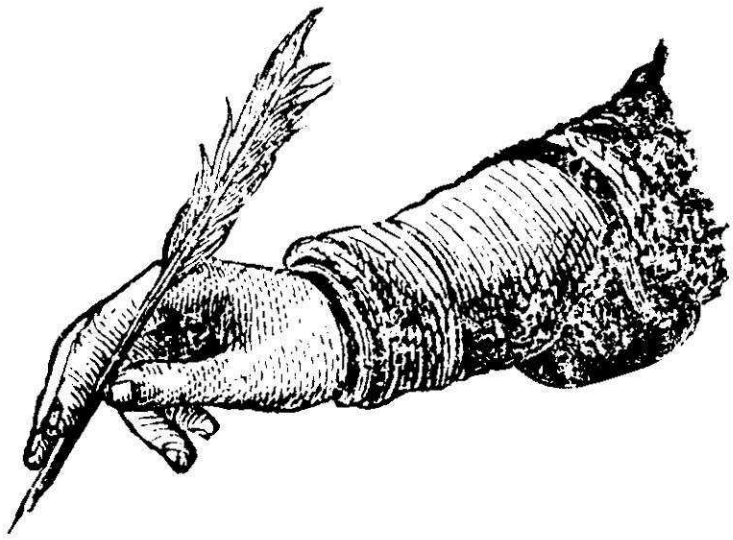
Walter Albert Wright is a candidate for a Master of Laws (LL.M.) degree in International Legal Studies at New York University.



Arbitration Clauses in Adhesion Contracts

WALTER ALBERT WRIGHT

Arbitration has long been valued as a voluntary process. Under ideal circumstances, two parties of relatively equal bargaining power agree to arbitrate as an alternative to litigation. A major exception to this rule occurs in the area of adhesion contracts. Standard form contracts reduce the time and cost involved in bargaining individual agreements. Yet, in using such a contract, a weaker party must agree—without any real choice—to arbitrate disputes in order to obtain goods or services it requires. Courts have often refused to enforce adhesion contracts or any of its terms when they have concluded that the stronger bargaining party has abused its dominant position. The author reviews the factors the courts weigh in making that decision.

The typical adhesion contract is a standard form contract drafted by a party with strong bargaining power and offered to a party whose bargaining power is much weaker. The latter party "accepts" the contract, either because the former is the only party who can provide the goods or services desired, or because all other parties providing the same goods or services use an identical standard form. The weaker party has no real choice when it accepts the stronger party's contract; voluntary consent to the contract terms does not exist.[1]

The appearance of an arbitration clause in an adhesion contract is a theoretical inconsistency. On the one hand, advocates of arbitration continue to stress that parties should agree to arbitrate conflicts arising between them on a wholly voluntary basis. In an ideal situation, two parties of roughly equal bargaining power agree to forego their right to seek justice in the courts in favor of what they perceive to be the greater benefits of arbitration (for instance, greater expertise, lower cost, and the quick resolution of disputes). Under these circumstances, arbitration has been described as an "alternative avenue of justice."[2] Yet, voluntariness and equality of bargaining power have no

[1] Morris Stone, "A Paradox in the Theory of Commercial Arbitration," *The Arbitration Journal*, 21 (1966): 156.

[2] Friedrich Kessler, "Contracts of Adhesion—Some Thoughts about Freedom of Contract," *Columbia Law Review* 43 (1943): 632; Martin Domke, *The Law and Practice of Commercial Arbitration* (Mundelein, Ill.: Callaghan & Co., 1968), p. 41 and 1977 Cumulative Supplement, p. 13.

place in the world of contracts of adhesion.

When a court is asked to enforce an arbitration clause that appears in an adhesion contract, it faces a dilemma. Should it, in deference to the public policy favoring arbitration and to the important role standard form contracts play in modern commerce, enforce the arbitration clause? Or should it uphold the fundamental nature of arbitration as a voluntary proceeding and, in the exercise of its judicial prerogative, refuse to enforce it? This article explores the factors courts weigh in answering such questions and focuses on the results of this balancing process.

FACTORS FAVORING ENFORCEMENT

No one doubts the importance of standard form contracts in modern commerce. They are a natural outgrowth of mass production and a necessary component of an overwhelming number of today's business transactions. Since a single standard contract is generally used in all transactions dealing with the same goods or services, both the supplier and the consumer benefit from a reduction in costs that results from saved bargaining time and simplified administration.[3] In addition, standard contract terms control risks assumed under a contract and provide some certainty in complex commercial transactions, which aids commercial planning.[4] It follows that a contract should not be held unenforceable simply because it is written in a standard form.[5]

Although common law courts were originally hostile to the idea of arbitration,[6] they now recognize the strong public policy favoring it, as evidenced by federal and state arbitration statutes.[7] Arthur J. Goldberg, former Associate Justice of the Supreme Court of the United States, noted the benefits of arbitration:

> . . . modern courts now recognize, as they should, that arbitration has the advantage, in the words of Mr. Justice Frankfurter, "of providing a speedier, more economic, and more effective enforcement of rights than can be had by the tortuous course of litigation."[8]
>
> . . . the economies resulting from the use of arbitration in commercial disputes are . . . substantial. And it must be remembered . . . the public—the consumer– is the ultimate beneficiary. It is he who in the long run must pay the expenses of prolonged litigation of commercial disputes since these expenses are necessarily reflected in the prices at which goods and services are sold.[9]

Arbitration is also favored because it relieves court congestion.[10]

Morris Stone[11] suggests that this general arbitration theory has become outdated as a result of insistence by arbitration's advocates that an agreement to arbitrate always be voluntary. Mr. Stone notes that one must often sign an adhesion contract whose terms one may not have read or be able to understand and which may greatly favor the party who wrote the contract.[12] If the contract gives greater rights to the latter party, one's right to seek redress in the courts may be "more illusory than real."[13] If, therefore, it contains an arbitration clause, one may have gained, rather than lost, an important right. Mr. Stone offers examples to illustrate his point:

> . . . a large brewing company established an arbitration system for its 650 independent franchised dealers throughout the country. All along, the corporation had the economic power to impose on those distributors contracts which permitted it to terminate the relationships *for any reason* on thirty days' notice. Theoretically, a dealer had the right to go to court and argue that the corporation had lacked just cause for taking his franchise away and giving it to another. But in view of the fact that the contract was so tightly drawn against him, can it be said that the right to litigate was real and meaningful? When an arbitration system subsequently gave the franchise-holder an avenue of appeal before an arbitrator, he obtained a *new* remedy, one he never really had in the past.[14]
>
> A corporation executive, hired for a term of office subject to the will of the Board of Directors, may think his dismissal was unjust and he may therefore have a grievance. But does he really have a "cause of action," to use the phrase familiar to lawyers, when the contract gave the Board all the rights? When such an executive is offered a commercial arbitration clause in his employment contract . . . is it not clear that his power to redress a wrong [is] enlarged? This enlargement of rights is a fact even if, instead of being offered an arbitration clause, he is *made* to sign one as a condition of employment.[15]

Mr. Stone argues persuasively that voluntariness need not be an essential element of an agreement to arbitrate and that courts, in deciding whether to enforce an arbitration clause that appears in an adhesion contract, should consider whether the effect of the arbitration clause is to create a new right for the weaker contracting party. There is no evidence, however, to suggest that courts do in fact consider such a factor when making their decisions.

FACTORS MILITATING AGAINST ENFORCEMENT

Voluntariness and equality of bargaining power are twin concepts that form an important part of basic contract theory. Since every person is presumed free to contract or not to contract, an agreement results only from the parties' voluntary entrance into the marketplace. Equality of bargaining power ensures that one party will not be able to take

---

[3] Nicholas Wilson, "Freedom of Contract and Adhesion Contracts," *International and Comparative Law Quarterly*, 14 (1965): 176.

[4] Kessler, *op. cit.*, p. 631.

[5] McFarland v. Mt. Helix Gen. Hosp., 4 Civil No. 14166 (Cal. Ct. of Appeal, 4th App. Dist. 1/17/76) (not otherwise reported).

[6] 6 C.J.S. Arbitration §2 (1975).

[7] "In the United States Arbitration Act, the Labor Management Relations Act and in numerous state statutes, our legislative bodies have voiced their conviction that voluntary arbitration of disputes is favored and has an important role in a society which seeks the peaceful, prompt and just disposition of controversies involving our citizens." Arthur Goldberg, "A Supreme Court Justice Looks at Arbitration," *The Arbitration Journal*, 20 (1965): 13.

[8] *Ibid.*, p. 14.

[9] *Ibid.*, p. 15.

[10] Wheeler v. St. Joseph Hosp., 63 Cal.App.3d 345, 356, 133 Cal.Reptr. 775, 782 (1976).

[11] Stone, *op. cit.*, pp. 157 and 163.

[12] "When one buys a car, rents an apartment, applies for a loan, signs a personal employment contract, arranges for the publication of a book, or engages in any of a thousand ventures, he will probably be asked to sign a printed document, composed by the other party, and this contract will contain many provisions that are not necessarily equally beneficial to both parties." *Ibid.*, p. 162.

[13] *Ibid.*, p. 161.

[14] *Ibid.*

[15] *Ibid.*, p. 162.

advantage of the other and that contract terms will be fair.[16]

This theory often has no relationship to the modern world of mass production, mass consumption, monopolies, oligopolies, and standard form contracts. Voluntariness and equality of bargaining power vanish when one or several parties are able to control the production of goods or services that consumers deem necessary or desirable. The inequality is reflected in standard contract terms favoring the party with stronger bargaining power. A court, however, can refuse to enforce a contract or any of its terms if it feels that the stronger bargaining party has abused its dominant position.[17] Such is the case when an arbitration clause appears in an adhesion contract. An arbitration clause is especially vulnerable to attack if one party has not voluntarily agreed to it because a fundamental factor in the courts' willingness to enforce arbitration clauses is their voluntary nature.[18]

An agreement to arbitrate is an agreement to forego one's right to seek resolution of disputes in a court of law.[19] Judges are aware of the fundamental importance of the right of access to the courts and are suspicious of any party's attempt to coerce another into giving it up.[20] Thus, the involuntary nature of an adhesion contract renders any arbitration clause it contains particularly vulnerable to court attack.

A court's willingness to enforce an arbitration clause is sometimes influenced by the importance of the goods or services contracted for. If the object of the transaction is a necessity, courts are less likely to enforce the arbitration clause. If the consumer has bargained for a luxury, it is more likely that the arbitration clause will be enforced.[21]

REACTIONS OF THE COURTS TO ARBITRATION CLAUSES IN ADHESION CONTRACTS

If arbitration is opposed on the ground that the contract containing the arbitration clause is adhesive, a court must first determine whether the elements of adhesion are present. The mere fact that the contract is a standard printed form prepared by one of the parties does not render it adhesive.[22] If the parties to the contract are of roughly equal bargaining power, a court will generally enforce its terms, even if one of the parties suffers a hardship as a result of such enforcement.[23] Nor will a court refuse to enforce the contract if there is no evidence that the stronger bargaining party refuses to deal with others except on its own terms.[24] As one court has said,

> The term "adhesion contract" refers to standardized contract forms offered to consumers of goods and services on essentially a "take it or leave it" basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract.[25]

A court's determination that a contract is adhesive does not automatically render its terms unenforceable, for courts are mindful of the widespread use of such contracts in modern commerce. A party seeking to invalidate an arbitration clause must further prove that arbitration was beyond its reasonable expectations when it signed the contract or that the clause is oppressive or unconscionable.[26] For example, an arbitration clause in a hospital's conditions of admission form was held unenforceable because an ordinary hospital patient would reasonably expect such a form to contain an agreement to abide by the hospital's rules and regulations, rather than an agreement to give the hospital or any doctor the option to compel arbitration of a malpractice claim.[27] But an arbitration clause in a union's standard employment contract could be enforced against the employer of a musician because a businessman would reasonably expect to find an arbitration clause in such a contract.[28]

An example of an oppressive or unconscionable arbitration clause is one that effectively deprives the weaker party of a forum for settlement of its claims against the stronger party. Thus, a clause that required a small California subcontractor to arbitrate all disputes with a large prime contractor in the latter's state of incorporation New Jersey—was not enforced, for it would have discouraged the subcontractor from seeking redress of legitimate grievances and may have resulted in a de facto limitation of the prime contractor's liability for wrongdoing.[29] Likewise, when a clause requires arbitration under the rules of an agency

---

[16] "Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole." Kessler, *op. cit.*, p. 630.

[17] "Adhesive clauses exacted by the overreaching of a contracting party who is in an unfairly superior bargaining position, are always subject to the defense of unconscionableness. Public policy invalidates such clauses. . . ." Fluor Western, Inc. v. G & H Offshore Towing Co., Inc., 447 F.2d 35, 39 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972).

[18] Gilbert v. Burnstine, 255 N.Y. 348, 354, 174 N.E. 706, 707 (1931); 6 C.J.S. Arbitration §2 (1975).

[19] Cross & Brown Co. v. Nelson, 167 N.Y.S.2d 573, 4 A.D.2d 501 (1957).

[20] "The courts have shown understandable reluctance to hold parties to agreements which would have the effect of adjudicating their rights without protections provided in a court of law, where the important elements of voluntariness are, in fact, absent." Goldberg, *op. cit.*, p. 16.

[21] Vernon v. Drexel Burnham & Co., Inc., 52 Cal.App.3d 706, 615, 125 Cal.Rptr. 147, 152 (1975).

[22] McFarland v. Mt. Helix Gen. Hosp., 4 Civil No. 14166 (Cal. Ct. of Appeal, 4th App. Dist. 2/17/76).

[23] Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 249 F. Supp. 526, 530 (S.D.N.Y. 1966), *aff'd*, 372 F.2d 753, 758 (2d Cir. 1967); Madden v. Kaiser Foundation Hosps., 17 Cal. App. 3d 699, 131 Cal.Rptr. 882, 552 P.2d 1178 (1976).

[24] Vernon v. Drexel Burnham & Co., Inc., 52 Cal.App.3d 706, 715, 125 Cal.Rptr. 147, 152(1975).

[25] Wheeler v. St. Joseph Hosp., 63 Cal.App.3d 345, 356, 133 Cal.Rptr. 775, 783 (1976).

[26] ". . . a determination that a contract is adhesive is merely the beginning and not the end of the analysis insofar as enforceability of its terms is concerned. Enforceability depends upon whether the terms . . . are beyond the reasonable expectations of an ordinary person or are oppressive or unconscionable." *Ibid.*, p. 357.

[27] *Ibid.*, p. 360. This court also gave great weight to the fact that a jury trial is very important to a medical malpractice claimant: ". . . while arbitration of a claim for damages for an alleged breach of contract may not be inherently unfair or prejudicial to the rights of either party, in the case at bench we are concerned with a tort claim which may involve the right to compensation for harm to the claimants' intangible interests such as pain and suffering, disfigurement, emotional distress, etc. That the right to a jury trial is far more valuable to a tort claimant than to one claiming damages for breach of contract is evidenced by the fact that most litigated breach of contract cases are tried to the court rather than to a jury while personal injury claims are generally tried to a jury." *Ibid.*, p. 363.

[28] *Ibid.*, discussing Frederico v. Frick, 3 Cal.App.3d 872.

[29] Player v. Geo. M. Brewster & Son, Inc., 18 Cal.App.3d 526, 96 Cal.Rptr. 149 (1971).

whose filing fees are very high, a court is reluctant to enforce it.[30]

An arbitration clause in an adhesion contract may also be attacked for lack of mutuality. If the stronger bargaining party includes a clause giving itself the option to arbitrate or sue in the courts, but granting the weaker party no such option, a court will refuse to enforce the clause because it is not mutually binding.[31] Thus, a clause that states that "any controversy arising under or in relation to the contract or any modification thereof may be settled by arbitration or by suit in any Court having jurisdiction, *as the [stronger party] shall direct*" will be held unenforceable,[32] as will other clauses in a similar vein.[33]

On the other hand, the courts look favorably on arbitration clauses that give the weaker party a choice of arbitration agencies. For example, customer agreements with the New York Stock Exchange leave the choice of the arbitration agency to the customer[34] and are enforced by the courts.[35] In addition, the Constitution of the New York Stock Exchange, while making arbitration of disputes between members mandatory,[36] allows access to its arbitration machinery by nonmembers who have complaints against members arising out of the members' exchange business.[37] This policy of the exchange has been praised as a sensitive response to the grievances of nonmembers and a contribution to the "high standards and business ethics"[38] of exchange members.

As previously discussed, a court may weigh the relative importance of the object of an adhesion contract in deciding whether to enforce its arbitration clause. Thus, a court refused to declare an arbitration clause in a "margin account" securities agreement unenforceable because, among other things, the agreement did not "ascend to a public 'need' status."[39]

In dealing with contracts for the sale of goods, courts have legislative authority for refusing to enforce an unconscionable arbitration clause. Section 2-302 of the Uniform Commercial Code states that:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.[40]
>
> When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[41]

SUMMARY

Standard form contracts play an important role in modern commerce. While the courts recognize the strong public policy favoring arbitration, contracts of adhesion are disfavored because they lack the important elements of voluntariness and equality of bargaining power. There is particular reluctance to enforce an arbitration clause contained within an adhesion contract because arbitration's fundamentally voluntary nature was an important factor in courts' original willingness to enforce arbitration agreements. It has been argued that voluntariness need not be an essential element of an agreement to arbitrate if the effect of the agreement is to give the weaker bargaining party additional rights. There is no evidence, however, that the courts have accepted this argument. Some courts consider the importance of the goods or services bargained for in deciding whether to enforce an arbitration clause.

The courts weigh the above factors in deciding whether to enforce an arbitration clause that appears in an adhesion contract. If a court finds that the elements of adhesion are present, the party opposing arbitration must further prove that arbitration was beyond its reasonable expectations when it signed the contract or that the arbitration clause is oppressive or unconscionable. If such proof is not forthcoming, the court will enforce the clause. A court may refuse to enforce an arbitration clause if it lacks mutuality or if the object of the contract is not a necessity. Moreover, a court has statutory authority for refusing to enforce an unconscionable arbitration clause that appears in a contract for the sale of goods.

---

[30] Spence v. Omnibus Indus., 44 Cal.App.3d 970, 119 Cal.Rptr. 171 (1975).

[31] Hull Dye & Print Works, Inc. v. Riegel Textile Corp., 37 A.D. 2d 946, 325 N.Y.S.2d 782 (1971).

[32] *Ibid.* (emphasis added), distinguished in Riccardi v. Modern Silver Linen Supply Co., Inc., 36 N.Y.2d 945, 373 N.Y.S.2d 551, *aff'g* 45 A.D.2d 191, 356 N.Y.S.2d 872 (1974), and Kessner & Robinowitz v. Winchester Textiles, 46 A.D.2d 239, 361 N.Y.S.2d 933 (1974).

[33] In re Firedoor Corp. of America, 47 A.D.2d 878, 366 N.Y.S.2d 443 (1975), Kaye Knitting Mills v. Prime Yarn Co., 37 A.D.2d 951, 326 N.Y.S.2d 361 (1971).

[34] Customer agreements signed in New York contain the following clause: "Any controversy between us arising out of or relating to the contract or the breach thereof shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Arbitration Committee of the New York Stock Exchange, as I may elect." Stockwell v. Reynolds & Co., 252 F.Supp. 215, 220 (S.D.N.Y. 1965).

[35] *Ibid.*, p. 220; Wheeler v. Boettcher & Co., 539 P.2d 1322 (Colo. 1975).

[36] Max Jacquin, Jr., "Arbitration in Action in Wall Street," *The Arbitration Journal*, 1 (1946): 261; such a requirement is binding on members: Tullis v. Kohlmeyer, 551 F.2d 632 (5th Cir. 1977), Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838 (2d Cir. 1971).

[37] "Any controversy between parties who are members . . . shall, at the instance of any such party, and any controversy between a nonmember and a member . . . arising out of the business of such member . . . shall, at the instance of such nonmember, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors." New York Stock Exchange Constitution, Art VIII §1 (1973).

[38] Domke, *Commercial Arbitration*, *op. cit.*, p. 44.

[39] Vernon v. Drexel Burnham & Co., Inc., 52 Cal.App.3d 706, 715, 125 Cal.Rptr. 147, 152 (1975).

[40] U.C.C. §2-301 (a) (1972).

[41] U.C.C. §2-302 (B) (1972).