THE REVOCABILITY OF CONTRACT PROVISIONS CONTROLLING RESOLUTION OF FUTURE DISPUTES BETWEEN THE PARTIES

PAUL D. CARRINGTON* AND PAUL Y. CASTLE**

I

INTRODUCTION

The common law long held that contract provisions controlling the resolution of future disputes between the parties were revocable until such a dispute was actually resolved by the forum designated in the agreement. In the context in which it evolved, this was a sound rule. It would today be a sound rule that such provisions are revocable when formed in contracts of adhesion, at least until a dispute to which they purport to apply has been submitted in writing to the specified forum or procedure.

In 1746, an English judge explained the ancient doctrine of revocability as based on the petty jealousy of courts fearing ouster of their jurisdiction.[1] That erroneous explanation was perpetuated as a reason for abrogating the common law rule when, in the late nineteenth century, it discommoded merchants making deals for goods to be shipped by rail in interstate commerce.[2] The rule was abrogated by the Federal Arbitration Act of 1925[3] (FAA), whose authors explained the rule as a feature of the federal common law governing contract disputes brought as diversity cases. Since that time, the Supreme Court has vastly expanded the applicability of arbitration legislation,[4] making it applicable to many types of contracts to which the application of the revocability doctrine would make better sense. Congress has recently revived the doctrine in its legislation shielding automobile dealers from the misapplication of federal law.[5] It

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* Professor of Law, Duke University.

** Duke Law Class of 2004.

1. Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746).

2. *E.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) (Jerome Frank, J.), *quoted in* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985).

3. Pub. L. No. 401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (2000)).

4. *See generally* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (providing an overview of the Supreme Court's recent jurisprudence on the issue).

5. Act of November 2, 2002, Pub. L. No. 107-273, 116 Stat. 1758, § 11,028 (to be codified at 15 U.S.C. § 1226) (prohibiting enforcement of predispute mandatory arbitration agreements between automobile manufacturers, importers, and distributors and automobile retailers).

is the purpose of this Article to correct the misunderstanding of the policies served by the common law rule and to suggest the rule's revival for application to many of the contracts to which the Supreme Court has expanded the application of the FAA.

II

REVOCABILITY IN THE ENGLISH COMMON LAW TRADITION

In medieval England, arbitration was used primarily by guilds of traveling craftsmen and merchants as a means of resolving commercial disputes quickly, before the parties departed the communities in which their disputes arose and without the travail of a trial before a royal judge.[6] In that context, the compulsion to comply with an arbitration agreement or award stemmed largely from the social interdependence of the merchants and resulting communitarian norms. These, it appears, were sufficient to enforce most arbitration agreements. Enforcement by the King's judges loomed only as a remote threat. In fact, medieval English courts generally did not enforce arbitration agreements. They were deemed to be private arrangements for which there was no enforcement authority other than the personal authority of the parties to the agreement.[7]

Vynior's Case[8] in 1609 was the first major expression of the doctrine of revocability. At the time, the common law of contracts was in its infancy.[9] It had become a common practice to secure performance of any agreement by putting the obligor under bond. If the obligor failed to perform, the other party had a suit on the bond, which might be sufficiently large to protect him. Robert Vynior brought an action against William Wilde on a bond for a hundred pounds, demanding twenty pounds' damages as well as the penal sum of the bond. Vynior's complaint alleged that the bond had been given by Wilde to insure his compliance with an arbitration agreement covering disputes between the two, but that Wilde had revoked Vynior's authority to submit the dispute to arbitration in violation of their agreement to "stand to and abide the award." To this, Wilde demurred. The court ruled that Vynior could recover on both his bond and his alleged damages. For this decision, Lord Coke set forth three reasons, one of which was that

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6. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599 (1997); *see* William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 ARB. J. 27 (1993).

7. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598 (1927).

8. 77 Eng. Rep. 597 (K.B. 1609). Revocation had been upheld in Y.B. 8 Edw. 4, fol. 9b, 10a, Mich., pl. 9 (1468); Y.B. 5 Edw. 4, fol. 3b, Trin., pl. 2 (1465); Y.B. 28 Hen. 4, fol. 6, Pasch, pl. 4 (1449); Y.B. 21 Hen. 4, fol. 30a, Hil., pl. 14 (1442).

9. Sayre, *supra* note 7, at 603; *see* 14 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 189 (A.L. Goodhart & H.G. Hanbury eds., 1964); FREDERIC WILLIAM MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 258 (A.H. Chaytor & W.J. Whittaker eds., 1929); 1 A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 9-135 (1987).

> [a]lthough William Wilde, the defendant, was bound in a bond to stand to, abide, observe, etc., the rule, etc., of arbitration, etc., yet he might countermand it, for one cannot by his act make such authority, power, or warrant not countermandable which is by the law or of its own nature countermandable.[10]

Lord Coke explained that when there was a suit on a bond given for a submission to arbitration, the submission itself was revocable, but such revocation came at the price of the forfeiture of the bond.[11] While a party had the power to revoke a submission, he was still held liable on his bond.

Unfortunately, common law judges seldom articulated the policy reasons underlying the rules they applied, and so Lord Coke did not explain the reasoning behind his revocability doctrine. Paul Sayre discussed the suggestion that *Vynior* may have rested on the idea of agency.[12] Lord Coke, however, did not employ the word "agency" in his report of his own opinion, nor does the word appear in Brownlow and Goldesborough's reports of the case.[13] Furthermore, the concept of agency had not been developed at the time the doctrine of revocability emerged.[14] In its modern form, agency "indicate[s] the relation which exists when one person is employed to act for another."[15] It is "a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other."[16] Once parties submit to arbitration, the "agent" (that is, the arbitrator), to whom authority is granted, is not under an obligation to further the interests of the "principal." As such, Professor Sayre rightly concluded that agency law does not explain the historic application of the revocability doctrine to arbitration.[17]

Nor can the historic revocability of arbitration agreements be explained by the theory that revocability is derived from the common law concept of delegated powers. Because a traditional agreement to arbitrate was purely a private arrangement, arbitrators had to get their power to act from the parties before them. On this theory, that power must be revocable at the election of either party to the dispute, as are other delegated powers.[18] But this theory does not

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10. *Vynior's Case*, 77 Eng. Rep. at 598-99.

11. *See* Sayre, *supra* note 7, at 601-02.

12. *Id.* at 599.

13. 1 BROWNLOW & GOLDESBOROUGH 64 (3d ed. 1675); 2 BROWNLOW & GOLDESBOROUGH 290 (3d. ed. 1675).

14. Sayre, *supra* note 7, at 599-600.

15. 1 FLOYD MECHEM, TREATISE ON THE LAW OF AGENCY § 25 (2d ed. 1914).

16. Warren A. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 868 (1920).

17. *See* Sayre, *supra* note 7, 599-600.

18. Taylor v. Burns, 203 U.S. 120 (1906); Hunt v. Rouismanier, 21 U.S. (8 Wheat.) 174 (1823); Cronin v. Am. Sec. Co., 50 So. 915 (Ala. 1909); Chambers v. Seay, 73 Ala. 372 (1882); Hynson v. Noland, 14 Ark. 710 (1854); Brown v. Pforr, 38 Cal. 550 (1869); Barr v. Schroeder, 32 Cal. 609 (1867); Posten v. Rassette, 5 Cal. 467 (1855); Mitchel v. Gray, 97 P. 160 (Cal. Ct. App. 1908); Briggs v. Chamberlain, 107 P. 1082 (Colo. 1910); Lowell v. Hessey, 105 P. 870 (Colo. 1909); Darrow v. St. George, 8 Colo. 592 (1855); Linder v. Adams & Co., 22 S.E. 687 (Ga. 1895); Davis v. Fidelity Fire Ins. Co., 70 N.E. 359 (Ill. 1904); Bonney v. Smith, 17 Ill. 531 (1856); Shiff v. Lesseps, 22 La. Ann. 185 (1870); Attrill v. Patterson, 58 Md. 226 (1882); Creager v. Link, 7 Md. 259 (1854); Smith v. Kimball, 79 N.E. 800 (Mass. 1907); Cadigan v. Crabtree, 70 N.E. 1033 (Mass. 1904); Loving Hesperian Co. v. Cattle Co., 75 S.W.

explain why the power of the arbitrator could not be an exception to the rule, and therefore irrevocable.

We perceive that the purpose underlying Lord Coke's revocability doctrine was that the rule served to insure the disinterest of arbitrators. The power that arbitrators were granted made them unaccountable to anyone or any entity for their fidelity to the terms of the contract or the controlling law. In view of the private source of their power, they had no official obligation to act impartially, in accordance with the law, or even in accordance with the contract. The only substantive constraint on an arbitrator's license resided in the ability of either party to revoke his authority. This assured that the arbitrator knew at the moment of undertaking his duty that he was acting on the trust of both parties.

There was an urgent need for such a policy in the seventeenth century. Arbitration then generally took place in a setting engaging the interests of a whole community of merchants. Merchants and craftsmen used arbitration because they carried on their trades in a community of their fellows.[19] Arbitration proceedings were conducted by fellow merchants acting in the role of arbitrator, and the cases were "viewed in the light of practical expediency and decided in [accord with] the ethical or economic norms of some particular group."[20] Because the arbitrators were sometimes buyers and sometimes sellers, there was a high level of mutual trust in the disinterest of the members selected as arbitrators, which was expressed and reinforced by the continued willingness to submit to their decision. However, because this community was so tight, there was also reason to believe that decisions would be made for reasons having nothing to do with the merits of the dispute at hand. An entire community might turn against a particular disputant, opening the door for the arbitrator to serve as the administrator of mob justice rather than act in the role of a fair and impartial adjudicator. Thus, the doctrine of revocability provided the merchant who felt outcast by his community with some element of protection by allowing him to seek the protections of law in the King's court. It also served the community by freeing the arbitrator from the stigma of mistrust that would have been present if the beleaguered member of the community had no choice but to submit to the collective will.

Despite these compelling considerations, an eighteenth century English judge attributed the doctrine of revocability to jurisdiction envy.[21] Although the court uttering it offered no grounds and no authority for that interpretation, once asserted, it continued to be repeated by others. In 1856, in *Scott v. Avery*,[22]

1095 (Mo. 1903); Miller v. Wehrman, 115 N.W. 1078 (Neb. 1908); Hartshorne v. Thomas, 10 A. 843 (N.J. Eq. 1887); Hutchins v. Hebbard, 34 N.Y. 24 (1865); Gardner v. Pierce, 116 N.Y.S. 155 (N.Y. App. Div. 1909).

19. William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 455 (1958).

20. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

21. Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746).

22. 10 Eng. Rep. 1121 (H.L. 1856).

Lord Campbell repeated the view that the doctrine of hostility to arbitration at common law "probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would deprive one of them of jurisdiction."[23] This assertion was again made without any evidence in its support, but judges and commentators appear to have subsequently taken Lord Campbell at his word. *Scott v. Avery* came to be known as the great case on revocability, and Campbell's doctrine of "judicial jealousy" became one of the most frequently cited reasons for revocability. In fact, eighteenth century common law courts showed no unwillingness to enforce awards or agreements to arbitrate existing disputes, as would seem likely to follow from jurisdiction envy.[24]

Vynior's Case, though decided almost 250 years earlier, itself illustrates a willingness to enforce an arbitration agreement under properly confined circumstances. While the court acknowledged the general right to revoke, it permitted a full recovery on the bond and the alleged damages, the combined sum of which was probably much in excess of what could reasonably have been recovered on the cause of action itself. The court thus did all that was reasonably necessary to sustain arbitration. This typified an absence of judicial hostility to the practice of arbitration. As Professor Sayre argued, "[i]f the courts had been jealous of their jurisdiction or had wished to secure business for themselves to the exclusion of arbitration, they might well have ruled that a bond given to secure a submission to arbitration was against public policy, and void."[25]

III

REVOCABILITY IN THE NINETEENTH CENTURY UNITED STATES

Similarly, the belief that the doctrine of revocability was supported in the United States during the nineteenth century only because of the jurisdictional jealousy of U.S. courts seems to be unjustified. To the contrary, U.S. courts have from the beginning embraced arbitration when freely chosen by the parties.[26] Arbitration awards were consistently enforced in federal and in most state courts, subject only to the defense of fraud, there being no review on the merits.[27] In addition, U.S. courts have always enforced agreements to resolve an existing dispute by arbitration.[28]

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23. *Id.* at 1138.

24. *See* Halfhide v. Fenning, 29 Eng. Rep. 187 (Ch. 1788); Wellington v. Mackintosh, 26 Eng. Rep. 741 (Ch. 1743).

25. *See* Sayre, *supra* note 7, at 610.

26. IAN R. MACNEIL, AMERICAN ARIBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 19 (1992).

27. *See, e.g.*, Red Cross Line v. Atl. Fruit Co., 264 U.S. 109 (1924); Hamilton v. Liverpool, London & Globe Ins., 136 U.S. 242 (1890).

28. Parties can agree in court to arbitrate an existing dispute and thus secure a rule of court ordering the arbitration. Courts would enforce such a rule against a subsequently revoking party. *See* MACNEIL, *supra* note 26, at 21.

Nevertheless, the principle of revocability was widely accepted by nineteenth century U.S. courts, and it is perhaps still the law in some states.[29] In 1874, the Supreme Court explained in *Home Insurance Co. v. Morse*:

> In a civil case [a man] may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit . . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.[30]

The same principle had been expressed earlier by Justice Story in *Tobey v. County of Bristol*:

> When the law has declared, that an agreement for an arbitration is, in its very nature, revocable, and cannot be made irrevocable by any agreement of the parties, courts of equity are bound to respect this interposition, and are not at liberty to decree that to be positive and absolute in its obligation, which the law declares to be conditional and countermandable.[31]

Morse and *Tobey* are merely illustrative of numerous other nineteenth century court decisions affirming the doctrine of revocability.[32] It seems that there was a perception, at least among some U.S. courts, that "the existence of genuine mutual assent was suspect" in a predispute arbitration agreement and that "a dispute resolution clause could be a trap for the unwary" and uninformed. As one court put it, "[b]y first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy."[33] As such, the best way to assure true assent to arbitration and the integrity of the arbitral process was to afford a party who has agreed to arbitrate a future dispute an opportunity to withdraw assent when a dispute has actually arisen and an informed decision is possible.

29. MACNEIL, *supra* note 26, at 20; WESLEY A. STURGES, COMMERCIAL ARBITRATIONS AND AWARDS § 15, at 45 (1930); Carrington & Haagen, *supra* note 4, at 339.

30. 87 U.S. (20 Wall.) 445, 451 (1874).

31. 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).

32. *See, e.g.*, Hobbs v. Manhattan Ins. Co., 56 Me. 417, 421 (1869); Nute v. Hamilton Mut. Ins. Co., 76 Mass. (6 Gray) 174 (1856); Cobb v. New England Mut. Marine Ins. Co., 72 Mass. (6 Gray) 192 (1856); *see also* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 670 (emphasizing that the doctrine of revocability was applicable in courts of equity as well as in courts of law).

33. Parsons v. Ambos, 48 S.E. 696 (Ga. 1904); *see* NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 34 HANDBOOK OF THE NATIONAL CONFERENCE 60-73 (1924). *Compare* Cocalis v. Nazlides, 139 N.E. 95 (Ill. 1923), *with* W.H. Blodgett Co. v. Bebe Co., 214 P. 38 (Cal. 1923).

IV

STATUTORY DEVELOPMENTS IN ENGLAND

The English courts' underlying purpose in promoting the objectivity of arbitrators was confirmed by their reactions to a series of legislative enactments between 1698 and 1889 through which Parliament sought to strengthen the enforceability of arbitration agreements. In 1698, a year after passing the Statute of Fines and Penalties,[34] regulating the use of bonds, Parliament enacted England's first arbitration act.[35] The aim of the act was to make the submission to arbitration irrevocable by making it a rule or order of a court. A revoking party was to be subject to charges of contempt of court. However, the act did not go far to strengthen the hand of the nonbreaching party, for a submission to arbitration was still revocable until an action at law to enforce the agreement had been brought and a rule or order of court enforcing it had been obtained.[36]

The act did not distinguish between the submission of an existing dispute and a future dispute. Both were assumed to come within the purview of the act. It did not give the parties the right to secure witnesses or compel testimony in the arbitration proceedings, nor did it provide for court review of questions of law. The act did not have any other provisions designed to secure a fair and adequate hearing. English courts reacted to this enactment by continuing to hold the submission of a future dispute revocable whenever it did not come strictly within the terms of the act.[37]

In 1833, Parliament enacted another statute, extending and reinforcing the act of 1689.[38] It provided that any arbitration agreement, once made a rule or order of court, was not revocable by any party without leave of the court, provided that the submission agreement was made with the understanding that it might be made a rule of court.[39] The statute of 1833 was an important step toward protecting the rights of the parties who submitted to arbitration: it provided for compulsory legal process by which the court could compel the attendance of witnesses and the production of evidence at hearings.[40] Nevertheless, even under the legislation, the courts continued to recognize the doctrine of revocability whenever possible.

The statutory trend toward strengthening the enforceability of arbitration agreements continued in 1854. Section 27 of the Common Law Procedure Act,

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34. 1697, 8 & 9 Will. 3, c. 11, § 8 (Eng.). This statute precluded recovery of the face value of bonds when they had become single unless the actual damages justified it. Under this statute and subsequent developments through judicial decisions, it became common practice that the courts would look behind the sum stated in the bond. *See* Sayre, *supra* note 7, at 604.

35. An Act for Determining Differences by Arbitration, 1698, 9 Will. 3, c. 15 (Eng.).

36. *See* Sayre, *supra* note 7, at 605.

37. *Id.* at 606.

38. An Act for the Further Amendment of the Law, and the Better Advancement of Justice, 1833, 3 & 4 Will. 4, c. 42, § 28 (Eng.).

39. *Id.* § 39.

40. *Id.* § 40.

enacted that year, provided that either party to an arbitration agreement could make the submission irrevocable by applying to the court to make it a rule of court, even in cases in which the submission had not been made with the understanding that it might be made a rule of court.[41] In 1889, another statute was enacted; its first two sections read as follows:

> 1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of court.
>
> 2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule of this Act, so far as they are applicable to the reference under the submission.[42]

This enactment presumed that every arbitration agreement was subject to the statute. The effect was that almost all arbitration agreements in England came within the purview of the statute.

However, it bears emphasis that this act also provided for judicial review of questions of law raised in arbitration hearings.[43] Since court review meant that arbitrators did not have the final say on the issue, the passing of the 1889 act had the effect of limiting the authority of arbitrators to final disposition of questions of fact only and assured disinterested assessment of all decisions on issues of law.

Thus, by 1889, the common law doctrine of revocability had been put aside in England, but with increasingly stringent protections for the parties' rights in the arbitration proceedings. As the enforcement of revocability retreated, the statutory requirements of procedure progressed to take revocability's place in safeguarding against improper conduct in arbitration proceedings. Consequently, the delicate balance between guarantees of disinterest and the enforceability of arbitration agreements was maintained through a change of doctrinal guards.

It also bears note that both Parliament and the royal courts were dealing with arbitration in a political context quite different from that of their U.S. counterparts. The royal courts were in business to resolve disputes; they were not regarded as enforcers of public law and policy, as U.S. courts, even in the nineteenth century, were.[44] For example, private enforcement of public law by means of contingent-fee lawyers presenting claims to civil juries, with the American Rule precluding liability for defendants' legal expenses, is an institution unique to the United States and one frequently relied upon as an alternative to administrative regulation of business.[45]

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41. Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 27 (Eng.).

42. English Arbitration Act, 1889, 52 & 53 Vict., c. 49, §§ 1, 2 (Eng.).

43. *Id.* § 11.

44. *E.g.*, Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2000)).

45. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79 (2003).

V

LEGISLATION IN THE UNITED STATES

Legislation in the United States followed a course similar to that in England, but it did not provide for judicial review of legal decisions made by arbitrators. The revocability doctrine conferred its benefits and posed no problem in the United States until the construction of railroads led to commerce between distant merchants. After the construction of railroads, local communitarian sanctions no longer applied to commercial disputes, and distant merchants mistrusted local courts. As such, trade associations were invented, in part to supply disinterested forums for the enforcement of contracts between distant merchants.[46] To achieve that aim and to prevent a party from resorting to his own hometown forum, arbitration clauses needed to be made irrevocable. Thus, an early New York case conceded that arbitration clauses

> induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to an action. But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice.[47]

By 1920, a widespread effort was afoot to modify arbitration laws in all states to secure better enforcement of agreements to arbitrate future commercial disputes. The movement's oft-stated purpose was to "make the benefits of arbitration generally available to the business world," and it was driven primarily by those engaged in interstate trade.[48]

There was, however, opposition to the enactment of state statutes aiming to assure the arbitrability of future disputes. As late as 1924, both the National Conference of Commissioners on Uniform State Laws and the American Bar Association took positions firmly in opposition to what was perceived by some to be an idiosyncrasy of New York law.[49] As an example, Ian Macneil quotes one opponent's statement:

> Under the New York Act you are called upon to agree in advance through a clause that is in the contract, most often in small type, that all controversies of any nature, kind, or description are to be taken out of the courts and are to be submitted to an arbitrator either named then or to be named later. It is felt by the great majority of the [ABA] committee that this is wrong in principle, to call upon men to agree in advance to arbitrate any difficulties that might arise, particularly in view of the fact that that would be done in most instances without any realization on the part of the contracting parties as to what they were really doing. Of course, we all agree that men

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46. *See* A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287, 321-24 (1989).

47. President of Del. & Hudson Canal Co. v. Pa. Coal Co., 50 N.Y. 250, 258 (1872). *Contra* Henry v. Lehigh Valley Coal Co., 64 A. 635 (Pa. 1906).

48. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 407 (2d Cir. 1959) (citing S. REP. NO. 68-536, at 3 (1924)).

49. MACNEIL, *supra* note 26, at 49-51.

> ought to know what they are doing when they are signing contracts, but we all know from . . . practical experience that the fine type of contracts[,] whilst entirely binding, is seldom read, and we do feel that is a giving up [of] rights that the American people really regard as sacred[,] and they shouldn't be called upon to do so.[50]

Reflecting this opposition, the Uniform Arbitration Act of 1925 did not provide for the enforcement of agreements to arbitrate future disputes.[51]

Although the Act was adopted in only four states, "modern" reformers succeeded over the next four decades in securing legislation in all but three states providing for the enforcement of such arbitration clauses.[52] Instrumental in that effort was the "modern" Uniform Arbitration Act of 1955,[53] which was enacted in over thirty states, often with significant modifications, but always with provisions for the specific enforcement of arbitration clauses. The prevailing view was that, as between contracting parties of reasonably equal strength and sophistication, there is no substantial public interest to be served by precluding parties from so moderating the rights they create by their contracts, and ample reason to enforce agreements to arbitrate claims asserting such rights. But as recently as 1991, the Supreme Court of Nebraska held that Nebraska's "modern" legislation was in violation of the Nebraska constitutional provision assuring that "all courts shall be open, and every person, for any injury done him in his goods, person, or reputation shall have a remedy by due course of law, and justice administered without denial or delay."[54]

It was in the context of this prolonged debate over the reform of state law that Congress was in 1925 importuned to act. The "modern" law, particularly that of New York, had been disregarded in federal admiralty and diversity cases. A 1915 opinion of Judge Hough had proclaimed that federal courts were powerless to compel arbitration because it was too well settled as a matter of federal equity that an arbitration agreement could not be specifically enforced.[55] The damages remedy for breach being ineffective, a merchant seeking to evade an arbitration agreement could find refuge through the federal admiralty or diversity jurisdictions. Congress was asked to eliminate this refuge from state law.

Given the broad similarities in the development of arbitration legislation in England and the United States, one difference warrants emphasis. Unlike their English counterparts, Congress did not make arbitrators accountable for their fidelity to law. As Justice Hugo Black observed, arbitrators in the U.S. may be

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50. *Id.* at 51.

51. UNIF. ARBITRATION ACT § 1 (1925).

52. MACNEIL, *supra* note 26, at 55-57.

53. UNIF. ARBITRATION ACT (1955), 7 U.L.A. 1 (1996); Maynard Pirsig, *The New Uniform Arbitration Act*, 11 BUS. L. 44, 44-45 (1956). For an account of the current state legislation, see George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419 (1992).

54. Nebraska v. Neb. Ass'n of Pub. Employees, 477 N.W.2d 577, 580 (Neb. 1991). *But see* Dowd v. First Omaha Sec. Corp., 495 N.W.2d 36 (Neb. 1993) (holding Nebraska law preempted).

55. United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1012 (S.D.N.Y. 1915).

"wholly unqualified to decide legal issues."[56] And even if qualified, the arbitrator is under no duty to resolve a dispute in compliance with the parties' legal rights. A Latin phrase sometimes employed to describe the spirit of much United States commercial arbitration is *ex aequo et bono*—a resolution is sought that is equitable, minimizes harm to either party, and enables potential adversaries to maintain a valuable commercial relationship. It is said of the U.S. commercial arbitrator that he "may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement."[57] And although it is also sometimes said that an award may be set aside if the arbitrator "manifestly disregards the law," this standard is almost never found to apply.[58]

The hyperinflation of the FAA by the Supreme Court has been addressed by the senior author of this Article elsewhere.[59] It will not be reconsidered here except to remind the reader of the resulting epidemic of arbitration clauses in contracts of adhesion having the secondary effect of stripping consumers, employees, patients, tenants, shippers, and diverse other individuals not only of their substantive entitlements under their contracts, but also of their potential status as private attorneys general enforcing public law in the manner contemplated by many federal and even state statutes.[60] Those who approve of the policy consequences of what the Court has done are generally those who have read Adam Smith's *The Wealth of Nations*[61] and suppose that economic benefits acquired in this way will somehow trickle down to the consumers, workers, passengers, and others whose legal rights are diminished.[62] Freedom of contract, in this view, is one of the Four Freedoms for which global war has been fought, or is at least one implied in the Bill of Rights.

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56. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting).

57. Silverman v. Benmor Coats, Inc., 461 N.E.2d 1261, 1266 (N.Y. 1984).

58. A rare example is *Pennsylvania Power Co. v. Local Union No. 272*, 276 F.3d 174 (3d Cir. 2001), *cert. denied*, 536 U.S. 959 (2002).

59. *See* Carrington & Haagen, *supra* note 4. *See generally* Paul D. Carrington, *The Dark Side of Contract Law*, 36 TRIAL 73 (2000); Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225 (1998); Paul D. Carrington, *Self-Deregulation, The "National Policy" of the Supreme Court*, 3 NEV. L.J. 259 (Winter 2002/2003); Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2003); Paul D. Carrington & Paul Y. Castle, *Unconscionable Predispute Arbitration Provisions in Construction Contracts*, MOLDS, Oct. 2002, at 51.

60. Southland Corp. v. Keating, 465 U.S. 1 (1984); *see*, *e.g.*, Dowd v. First Omaha Sec. Corp., 495 N.W.2d 36 (Neb. 1993).

61. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776).

62. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

VI

THE REVIVAL OF THE REVOCABILITY PRINCIPLE

At least two problems with the fundamentalist economic justification of arbitration clauses in standard-form contracts suggest the wisdom of the ancient revocability principle in its application to adhesion contracts. The first is that such contracts (like most of those made in the seventeenth century) are not the subject of agreement in the moral sense on which the law of contracts rests. Karl Llewellyn, the architect of the Uniform Commercial Code, explained:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the more broad type of the transaction, but one thing more. The one thing more is a blank assent (not a specific assent) to any not unreasonable or indecent term the seller may have on his form[] [that does] not alter or eviscerate the reasonable meaning of the dickered terms. The fine print that has not been read has no business to cut under the reasonable meaning of those dickered terms that constitute the dominant and only real expression of agreement, but much of it commonly belongs in."[63]

When there is no genuine assent, it is not reasonable to assume that the benefits gained will trickle down to benefit weaker parties or the public. Those who have read *The Wealth of Nations* and think otherwise would do well to consider Smith's other great work, *The Theory of Moral Sentiments*,[64] in which he calls attention to the unlikelihood that we (or corporate management) will in our (or their) own lives and decisions be motivated by a concern for the welfare of remote others whom we do not know or expect ever to meet.[65] It is fanciful to suppose that businesses draft their printed forms to confer benefits on the other parties to their contracts, or to benefit the public good generally.

The second problem to which we advert is redolent of the considerations underlying the revocability principle in the seventeenth century. It is that the integrity of the arbitration process is at issue when a weak and beleaguered citizen is brought before an arbitral tribunal created pursuant to a contractual text dictated by her adversary. No doubt many arbitrators can put out of their minds the fact that their jurisdiction was created by one party and not the other, but some cannot, and even those who do will be mistrusted by those weaker and unwilling parties who are not favored with an award and who will attribute their defeat to the corruption of the arbitrator. If both parties are voluntarily before the forum, neither they nor the rest of us have standing to protest either the lack of accountability or the conferring of arbitral jurisdiction by the will of one party alone.

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63. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960). On the relation between this idea and the Uniform Commercial Code, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

64. ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS (D.D. Raphael & A.L. Macfic eds., Liberty Classics 1982) (1759).

65. *Id. passim*.

To some extent, state courts have responded to the developments brought on by the Court's treatment of the FAA. The Court has enabled them to do so by acknowledging the applicability of state contract law to determinations of whether an arbitration agreement has in fact been reached.[66] This has allowed numerous state courts to hold specific arbitration clauses unconscionable.[67] Some federal courts have done the same, applying the state law of unconscionability in diversity cases.[68]

That is all well enough, but it does not answer either of the concerns supporting the revocability doctrine—that there is no realistic mutual assent to a dispute resolution clause in a standard form and that such clauses place at issue the disinterest of the arbitral panel because jurisdiction is, as all know, conferred by one party and not the other.

It was these considerations that moved the automobile dealers in 2001 to seek exemption from the Federal Arbitration Act. As proposed and first approved by both houses of Congress, a bill drafted by Senator Hatch of Utah would have amended the FAA to exempt automobile dealers.[69] In the course of reconciling the views of the two houses of Congress, a change was made, perhaps in response to the sensitivities of the American Arbitration Association, a nonprofit organization immune to any concern that arbitration clauses might have adverse consequences. As enacted, Senator Hatch's bill amended the 1958 Automobile Dealers' Day in Court Act[70] to insert into its provisions bearing on the franchise agreements dictated by automobile manufacturers the ancient principle of revocability.[71] At the behest of the National Automobile Dealers Association, Congress gave no consideration to the possible application of the same principle to clauses in purchase agreements written by the dealers them-

66. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

67. *E.g.*, Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002); Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So. 2d 779 (Ala. 2002); Cash in a Flash Advance of Ark., L.L.C. v. Spencer, 74 S.W.3d 600 (Ark. 2002); Flyer Printing Co. v. Hill. 805 So. 2d 829 (Fla. Dist. Ct. App. 2001); Kloss v. Edward D. Jones & Co., 54 P.2d 1 (Mont. 2002); Milon v. Duke Univ., 559 S.E.2d 789 (N.C. 2002); State *ex rel*. Dunlap v. Berger, 567 S.E.2d 205 (W. Va. 2002); *cf.* Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669 (Cal. 2000).

68. *E.g*., McCaskill v. SCI Mgmt. Corp., 294 F.3d 897 (7th Cir. 2002); Choice Hotels Int'l, Inc. v. Ticknor, 265 F.3d 931 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133 (2002); Shankle v. B-G Maint. Colo. Inc., 163 F.3d 1230 (10th Cir. 1999); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997); Acorn v. Household Int'l Inc., 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (holding unconscionable an arbitration rider to a mortgage agreement); *In re* Managed Care, 132 F. Supp. 2d 989, 1001 (S.D. Fla. 2000).

69. The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. § 2 (2001).

70. 5 U.S.C. §§ 1221-25 (2000).

71. Act of November 2, 2002, Pub. L. No. 107-273, 116 Stat. 1758, § 11,028 (to be codified at 15 U.S.C. § 1226) (providing that arbitration agreements between auto manufacturers, importers, and distributors and auto retailers shall only be enforceable if formed post-dispute).

selves to consummate transactions with those who acquire new or used automobiles.[72] The inappropriateness of this disparate treatment is obvious.

Now come the Poultry Growers of America. They are small farmers who sell their product to very large enterprises on standard printed forms written by their buyers and containing arbitration clauses of doubtful conscionability. They have enlisted the services of Senator Grassley of Iowa to advocate their claim to treatment equal to that of the automobile dealers.[73]

VII

CONCLUSION

The poultry growers are, we believe, entitled to what they seek. But then so are those who buy automobiles, work for a living, need to check into a hospital, need telephone service, or need whatever good or service is accompanied by a printed form. Resurrection of the revocability principle would not mean the end of arbitration in any of the circumstances in which private dispute resolution is now usefully employed. It would mean only the end of the many kinds of clauses now deemed unconscionable and of many other kinds that are deemed barely conscionable. It would assure that arbitration is genuinely beneficial to all parties, and that arbitrators have the trust and confidence of all the parties who appear before them. Those objectives are presently worthy of the attention of Congress.

72. The senior author was retained by the National Automobile Dealers Association to write an argument for Senator Hatch's bill. He was directed not to make any argument that could also be used by consumers. He agreed to do so, but on condition that he be free to make arguments for consumers as well, as he now does.

73. *See* The Fair Contracts for Growers Act of 2003, S. 91, 108th Cong. (2003).