Filed 6/4/15 Elite Logistics v. Wan Hai Lines CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ELITE LOGISTICS CORPORATION, Plaintiff and Appellant, v. WAN HAI LINES, LTD., et al., Defendants and Respondents. UNIMAX EXPRESS, INC., Plaintiff and Appellant, v. HYUNDAI MERCHANT MARINE CO., LTD., et al., Defendants and Respondents.	B252543 (c/w B252599) (Los Angeles County Super. Ct. Nos. BC459050 & BC459051)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Reversed with directions.

McCune Wright, Richard D. McCune, David C. Wright and Jae E. Kim for Plaintiffs and Appellants.

Flynn, Delich & Wise, Erich P. Wise and Alisa Manasantivongs for Defendants and Respondents.

INTRODUCTION

The defendants in these related actions are international cargo shipping companies that transport goods to California seaports, and the plaintiffs are California motor carriers that pick up intermodal shipping containers from the seaports and bring them to destinations throughout the United States. Pursuant to standard-form contracts used widely in the industry, the shipping companies do not charge the motor carriers for their use of the intermodal containers for an initial period of "free days." If a motor carrier returns a container after the expiration of the "free day" period, however, the shipping companies assess a daily rental fee, referred to as a "per diem" fee.

In 2005, the California Legislature adopted Business and Professions Code[1] section 22928, which prohibits shippers from assessing per diem fees against motor carriers on weekends or holidays, among other times. Plaintiffs allege that notwithstanding the adoption of section 22928, defendants unlawfully have continued to assess per diem fees on weekends and holidays. The present putative class actions allege that defendants' ongoing violations of section 22928 constitute unlawful business practices and breaches of contract.

Defendants moved to compel arbitration of plaintiffs' claims pursuant to arbitration provisions in the parties' contracts. The trial court granted the motions and ordered the parties to arbitrate. The arbitration panels issued awards in defendants' favor, and the trial court confirmed the arbitration awards. Plaintiffs appealed.

On appeal, plaintiffs contend that the trial court erred in granting the motions to compel arbitration because, as applied to their claims, the arbitration agreements are procedurally and substantively unconscionable. We agree. As we discuss more fully below, the arbitration agreements, which are contracts of adhesion, provide that if a motor carrier disputes a per diem charge, it must advise the shipper of the dispute *within*

---

[1] All subsequent undesignated statutory references are to the Business and Professions Code.

30 days or lose the right to contest the charge in any forum. Further, the arbitration agreements give the motor carriers only 15 days to file arbitration briefs and do not authorize arbitrators to enjoin ongoing unlawful conduct. Because these provisions do not provide plaintiffs with sufficient time or an adequate mechanism to address and remedy the kinds of legal and statutory disputes at issue in this case, they effect "a practical abrogation of the right of action" (*Ellis v. U.S. Security Associates* (2014) 224 Cal.App.4th 1213, 1223), and therefore are unconscionable and unenforceable under California law. Accordingly, the trial court erred in ordering plaintiffs' claims to arbitration and in confirming the resulting arbitration awards.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Plaintiffs Elite Logistics Corporation (Elite) and Unimax Express, Inc. (Unimax) are California motor carriers, and defendants Wan Hai Lines, Ltd. and Wan Hai Lines (America), Ltd. (collectively, Wan Hai) and Hyundai Merchant Marine Co., Ltd. and Hyundai Merchant Marine (America), Inc. (collectively, Hyundai) are international shipping companies and their American subsidiaries. Wan Hai and Hyundai ship intermodal containers to California seaports, where they contract with local motor carriers, including Elite and Unimax, to transport the containers from the seaports to their ultimate destinations.

Throughout this opinion, we sometimes refer to Elite and Unimax as plaintiffs or "motor carriers," and to Wan Hai and Hyundai as defendants or "shippers."

B. The Uniform Intermodal Interchange and Facilities Access Agreement (UIIA)

Plaintiffs and defendants are signatories to the "Uniform Intermodal Interchange and Facilities Access Agreement" (UIIA), a standard form agreement administered by the Intermodal Association of North America (IANA). The UIIA is a standard-form contract "used throughout the Nation . . . to govern the interchange of intermodal equipment . . . by ocean carriers, railroads, and others to Motor Carriers for use by the Motor Carriers in

their transport of cargo between rail and marine terminals and . . . facilities that handle, ship or receive cargo for importers or exporters." Elite, Wan Hai, Hyundai, and Unimax became "participating parties" to the UIIA on December 2002, April 2003, April 2002, October 1997, respectively.[2]

Per diem fees. Among other things, the UIIA provides that the "Provider" (Wan Hai or Hyundai) will provide the "Motor Carrier" (Elite or Unimax) with "free days"—i.e., days for which the motor carriers will not be charged for their use/possession of the shippers' containers (also known as "intermodal equipment"). The UIIA provides that if the motor carrier does not return a container within the allotted number of free days, the shipper can impose "per diem" fees. Wan Hai's and Hyundai's per diem fees were $85 per day for "regular" equipment, and up to $160 per day for other equipment.

Dispute resolution. Effective August 1, 2008, if a motor carrier disputes a per diem charge, it "shall advise Provider in writing of any disputed items on Provider's invoices within 30 days of the receipt of such invoice(s)." In response, the provider "will undertake to reconcile such disputed items" within 30 days (Wan Hai) or 60 days (Hyundai) of receiving the motor carrier's notice, "and will either provide verification for charges as invoiced or will issue a credit to Motor Carrier's account for any amount not properly invoiced."

If the parties are unable to resolve their disputes informally, they "shall utilize the mandatory and binding Dispute Resolution Process, in accordance with the guidelines listed in Exhibit D, to arbitrate matters relating to per diem/use, maintenance and repair or lost/stolen equipment charges." Exhibit D provides as follows:

---

[2] The "Participating Party Agreement" signed by the parties says: "The Party named below agrees that by executing the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) it will be bound by the provisions of the UIIA, and subsequent amendments and/or revisions of that Agreement, which govern the interchange and use of Equipment in intermodal interchange service. The Provider named below agrees that in its interchange activities with Motor Carrier participants who are signatories to the Agreement, this Agreement will be the only Agreement it will use."

"1. This process is applicable for disputed transactions between Equipment Providers and Users (Motor Carriers) of intermodal equipment who are signatories to the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA).

"2. Disputes handled under the arbitration process will be mandatory and binding upon the [P]arties. The resolution process will be administered exclusively by IANA.

"3. A three-member arbitration panel will be appointed by IANA to handle disputed invoices submitted for arbitration. The panel will consist of one IANA member from each mode, i.e., a Motor Carrier, Water Carrier, and Railroad. However, the decision will be rendered by the two arbitrators representing the modes involved in the disputed invoice(s). The third appointed arbitrator from the mode not involved in the transaction will act as an alternate, and will render a decision only in the event the arbitrators from the involved modes cannot agree on a resolution of the dispute.

"4. . . . To qualify as an arbitrator the individual must have five years' operating experience involving such matters as gate interchanges, the yard procedures associated with vessels and trains, loading and unloading operations, the operations of marine and rail container yards, the receiving and delivery of containers, and/or with road equipment.

"5. Disputes must be submitted to IANA in writing and in accordance with paragraph 7 below and must be accompanied by a filing fee made payable to IANA to cover the costs of the administration of the dispute process.

"6. Disputes must be confined to charges arising from Maintenance and Repair (M&R), Per Diem or Lost/Stolen Equipment invoices. There will be no limitation on the amount in controversy, except that the amount cannot be below that specified in the applicable addendum as the minimum amount that can be submitted for recovery, e.g., if claims pertaining to an involved matter may not be submitted below a specific dollar amount in an addendum, a disputed invoice below that amount may not be submitted for

arbitration. Also, no more than five disputed invoices involving the same type charge can be consolidated for handling in a single arbitration.

"7. All claims must have been disputed initially through the standard dispute resolution process under the UIIA/EP Addenda. In [the] absence of a dispute resolution process contained in the Equipment Provider's Addendum, the default process in the UIIA will be utilized in which a Motor Carrier has 30 days from [the] date of an invoice for M&R or Per Diem claims to dispute the invoice to the Equipment Provider. The Equipment Provider must respond to the Motor Carrier within 30 days from the date of the notice of the dispute. The Motor Carrier will have 15 days from the date of the Equipment Provider's response to either pay the claim(s) or to seek arbitration.

"8. The arbitration process will be initiated by the Motor Carrier or the Equipment Provider by the filing of a Notice of Intent to Seek Arbitration with IANA. . . . Within 15 days from the filing of the Notice, the Moving Party must submit its information and arguments to IANA which will submit the documents to the Responding Party. The Responding Party will have 15 days from the date the documents are sent to it by IANA to respond. Upon receipt of the Responding Party's documents, the complete record will be transmitted by IANA to the arbitrators.

"9. The arbitration panel will have 45 days from the date the information and arguments submitted by the Parties are sent by IANA to render a written decision indicating the basis for its conclusions. Its findings will address the validity of the claims and the Party responsible for payment or satisfaction thereof. The determinations are to be based solely on the rules in the UIIA and the rules and charges in the Equipment Provider's Addendum. . . .

"15. Invoices submitted for dispute resolution must arise on or after the announced effective date of the implementation of the program, which is August 1, 2008."

C. Business and Professions Code Section 22928

Section 22928, adopted in 2005, prohibits intermodal marine equipment providers or intermodal marine terminal operators from imposing per diem or demurrage charges on weekends or holidays, among other times. It says: "(b) An intermodal marine equipment provider or intermodal marine terminal operator shall not impose per diem, detention, or demurrage charges on an intermodal motor carrier relative to transactions involving cargo shipped by intermodal transport under any of the following circumstances: . . . [W]hen the intermodal marine or terminal truck gate is closed during posted normal working hours. No per diem, detention, or demurrage charges shall be imposed on a weekend or holiday, or during a labor disruption period, or during any other period involving an act of God or any other planned or unplanned action that closes the truck gate. . . ."

D. The Present Actions

Elite and Unimax filed the present actions on April 8, 2011 alleging unlawful business practices in violation of the Unfair Competition Law (section 17200 et seq.) (UCL) and breaches of contract. The complaints alleged that Wan Hai and Hyundai were unlawfully charging plaintiffs and others similarly situated per diem and demurrage charges for weekends and holidays in violation of section 22928. Elite and Unimax sought to represent plaintiff classes defined as "All California intermodal motor carriers who were charged and paid unlawful per diem detention, and/or demurrage charges for weekend days and holidays, in violation of California Business & Professions Code § 22928, from April 7, 2007, to the present." Plaintiffs sought compensation for economic losses, including disgorgement of all unlawfully obtained charges, and an order enjoining defendants from any such further unlawful acts.

E. Motions to Compel Arbitration

In September 2011, defendants filed motions to compel arbitration of plaintiffs' claims arising out of invoices dated on or after August 1, 2008, the effective date of the UIIA arbitration provision. Wan Hai's motion asserted that between April 7, 2007 (the

earliest date for which the complaint sought recovery) and October 10, 2010, Wan Hai charged Elite $32,405 in per diem charges, of which $3,300 was for weekends or holidays before August 1, 2008, and $6,460 was for weekends or holidays after August 1, 2008. Hyundai's motion asserted that between April 7, 2007 and August 3, 2009, Hyundai charged Unimax a total of $2,380 in per diem, use, or detention charges, of which $400 was for weekend days or holidays before August 1, 2008, and $200 was for weekends or holidays after August 1, 2008.

Plaintiffs opposed the motions to compel. Among other things, they contended the UIIA arbitration provision was unconscionable because it effectively shortened the statute of limitations available under the UCL from four years to 30 days, and made it impossible for them to obtain injunctive relief.

The trial court granted the motions to compel arbitration. As a preliminary matter, the trial court found that the California unconscionability doctrine was preempted by federal law under *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740]. The court said: "The *AT&T Mobility* rationale is that 'agreements to arbitrate cannot be invalidated by [state law] defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' [Citation.] [¶] All of the state law defenses on which Elite and Unimax rely are arbitration-specific doctrines. They are all preempted, by the logic of *AT&T Mobility*. As a result, this court is now to treat these arbitration contracts just like any other contract."

The trial court also found that the 30-day notice provision did not render the UIIA arbitration provision unconscionable: "It is true, as Elite points out, that the notice provision has cut off Elite's right to recover restitution of four years of detention charges, which it would otherwise be entitled to recover under the Unfair Competition Law. . . . [¶] The effect of the notice provision is hardly surprising. The notice provision requires an aggrieved party to raise disputes over per diem claims within 30 days to promote timely resolution. Timely resolution of claims is a reasonable goal of any contractual dispute resolution provision. A provision that affords Elite one month to review its

invoices and prepare any claims does not shock the conscience. The one-month time frame is businesslike, not shocking."

The trial court also rejected plaintiffs' contentions that the dispute resolution procedure was oppressive because it did not provide for discovery, limited each party to one written submission of evidence and arguments, and provided no avenue for appeal. The court explained: "These terms limit the parties' abilities to fully litigate disputes. However, the dispute resolution procedure is limited to charges 'arising from Maintenance and Repair (M&R), Per Diem or Lost/Stolen Equipment invoices.' When limited to these relatively simple matters, the constraints on the dispute resolution process are not objectively unreasonable. This is not a situation in which Elite would be required to resolve any dispute under the UIIA, no matter how complex, within the confines of the dispute resolution procedure."

F. Arbitration Proceedings

In June 2012, Elite and Unimax filed notices of intent to seek arbitration with the IANA. Initially, IANA's general counsel, John Bagileo, advised the parties that plaintiffs' claims were "not within the purview of the matters which are the proper subjects for resolution under the Binding Arbitration Process of the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA)." Counsel explained: "The apparent determination of the merits of the disputed claims rests on the determination of whether they were assessed in violation of Cal. Bus. & Prof. Code Section 22928 . . . . That is a legal determination which is not within the purview of the operational matters the UIIA arbitration process is intended and designed to resolve. [¶] This can be seen from the qualifications of the arbitrators as described in Section 4 of the Binding Arbitration Process Guidelines. To be qualified to act as an arbitrator, the individual must have five years' operating experience involving such matters as gate interchanges, the yard procedures associated with vessels and trains, loading and unloading operations, the operations of marine and rail container yards, the receiving and delivery of containers, and/or with road equipment. It is within such operational and commercial

contexts that the arbitrators address the disputed invoices relating to maintenance and repair or per diem matters. The panels are not qualified to address legal matters and no lawyers serve on the panels. Therefore, the UIIA arbitration process is not able to address the disputed claims which you have presented for arbitration under the UIIA's process."

In September 2012, following receipt of the trial court's order compelling arbitration, IANA changed course and agreed to arbitrate the dispute. IANA's counsel's letter explained: "Elite's Notice of Intent was initially rejected because the disputed claims apparently were grounded on an interpretation of the California Business and Professions Code Section 22928 . . . . This decision was based on the precedent that claims disputes have been confined exclusively to the validity or correctness of the challenged invoices according to operational or commercial practices. [¶] However, following a request for reconsideration and upon additional review of a decision rendered by the Los Angeles Superior Court (Case BC459050) that compels arbitration under the UIIA, the original notice of intent filed by Elite Logistics Corporation will be re-initiated so that the Parties are not left without recourse in this dispute."

All parties filed written submissions to the IANA, and on January 3, 2013, a two-member panel issued arbitration awards in favor of defendants. The panel found that the relevant arbitration agreements "specifically require[] that [the motor carriers] advise [the shippers] in writing of any disputed items on [the shippers'] invoice[s] within 30 days of the receipt of such invoice[s]. No evidence presented in this case . . . validated [that the shippers] met this requirement by disputing the per diem charges within this specified timeframe. As a result, [the motor carriers] lost [their] right[s] to pursue a claim for relief and subsequent reimbursement of those charges now."

G. Motion to Confirm the Arbitration Awards

Defendants jointly moved to confirm the arbitration awards. Plaintiffs opposed the motion, contending that the arbitrators acted beyond their powers by deciding issues of legal and statutory interpretation. According to the plaintiffs, "Section 4 of the UIIA

makes clear that the arbitration provision is intended solely to encompass operational and accounting issues relating to per diem charges. . . . [I]t does not make sense for a panel consisting of non-lawyers to decide issues of legal and statutory interpretation."

The trial court issued an order and judgment confirming the arbitration awards on September 18, 2013. In doing so, it rejected Elite's and Unimax's contentions that the arbitrators exceeded their powers: "The UIIA sets out a system of industry self-governance. Paragraph H of the relevant version of the UIIA agreement says, 'Parties shall utilize the mandatory and binding Dispute Resolution Process, in accordance with the guidelines listed in Exhibit D, to arbitrate matters relating to per diem/use, maintenance and repair or lost/stolen equipment charges.' This court has already ruled this sentence covers the dispute in this case. It commanded this matter be arbitrated rather than litigated in court."

Plaintiffs timely appealed.

CONTENTIONS

Plaintiffs contend (1) the UIIA's arbitration provision is unenforceable because it is procedurally and substantively unconscionable under California law, and (2) the California unconscionability doctrine is not preempted by the Federal Arbitration Act (FAA) as interpreted by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] (*Concepcion*). Plaintiffs therefore urge that the judgment confirming the arbitration award must be reversed because the arbitrators exceeded their powers by adjudicating the parties' claims.

Defendants contend that the arbitration agreement is neither procedurally or substantively unconscionable and, in any event, the FAA preempts all the state law defenses asserted by plaintiffs. They suggest the arbitration awards therefore were properly confirmed.

DISCUSSION

I.

Standard of Review

An order granting a motion to compel arbitration is not appealable, but is reviewable on appeal from a subsequent judgment on the award. (Code Civ. Proc., §§ 1294 & 1294.2; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1121-1122.) On appeal, " ' "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law." ' " (*Carmona v. Lincoln Millennium Car Wash, Inc*. (2014) 226 Cal.App.4th 74, 82.) In so doing, we review legal issues de novo, and the trial court's factual determinations for substantial evidence. (*Ibid*.)

II.

Overview of Applicable Law: The Federal Arbitration Act and California's Unconscionability Doctrine

It is undisputed that the FAA governs the parties' agreements to arbitrate. Section 2 of the FAA provides that any contract to settle a dispute by arbitration "shall be 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.) "This provision reflects both that (a) arbitration is fundamentally a matter of contract, and (b) Congress expressed a 'liberal federal policy favoring arbitration.' *Concepcion*, 131 S.Ct. at 1745 (citation and internal quotation marks omitted). Arbitration agreements, therefore, must be placed on equal footing with other contracts. *Id.*" (*Chavarria v. Ralphs Grocery Co*. (9th Cir. 2013) 733 F.3d 916, 921.)

Under California law, a contract is subject to revocation if it is unconscionable. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142 (*Sonic-Calabasas*).) " '[U]nconscionability has 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" ' results. [Citation.] 'The prevailing view is that

[procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, 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." (*Armendariz v. Foundation Heath Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

Like any other contract, an agreement to arbitrate may be subject to revocation if it is unconscionable. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 702; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US)* (2012) 55 Cal.4th 223, 246-247.) However, under some circumstances (discussed in Section V, *post*), the FAA preempts California's unconscionability doctrine as applied to an arbitration agreement.

In the sections that follow, we conclude: (1) the UIIA arbitration agreement is procedurally unconscionable; (2) the UIIA arbitration agreement is substantively unconscionable as applied in this case; (3) the FAA does not preempt plaintiffs' unconscionability claims; and (4) the arbitration agreement is unenforceable in its entirety.

III.

The Arbitration Agreement Is Procedurally Unconscionable

" 'Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position.' " (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc*. (2015) 232 Cal.App.4th 1332, 1351 (*Grand Prospect*).) The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which " "relegates to the subscribing party only the

opportunity to adhere to the contract or reject it." ' " (*Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1071.) 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. [Citation.]' " (*Grand Prospect*, at p. 1351.)

The UIIA unquestionably is a contract of adhesion. The shippers have express authority to amend the UIIA, while the motor carriers do not. The UIIA contains an "Addendum Template," which describes the matters that the Intermodal Interchange Executive Committee "has approved for inclusion in each participating Equipment Provider's Addendum" to the UIIA. Those matters include, among others, free time allowances, per diem charges, and dispute resolution—precisely those matters at issue in this case.

Both Wan Hai and Hyundai elected to execute addenda governing free time allowances, per diem charges, and dispute resolution. In contrast, according to Moon Chul Kang, president of Elite and Unimax, the motor carriers had no ability to amend the UIIA, and instead were required to sign the UIIA as written in order to conduct business as intermodal motor carriers. In his declaration, Moon Chul Kang said as follows: "The UIIA was presented to [Elite and Unimax] on a take it or leave it basis. That is to say, [Elite and Unimax] only had the choice to accept the terms of the UIIA or forego operating as an intermodal motor carrier."

The shippers urge on appeal that the motor carriers provided no evidence "that either Wan Hai or [Hyundai] drafted the contract or that they tried to negotiate with or sought different terms from Wan Hai or [Hyundai] or that Respondents refused to negotiate with them on the terms of the agreement. They did not prove that Wan Hai or [Hyundai] presented the UIIA to them on a take it or leave it basis or that either of the Respondents required them to agree to the contract in order to do business with them." We do not agree. As plaintiffs correctly note, the contract need not have been drafted by the shippers to be adhesive (see *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 818-

819); in any event, many of the salient provisions of the contracts appeared in the defendants' addenda, not the standard form. Further, defendants have not pointed to any evidence that tends to dispute Moon Chul Kang's testimony that the UIIA was presented to plaintiffs on a take-it-or-leave-it basis and that plaintiffs had to "accept the terms of the UIIA or forego operating as an intermodal motor carrier." Accordingly, we conclude that the contracts at issue were adhesive and, as such, were procedurally unconscionable.

IV.

As Applied to This Case, the Arbitration Agreement Is Substantively Unconscionable

A. A Contract Is Substantively Unconscionable If It Unreasonably Prevents a Party From Obtaining Legal Redress

The central substantive unconscionability inquiry is whether the terms of a contract are "unreasonably one-sided" or " 'unreasonably favorable to the more powerful party.' " (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1145.) In *Sonic-Calabasas*, *supra*, our Supreme Court summarized the issue this way: "[T]he core concern of the unconscionability doctrine is the ' " 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' " ' [Citations.] The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as ' " 'overly harsh' " ' [citation], ' "unduly oppressive" ' [citation], ' "so one-sided as to 'shock the conscience' " ' [citation], or 'unfairly one-sided'[citation]. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party' [citation]. 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, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.' [Citation.]" (*Id.* at p. 1145.)

The *Sonic-Calabasas* court explained that one form of substantive unconscionability exists if an adhesive arbitration provision effectively blocks a party from obtaining redress of disputes in *any* forum. This form of unconscionability was discussed in *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, which held that an arbitration agreement was unconscionable because the plaintiff could not afford the substantial fees the agreement required as a prerequisite to pursuing arbitration. The *Sonic-Calabasas* court explained *Gutierrez*'s import as follows: "[In *Gutierrez*], the plaintiff entered into an automobile lease agreement with the defendant automobile dealer. He subsequently sued the dealer over alleged fraud in the transaction. The adhesive agreement contained an inconspicuous arbitration clause. [Citation.] The Court of Appeal found that, based on the American Arbitration Association rules in effect at the time the defendant moved to compel arbitration, the plaintiff would have had to pay $8,000 in administrative fees to initiate the arbitration. [Citation.] It was undisputed that such fees exceeded the plaintiff's ability to pay. [Citation.] In holding this aspect of the arbitration agreement unconscionable, *Gutierrez* said: 'We conclude that where a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay. It is self-evident that such a provision is unduly harsh and one-sided, defeats the expectations of the non-drafting party, and shocks the conscience. While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not. [Citation.] To state it simply: it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high. *Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself.*' [Citation.]" (*Sonic-Calabasas, supra*, 57 Cal.4th at pp. 1144-1145, italics added.)

The principle that an agreement is unconscionable if it unreasonably blocks a party from obtaining redress of disputes has been applied not only in cases where arbitration fees are unreasonably high, but also where the time to file a claim is unreasonably short. In *Ellis v. U.S. Security Associates*, *supra*, 224 Cal.App.4th 1213, 1223 (*Ellis*), for example, an employment contract provided that any claim against the employer had to be filed " 'no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit.' " The Court of Appeal held that this shortened statute of limitations was unreasonable and, hence, unenforceable. It noted that in various contexts, cases have said that to be enforceable, "[a] shortened limitation must be reasonable. As Witkin puts it, such provisions will be upheld if the shorter period is 'reasonable, i.e. if it gives sufficient time for the effective pursuit of the judicial remedy.' " (*Id.* at p. 1222.) "As the rule is generally described, '[a] contractually shortened limitation period, in order to be reasonable, must provide a party sufficient time to effectively pursue a judicial remedy. A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained. On the other hand, a contractual limitation provision that requires the plaintiff to bring an action before any loss can be ascertained is per se unreasonable.' (51 Am. Jur. 2d (2011) Limitation of Actions, § 81, p. 552, fns. omitted.)" (*Ellis*, *supra*, at p. 1223.) Applying this rule, the *Ellis* court found the six-month statute of limitations unreasonable because it gave the plaintiff insufficient time to investigate and file her claim. (*Id.* at p. 1226.)

The court similarly concluded in *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415 (*Moreno*), on which defendants rely. There, a home inspection contract limited a homeowner's right to bring an action against the home inspector to one year from the date of inspection. (*Id.* at p. 1418.) Although the court acknowledged that "California courts have afforded contracting parties considerable freedom to modify the length of a statute of limitations," it noted such shortened statutes of limitations must be *reasonable*.

" 'Reasonable' in this context means the shortened period nevertheless provides sufficient time to effectively pursue a judicial remedy. 'It is a well-settled proposition of law that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way. [Citations.]' " (*Id.* at p. 1430.) In *Moreno*, the court held the one-year statute of limitations unreasonable because it denied the plaintiffs the benefits of the delayed discovery rule. (*Id.* at p. 1433.)

The court reached a similar result in *Assaad v. American Nat'l Ins. Co.* (N.D. Cal., Dec. 23, 2010, No. C 10-03712 WHA) 2010 WL 5416841, where an employment agreement required employees to request arbitration "within 30 days from the date of termination or other adverse employment action." (*Id*. at p. *7.) The court noted that 30 days was far shorter than the one-year statute of limitations provided by the Fair Employment and Housing Act, and it quoted with approval the decision of another court finding a 30-day statute of limitations unconscionable: " 'If an aggrieved employee is uncertain whether he has a claim, it may take the employee more than thirty days to retain counsel and determine whether an act by the employer violated the employee's statutory rights. If an employee has a general sense that he has been wronged but lacks the sophistication to determine what legal claims he should bring, even if he complies with the thirty-day deadline to file a dispute in writing, he may fail to bring the correct claims during this internal resolution period and waive his right to assert meritorious claims later in the proceedings after obtaining counsel.' (*McKinney v. Bonilla*, No. 07cv2373, 2010 WL 2817179, at *9 (S.D.Cal. July 16, 2010).)" (*Assaad, supra*, at p. *7.) The court continued: "This analysis is persuasive. This thirty-day window 'functions as a trap for the unwary, limits the employee's ability to consult counsel, and appears to serve no legitimate purpose.' [Citation.] This provision imposes a vastly shortened statute of limitations and constitutes an unlawful attempt by [employer] to restrict its employees' rights." (*Ibid*.)

B. The Arbitration Agreement Is Substantively Unconscionable As Applied to the Present Case Because It Did Not Give Plaintiffs a Reasonable Opportunity to Investigate and Pursue Their Claims

Taken together, the cases just discussed stand for the proposition that, while parties may agree to shorten a statute of limitations, a contractually-shortened limitations period must provide a party sufficient time to retain counsel and to investigate and file an action. If the contractual statute of limitations is so short as to effect " 'a practical abrogation of the right of action' " (*Ellis*, *supra*, 224 Cal.App.4th at p. 1223), it is unreasonable and unenforceable.

Applying this principle, we conclude that the UIIA statute of limitations is unreasonable as applied to the present dispute. Under section E(6) of the UIIA and Wan Hai's and Hyundai's addenda, if a motor carrier disputes any item on a shipper's (i.e., "Provider's") invoice, the motor carrier "*shall advise* Provider in writing of any disputed items on Provider's invoices within 30 days of the receipt of such invoice(s)." (Italics added.) If a motor carrier fails to comply with the 30-day notice provision, it loses the right to challenge an improper invoice charge.

Plaintiffs contend that the notice provision is substantively unconscionable because it effectively reduces the time in which they may bring a claim from four years (under the UCL) to a mere 30 days, "essentially insulat[ing] [defendants] from liability for [their] violations of state regulations." We agree. Plaintiffs' claims are not operational challenges to per-diem charges, which are the kinds of disputes the 30-day rule appears to have been designed to address.[3] Instead, plaintiffs' claims concern the interpretation and enforceability of a California statute, as well as the application of that

---

[3] As IANA's general counsel noted in his preliminary rejection of the shippers' arbitration demand, the UIIA dispute resolution/arbitration procedure appears designed to address operational matters (i.e., "gate interchanges, the yard procedures associated with vessels and trains, loading and unloading operations, the operations of marine and rail container yards, the receiving and delivery of containers, and/or with road equipment").

statute to the contracts between the parties. This is not an issue on which motor carriers are likely to have expertise, and thus a reasonable statute of limitations must allow them time to consult with legal counsel. It is likely to take a motor carrier more than 30 days to retain counsel and determine whether weekend or holiday per diem charges violated its statutory rights. Thus, as in the cases discussed above, the 30-day notice provision is unreasonable because it requires motor carriers to dispute per diem charges before they fairly can do so.

The UIIA arbitration agreement further is unconscionable because it gives plaintiffs only 15 days to initiate arbitration and to submit briefs to the arbitration panel. Whatever the reasonableness of this requirement in other contexts, it is not reasonable as applied to a legal/statutory dispute like the present one.[4]

Defendants urge that the 30-day notice provision is "reasonable, fair, and businesslike" and does not place an unreasonable burden on the motor carrier because "it imposes no costs on motor carriers and does not require an elaborate statement of reasons for the objection." Although we agree that motor carriers need not supply an "elaborate statement of reasons," to dispute the charges at issue here a motor carrier must both be familiar with section 22928 and understand the statute's impact on shippers' rights to impose per diem fees on weekends and holidays. For this reason, requiring motor carriers to identify illegal charges within 30 days or lose the right to challenge them

---

[4] Defendants also contend that unlike the arbitration procedures disapproved in other cases, the procedures imposed by Wan Hai and Hyundai do not require the parties to commence arbitration within any specified time limitation. We do not agree. Exhibit D to the UIIA, which applies to arbitration of claims against both Wan Hai and Hyundai, provides that once a shipper responds to a motor carrier's dispute notice, the motor carrier "will have 15 days from the date of the Equipment Provider's response to either pay the claim(s) or to seek arbitration."

effectively prevents the motor carriers from obtaining legal redress and, therefore, is unconscionable.[5]

C. Other Provisions of the Arbitration Agreement Also Render It Substantively Unconscionable

As we have said, the substantive unconscionability doctrine "is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party.' " (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1145.) Such unconscionable terms exist in cases where arbitration is required only of the kinds of claims likely to be brought by the less powerful party (e.g., *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85-88; *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 486-488 (*Zullo*)), or where an adhesive agreement " 'effectively blocks every forum for the redress of disputes, including arbitration itself.' " (*Sonic-Calabasas*, *supra*, at pp. 1144-1145, italics added.) Applying these principles, there are at least four additional provisions that render the arbitration agreement unconscionable as applied to the present dispute.

First, Exhibit D to the UIIA provides that the arbitrators' determinations "are to be based solely on the rules in the UIIA and the rules and charges in the Equipment Provider's Addendum." Plaintiffs' claims, however, rely on section 22928, which is a source *outside* "the rules and charges" in the UIIA and the defendants' addenda. By its plain language, therefore, the arbitration agreement prohibits arbitrators from considering the very authority on which plaintiffs' claims depend.

Second, if the motor carriers are correct that the shippers consistently have been charging per diem fees that violate section 22928, they can avoid further harm only

---

[5] We note that our holding is limited to the particular dispute before us. In other words, while we hold that the 30-day notice requirement is unreasonable as applied to the legal/statutory issues addressed by Elite's and Unimax's claims, we do not consider or decide whether the UIIA procedures are reasonable as applied to the resolution of operational or other disputes.

through an order enjoining future similar per diem charges. Nothing in the UIIA, however, empowers arbitrators to issue an injunction. To the contrary, the UIIA limits the arbitrators' powers to resolving disputes concerning "charges arising from . . . invoices." In short, under the UIIA, plaintiffs' only recourse is to file a request for arbitration—and pay a filing fee—*each time* a shipper issues an invoice that contains fees alleged to violate section 22928. This procedure does not provide plaintiffs with a reasonable avenue for redress of defendants' alleged unlawful conduct, and thus is unconscionable as applied to plaintiffs' claims.

Third, the arbitral limitations described above uniquely handicap motor carriers. The obligation to arbitrate applies only with regard to "[d]isputes . . . to charges *arising from Maintenance and Repair (M&R), Per Diem or Lost/Stolen Equipment invoices*." (Italics added.) Thus, although the arbitration agreement is not on its face limited to disputes initiated by motor carriers, because invoices are prepared *by* the shippers and issued *to* the motor carriers, challenges to charges "arising from" such invoices are the kinds of claims that " 'are virtually certain to be filed *against*, not by [shippers].' " (*Zullo*, *supra*, 197 Cal.App.4th at p. 486, italics added.) Indeed, it is difficult for us to imagine a scenario in which a shipper would be disputing its *own* charges.

Fourth, on its face the 30-day requirement applies only to motor carriers, who are *required* to advise shippers ("Providers") of any disputed invoice items "within 30 days of the receipt of such invoice(s)." In contrast, the shippers need only "*undertake to reconcile* such disputed items" within 30 days (under Wan Hai's addendum) or 60 days (under Hyundai's addendum). (Italics added.) In other words, while motor carriers are required to advise shippers of disputed charges within 30 days or lose the right to challenge such charges, shippers need only "undertake"—i.e., "set about: *attempt*" (Merriam-Webster Dict. <http://www.merrian-webster.com> [as of June 4, 2015], italics added)—to respond within the same (or greater) time period.[6]

---

[6] Having concluded that the arbitration agreement is substantively unconscionable for the reasons articulated above, we need not address plaintiffs' additional contentions

For all of these reasons, therefore, the UIIA is unconscionable as applied to the present dispute.

D. Our Conclusion Is Consistent with That of Recent Federal Court Decisions

Our conclusion is consistent with two recent decisions of the federal courts. In *Elite Logistics Corp. v. Hanjin Shipping Co.* (9th Cir. 2014) 589 Fed.Appx. 817 (*Hanjin*), the Ninth Circuit held that the UIIA arbitration agreement is unconscionable as applied to claims like those asserted here. The court explained: "Under the agreement, the invoiced party must provide written notice of its dispute as to an invoice within 30 days, which is shorter than California's four-year statute of limitations. The burden to dispute an invoice is on the invoiced party. After receiving the dispute response from the invoicing party, the invoiced party has 15 days to pay the invoice or seek arbitration. If an invoiced party proceeds to arbitration, it must submit all of its arguments to the arbitration panel first. Further, the arbitration panel lacks the authority to enjoin wrongful conduct, which is a significant burden in cases such as the one at bar where recurring invoice problems are at issue." (*Id*. at p. 819.)

The district court similarly concluded in *Unimax Express, Inc. v. Cosco North America, Inc.* (C.D.Cal., Nov. 28, 2011, No. CV 11-02947 DDP (PLAx) 2011 WL 5909881 (*Cosco*): "Here, the burdens of the arbitration procedures fall inordinately on the invoiced party. If Unimax believes it has been improperly charged, it must provide written notice of the dispute to Cosco within thirty days, at pain of forfeiting any defense to such charges, regardless of whether the charges are proper. Cosco contends that the 'expeditious and efficient' thirty-day limitation period furthers Unimax's 'interest in resolving legitimate disputes.' (Reply at 12-13.) Cosco's argument ignores the reality that the thirty-day notice period operates as a statute of limitations shorter than that available under California law, and works solely to Cosco's benefit. [¶] Other terms of

---

that the agreement is also unconscionable because it fails to permit discovery, rebuttal, or an oral hearing.

the Provision also operate solely to Cosco's benefit. While both parties could theoretically initiate an arbitration, the burden is always on the invoiced party to initiate a dispute. (Agreement § H.1.) When an invoiced party believes it has been wrongly charged and seeks to arbitrate, it must submit all of its arguments to the arbitration panel first. The invoiced party must articulate its arguments with a clarity bordering on prescience, for it has no right to discovery and will have no opportunity to rebut the invoicing party's response (notwithstanding the possibility that the arbitration panel 'may' initiate a conference call). Finally, even if the invoiced party receives a favorable determination, the arbitration panel lacks the power to enjoin the invoicer's wrongful conduct, leaving the invoicer free to repeat the offense. In the case of an ongoing violation, the invoiced party's only option is to initiate a separate dispute every thirty days, ad infinitum. Under these circumstances, the arbitration procedures lack even a modicum of bilaterality, and the Provision is, therefore, substantively unconscionable." (*Id*. at p. *4.)

V.

As Interpreted by *AT&T Mobility LLC v. Concepcion*, the FAA Does Not Preempt Plaintiffs' Unconscionability Claim

Citing *Concepcion*, *supra*, 131 S.Ct. 1740, defendants contend that even if the arbitration agreements are unconscionable under California law, they nonetheless are enforceable because the FAA preempts California's unconscionability doctrine. Indeed, according to defendants, "each of the grounds asserted by Elite and Unimax to deny enforcement of the arbitration clause are 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " For the reasons that follow, defendants are wrong.

A. *AT&T Mobility LLC v. Concepcion*

In *Concepcion*, *supra*, 131 S.Ct. 1740, the United States Supreme Court held that the FAA preempts California's unconscionability doctrine in some contexts. At issue in *Concepcion* was the rule articulated by the California Supreme Court in *Discover Bank v.*

Superior Court (2005) 36 Cal.4th 148 (the *Discover Bank* rule), which (1) held that most collective-action waivers in consumer arbitration contracts were unconscionable, and (2) imposed class-wide arbitration in some circumstances where consumers both had agreed to arbitrate and had waived the right to participate in class actions. The Supreme Court abrogated this rule, finding it is preempted by the FAA. (*Concepcion*, at p. 1753.) The Supreme Court held that although the FAA preserves generally-applicable contract defenses, it does not permit state law defenses "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, *supra*, at p. 1746.) In other words, the court said, "nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"—i.e., to " 'ensur[e] that private arbitration agreements are enforced according to their terms.' " (*Id.* at p. 1748.)

The court noted that its prior decisions had held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes. (*Concepcion*, *supra*, 131 S.Ct. at pp. 1748-1749.) It explained: "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." (*Id.* at p. 1749.) Thus, the court concluded, states cannot require procedures inconsistent with the FAA, even if such procedures are desirable for unrelated reasons. (*Id.* at p. 1753.)

B. *Sonic-Calabasas A, Inc. v. Moreno*

In *Sonic-Calabasas*, *supra*, 57 Cal.4th 1109, the California Supreme Court considered the extent to which, after *Concepcion*, state unconscionability rules may be applied to invalidate arbitration agreements. The court began by noting that "after *Concepcion*, unconscionability remains a valid defense to a petition to compel

arbitration." (*Sonic-Calabasas*, at pp. 1142-1143.) The court explained: "Quoting the FAA's saving clause, *Concepcion* reaffirmed that the FAA 'permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" ' (*Concepcion*, *supra*, 563 U.S. at p.__ [131 S.Ct. at p. 1746], quoting 9 U.S.C. § 2), including ' "generally applicable contract defenses, such as fraud, duress, or unconscionability . . . " [citations]' (*Concepcion*, at p. __ [131 S.Ct. at p. 1746]). Although courts may not rewrite agreements and impose terms to which neither party has agreed, it has long been the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided. [Citations.] After *Concepcion*, the exercise of that judicial function as applied to arbitration agreements remains intact, as the FAA expressly provides." (*Id.* at pp. 1142-1143.)

The court noted, however, that *Concepcion* did make some significant changes to the legal landscape. It said: "What is new is that *Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements. It is well established that such rules must not facially discriminate against arbitration and must be enforced evenhandedly. *Concepcion* goes further to make clear that such rules, even when facially nondiscriminatory, must not disfavor arbitration *as applied* by imposing procedural requirements that 'interfere[ ] with fundamental attributes of arbitration,' especially its ' "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." [Citation.]' (*Concepcion*, *supra*, 563 U.S. at pp. __, __ [131 S.Ct.at pp. 1748, 1751].) As the high court explained, if facial neutrality or evenhanded enforcement were the only principles limiting the scope of permissible state law defenses to arbitration, then a state court could—on grounds of unconscionability or public policy—compel the adoption of an arbitration procedure that would be arbitration in name only. It could impose judicially monitored discovery, evidentiary rules, jury trials, or other procedures that mimic court proceedings, and thereby undermine the FAA's purpose of encouraging arbitration as an efficient

alternative to litigation." (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1143.) However, state law rules that do not interfere with fundamental attributes of arbitration do not implicate *Concepcion*'s limits on state unconscionability rules. Thus, "a facially neutral state law rule is not preempted simply because its evenhanded application 'would have a disproportionate impact on arbitration agreements.' (*Concepcion*, at p. __ [131 S.Ct. at p. 1747].)" (*Sonic-Calabasas*, *supra*, at p. 1144.)

The court concluded that after *Concepcion*, "courts may continue to apply the unconscionability doctrine to arbitration agreements. [Citations.] As the FAA contemplates in its savings clause (9 U.S.C. § 2), courts may examine the terms of adhesive arbitration agreements to determine whether they are unreasonably one-sided. What courts may not do, in applying the unconscionability doctrine, is to mandate procedural rules that are inconsistent with fundamental attributes of arbitration, even if such rules are 'desirable for unrelated reasons.' (*Concepcion, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1753].) " (*Sonic-Calabasas, supra*, 57 Cal.4th at p. 1145.)

C. Analysis

Nothing in *Concepcion* or *Sonic-Calabasas* suggests that California unconscionability law, as we have applied it in the present case, is preempted by the FAA. This is true most fundamentally because nothing in our analysis compels the parties to adopt arbitration procedures to which they have not agreed. That is, the central flaw in the *Discover Bank* rule, as described by the Supreme Court in *Concepcion*, is that it allowed courts to impose onerous classwide arbitration procedures "*ex post.*" (*Concepcion, supra*, 131 S.Ct. at p. 1750.) As a result, the Supreme Court said, "[t]he conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*Id.* at pp. 1750-1751.) In the present case, in contrast, we are not requiring the parties to adopt an onerous procedure of our own invention. We are, instead, merely requiring them to submit their dispute to normal litigation channels.

Concepcion also cautioned against "interfer[ing] with fundamental attributes of arbitration," especially its " 'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.' [Citation.]" (*Concepcion*, *supra*, 131 S.Ct. at pp. 1748, 1751.) We have not done so. While we have concluded that the arbitration agreement's 30-day statute of limitations did not give plaintiffs a reasonable opportunity to investigate and pursue their claims, we do not suggest that, to be enforceable, an arbitration agreement must allow plaintiffs the full four-year statute of limitations provided by the UCL. Nor have we either exempted a whole class of claims from arbitration or struck the UIIA arbitration provision in every context. To the contrary, we have said that our conclusion that the UIIA arbitration procedure is unconscionable is limited *to this case*. We have not considered, nor have we decided, that the UIIA arbitration provision cannot lawfully be applied to *any* dispute—we hold only that it cannot be applied to *this* dispute.

Finally, as we have applied it in the present case, the unconscionability defense does not "apply only to arbitration" or "derive [its] meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, *supra*, 131 S.Ct. at p. 1746.) The standard we apply—that a statute of limitations must not be so short as to work "a practical abrogation of the right of action" (*Ellis*, *supra*, 224 Cal.App.4th at p. 1223)—applies equally to arbitration and litigation. *Ellis* and *Moreno*, two of the cases on which we rely, are not arbitration cases at all, but instead discuss contracts that shorten a statute of limitations in the context of court actions. Our analysis, therefore, does not in any sense apply only to arbitration or derive its meaning from the fact that an arbitration agreement is at issue, and therefore it is not preempted by the FAA.

VI.

The Arbitration Agreement Is Unenforceable in Its Entirety

Having found that the arbitration agreement is both procedurally and substantively unconscionable as applied to this dispute, the only remaining question is whether the unconscionable provisions can be severed from the balance of the arbitration agreement. (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 90.) We conclude they cannot.

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 121-122 (*Armendariz*), our Supreme Court explained, pursuant to Civil Code section 1670.5, subdivision (a), that " '[i]f the court as a matter of law finds [a] 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.' " In the case before it, the court said that two factors weighed against the severance of the unconscionable provisions. First, the arbitration agreement contained more than one unlawful provision, indicating "a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the [defendant's] advantage." (*Armendariz*, at p. 124.) Second, "in the case of the agreement's lack of mutuality, such permeation is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. Rather, the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. Code of Civil Procedure section 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful. Nor do courts have any such power under their inherent limited authority to reform contracts. [Citations.] Because a court is unable to cure this

unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire agreement." (*Id.* at pp. 124-125.)

The same analysis applies here. Because the arbitration agreement contains many unconscionable provisions, there is no single provision we can strike. Instead, we would have to reform the contract by augmenting it with additional terms, something we are not permitted to do. Accordingly, we must void the entire arbitration agreement.

DISPOSITION

The orders granting the motions to compel arbitration and the order and judgment confirming the arbitration awards are reversed, with directions to reinstate the civil actions following the issuance of the remittitur. Plaintiffs are awarded their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.