities -- the good guys in Congress have introduced bills, as previously referenced. But the proposed Arbitration Fairness Act of 2017 (to amend Title 9 of USC) does not address many present unanswered questions. The bill prohibits only predispute arbitration agreements concerning employment, consumer, antitrust or civil rights. What about professional services contracts, e.g., doctor-patient? Or church-member church? These are only two examples of arbitration contracts having come to my attention by accident. I have not researched the matter, so I have no knowledge who else has joined the party.

As a **concluding comment** on legislative attempts to replace Title 9, if the Senate achieves enactment of just one requirement -- that arbitration agreements be restricted to disputes between entities of generally similar sophistication and bargaining power – it would solve the problem, as in the case of those organizations acknowledging the problem and specifically eliminate the Pernicious Pair in their contracts, e.g., Securities and National Labor Relations Board subsequently discussed. So, until any constructive change is made to the present interpretation of the FAA, I present the following arguments and conclusions with the assistance of Alexander Hamilton.

Supportive Explanation of Summary

Federal Arbitration Act of 1925 – Birth of the Problem

As stated in my preceding summary, Section 2 of the Federal Arbitration Act of 1925) U.S.C. Sections 1-14 makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." (Emphasis added.) This savings clause permits agreements to arbitrate to be invalidated by generally applicable state contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to the issue of arbitration. *AT&T Mobility LLC* v. *Concepcion* (2011) 131 U.S. 1740. Relevant to my request, I am applying the defenses of fraud and unconscionability as subsequently discussed.

California Arbitration – Statutory and Case Law

Also, to review my summary, in keeping with the FAA of 1925 and *Concepcion, supra,* I rely in part on California Civil Code section 1670.5 (a) which codifies the principle that if a court as a matter of law finds the contract or any clause to have been unconscionable at the time it was made, the court may refuse to enforce the contract or any clause. This code also specifies that for parties claiming under this defense of unconscionability, such parties "shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." I take this opportunity to present this evidence as follows.

Representing the most recent case law in California on the issues of arbitration and unconscionability is [redacted] *LLC* (2015) 61 Cal. 4th 899. Citing [redacted] 2000) 24 Cal.4th 83 and California Civil Code Section 1670.5, [redacted] held that if a court finds the contract or any clause unconscionable, the court may refuse to enforce the entire contract or any part without the unconscionable clause. Also supportive of its conclusion, [redacted] cites *Concepcion, supra,* 131 U.S. 1740 which gives a similar interpretation to section 2 of the FAA, that is, that generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate an arbitration clause.

Unconscionability: Rule and Application as Applied in Case in Issue

As an aid to understanding unconscionability, [redacted] (2011) 201 Cal.App. 4th 75, begins by discussing the general principles of unconscionability.

" 'One common formulation of unconscionability is that it refers to absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" [Citation.] That formulation implicitly recognizes the doctrine of unconscionability as having both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided result.

Both must be present but not necessarily to the same degree in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. [redacted] (2008) 160 Cal.App.4th 1272.

This attempt in [redacted] to give some definitional objectivity to the concept of unconscionability represents just a few of the thousands of pages of California, federal, and United States Supreme Court rulings devoted to the subject of arbitration as an alternative to litigation. Each of these judicial decisions was supported by a definition in an attempt to provide some degree of objectivity, and therefore reliability, to the abstract criterion measure of "unconscionability." My conclusion is that there is more uncertainty than reliability, that is, uniformity of application.

I give one supportive example to this conclusion by reference to the conflict between the most recent California Supreme Court case of [redacted] and the United States Supreme Court case

of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. Note my previous reference to the doctrine of unconscionability. As explained in [redacted] procedural unconscionability focuses on **"oppression or surprise due to unequal bargaining power,"** and this inequality justifies a defense to the enforcement of an arbitration agreement.

Concepcion indicates a completely divergent view. The majority opinion of the court stated that even with the presence of **unequal bargaining power** between the parties, "we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable." spDespite this significant apparent conflict, [redacted] ignores it. In any event, *Concepcion,* of course, takes precedence over [redacted]

With this uncertainty of the law and as it may ultimately relate to my case, it may be appropriate to digress here for more specific discussion of this existing problem. First of all, is the fact that *Concepcion* was a 5-4 decision (Justice Alito in the majority. The present U. S. Supreme Court is still split. This split has been referred to as ideological. But from my pragmatic view, I do not see that this split has achieved the sophistication of an ideology. It is more likely , a least operationally, determined by the split in bargaining power. And at the U. S. Supreme Court level, it translates to Republicans v. Democrats, five and four respectively.

The question arises: How did we arrive at this expansive use of arbitration, mandatory or otherwise, and with the blessings of the U. S. Supreme Court? With its advantages to the entity drafting a contract legally permitting boilerplate clauses, it was inevitable its growth would be exponential.

Complete freedom, however, brings opposing forces, one of which was the Consumer Financial Protection Bureau (under Dodd-Frank) which adopted a rule that banks and credit card companies could no longer force customers into arbitration and block them from filing a class-action cause of action. Unfortunately, Dodd-Frank Wall Street Reform and Consumer Protection Act was repealed. Presumably taking its place is the Arbitration Fairness Act of 2017 possibly in committee.

a. Procedural Unconscionability

As explained in [redacted] "oppression" arises from an **inequality of bargaining power.** This results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [redacted] *Co. LLC, supra,* Cal.App.4th 75.

Specific to procedural unconscionability are the criteria determining the manner in which the contract was negotiated and the circumstances of the parties at that time, that is, the complete contractual setting.

As related to my case, after several hours in the showroom before reaching decisions of car model and safety options, I was directed to the finance officer for signing of purchase agreement and payment. However, by late in the afternoon, I was very tired having to walk with a cane required by recent surgery. Also, as it was to be an all-cash purchase I assumed the

formalities would take just a short time and dutifully went to the finance office.

After meeting the finance officer, I was handed a sales contract. This preprinted document consists of one long page, approximately 4" x 28" inches with print on each of the two sides requiring 13 buyer signatures. My simple-formalities assumption proved painfully in error. Excusable or not, I was too tired to do not much more than sign my name, thirteen times. And it seemed only reasonable to expect that a tired customer making a $43,000 cash transaction just minutes before closing would – as a common business courtesy -- be given within the next day or so an opportunity to discuss or clarify any particular contract issue.

My defense is that a dealership should have a business philosophy that shows some respect and consideration for its customers as might be evidenced by a salesperson giving some degree of forewarning to a prospective buyer of the lengthy contract to be signed and an opportunity to return for a more comfortable time. This would certainly be more in keeping with the customer satisfaction goal of Nissan Infinity as proudly indicated in the Customer Care brochure, What I experienced instead was the old buyer-beware caution.

Purpose: There is also disagreement on the issue of the purpose of the FAA of 1925. Historical analysts have concluded that the initial purpose was to make available a procedure of conflict resolution to be applied between merchants with approximately equal bargaining power.

The United States Supreme court, however, rejects this conclusion. The court ruled in *Concepcion* that "(s)uch a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases." The Supreme Court should also have taken note in that nowhere in the text of the FAA is the word "arbitration" preceded by the adjective, "mandated."

Another divergent group on the issue of mandated arbitration is the National Automobile Dealers Association (NADA). As previously referenced, its members occupy a unique position. . They are both mandatory *and* mandating contractual parties, the former in their contracts with their respective auto manufacturer, the latter in their contracts with their auto buyers. Appreciating the significantly advantageous position of the mandating party, the dealerships combined their forces and took legal action to remove mandatory arbitration from their contract with the auto manufacturer but retained it in contracts with their buyers.

The outcome was that in November 2002 Congress passed an act, the Motor Vehicle Franchise Contract Arbitration Fairness Act (ACT). It limits arbitration in contract franchise contracts only if after a controversy arises both parties consent in writing to use arbitration to settle such controversy.

b. Substantive Unconscionability

Contract Format and Content: As a consequence of the growing pressure from consumer groups, as for example, the Consumer Financial Protection Bureau, and also the greater scrutiny given to arbitration clauses by both state and federal courts, dealerships are being warned to examine their arbitration clause to make sure it will keep the dealership out of the court system. The Automotive Compliance Consultants offer to dealers several specific

recommendations, one of which is to make the arbitration provision conspicuous using different type size and style. Whatever the source, that recommendation is plainly evident in the Infinity contract but satisfied with psychological deceptiveness, subsequently discussed.

Under the paragraph title "Agreement to Arbitrate," it is specified that pursuant "to the Arbitration Provision on the *reverse* side of this contract" by signing that paragraph "you or we may elect to resolve any dispute by neutral, binding arbitration . . . ." However, by the time I reviewed the front side and signed it, I forgot to read the reverse side.

It was not until the next day in the quiet confines of my home did I carefully read the contract -- including the reverse side. It took a few hours to do so, and I still had unanswered questions. But I did come to some psychological discoveries. The arbitration clause is presented in a clever design: it minimizes text legibility where emphasis instead should be given for buyer's attention. As explained:

Mandatory Agreements to Arbitrate: The format of the arbitration clause – that is, the clause on the contract face, signature side, is comprised of two lines, the first of which is the title "Agreement to Arbitrate" in bold print. But the remaining two-line text is in very small print. This text explains that the buyer signing the contract agrees to binding arbitration in the resolution of any dispute on the election of Nissan.

Presumably, this was meant to provide proof that the customer has been alerted to the arbitration clause, re the bold type. But the text on the other hand -- which explains the limitations of arbitration versus a trial court – is not given the bold treatment. It is these limitations, however, that should be in bold type and large font.

As to the "reverse side" addendum of the arbitration clause, that is, the no-signature side, the first few lines are in bold print, here again presumably to provide evidence that the buyer has been alerted. But the information important to the buyer is in the text in fine-print. It is interesting to note that these comments on format are also noted in the *Sanchez* appellate ruling in support of the "unconscionability" issue, as for example, placement of signature page.

The dealership should be honest by informing the customer: "The mandatory arbitration clause is nonnegotiable." This take-it-or-leave-it clause *might* very likely alert the buyer to investigate the issue or not waste time in dealing further with that dealership.

Prohibition of Class Action

The two-line section under Agreement to Arbitrate on the *signature side* is *devoid* of any reference to class actions. However, on the *reverse no-signature side* in the box entitled Arbitration Provision, item 2 makes a *complete, definitive statement* as to the buyer's rights if a dispute is arbitrated. That is, "you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations."

This contract design goes beyond psychological cleverness. It is fraud in its deceptiveness and, therefore, justifies application of the FAA savings clause which permits

agreements to arbitrate to be invalidated by generally applicable state contract defenses, such as fraud, duress, or unconscionability.

Other Deceptive Contract Provisions

Further review of the contract also revealed this unique composition in font style and size with variations in boldface. The purpose obviously is to design a contract advantageous to the seller. Psychological studies in perceptual mechanisms help point the way. For example, in taking measurements of attention, human factor specialists have used eye-movement tracking devices in a wide variety of domains. *Journal of Experimental Psychology*: Applied, 6(1), 31-43.

Also, the small-and-large-print pattern of the sales agreement takes advantage of the *tendency of the eye to shift from effortful to easy readability,* that is, from small to large print. Reading the contract, the buyer's attention shifts away from the text with small print -- the ***seller's right*** to cancel and ***buyer's requirement*** to sign the arbitration agreement, both to advantage of seller – and shifts to the larger print. What is in large print is the subject of public liability insurance limits. Small print could have been used. Or *very* small print.

Before leaving the subject of contract design, reference should also be made of the "Note to Buyer" not to sign the contract before reading it. This notice does not, however, appear until halfway through the contract and the several required signatures. As for content, apart from comments previously made, the contract makes casual note that discovery and rights to appeal in arbitration are generally more limited than in a lawsuit," and "other rights that you and we would have in court may not be available in arbitration." And the appeal statement borders on fraud.

It may be relevant here to refer to *Sanchez, supra,* specifying that all the formulations used to determine unconscionability point to the central idea that the unconscionability doctrine is concerned with terms that are unreasonably favorable to the more powerful party citing 8 Williston on contracts (4th ed. 2010) Section 18.10. These include:

> terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible *manner fundamental duties otherwise imposed by the law, fine-print* terms, or provisions that seek to negate the reasonable expectations of the nondrafting party . . . . *Sonic II, supra,* 57 Cal. 4th at p. 1145.

Validity of Contract Defense of Disparity of Bargaining **Power**

Admittedly, the AFA specifies motor vehicle franchise agreements. But the stated purpose of this act is noteworthy. According to the Report of the Senate Committee on the Judiciary, the act was necessary because of the disparity in bargaining power between motor vehicle dealers and manufacturers. In addition, the report found these franchise agreements were inherently coercive and one-sided. See Motor Vehicle Franchise Contract Arbitration Fairness Act Report, S. Rep. (Sept 10, 2002). It follows then that this act legitimizes the defense of a disparity in bargaining power.

In addition to defenses previously discussed in relation to motor vehicle franchise contracts, I claim a cause of action under the Motor Vehicle Franchise Contract Arbitration rness Act of 2001 (AFA). As explained, Section 17(b) simply states that whenever a motor vehicle franchise contract provides for the use of arbitration, both parties must consent in writing to its use to settle controversies.

So if National Automobile Dealers Association is a victim of mandatory arbitration, I too should so qualify as a single auto purchaser against a dealership. But admittedly this bargaining power issue is in conflict with the U. S. Supreme Court.

AFA Exception to FAA v. United States Supreme Court

While this conflict was previously discussed, it is deserving of more explicit explanation of the nature and extent of this conflict. The differences between the Motor Vehicle Franchise Contract Arbitration Fairness Act and the five-member majority of *AT&T Motility LLC* v. *Concepcion* are more than diverse. They are antagonistic. This is revealed in both statements of purpose and practice of arbitration.

As indicated in its legislative history, the purpose of the AFA was to redress the unfair balance of power between the mandating party and the mandated party of arbitration. The holding in *Concepcion,* however, was in complete conflict as previously stated. In addition to the ruling that the defense of bargaining power was explicitly rejected, the court went on to say, as previously referenced, that even in relationships involving unequal bargaining power ";agreements to arbitrate in that context are enforceable." (AT&T Mobility LLC v. Concepcion (2011) 131 U.S. 1740 fn. 5)

It is difficult to understand what factual data support the Court's conclusion in *Concepcion.* The court merely makes conclusory statements in the absence of any supportive citations other than citing itself in [redacted] "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" And *Concepcion* also concludes that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." No supportive data.

The court, however, does not specify for whom the benefits of arbitrations are bestowed. Is it the mandating or mandated party? Or is everyone included? **Obviously, one biased person, the arbitrator -- taking the place of judge, jury, discovery rights, rules of evidence, and eliminating the appeal process as in litigation -- would definitely save time and money. But so would flipping a coin.**

To return to the AFA, while it makes a wedge into justice with its potential for further exceptions to forced arbitration in contracts, unfortunately, it makes no reference to the ban on class action procedure for resolving disputes. However, the United States Supreme Court, by virtue of its position, need only make a declaration to bestow upon it the law of the land for some indeterminate time as evidenced in *Concepcion,* as follows:

"First, the switch from bilateral to 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." *AT&T Moblity LLC v. Co84;ncepcion*, 131 S. Ct. 1740 (2011). This statement reveals a misconstruction of the issue -- which does not involve a comparative analysis of merits of class actions v. individual arbitration. The issue is the legality of a contract clause *banning* class action participation as opposed to permitting the parties to have the freedom to exercise that right. A boilerplate waiver of rights does not permit a choice by definitio

However, if arbitration has advantages of savings in cost and time, why should a waiver of the alternative class action rights be necessary? A waiver is not necessary if it is to give something to someone. The Concepcion court did not answer that question. Neither did it consider the opposing argument that an individual action may not be feasible for those cases in which a small amount of the individual loss does not make it financially feasible to devote extensive resources to resolve complex issues of design and manufacture as in the auto industry.

For example, would a $100 loss justify filing a cause of action against General Motors with an uncertain outcome? On the other hand, a class action is a great threat to the manufacturer who sells millions of automobiles worldwide with that $100 defect. Obviously, auto manufacturers want to maintain legally approved clauses of adhesion mandating the auto buyer to arbitrate and also to give up the right to participate as a class action in any class claim. This logic seems simple, but was not acceptable to Judge Spiro and four other judges.

Trend of Widening Scope of FAA

The Federal Arbitration Act of 1925 has come a long way from its original purpose, that is, "for any maritime transaction or contract involving commerce to settle through arbitration or any conflict that results thereafter."

Arbitration also has an extensive operational history which might be considered to have begun before the FAA of 1925, that is, going back to Colonial times when it was used to resolve certain disputes between businesses in the commercial community. [redacted] "Arbitration Domestic." The Social Science Research Network Electronic Paper Collection.

But it was during the 1980s that judicial expansion greatly increased the use of arbitration covering disputes between companies both with their employees and with their customers. Big business could appreciate its advantages, and with an absence of any obstructions, it was inevitable that its use would become pervasive. In fact, there is now complete freedom of corporations to include in their contracts adhesive contract clauses of mandatory arbitration.

The FAA has continued unabated with its tentacled insidious spread. At least in San Francisco, binding arbitration has now found its way into doctor-patient contracts which I just recently learned from personal experience. I have no idea what other professional or occupational fields have now been included. Maybe plumbers.

However, arbitration in its binding form may now have reached its spiritual limits. Mandatory arbitration – as anointed by the United States Supreme Court – now applies to the spiritual world, one ecclesiastical manifestation of which is in the following agreement of religious organization:

> The undersigned parties hereby agree that if any dispute . . . is not resolve in private meetings between the parties pursuant to Matthew 5:23-24 and 18:15, then the dispute or controversy will be settled biblically based mediation and, if necessary, legally binding arbitration on, in accordance with the Rule of Procedures for Christian Conciliation . . . ."

As to legal status of this religious use, "Religious arbitration clauses . . . have often proved impervious to legal challenges." The New York Times (Nov. 3, 2015) at page B6.

The only difference in contractual wording is the replacement of "legally binding" for "mandatory arbitration." So given the present impregnable appearing forces of big business and the U. S. Supreme Court ruling, hopefully Congress can bring an end to this encroaching menace of enforced legal acceptance of contracts of adhesion and mine in particular.

Conclusion: The conclusion is that after almost a century of experience with the FAA of 1925. "tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court." The Times, Nov.2, 2015. The individual consumer is no match on the big business battlefield with the added support of the Supreme Court.

A second conclusion is that there are many issues concerning arbitration which remain not only unresolved but in conflict between the congressional and judicial branches of our government. While the history of arbitration reveals exhaustive analysis -- thousands of judicial

decisions, both state and federal, discourses of legal scholars, law journals, the many rulings of the United States Supreme Court on the relative merits of arbitration, and Congressional hearings devoted to drafting a comprehensive bill governing the subject -- no resolutions are in sight. Just piecemeal laws and judicial decisions to escape arbitration as now applied.

Sources of Input Determining California Auto Buyer's Rights and Remedies

To return to the specific issues in my case, that is, the murky unsettled field of binding arbitration clauses, specific review of rights and remedies may be clarifying for arriving at any conclusions. And for a realistic picture, the political and economic context must also be considered. The beginning question: Auto dealer's contract.

1. The Auto Dealer

Whether individual or class action arbitration, the dealership is in the driver's seat and and continues to hold the balance of power. As stated In the Consumer Task Force for Automotive Issues, "Such Dealership Mandatory Arbitration Agreements are almost always designed to protect the seller and to make it nearly impossible for the consumer to receive a fair hearing – even when the fraud committed against the consumer is clear and highly destructive." In this same article Remar Sutton, President, puts it succinctly: ***"Mandatory binding agreements are the newest scam in the*** **arsenal** ***of unethical dealership weapons used to protect the dealership from accountability when they defraud consumers."*** (Emphasis added.)

So, as previously discussed in my Summary, with their combined efforts under the political force of the National Automobile Dealers Association, they were successful in the passage of the Motor Vehicle Franchise Contract Arbitration Fairness Act (15 U.S.C. Section 1226(a) (2) (2002). The National Automobile Dealers Association (NADA) hailed this Act as the "'biggest legislative victory for NADA in the least 50 years.'" Chiappa and Stoelting, *Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration ACT* (2003) 22 ABA, Franchise Law Journal 219.

As the dealerships had no interest in treating their customers as they wished to be treated by their respective auto manufacturers, then the individual auto buyers should be legally justified to use the same arguments against their dealerships as the dealerships used against their respective manufacturers. Or if legality lacks relevance, how about fairness?

2. U. S. Supreme Court Ruling – *AT&T Mobility LLC v. Concepcion*

Another source of input at the present time, the Supreme Court's 5-4 ruling of Concepcion is the final arbiter on the contractual application of arbitration and class actions. While I disagree completely with the majority opinion, I agree completely with the dissenting opinion as written by Judge Stephen Breyer. Specifically, I offer the following arguments in support of my case and for whatever purpose certain government entities may find useful in consumer data collection.

3. Savings Clause – Article 2 of FAA

The *Concepcion* majority opinion makes reference to the Savings Clause of the FAA relevant to the defense of unconscionability as follows:

> This savings clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, on such as fraud, duress, or unconscionability.' But not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *AT&T Mobility LLC* v. *Concepcion (2011)131 U.S.1740.*

However, Article 2 of the FAA states that an "an arbitration agreement 'shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or equity for the revocation of *any contract.* (Emphasis added.) California law is consistent with this rule, and is applied to *any contract.* Therefore, as stated by Justice Breyer in the dissent of *Concepcion,* whose opinion undoubtedly will be accepted as more authoritative than mine: The "court is wrong to hold that the federal Act pre-empts the rule of state law."

The U. S. Supreme Court, however, ruled that California law "stands as an obstacle to the full purposes and objectives of Congress," citing *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). The court held in *Hines* that a Pennsylvania state system of alien registration was superseded by a federal system (the Alien Registration Act) because it was an obstacle to the accomplishments and execution of the full purposes and objectives of Congress.

Unfortunately, I fail to see the relevance of a 1941 case concerning international law to class-action waivers. However, the "obstacle" statement is cited in *Concepcion.* But that is nothing more than a conclusory statement hanging on a 5-4 decision. In any event, as I stated briefly, the facts in my case support a defense of "unconscionable " under this savings clause.

a. The Discovery Bank Rule -- Consistent with FAA

Oversimplifying the Discover **Bank Rule, California Supreme Court stated that when a consumer** contract includes a class action waiver, the contract is unconscionable and therefor not pre-empted by the FAA. *Discover Bank* v. *Superior Court,* 36 Cal. 4th 148 (2005). This decision was subsequently confirmed by the Ninth Circuit. Justice Breyer in the court's dissent gives detailed support for his statement that waivers are unconscionable and should not be forced. Unfortunately, the U. S. Supreme Court overruled *Discover* in *Concepcion*, supra.

c. Questionable Identification of Issues

The Supreme Court in *Concepcion* describes the provision of arbitration "as reflecting both a 'liberal federal policy favoring arbitration . . . and the fundamental principle that arbitration is a matter of contract . . . ." But the significant adjective of *mandatory* is judicially ignored. The end result is that statements made on the subject of arbitration are now applied to *mandatory* arbitration.

Also, I have not been able to find any reference to a federal policy favoring arbitration. Neither did the Court provide one. In fact, I have found just the opposite. For the past several years Congress has been submitting proposed bills which are in complete opposition to *Concepcion's* five-member majority. (See my subsequent discussion on Congressional action.)

d. Adhesion Contracts and Due Process

With reference to the waiver of class action rights, the question arises: Is a waiver enforceable? The "Supreme Court's introduction of the concept of an adhesion contract into due process jurisprudence is highly significant for consumers." (McCall, *Due Process and Consumer Protection: Concepts and Realities in procedure and Substance – Repossession and Adhesion Contract Issues* (1974) 26 Hastings L.J. 383.) My arguments are consistent with this review and also the following judicial rulings.

In two cases prior to *Conception*, the Supreme Court defined a two-part test for determining the enforceability of a waiver of constitutionally protected right through a provision in an adhesion contract. The court specified that such a waiver not be given effect where (1) the disparity in bargaining power or the parties is great; and (2) the debtor (or more generically, the adhering or submitting party) receives nothing in return for his "consent" to the waiver provision (See [redacted] (1972) 407 U. S. 67 (dictum) and [redacted] (1972) 405 U. S. 1783 (dictum).)

Also as stated in [redacted] (1973) 412 U. S. 218 a waiver n a contract of adhesion will be *un*enforceable when the hearing party's assent is unavoidable because of economic advantage of the dominant party.

It is interesting to note that as early as 1964 in *National Equipment Rental, LTD*, v. [redacted] Justice Black in a dissenting opinion urged the court to give recognition to differences in bargaining power between the contracting parties. He argued that enforcement of such non-negotiated "take-it-or-leave-it" contracts would permit powerful litigants to gain unjust results. He further noted that "[t]herefore judicial common sense has, on one ground or another, disregarded contractual provisions like this one, not encouraged them." (Id. at 329.) These words could be cited today. In fact, they *are.* They should be.

3. Justice Neil Gorsuch – Position on Arbitration and Class Action

Judge Gorsuch's arbitration opinions have been analyzed as adhering to two general principles: (1) issues regarding arbitrability are matters of contract in which the intent of the parties control; (2) that federal policy favors arbitration which preempts conflicting state laws.

As to the variable "intent," it is irrelevant for the simple reason that the average person has no knowledge of the subject of arbitration, to say nothing of the fact that even the U. S. Supreme Court is split on the subject -- historically, legally, and operationally -- re the 5-4 *Concepcion* opinion. I might also add "factually." The court states that arbitration is more efficient and with less expenditure of cost and time than litigation. But no supportive data are given. Nor could I find any agreement other than a similar statement made by the Chamber of

Commerce, also without supportive data. In any event, the issue is not intent. It is whether the contracting party is mandated or mandating. As previously discussed, ask the auto dealers.

On the issue of federal policy, in a dissenting opinion in [redacted] (10th Cir. 2016) __ F. __ in which a majority of a three-judge panel upheld a district court's denial of a motion to compel arbitration, Judge Gorsuch gave the following supportive reasoning: "Then too, there is the federal policy favoring arbitration *embodied* in the FAA and armed with preemptive force." (Emphasis added.)

As in my earlier comments on *Concepcion,* I fail to see this embodiment of a federal policy in the FAA. Also worth noting is Judge Gorsuch's comment that it is the job of the court to enforce the parties' intent and absent such intent apply the presumption of arbitrability.

4. Relationship of FRCP Rule 23 to *Concepcion*

The U.S. Supreme Court makes no reference to Rule 23 of the Federal Rules of Civil Procedure in its decision on the issue of a class-action waiver. Rule 23 gives the codified definition to class action rights but as with other codified rights, no reference is made to waiving those rights. There should be. The absence of any guidelines leaves an open invitation for creative drafting of contracts with the resulting questionable legality.

Certainly purpose of class action and Rule 23 must be considered. The commonly stated purpose is that class actions provide an efficient use of judicial resources, assuming of course that all other required elements have been met. If that purpose is accepted, judicially enforcing a waiver would be in conflict with such purpose. How would it be justified?

5. California Law on Arbitration

The relevant law in California on arbitration is for the most part contained in the Federal Arbitration Act of 1925 and amendments (9 U.S.C. Sections 1-14); Motor Vehicle Franchise Contract Arbitration Fairness Act (2002) (ACT); [redacted] *LLC* (2015) 61 Cal. 4th 899; *AT&T Mobility LLC v. Concepcion* (2011) 131 U. S. 174. I *am* in conflict with *Concepcion* but not [redacted] or the 9TH Circuit on the subjects in issue.

As a possibly fitting closure on my opinion of *Concepcion,* I add the following psychological explanation, the citation for which I unfortunately lost:

> A temporary aberration emerging as a consequence of a synchronous combination of five justices applying the same judicial reasoning in support of their holdings.

Public Policy and the Law on Mandatory Arbitration and Class Action Waiver

As explained in Corbin on Contracts (1952), the sources of the law on contracts includes the common law, statutes, judicial decisions and public policy. As arbitration and class action must be considered as part of the law on contracts, in addition to particular issues previously discussed I add the consideration of public policy. And what is public policy?

One explanation is given by Corbin with reference to a New York Case: "'(W)henever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for a well-fitting definition of public policy, nor hesitate in its practical application to the law of contracts.'" Corbin, Contracts (1952) Section 1376 p. 1167. That is, such judgments are made against a backdrop of economic factors, and prohibitum bargain. That is, it is not a bargain to be declared illegal by legislation. It is a malum in se, that is, it is intrinsically bad without reference to time or place. It is against public policy.

If this reasoning is accepted, it would follow that the United States Supreme Court ruling in [redacted] (2011) 131 U. S. 1740 lacks justification for enforceability, that is, that the Federal Arbitration Act preempts state laws that prohibit contracts for disallowing class-wide arbitration Also, arbitration agreements accompany these class action waivers, so the *Concepcion* decision also implicates the use of arbitration in consumer clauses. The outcome is the Pernicious Pair. The are a boilerplate combo.

With more convincing legal authority than my opinion on the subject, I refer to Justice Ruth Bader Ginsburg's dissenting opinion in [redacted] (2015) 577 U.S. (?). Justice Ginsburg cites the observations of Justice O'Connor in that "when the Court was just beginning to transform the FAA into what it has become, 'the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.'"

In discussing further the Court's ever-larger expansion of the FAA's scope, Justice Ginsburg points out that this expansion contrasts sharply with how other countries treat mandatory arbitration clauses in consumer contracts of adhesion. "'A 1993 *European Union Directive forbids binding consumers to unfair contractual terms*, defined as those 'not . . . individually negotiated' that 'caus[e] a significant imbalance in the parties rights and obligations . . . to the detriment of the consumer.'" (Emphasis added.)

Justice Ginsburg concludes her opinion with a statement directly relevant to my case, that is, that the California Court of Appeals has appropriately applied traditional tools of state contract law, and that in *Directv* "this court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts." *Directv*, supra, p. (?)

And as to a comparison of the United States with the rest of the world, Justice Ginsburg cites a University of Miami law review article entitled "Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World." The author concludes that **the enforcement of mandatory arbitration clauses "is quite rare, if not nonexistent,' *outside of the United States.*"** (Emphasis added.)

After reading of mandatory arbitration appearing in religious contracts, I thought the spread of its application had been exhausted. But in July 2017, I was given a standardized contract to sign for medical consultation and treatment which included mandatory arbitration and the usual accompanying class-action waiver on a take-it-or-leave-it basis.

Conclusion: With the imprimatur of the United States Supreme Court -- the consumer, employee, patient, churchgoer, and etc., all are exposed to the pervasive and inescapable boilerplate contracts with mandatory arbitration and class action waiver clauses. As compared with certain other countries, this business practice places United States in a relatively unfavorable position. I am sure this is not what the Framers of our constitution envisioned. As one author writes:

> We take pride in the Framers (of the Constitution) not only for writing an ingenious plan of government but also for providing guarantees of individual liberty and dignity against government oppression. That faith attaches to the Supreme Court of the United States . . . as the mechanism for interpreting the Constitution and preserving the rule of law. (Cox, The Court and the Constitution (1987)).

In an effort to determine what action has been taken to correct the indefensible judicial enforcements of contracts of adhesion and consequently the effect of individual rights, I review the impressive efforts of Congress which I include here both pre-2017 proposed bills and the present status of arbitration. This examination of history may help to define future efforts.

U.S Legislative Bills for Modification of the FAA – Prior to 2017

I make reference here to the recent legislature's history of efforts to correct the injustices of mandatory arbitration not only as support for my case but also to provide information in the planning and prediction of success of present efforts.

A comprehensive proposal of the House of Representatives was HR No. 534, Fairness and Voluntary Arbitration Act, was submitted before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary House of Representatives June 8, 2000, at pp. 65-871. For further support, I also make reference to comments from the Text of the Arbitration Fairness Act of Hearings on Senate Bill No. 878 before the Committee on the Judiciary o(2013), S.Hrg. 113-373 as follows.

Congressional findings identified in S. 878 are confirmation of arguments I presented here on mandatory arbitration, a few of which are summarized as follows:

(1) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.
(2) The *Federal Arbitration Act* (FAA) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
(3) Most consumers and employees have little to no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights to litigation.
(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.
(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary and occurs after the dispute arises.

For further confirmation of my arguments, I make brief reference to Hearing of House of Representatives Bill No. 534, *supra.* The purpose of this bill was to amend the FAA to permit each party to a sales and service contract to elect or reject arbitration as a means of resolving disputes under the contract. And of specific relevance to my case, this hearing focused on the relationship between auto manufacturers and their dealerships. Some comments reported in this 107-page document follow:

(1) "Motor vehicle dealers in particular have complained that manufacturers often require that they accept 'take it or leave it' form franchise agreements containing mandatory binding arbitration clauses. These mandatory arbitration clauses often place dealers in the position of having to forego state legal protections designed to remedy the disparity in bargaining power between dealers and manufacturers. The bill would change this by making arbitration between motor vehicle dealers and manufacturers a voluntary choice." (Statement of member of House Committee on the Judiciary.) (Page uncertain.)

(2) H.R. 534 addresses the problem of the "potential for abuse" of an arbitration clause "in a non-negotiated contract." As a solution, a provision in the bill "expressly provides that, 'Whenever a sales or service contract provides for the use of arbitration . . . each party to the contract shall have the option, after the controversy arises and before both parties commence an arbitration proceeding, to reject arbitration as the means of settling the controversy . . . in writing.' Thus, H.R. 534 would remove the potential of these contracts to deprive persons of statutory rights and remedies without doing violence to the public policy interest served in encouraging arbitration as a means of dispute resolution."

(3) "The manufacturers are using the Federal Arbitration Act to force dealers into mandatory and binding arbitration in their non-negotiated franchise contracts. Unless changes are made to this Federal statute, automobile and truck manufacturers will continue to have the ability to unilaterally impose mandatory arbitration on dealers and deny them the opportunity to resolve disputes designed to govern the relationship between manufacturers and dealers."

Not supporting my position but for analytical completeness, I also make reference to arguments against this bill: that the reduced cost makes available a method of conflict resolution for those plaintiffs who cannot afford litigation and that "researchers have found that employees win more often in arbitration than in court." But there is disagreement here. No data.

Status of Mandatory Arbitration in Business and Government Contracts

After almost a century, the FAA of 1925 has undergone not only an insidious and unfounded expansion, but also a complete metamorphosis, that is, from what was originally created for resolution of "maritime transactions" and those involving "commerce" to an enforced contract of adhesion which now encompasses consumers, employees, medical patients, churchgoers, and whatever remains to be engulfed by the mandatory power of big business, and now, any business or service – or church. In fact, the arbitration contract has reached complete unobstructed boilerplate status.

While big business has the unobstructed power at the present time to impose upon the less powerful its illegal mandated contractual clauses, government contracts do not contain these clauses.In fact, they are specifically negated. These entities include the Securities Exchange Commission and the National Labor Relations Board.

It is interesting to note that the NLRB. an independent U. S. government agency, has responsibility for enforcing labor laws in relation to *collective bargaining and unfair labor practices.* Consequently, the pervasive and permissible use of this waiver is incompatible with the purpose and practice of the NLRB and therefore in violation of Section 8(a)(1) of the act.

Another example is the U. S. Department of Defense spending bill signed into law in December 2009 in which there is a restriction on the use of mandatory arbitration clauses in defense contractors' employment agreements. It prohibits defense contractors from entering into any agreement that requires their employees or independent contractors as a condition of employment to agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort relating to or arising out of the sexual assault or harassment. Also, contractors will have to certify that their subcontractors agreed to these arbitration restrictions with respect to their employees and independent contractors. (This amendment is a good example of the complexity associated with making exceptions to the FAA and escaping its boilerplate requirements.)

At the national level, the Consumer Financial Protection Bureau proposed a rule that would ban arbitration clauses in consumer financial contracts. The ban, however, has a significant limitation. It applies only when consumers want to create or join a class action law suit. Financial companies will still be able to settle disputes through arbitration.

With this disorganized expansion of arbitration has emerged a hodgepodge of judicial decisions and legislation including conflict -- as revealed in a 5-4 decision-making Supreme Court. Unfortunately, this expansion is continuing. But having arrived at the spiritual levels of the church, one might reasonably conclude legal creativity has reached its limits. Experience may prove otherwise. This amorphous system presents an irresistible invitation to give the law of arbitration whatever structure and scope satisfies its immediate use. So, how should we proceed from here?

The cautions of Mr. Archibald Cox are relevant: "The best way to protect fundamental fairness . . . is to adhere literally to the federal Bill of Rights and so to avoid judges insufficiently sensitive to the requirements of liberty." (Cox, The Court and the Constitution (1987) p. 243.) One could hardly conclude that a system which relies primarily on a biased mandatory arbitrator fits into that "best way" protection. What *is* the best way?

The following is a brief review of how certain segments of our government are attempting to answer that question. While efforts are admirable considering the political forces in opposition, they rest on faulty assumptions, not reality, so problems will continue to exist even if all proposed bills become law.

CURRENT ACTION ON MODIFICSATION OF FAA AND COMMENTARY

1, Current National Legislative Action for Modification of the FAA

The Senate introduced in March 2017 S.53, Arbitration Act of 2017 which prohibits a predispute agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil fights dispute. A second bill introduced in Senate is S.550, Restoring Statutory Rights and Interests of the States of 2017. This bill amends the FAA to invalidate arbitration agreements between parties in certain commercial contracts if they require arbitration for damage arising from the alleged violation of a federal or state statute, the U. S. Constitution or a state constitution unless the written agreement to arbitrate is entered into by both parties after the claim has arisen.

The House of Representatives introduced H.R. 1374 which prohibits arbitration agreements from being valid or enforceable if it requires arbitration of an employment, consumer antitrust, or civil rights dispute. Note that nothing in this bill applies to arbitration provisions in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek additional enforcement of a right entering under the U. S. Constitution, a state constitution, a federal or state statute, or related public policy.

2. California Supreme Court:

Amidst all this activity, California is also taking action on arbitration provisions in consumer contracts for financial products and services. In fact, California, as in the past, is taking the forefront position in countering the Republican acceptance of *Concepcion.* This current action is, however, removed from addressing the underlying problem. It is this: big business and the balance of power.

3. President's Position:

The President has made his position clear. He "strongly supports" the House bill that would nullify the CFPB rule. But – at least at the present time the CFPB is not on the president's personal agenda and may escape his consideration.

4. Unorganized Mandated Party:

While the consumer-employee-etc. party as an entity of one is not presently in a position to take any action, political weight may be derived indirectly through the action of mass media. An informed public may very well be the ultimate controlling factor in defining the place of arbitration.

One example of the efforts of mass media to focus headlights on arbitration is The New York Times investigation reported in a front-page series of articles in November 2015. It was based on thousands of court plaintiffs in 35 states examining "how clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court." More disturbing, these arbitration clauses have become "increasingly

unavoidable , appearing in contracts for everything from credit cards to nursing homes." (*Arbitration Everywhere, Stacking Deck of Justice*, The New York Times (Nov. 1, 2015) at page 1 --.) And two years later there have been a few more of those "unavoidable appearances."

A more recent article was included in the San Francisco Chronicle, February 29, 2016, It conclude0d that "arbitration rulings have affected millions of consumers and employees who now must take their grievances to arbiters instead of a court." True, the recipient, the nondrafting party, to these contracts of adhesion need not have given signed acceptance. But these contracts are ubiquitous and inescapable. A sad commentary on the American reputation of fair play.

5. United States Supreme Court:

There are three consolidated class action cases presently on the Supreme Court docket scheduled for oral arguments this fall. At issue is whether an agreement that requires an employee and an employer to resolve employment related disputes through individual arbitration thus waiving the right to join a class action is enforceable under the FAA. For reasons previously given, I do not see how anyone could keep a straight face with a "yes" answer. Possibly the decisions made concerning arbitration cases presently on the Supreme Court docket will resolve the presently unresolved.

6. Entity of Big Business:

As a significant operational force in arbitration, big business comprises an entity, a heavily weighted entity, in any equation involving business or service transactions. As explained by Henry C. Strickland in his 1992 law review article entitled "The Federal Arbitration Act' Interstate Commerce Requirement: What's Left for State Arbitration Law?" the courts initially enforced arbitration awards once they were rendered but refused to enforce prospective agreements to arbitrate. Consequently, an agreement to arbitrate was revocable at the whim of any party. In response, *"(p)ressure from business interests* eventually brought about legislation that reversed the common law and required courts to *enforce* some or all agreements to arbitrate." (Emphasis added.) In 1925 Congress enacted the Federal Arbitration Act. (See *Hofstra Law Review*: Vol. 21: 1ss. 2, Article 3.)

It is not just big business in itself. It is the disparity in bargaining power, a disparity between the business entity drafting the contract and the party on whom it was enforcejd. However, the *Concepcion* majority denies a disparity in bargaining power between consumer and corporation or that this factor of bargaining power can be related to the initial FAA purpose.

The *Concepcion* minority, however, held a different view on the bargaining power issue. In the dissenting opinion, Judge Breyer writes that Congress "may well have thought that arbitration would be used primarily where the parties possessed roughly equivalent bargaining power." But Judge Breyer was not the only confused Supreme Court justice even as to the purpose of the Federal Arbitration Act. Justice Sandra Day O'Connor, who dissented in a case with Justice William Rehnquist on an issue of application of arbitration, argued that the legislative history of the FAA strongly suggested it was intended to apply only to contracts executed under federal law. [redacted] (1984) 465 U. S. 1.

To be objective in my presentation here, I should acknowledge evidence of a study in disagreement with my position and supportive research. But I found only one study. It is a poll that was conducted on behalf of the Chamber of Commerce. The results indicated that 82% of Americans said they preferred the cheaper, faster method of arbitration, and only 15% preferred litigation. [redacted]

Unfortunately, the research design was not available for evaluative purposes, so I am not impressed with those results. In fact, as a former researcher, I am reasonably certain I could get the same conclusion with an even better percentage than 82 assuming the same ill-informed subjects on knowledge of arbitration. My contract design would read as follows:

> The United States Supreme Court has ruled that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." Sign below if you agree to arbitrate.

Summary of Research on Arbitration Performance:

In addition to my brief reference previously made on research of arbitration performance, I present the general conclusion here of many other studies which all reveal advantages of courts over arbitration. Criterion measures include primarily trial win rate, cost and dollar amount of awards. See for example, Alexander J. S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." Journal of Empirical Legal Studies 8(1): 1-23 (2011). There is the one exception, previously mentioned, the Chamber of Commerce study, the reporting of which did not include specific data, just a conclusory statement. From another viewpoint, I refer to Alexander Hamilton.

Arbitration v. Jury -- Alexander Hamilton's Position?

Apart from the question of arbitration vs. litigation, there is the specific question of arbitration (one judge) vs. a jury (12 judges), and any discussion on the merits of the jury system demands some reference to Alexander Hamilton. But first some comments on arbitration .

As a one-man system, arbitration has the potential problem of reliability of the decision. Statistically speaking, sample size is a significant variable relevant to reliability. But in the case of the present arbitration system, we are not dealing with chance factors. The arbitrator is biased to the advantage of the mandating party. So, knowing the bias increases predictability of the decision from a 50-50 chance, but there are very few studies revealing the extent of the bias.

This problem, however, can be expected. It was acknowledged in 1765 by the British jurist, Sir William Blackstone in his *Commentaries on the Common Law:*

> "But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in. . . ."

Moving ahead to the 21st century, there is confirmation of this ample ranging. Unfortunately, however, the mandated party, the consumer or employee does not have this bias information from which to make a knowledgeable decision, i.e., to arbitrate or refuse the contract, the take-it-or-leave-it boilerplate option.

Turning now to the subject of the jury system, the question arises as to what Alexander Hamilton would say on the subject of arbitration inasmuch as he played such a significant role toward the inclusion of the jury system into our Constitution. For the best guess to answer that question, I make reference to The Federalist Papers:

In offering arguments in favor of the newly written constitution, Hamilton gave particular attention to trial by jury in civil cases. He cautions in The Federalist Papers No. 83, written in 1787-1788 that: "The mere silence of the Constitution" in regard to trial by jury in civil causes should not be interpreted to mean trial by jury should not be used in civil action and "if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty to adopt that institution or to "let it alone." Fortunately, it decided to adopt, re the 7th Amendment.

As a closing statement on the issue of one-judge arbitrator vs. trial by jury, I cannot help but appreciate Hamilton's evaluative statements of the "excellence of the trial by jury in civil cases" and its "valuable check on corruption." The Federalist Papers No. 83.

Conclusions

The modifications I am requesting include the exclusion of boilerplate clauses from my purchase contract, that is, mandatory arbitration and the waiver of class action rights. In any event, such clauses will eventually be excluded in any revision of arbitration law if restoration of its integrity is ever to be achieved. Also, it may be advantageous for a company to be the first on the block to take a more friendly customer relations position for both profit and reputation and omit these clauses from purchase contract.

While the people do not comprise an organized competitive force on the subject of arbitration, they may eventually hold the dominant position. I cite Alexander Cox:

"On the future of judicial review --- of 'constitutional adjudication,' as I wish to call it — will be molded in unpredictable ways by many hands: by the Justices of the U. S. Supreme Court; by professional criticism; by the Presidents who select the Justices and the Senate that must confirm each nomination; by the Congress . . . ; and, most influential of all in the long run, by our own collective expectation as citizens. In a free democratic society the Court can never break away for very long from the dominant long-range will of the people." (Cox, The Court and the Constitution, p. 343.) I present this paper as one vote of the people.

In the meantime the will of the people remains subrogated to business entities of greater bargaining power. At this point, I could not help but appreciate the weak v. powerful conclusion of R. H. Tawney (1880-1962) as follows:

"Few who consider dispassionately the facts of social history will be disposed to deny that the exploitation of the weak by the powerful, organized for purposes of economic gain,

buttressed by imposing systems of law, and screened by decorous draperies of virtuous sentiment and resounding rhetoric, has been a permanent feature in the life of most communities that the world has yet seen." (Boldman, Cult of the Market – Economic Fundamentalism and Its Discontent (2007) p. 245). (Emphasis added.)

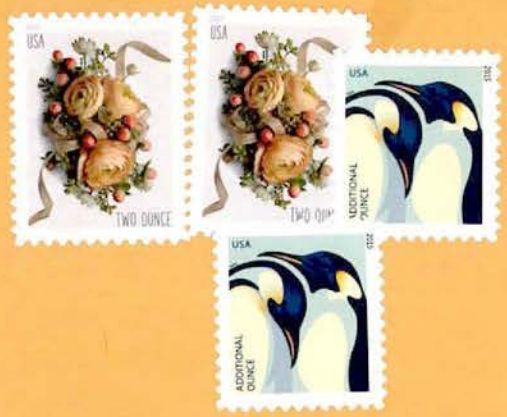
The question now emerges. Is this long-lasting and continuing conflict with arbitration a microcosm of our social history, or can it be altered from its Darwinian trajectory to a system of conflict resolution that satisfies the goals of fairness and respect for all parties. I am hoping that Infinity will lead the way and thereby demonstrate its criterion of success includes customer safety and satisfaction.

Signature

Date

Dec 9, 2017

[redacted]
San Francisco CA [redacted]



NHTSA Headquarters
1200 New Jersey Ave. SE
West Building
Washington, DC 20590

ATTN - Customer Relations