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Two Bites at the Apple: The Prejudicial Burden in Arbitration Waiver

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Written by **Alexander H. Weathersby**

Arbitration has ancient roots. Disputants have long viewed arbitration as an attractive alternative to litigation. In the years following the passage of the 1925 Federal Arbitration Law (FAA), commentators trumpeted arbitration's efficiencies to encourage acceptance of the FAA. The judicial climate of 1925 lent an air of relevance to these commentators' arguments in favor of the new federal regime, which put arbitration clauses on par with other contract clauses. Before 1925, common-law precedent prohibited courts from enforcing executory agreements to arbitrate against parties who wished to revoke an arbitrator's authority. This common-law holdover badly weakened the institution of arbitration—an institution that academics, legislators, and even judges agreed would aid dispute resolution in the United States.

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Alexander H. Weathersby

t 404.815.6287

aweathersby@ktslaw.com