

COMMERCIAL ARBITRATION—INTERNATIONAL AND INTERSTATE ASPECTS

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I

Historical Introduction

*England.*¹ The development of commercial arbitration in England was particularly affected by a dictum of Lord Coke in *Vynior's Case*,² decided in 1609, where plaintiff was permitted to recover on a bond given for the faithful performance of an arbitration agreement. Lord Coke explained that where there is an agreement to submit to arbitration, a party "might countermand it, for a man cannot by his act make such authority, power, or warrant not countermandable which is by the law and of its nature countermandable"; but the bond is thus forfeited because the condition of the bond is broken by such revocation. With the enactment of the Statute of Fines and Penalties,³ in 1697, the use of a bond in submission was no longer effective, but the fact that the method of making the agreement effective had been abrogated did not induce the courts to abandon the revocability rule. There resulted the irrational situation that a valid agreement was utterly ineffective, for the courts would give only nominal damages for breach of the agreement

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1. The following abbreviations are used:

BLUE BOOK: Reports from the Governments in the British Self-Governing Dominions and His Majesty's Representatives in Foreign Countries as to the Enforcement of British Arbitration Awards. (London, 1912.)

CLUNET: JOURNAL DE DROIT INTERNATIONAL PRIVÉ.

NUSSBAUM: INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESEN IN ZIVIL—UND HANDELSSACHEN, vols. 1-3 (1926, 1928, 1931). The first volume has been translated into English and the references in that volume are to this translation. (Oxford Univ. Press, N. Y. 1928).

REVUE: REVUE DE DROIT INTERNATIONAL PRIVÉ.

2. 8 Co. 80a and 81b; also reported in 1 Brownlow & Goldesborough 64, and 2 Brownlow & Goldesborough 290. There appear to have been English cases involving arbitration much earlier than *Vynior's* case. For a detailed study of the origin of the doctrine of revocability see COHEN, COMMERCIAL ARBITRATION AND THE LAW (1918) c. 8, 9; Sayre, *Development of Commercial Arbitration* (1928) 37 YALE L. J. 595.

At the time that Coke announced the doctrine, there appears to have been no hostility to arbitration agreements, for recovery on the bond—the usual and almost invariable method at that time for insuring performance of any agreement, the entire law of contracts being in its infancy—was available. See Sayre, *supra*, at 603; COHEN, *op. cit. supra*, at 92.

3. 8 & 9 Wm. III, c. 11 (1696-97).

on the theory that there could be no actual injury in forcing people to litigate in the King's own courts of justice. The view that courts cannot approve irrevocability of arbitration agreements because it "ousts the jurisdiction of the court" did not appear in the early cases, and is not to be found until the case of *Kill v. Hollister*,⁴ decided in 1746. It was created perhaps to justify the maintenance of the revocability rule which could no longer be mitigated by the use of bonds after the passage of the Statute of Fines and Penalties.⁵ The doctrine has also been credited to the judicial jealousy of the English courts, whose judges and court officers in early times were paid by fees on the volume of business which came to them.⁶

The English Parliament and courts started early to modify this situation. The first arbitration act, passed in 1698,⁷ provided that the parties might agree to make their submission agreement a rule of court, whereby the party who revoked should be subject to imprisonment for contempt of court. However, this did not prevent the parties from revoking the authority of the arbitrator at any time before an award was made. In 1833, however, it was provided⁸ that where the submission agreement had been made a rule of court under the Act of 1698, the authority of the arbitrators appointed should be irrevocable, except by leave of court, and the arbitrators might proceed to make a binding award. The Common Law Procedure Act of 1854⁹ further provided that any agreement of submission to arbitration by consent could be made a rule of court, unless the parties expressly agreed to the contrary. Power was also given to the court to stay the proceedings in an action brought contrary to the agreement, and to appoint an arbitrator where there was a failure of appointment according to the agreement of the parties. The Arbitration Act of 1889¹⁰ completed the effectiveness of arbitration agreements. Under this Act agreements to refer disputes to arbitration voluntarily, whether the disputes be existing ones or future ones, are given full effect, subject to certain general powers of control and supervision by the courts. Section 4 of the Act provides for a stay of legal proceedings where one party to the agreement brings an action at law despite the agreement and the court is "satisfied that there is no sufficient reason why the matter should not

4. 1 Wils. K. B. 129 (1746).

5. See Sayre, *supra* note 2, at 604.

6. See COHEN, *op. cit. supra* note 2, 253 *et seq.*; Sayre, *supra* note 2, at 609.

7. 9 Wms. III, c. 15 (1698).

8. 3 & 4 Wms. IV, c. 42 (1833).

9. 17 & 18 VICT. c. 125, §§ 3-17 (1854).

10. 52 & 53 VICT. c. 49 (1889).

be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration."¹¹ Section 5 gives the court power to appoint an arbitrator, umpire or third arbitrator in certain cases where there has been refusal to appoint or failure of appointment. Section 6 further provides that, unless the agreement shows a contrary intention, the parties may themselves supply vacancies caused by death of an arbitrator or refusal by an arbitrator to act; or where one party fails to make his appointment of an arbitrator according to the agreement, the other party may authorize his appointee to act as sole arbitrator, whose award shall be binding on both parties.

It should be noted that the English acts have always covered both present and future disputes. The early statutes contained detailed provisions governing the manner of the submission and the regulation of the proceedings which had to be complied with in order to obtain the advantages of the statute. On the other hand, the statute of 1889 is very liberal in presuming every arbitration agreement to be within the statute, and provides only in general terms for regulation of proceedings.

Meanwhile the courts also had been busy loosening the shackles upon arbitration agreements. The revocability rule, as has been seen, dissolved early into the public policy doctrine against ousting courts of jurisdiction, and, in 1855, in the case of *Scott v. Avery*,¹² the application of this doctrine to arbitration agreements was recognized as irrational and inequitable where the agreement was open to the interpretation that the arbitration was only a condition precedent to resort to the courts. That case held that an agreement not to resort to the courts of law or equity until after an arbitral determination of the claims of the parties was sound policy and did not oust the courts of jurisdiction, but merely established a valid "condition precedent" to jurisdiction. Even the whole question of liability under the contract may be determined in England at common law if put in the form of a condition precedent.¹³

United States. Common-law arbitration in the United States followed the more reactionary steps of the English development. *Vynior's Case* and *Kill v. Hollister*, or at least *Scott v. Avery*,¹⁴ narrowly interpreted,

11. The application of the stay must be made "at any time after appearance and before delivering any pleadings or taking any other steps in proceedings."

12. 5 H. L. Cas. 811 (1856).

13. 3 WILLISTON, CONTRACTS (1920) 3010.

14. In many states of this country agreements to arbitrate the whole question of liability are ineffectual even though expressed in the form of a condition precedent,

have been the favorites. Arbitration agreements, whether to submit future disputes or existing disputes, are regarded almost universally in our common-law cases as revocable. A party can terminate the agreement either by giving notice of revocation or by bringing an action at law in disregard of it. The reason given by the great majority of courts is the old doctrine of *Kill v. Hollister* against ousting the courts of jurisdiction. An action for breach of a common-law agreement to arbitrate an existing dispute was generally allowed, but the damages were ordinarily only nominal.¹⁵

Many states have long had legislation making irrevocable and enforceable agreements to submit existing disputes to arbitration.¹⁶ These statutes, however, are strictly limited to agreements which conform to detailed regulations. The agreement must be in writing and generally there is provision that the submission be made "an order of court" by filing the agreement with the clerk of court. There are also requirements in more or less detail regarding parties who can submit under the statute, causes which can be settled by such arbitration, execution of the agreement, conduct of the arbitral hearing, and enforcement or impeachment of the award.

Agreements to arbitrate future disputes were, until 1920, almost completely left in the realm of the "revocability rule." Pennsylvania seems to have stood alone in recognizing such agreements as enforceable at common law, and in Pennsylvania they were irrevocable only where the arbitrators were named or designated.¹⁷ Even at the present time the great majority of states have done nothing to change the revocability rule in regard to such agreements. The Draft State Arbitration Act, sponsored by the American Arbitration Society, and first adopted in New York in 1920,¹⁸ repudiates the rule with respect to all arbitration

whereas agreements providing merely for the determination of a particular fact are effective. WILLISTON, *op. cit. supra* note 13, at 3012. See also Note (1923) 26 A. L. R. 1077.

15. WILLISTON, *op. cit. supra* note 13, at 3009; STURGES, COMMERCIAL ARBITRATIONS (1930) 253-262.

With reference to the breach of future disputes clauses, Sturges says: "Statements also frequently appear to the effect that a party who is aggrieved by the breach of such an agreement can maintain an action for damages. So few cases, however, have involved such assertion that if there is such a rule of law it rests upon this popular acclaim." STURGES, *op. cit. supra*, at 82.

16. See STURGES, *op. cit. supra* note 15, at 263 *et seq.*

17. See *id.* at 48-50. In recent years the Supreme Courts of Washington and Colorado have rejected the revocability rule with respect to future disputes clauses in written contracts, although the arbitration statutes of these states do not expressly embrace future disputes. *Id.* at 505.

18. N. Y. CONSOL. LAWS (Cahill, 1930) c. 2. See Popkin, *Judicial Construction of the N. Y. Arbitration Law of 1920* (1926) 11 CORN. L. Q. 329; Fraenkel, *The New York Arbitration Law* (1932) 32 COL. L. REV. 623.

agreements (whether to submit existing or future disputes) and declares the agreements to be irrevocable from date of execution without the necessity of filing in any court. Provision is made for stay of trial in an action at law on issues referable to arbitration by the agreement of the parties, and a method is provided for specifically enforcing the agreement where one of the parties refuses to proceed to arbitration. An order from the state supreme court, or a judge thereof, may be procured directing the parties to proceed with the arbitration in accordance with the terms of their contract. If a party refuses to appoint an arbitrator or arbitrators, the court, or an individual judge, may, upon application, make the necessary appointment.¹⁹ The New York statute has been substantially followed or copied by a number of other states.²⁰ The United States Arbitration Act,²¹ in force since January 1, 1926, relating to controversies concerning matters arising in admiralty and in foreign and interstate commerce, exclusive of most contracts of employment, also follows closely the New York Act.²²

Continental Countries. In Roman law existing disputes might be arbitrated (*compromissum*), but no effect was given to agreements to submit future disputes to arbitration.²³ This attitude was maintained

19. Such an appointment cannot be made *ex parte*. In this case, as in the case of a motion to compel, personal service within the state is required.

20. ARIZ. CODE (Struckmeyer, 1928) c. 93, art. 1, amended by Laws 1929, c. 72; CAL. CODE CIV. PROC. (1931) §§ 1280-93; CONN. GEN. STAT. (1930) §§ 5840-56; LA. GEN. STAT. (1932) §§ 405-22; N. H. PUB. LAWS (1929) c. 147; N. J. LAWS (1923) c. 134; OHIO GEN. CODE (Page, 1932) § 12148 (1-17); ORE. CODE ANN. (1930) §§ 21-101 to 21-113, LAWS 1931, c. 36; PA. STAT. ANN. (Purdon, 1930) tit. 5, §§ 161-181; R. I. PUB. LAWS (1929) c. 1408, §§ 1-18; WIS. STAT. (1931) §§ 298.01-298.18. See also MASS. GEN. LAWS (1932) c. 251.

Nevada, North Carolina, Utah and Wyoming have adopted the Uniform Arbitration Act, recommended by the National Conference of Commissioners on Uniform State Laws. This act does not provide for specific performance and applies only to agreements to submit existing disputes. NEV. COMP. LAWS (Hillyer, 1929) §§ 510-34; N. C. CODE (1931) §§ 898(a)-898(x); UTAH REV. STAT. (1933) tit. 104, c. 36, §§ 1-22; WYO. REV. STAT. ANN. (1931) c. 7, §§ 7-101 to 7-124.

For a thorough discussion and annotation of all arbitration statutes of this country, see STURGES, *op. cit. supra* note 15.

21. 43 STAT. 883 (1925), 9 U. S. C. §§ 1-15 (1926).

22. Of importance from an international point of view are the Court of Commercial Arbitration of the International Chamber of Commerce and the arrangements for arbitration made between the Chamber of Commerce of the United States and the Chambers of Commerce of some of the most important Latin-American cities. See Jones, *Historical Development of Commercial Arbitration in the United States* (1928) 12 MINN. L. REV. 240.

23. Roman law, it seems, never gave effect to agreements to submit future disputes. The *compromissum* required that the arbitrators should be appointed at the time of the agreement. Such agreement to submit existing disputes to arbitration was not enforceable

by the canon law.²⁴ The old Germanic law, on the other hand, is said to have recognized the binding nature of agreements to submit future disputes to arbitration, granting a stay of proceedings where a party resorted to the courts in violation of such agreement.²⁵ After the reception of the Roman law in Germany the Roman-canonical *compromissum* displaced the Germanic rules for the most part, and arbitration became thus limited to existing disputes. With the development of territorial sovereignty during the seventeenth and eighteenth centuries and the growing jealousy of the ordinary courts with respect to arbitral procedure, the practice of submitting disputes to arbitration practically disappeared. It was allowed by the Judicial Codes of Bavaria (1753) and of Prussia (1794),²⁶ but the restrictions which had impeded the development of arbitration in Germany were not effectively removed until the enactment of the German Code of Civil Procedure in 1877²⁷ permitting agreements for the submission of future disputes and authorizing the courts to appoint arbitrators where the parties failed to do so.

The French law of arbitration was, until 1925, based wholly upon Article 1006 of the French Code of Civil Procedure. This Code has had a considerable influence upon the law of other countries, without being instrumental, however, in advancing the cause of arbitration. It requires that the agreement to arbitrate must designate the objects in dispute and the names of the arbitrators, thus limiting the validity of such agreements to existing controversies.²⁸ Unlike American courts, the French did not regard the requirements thus laid down as "procedural" or "remedial" in their nature, so as to be applicable to foreign agreements, nor did they, in the end, consider them as constituting rules of international public order (public policy), which would prevent the

in classical times; nor was an award. Notwithstanding such an agreement or award, the parties could bring the case before the ordinary courts, which were without power to grant a stay of trial or to compel the opposing party to proceed with the arbitration. If a penalty had been agreed upon in case of breach, such penalty could be recovered, but until the time of Justinian that was all. Justinian provided for the enforcement of an award, if it was accepted in writing or if the parties allowed ten days to pass by without notice of repudiation. BUCKLAND, *TEXTBOOK ON ROMAN LAW* (2d ed. 1932) 532.

24. KRAUSE, *DIE GESCHICHTLICHE ENTWICKELUNG DES SCHIEDSGERICHTSWESENS IN DEUTSCHLAND* (1930) 50; *ENTWICKELUNGSLINIEN DES DEUTSCHEN SCHIEDSGERICHTSWESENS*, 3 NUSSBAUM 229.

25. KRAUSE, *op. cit. supra* note 24, at 39; see also Krause, 3 NUSSBAUM 227.

26. KRAUSE, *op. cit. supra* note 24, at 84; see also Krause, 3 NUSSBAUM 236.

27. KRAUSE, *op. cit. supra* note 24, 114 *et seq.*; see also Krause, 3 NUSSBAUM 236 *et seq.*

28. The only exception to the rule was contained in Article 332 of the Commercial Code, where the arbitration of future disputes is expressly sanctioned in matters of marine insurance.

recognition of all foreign agreements for the arbitration of future disputes. The arbitration of future disputes, limited to contracts between merchants or to contracts having a commercial character, was authorized in France by the law of December 31, 1925.²⁹

Of the other continental countries, many have followed the German example in allowing the arbitration of future disputes, while some continue to have provisions similar to those of Article 1006 of the French Code of Civil Procedure.

Latin-American Countries. In Latin-America little interest has been manifested thus far in the subject of arbitration, the result being that no modern arbitration statutes are to be found in any of the leading countries. Brazil regulates the matter of arbitration in its Civil Code of 1917, but according to a decision of the Supreme Court of the state, agreements for the submission of future disputes to arbitration are still invalid.³⁰ Argentina³¹ has in its Code of Civil Procedure provisions similar to Article 1006 of the French Code of Civil Procedure, so that agreements for the submission of future disputes to arbitration must be regarded as invalid. In the other Latin-American countries provision is likewise made for the submission of existing disputes only.³²

II

Comparative Law

Scope of Arbitration Agreements. Section 1026 of the German Code of Civil Procedure provides that "An arbitral agreement concerning future disputes is not effective if it does not refer to a definite legal relationship and the legal disputes arising therefrom."³³ An agreement, therefore, that all disputes arising between the parties from their business relations shall be submitted to arbitration would be invalid. On the other hand, a provision that all disputes arising under a specific contract of partnership shall be settled by arbitration is valid.³⁴

Formal Requisites. At common law no formalities were required for the validity of a submission to arbitration, except where the case fell within the statute of frauds. Statutory submission agreements, however,

29. See André-Prudhomme, *The Present Position of the Arbitration Clause under the Law of France*, 1 NUSSBAUM 70.

30. See Valladão, *Die Schiedsgerichtsbarkeit in Zivil- und Handelssachen in Brasilien*, 3 NUSSBAUM 59.

31. Art. 770.

32. See OBREGON, *LATIN-AMERICAN COMMERCIAL LAW* (1921) 798.

33. So also some cantons of Switzerland. See Fritsche, *Schiedsgerichte in Zivilsachen nach schweizerischem Recht*, 2 NUSSBAUM 56.

34. Mittelstein, *Law and Practice of Arbitral Tribunals in Germany*, 1 NUSSBAUM 35.

are generally required to be in writing and in many instances have to be acknowledged or made a rule of court.³⁵ The modern statutes authorizing the submission of future disputes, which are based on the Draft State Arbitration Act, invariably demand the agreement be in writing. In England the submission must be in writing in order to come under the Arbitration Act of 1885; an oral submission is generally valid, but can be revoked at any time prior to the award.³⁶ The Act does not require a formal document nor need all the terms be contained in the same document; an exchange of letters is sufficient.³⁷ It is yet to be determined whether an arbitration agreement, signed by one party only, as in buyers' and sellers' orders, invoices and confirmations or insurance policies, is sufficient under the United States statutes relating to the arbitration of future disputes.³⁸

Continental countries are somewhat divided on the question of whether a writing should be required for the validity of agreements for arbitration. In some countries a document signed by both parties is required.³⁹ In others an exchange of letters is sufficient.⁴⁰ Sometimes the requirement of a writing is deemed waived if the parties proceed with the arbitration.⁴¹ In some countries the agreement may be oral.⁴² In Germany either party has the right to have it reduced to writing;⁴³ compliance must then, it seems,⁴⁴ be had with Section 126 of the German Code which provides that "If a writing is prescribed by law . . . the signatures of the parties must be attached to the same document. If several identical copies of the same contract are drawn up, it is sufficient if each party signs the copy intended for the other party." Purchase orders, letters of confirmation, or even an exchange of letters would not satisfy this requirement.

In Latin-America submission agreements are required to be executed in a public instrument.⁴⁵

35. STURGES, *op. cit. supra* note 15, at 218-225.

36. RUSSELL, *ARBITRATION AND AWARD* (12th ed. by V. R. Aronson, 1931) 336.

37. *Id.* at 326-327.

38. STURGES, *op. cit. supra* note 15, at 95.

39. POLAND, *CODE CIV. PROC.* art. 487, 3 NUSSBAUM 266.

40. Hungary (See Fabinyi, *Schiedsgerichte nach ungarischem Recht*, 3 NUSSBAUM 40); Italy (See Ascarelli, *Arbitration under Italian Law*, 1 NUSSBAUM 80); Norway (See Knoph, *Die norwegischen Gesetzesbestimmungen über Schiedsgerichtswesen*, 2 NUSSBAUM 16).

41. E. g., in some cantons of Switzerland. See Fritsche, *supra* note 33, at 56.

42. E.g., Sweden, *Arbitration Law of June 14, 1929*, art. 1; and some cantons of Switzerland, Fritsche, *supra* note 33, at 57.

43. GERMANY, *CODE CIV. PROC.* § 1027.

44. Mittelstein, *supra* note 34, at 38.

45. ARGENTINE, *CODE CIV. PROC.* art. 770; URUGUAY, *CODE CIV. PROC.* art. 540; OREGON, *op. cit. supra* note 32, at 798.

Parties Competent to Submit. At common law neither married women nor infants⁴⁶ had the power of submitting their disputes to arbitration, but under modern legislation the former can generally bind their separate property as freely as can a femme sole. On the continent and in Latin-America, a married woman's capacity to enter into a valid contract of arbitration may depend upon her husband's authorization. If she is authorized to engage in business, she would have the capacity to enter into contracts of arbitration with respect to controversies arising out of such business. Agreements to arbitrate by minors depend upon the ordinary principles relating to minors' contracts, concerning which there exists great diversity in the different countries. Partners may have in some countries the implied power to bind the partnership by a contract to submit to arbitration controversies arising out of the partnership business, whereas in others they are not able to do so without express authorization or ratification.

Revocability. The history of the Anglo-American doctrine of the revocability of agreements to submit disputes to arbitration has been indicated. The notion that arbitration agreements may be valid but revocable is foreign to continental and Latin-American countries; they are either valid or invalid, and if valid, are irrevocable. Under the modern arbitration statutes in the United States agreements for arbitration are irrevocable. In England they are irrevocable except by leave of the court or a judge.⁴⁷

Stay of Proceedings. Wherever an agreement to arbitrate is regarded as valid and irrevocable, any court action brought in violation thereof will, on defendant's motion, be stayed or dismissed for want of jurisdiction.⁴⁸ In England the court is under a prima facie duty to grant such a stay, but it may, for sufficient reasons, decline to do so.⁴⁹ Under the modern arbitration acts of the United States the courts have no discretionary power, but must grant the stay whenever it appears that a valid

46. See RUSSELL, *op. cit. supra* note 36, at 21-23; STURGES, *op. cit. supra* note 15, at 159 *et seq.*

47. ARBITRATION ACT (1889) § 1.

48. Austria (See Wehli, *Arbitral Tribunals under Austrian Law*, 1 NUSSBAUM 117); Denmark (See Raffenberg, *Recht und Praxis der Schiedsgerichte in Dänemark*, 2 NUSSBAUM 6); Germany, CODE CIV. PROC. § 274; Holland (See Van Praag, *Arbitral Tribunals for Civil and Commercial Disputes under the Law of the Netherlands*, 1 NUSSBAUM 102); Hungary (Fabinyi, *supra* note 40, at 35); Italy (Ascarelli, *supra* note 40, at 82); Poland (CODE CIV. PROC. art. 486, § 2, 3 NUSSBAUM 266); Sweden (See Fehr, *Schiedsgerichte nach schwedischem Recht*, 2 NUSSBAUM 44-45).

49. *Supra* note 47, § 4

submission agreement exists, and the dispute falls within such agreement.⁵⁰

Specific Performance. No method for the specific performance of arbitration agreements is provided by the English Arbitration Act of 1887.⁵¹ Under the modern arbitration statutes in the United States⁵² the defaulting party may be ordered by the court to proceed to arbitration; and when the terms of the statute have been satisfied, the specific performance of the contract is made mandatory, without any discretionary power on the part of the court.⁵³ On the continent the specific performance of contracts is regarded in some countries as the normal remedy for the breach of contract, and not as an extraordinary remedy to be granted only when damages are inadequate.⁵⁴ In such countries agreements for arbitration can, of course, be specifically enforced.⁵⁵ In other countries the remedy of specific performance does not exist or is granted only hesitatingly.⁵⁶

Who Can Be Arbitrators? Most countries have liberal provisions on this subject. Generally it is sufficient that the arbitrator shall have legal capacity, no discrimination being made against women⁵⁷ or foreigners.⁵⁸ In some countries there is a specific provision that no local judge in active service can be an arbitrator.⁵⁹ Spain and some Latin-American countries require "legal" arbitrators to be trained in the law.⁶⁰

Appointment of Arbitrators and Umpires. Statutes frequently provide that if a party who is to appoint an arbitrator does not do so in due time or if two arbitrators are to choose an umpire and cannot agree

50. For a criticism of the mandatory provisions relating to stay and specific performance, see Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* (1933) 46 HARV. L. REV. 1258.

51. See p. 742, *infra*.

52. Regarding statutory submission agreements, see STURGES, *op. cit. supra* note 15, at 83.

53. The Massachusetts act does not provide for specific performance. MASS. GEN. LAWS (1932) c. 251.

54. See GERMANY, CIV. CODE § 2401.

55. Denmark (Raffenberg, *supra* note 48, at 7); Norway (BLUE BOOK 55); Sweden (Fehr, *supra* note 48, at 45).

56. GODRON, LA CLAUSE COMPROMISSOIRE (1916).

57. In some countries women cannot be arbitrators. For example, Holland, Van Praag, *supra* note 48, at 101.

58. In Spain, arbitrators who are not amicable compounders must be citizens. Ballvé, *Das Schiedsgerichtswesen in Spanien*, 2 NUSSBAUM 96.

59. AUSTRIA, CODE CIV. PROC. § 578; Hungary, Fabinyi, *supra* note 40, at 43; POLAND, CIV. PROC. art. 489, § 2, 3 NUSSBAUM 266.

60. SPAIN, CODE CIV. PROC. art. 790.

upon a choice, the court may make such appointment.⁶¹ In some countries such power does not exist⁶² or its existence is doubtful.⁶³

Judicial Determination of Validity of Submission Agreements Prior to Rendition of Awards. In England and the United States the courts have the power where an action has been brought impeaching the contract of arbitration to restrain the defendant from proceeding to arbitration until the right to impeach has been determined. The foreign codes are generally silent on the subject.⁶⁴ In Germany such an action is not allowed to interfere with or to delay the arbitral proceedings. Section 1037 of the Code of Civil Procedure reads: "The arbitrators may continue the proceedings and render an award, even if the permissibility of the arbitral proceedings is denied, especially when it is contended that a valid submission agreement does not exist, that the submission agreement is inapplicable to the dispute in question, or that an arbitrator is not competent to proceed with the arbitral proceedings."

Arbitration Hearing. The statutes of the different states in this country⁶⁵ and of foreign countries vary greatly in their attitude in this matter. Some prescribe detailed rules for the regulation of the arbitral proceeding; others leave it to the determination of the parties or to the arbitral tribunal, subject to certain reservations.⁶⁶ The English Arbitration Act of 1887 contains various provisions relating to the conduct of the reference, but these control only when the parties have not expressed a contrary intention in their submission agreement.⁶⁷ On the continent there appears to be agreement that the arbitrators cannot

61. So in England, ARBITRATION ACT (1889) § 5; and generally in the United States, STURGES, *op. cit. supra* note 15, at 7 *et seq.*; AUSTRIA, CODE CIV. PROC. § 582; GERMANY, CODE CIV. PROC. § 1029, par. 2; NORWAY, CODE CIV. PROC. § 455; POLAND, CODE CIV. PROC. art. 492, § 1; SWEDEN, ARBITRATION LAWS (1929) No. 145, § 8, 3 NUSSBAUM 269, 270.

62. E.g., Denmark, Raffenberg, *supra* note 48, at 7.

63. The French Law of 1925 contains no provisions on the subject. The Government bill did not provide for such an appointment, whereas the bills of Flandis & Clementel did so provide, on the condition, however, that the domestic laws of the other party to the arbitration admits of the same procedure. André-Prudhomme, *supra* note 29, at 75.

64. Such impeachment is allowed also in at least some of the foreign countries. Denmark, Raffenberg, *supra* note 48, at 6; Canton of Bern, CODE CIV. PROC. art. 385.

65. See STURGES, *op. cit. supra* note 15, at 422-519.

66. In some cantons of Switzerland the parties may determine the procedure, and if they do not do so, the ordinary procedure before the President of the Tribunal sitting as a single judge controls. In others the procedure may be determined by the arbitral court, subject to certain mandatory provisions. In still others the proceedings are controlled by the rules governing in the ordinary courts. See Fritsche, *supra* note 33, at 59.

67. ARBITRATION ACT (1887) First Schedule. RUSSELL, *op. cit. supra* note 36, at 338 *et seq.*

subpoena witnesses or administer oaths. Where this necessity occurs recourse must be had to the courts.⁶⁸

Are the Arbitrators Bound by Law? May the parties validly stipulate that "The arbitrators and umpire shall interpret this present agreement as an honorable engagement, rather than as a merely legal obligation . . . The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of law"?⁶⁹ In some countries the codes regulate two types of arbitration known as "legal" arbitration and arbitration by "amicable compounders,"⁷⁰ the latter not being bound by rules of law.⁷¹ In these countries it is clear that "arbitrators" in the strict sense must apply legal rules. In other countries only one system appears in the code but there is an express provision that arbitrators must comply with rules of law unless the parties have agreed that they shall act merely as "amicable compounders."⁷² In still other countries, though amicable compounders are unknown as such,⁷³ arbitrators are not necessarily governed by strict rules of law.⁷⁴

In England the arbitrators must apply the ordinary rules for the administration of justice in the absence of an express provision in the submission to the contrary, and failure to do so may amount to such mis-

68. As to the different attitude taken in England and the United States, see ARBITRATION ACT (1887) § 8, The First Schedule (g); RUSSELL, *op. cit. supra* note 36, at 160-161; STURGES, *op. cit. supra* note 15, at 390 *et seq.*, 486 *et seq.*

69. See *Pacific Indemnity Co. v. Insurance Co.*, 25 F. (2d) 930, 931 (C. C. A. 9th, 1928).

70. For example, Spain, Argentina, Brazil, Chile, Cuba, Mexico, Venezuela. See OBREGON, *op. cit. supra* note 32, at 798. In some Latin-American countries the amicable compounders are called "arbitros arbitratores" or simply "arbitratores." See CHILE, CODE CIV. PROC. arts. 792 *et seq.*; MEXICO, CODE CIV. PROC. arts. 1334 *et seq.*; VENEZUELA, CODE CIV. PROC. art. 510.

In Spain, Argentina and Cuba the codes expressly provide that the decisions by amicable compounders shall be rendered exclusively on the basis of documents submitted and the testimony of the parties. SPAIN, CODE CIV. PROC. art. 833, par. 2; ARGENTINA, CODE CIV. PROC. art. 802; CUBA, CODE CIV. PROC. art. 832.

71. So expressly, ARGENTINA, CODE CIV. PROC. art. 802; CUBA, CODE CIV. PROC. art. 832; MEXICO, CODE CIV. PROC. arts. 1281, 1340; see also OBREGON, *op. cit. supra* note 32 at 798. *cf.* LA. CIV. CODE (1932) §§ 3109-3110.

72. FRANCE, CODE CIV. PROC. art. 1019; BELGIUM, CODE CIV. PROC. art. 1019; HOLLAND, CODE CIV. PROC. art. 636; ITALY, CODE CIV. PROC. art. 20.

73. E.g., in Germany and Austria.

74. According to Nussbaum, the recent development in Germany tends toward the recognition of the binding force of the law. Nussbaum, *Problems of International Arbitration*, 1 NUSSBAUM 20. Section 1042, par. 2 of the German Code of Civil Procedure, as amended in 1924, determines that the arbitrators cannot disregard provisions that are *ius cogens*. This provision was abrogated, however, by the Law of July 25, 1930 (RGBl 1930 II p. 361).

conduct that the award will be set aside.⁷⁵ In the United States, it seems, arbitrators are not bound by the strict rules of law or equity unless there is an express stipulation to this effect in the agreement for arbitration.⁷⁶ However, if the arbitrators undertake to decide the dispute according to strict law and it appears from the face of the award that they have misconceived any principles of law applicable to the case, the award will be set aside.⁷⁷

The Rules of Conciliation and Arbitration of the International Chamber of Commerce provide that "The Court of Arbitration shall give to the arbitrators or arbitrator power to act as 'amisables compositeurs' whenever all parties to the arbitration have previously given their consent to this course and it will not in any way interfere with the legal enforcement of the award."⁷⁸

III

The Conflict of Laws

United States. Questions involving arbitration agreements from the standpoint of the conflict of laws rarely came before the state courts prior to the adoption of the modern arbitration statutes. The leading case on the subject is *Meacham v. Jamestown, Franklin & Clearfield Ry. Co.*, decided by the New York Court of Appeals in 1914.⁷⁹ A contract had been entered into in Ohio between two Pennsylvania corporations for the construction of a railway in Pennsylvania. The contract contained a provision that all matters in dispute arising out of the contract were to be decided by the chief engineer of the railroad company, the parties waiving "all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator." Under the law of Pennsylvania the arbitration clause could be specifically enforced. Suit was brought in New York to recover a certain sum alleged to be due under the contract. The trial court dismissed the complaint on the ground that a submission to the chief engineer and an award by him, or an offer or tender of such submission on the part of the plaintiff was a valid condition to plaintiff's right to sue. The judgment was affirmed by the Appellate Division but

75. RUSSELL, *op. cit. supra* note 36, at 379-380.

76. STURGES, *op. cit. supra* note 15, at 500-502.

77. *King v. The Falls of Neuse Manufacturing Co.*, 79 N. C. 360 (1878). "The cases have not yet fully determined to what extent arbitration may disregard statutory law as distinguished from the law of the courts." STURGES, *op. cit. supra* note 15, at 501.

78. Arbitration Rules, Art. 16 (3), 1 NUSSBAUM 263.

79. 211 N. Y. 346, 105 N. E. 653 (1914).

was reversed by the Court of Appeals. Judge Hogan, in writing the opinion of the court, advanced the following argument in support of the decision:

"Tested by the principles of the cases cited, we conclude that the language employed in the contract in question is susceptible of but one construction, namely, an attempt on the part of the parties to the same to enter into an independent covenant or agreement to provide for an adjustment of *all* questions of difference arising between the parties by arbitration to the exclusion of jurisdiction by the courts.

"Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts . . . shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state."⁸⁰

Judge Cardozo, in a concurring opinion, justified the decision of the court on the ground that the agreement to submit all differences to arbitration related to the law of remedies. The reasoning of the learned Judge was as follows:

"An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. In applying this rule, regard must be had not so much to the form of the agreement as to its substance. If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned . . . it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action. A rule would not long survive if it were subject to be avoided by so facile a device. Such a contract, whatever form it may assume, affects in its operation the remedy alone."⁸¹

To what extent have the recent arbitration statutes brought about a change of attitude on the part of our courts? From the standpoint of the conflict of laws there is probably no field in which a greater variety of fact situations may conceivably arise. The following situations involving a foreign element may present themselves, whether or not the state be one having a modern arbitration act: The contract may be made in the state and call for arbitration in another state or in a foreign country, or it may be silent on the question where the arbitration is to take place. Or the contract may have been made in some other state or country without specifying where the arbitration is to

80. *Id.* at 351-352, 105 N. E. at 655.

81. *Id.* at 352, 105 N. E. at 655.

take place; or it may call for arbitration in the state of the forum, or it may call for arbitration in a third state. Finally, it may not appear where the contract was made, but the place of arbitration may be specified to be the state of the forum, or some third state or country.

In each of the above situations, the law of the state in which the contract was made may render it irrevocable or revocable and unenforceable. If it is valid and enforceable by the *lex loci*, it may be unenforceable by the law of the state or country in which the arbitration is to take place; or, what is more likely to happen in fact, it is made in a state or country under the local law of which it is unenforceable, and arbitration is to take place in a state or country in which it is valid and enforceable. Further complications will occur if the residence or domicile of the parties is a material factor, for in each of the above situations both parties may be residents of the same state or country—of the state or country where the agreement for arbitration was made or where the arbitral tribunal is to sit, or of the forum, or of some other state or country—or they may be residents of different states or countries.

Which of the above cases would fall within an arbitration statute of the forum? If it falls within such a statute of the forum for one purpose, does it necessarily fall within it for all purposes? Will a stay of proceedings be granted by virtue of the arbitration statute of the forum? Will the parties be ordered to proceed to arbitration in another state or country? Under what circumstances will an arbitrator be appointed in accordance with the local statute? The actual decisions of the courts in this country throw little light upon the problems suggested; so far as they point in any definite direction it would appear that they are unfavorable from the standpoint of interstate and international commercial arbitration.

In *Matter of Berkovitz v. Arbib & Houlberg*,⁸² various questions arose with respect to the application of the New York Arbitration Act of 1920. Was it applicable to contracts made prior to its enactment? Was it applicable to an action brought prior to the enactment of the law? Was it applicable to a provision for arbitration made and to be performed in a jurisdiction where arbitration was enforceable when the contract was made and to be performed? Was it applicable to a contract containing a provision for arbitration without the state of New York? In answering the first question in the affirmative and the second in the negative, the learned court, speaking through Judge Cardozo, said:

“The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies . . . The rule to be applied is the rule of the

82. 230 N. Y. 261, 130 N. E. 288 (1921).

forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."⁸³

The questions actually decided by the case were not questions of the conflict of laws in the ordinary sense but the application of the statute from the standpoint of time, that is, whether it was to be applied to existing contracts and pending actions. For the purpose in hand it was held that the statute was remedial and was therefore applicable to existing contracts. The court did not find it necessary to answer the other questions submitted but left them open for future consideration.⁸⁴

One of these later came before the First Department of the Appellate Division of New York in *Matter of Inter-Ocean Food Products, Inc.*,⁸⁵ in which a contract for the purchase of California raisins had been made in New York between two New York corporations. Under the terms of the contract all disputes arising out of the contract were to be settled before the arbitration committee of the Dried Fruit Association in San Francisco. In a dispute arising out of the contract, upon a motion of the seller before the Supreme Court of New York, an order was made that the parties proceed to arbitrate in California all disputes between them as provided for in the contract. This order, however, was reversed by the Appellate Division, which held that the only remedy available in the courts of New York was a stay of proceedings. The reasoning of the court was as follows:

"The general trend of authority, it seems to me, is that no court will willingly relinquish jurisdiction over controversies arising between those who are amenable to its judgments, nor will any sovereignty order its citizens or subjects to go before the tribunals of another sovereignty and submit to its jurisdiction that their differences may be adjudicated.

"I am of the opinion that while an agreement to arbitrate in a foreign jurisdiction, and before a foreign arbitrator, is not invalid or illegal, it cannot be enforced as between citizens of this State who are the parties thereto, by com-

83. *Id.* at 270, 130 N. E. at 289, 290.

84. Under the California Arbitration Act, arbitrations shall be held in California unless the parties have agreed in writing after the controversy arises that it shall be held elsewhere. CAL. CODE CIV. PROC. (1930) § 1286.

85. 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dep't 1923). The case was approved by the Court of Appeals in *Matter of Marchant v. Mead-Morrison Manufacturing Co.*, 252 N. Y. 284, 169 N. E. 386 (1929). See also *In re California Packing Corp.*, 121 Misc. 212, 201 N. Y. Supp. 158 (Sup. Ct. 1923). In this case the contract provided for arbitration in California. The court denied an application for an order directing that the arbitration proceed in California, but held that the arbitration might be compelled in New York.

pling them to go without the State, in a foreign jurisdiction and before a foreign tribunal, there to arbitrate their disputes."⁸⁶

Inasmuch as California at the time of this decision had not yet adopted its modern arbitration act, arbitration could not have been compelled in that state. No reference, however, was made to this fact in the opinion of the court.

The above case was followed as precedent by the Supreme Court of New York in *Kelvin Engineering Co. v. Blanco*,⁸⁷ where a contract, made in Cuba, provided that the parties "submit themselves to the courts of the City of Santiago de Cuba for all questions relating to the performance or non-performance of this contract, expressly renouncing their right to litigate in any other place." It does not appear from the case whether both parties were residents of Cuba or not.⁸⁸

The question of the power to order arbitration in another state has recently come before the Supreme Court of Pennsylvania in the case of *Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp.*⁸⁹ Plaintiff, a Japanese corporation having an office in New York, agreed to sell to the defendant, a Pennsylvania corporation, bales of raw silk. The contracts provided that "Every dispute, of whatever character, arising out of this con-

86. *Supra* note 85, at 432-433, 201 N. Y. Supp. at 540.

87. 125 Misc. 728, 210 N. Y. Supp. 10 (Sup. Ct. 1925).

88. "It would be too strict and narrow a limitation of the intention of the parties as expressed," said the court, "to hold that an agreement to submit to courts of foreign jurisdiction should not be treated as a submission to arbitration within the purview of the Arbitration Law." *Id.* at 733, 210 N. Y. Supp. at 15.

Whereas stipulations like the above may be deemed to fall within the local arbitration act and thus to justify a stay, they do not oust the jurisdiction of the courts. See *Sudbury v. Ambi Verwaltung Kommanditgesellschaft auf Aktien*, 213 App. Div. 98, 210 N. Y. Supp. 164 (1st Dep't 1925) (contract made in Germany between a resident of New York and a German corporation vesting exclusive jurisdiction in the German courts); *Sliosberg v. New York Life Insurance Co.*, 217 App. Div. 685, 217 N. Y. Supp. 226 (1st Dep't 1926) (contract made in Russia between a resident of Russia and a New York corporation submitting dispute to the jurisdiction of the St. Petersburg courts only). See also, *The Fredensboro*, 18 F. (2d) 983 (E. D. Pa. 1927); *Danielsen v. Entre Rios Rys. Co.*, 22 F. (2d) 326 (D. Md. 1927).

89. 170 Atl. 286 (Pa. 1934). In *Katakura & Co. v. Vogue Silk Hosiery Co.*, 307 Pa. 544, 161 Atl. 529 (1932), the lower court had ruled that it had power to order the defendant to go to New York to submit to arbitration, but the Supreme Court had found it unnecessary to discuss the question, holding that a provision in the contract of arbitration that "Hearings shall be held customarily at Association Headquarters [New York City] where adequate room will be provided," did not designate New York as the exclusive place where the arbitration might be held under the contract, and that such arbitration might be enforced in Pennsylvania in the manner provided by the rules of the Association, or so far as they were not inconsistent with the laws of Pennsylvania and with the rules of the court of common pleas concerning procedure and practice under the Pennsylvania Arbitration Act.

tract, *must* be settled by arbitration in New York, to be conducted in the manner provided by the by-laws, rules and regulations of the Silk Association of America, Inc., governing arbitration." A dispute having arisen under the contract, the plaintiff prayed an order on the defendant to show cause why the dispute "should not be submitted to arbitration in the manner provided for in said contract." The Supreme Court, reversing the decision of the lower court, held that the plaintiff's petition should be allowed.

"The principal contention made in the opinion of the court below is that our Arbitration Act relates only to arbitrations to be held in Pennsylvania. The statute does not say so, and the argument brought forward to show that under sections 6, 10, and 11 (5 PS §§ 166, 170, 171) that conclusion must be implied, is not only both labored and inconclusive, but also wholly overlooks other sections of the act. Moreover, it ignores the legal principle that it is our duty to sustain the act, if this can reasonably be done, and not to destroy it either in whole or in part."⁹⁰

By what law will the validity and enforceability of arbitration agreements be determined, if they are made in some state or country other than that of the forum? Will the courts go so far in their procedural point of view as to hold that the law of the forum governs without regard to the law of the state where the contract is made or the arbitration is to take place? The modern legislation making arbitration agreements enforceable has been held to be remedial for some purposes; will it be held to be remedial for all purposes? Suppose a contract was unenforceable both by the law of the state where it was made and the law of the state where the arbitration is to be held, would it be enforceable nevertheless in any state having a modern arbitration statute? No direct decision on the point has been found. In *Estate Property Corp. v. Hudson Coal Co.*,⁹¹ a contract involving the lease of a Pennsylvania coal mine provided for the arbitration of all disputes or differences. An action arising out of an alleged breach of this contract having been brought in New York, the learned court observed: "But should the Court entertain jurisdiction in view of the arbitration clause contained in the agreement? The solution of this, in the light of the subject-matter and the contemplation of the parties, must be governed by the law of Pennsylvania."⁹² The court interpreted the Pennsylvania

90. *Id.* at 289. In accord see *California Lima Bean Growers' Association v. Mankowitz*, 154 Atl. 532 (N. J. 1931). Other courts, however, have in this situation ordered arbitration in accordance with the local law, disregarding the stipulation altogether. *In re California Packing Corp.*, *supra* note 85; see also *In re Nozak Brothers, Inc.*, N. Y. L. J. Aug. 5, 1931.

91. 132 Misc. 590, 230 N. Y. Supp. 372 (Sup. Ct. 1928).

92. *Id.* at 595, 230 N. Y. Supp. at 378.

act, which contained provisions identical to those in New York, as applicable to contracts made prior to its enactment, provided no action was pending on the contract at the time of the passage of the act. In so doing, the court either ignored or overlooked the express provision in the Pennsylvania statute that it "shall not apply to contracts made prior to the taking effect of this act."⁹³ Hence it is not clear whether the New York court would have applied the Pennsylvania statute had it known of its variance from the New York statute. The facts of the case do not disclose where the contract was made, nor the states in which the plaintiff and defendant corporations had been organized. The language of the court would indicate that it was inclined to look to the law of Pennsylvania as governing the enforceability of the contract, on the ground that the coal operations to which the contract related were to take place in Pennsylvania and that the parties must therefore be deemed to have contracted with reference to such law.⁹⁴ So far the courts have paid little attention to the place where the arbitration agreement was made or where it was to be performed, or to the domicile of the parties.

Another problem relates to the appointment of arbitrators by the courts where the party under a duty to make such appointment fails to do so, or the arbitrators cannot agree upon an umpire. The question of what court is the proper one to lend such assistance came before the New York Court of Appeals in *Matter of Marchant v. Mead-Morrison Manufacturing Co.*⁹⁵ The contract for arbitration, in this case between a New York and a Maine corporation, was concluded in Massachusetts and called for the manufacture and delivery of tractors in that state. The arbitration clause did not specify where the arbitration was to take place. A controversy having arisen, the two arbitrators selected by the parties were unable to agree upon a third. On motion of the buyer's trustee in bankruptcy a third arbitrator was appointed by the Supreme Court of New York and the parties were directed to proceed to arbitration before the tribunal thus constituted. Both parties entered appeals from the award rendered, of which defendant's was a challenge to the order directing arbitration. The Court of Appeals held the challenge to be too late, on the ground that, since the Supreme Court had power to appoint the third arbitrator, the order was not void, and there had been at most an error in the use of it.

93. PA. STAT. SUPP. (1928) § 606a-19.

94. "If defendant should with reasonable dispatch move for a stay of this action pending a proper application to enforce arbitration, the motion would most likely be granted." *Estate Property Corp. v. Hudson Coal Co.*, *supra* note 91, at 597, 230 N. Y. Supp. at 380.

95. *Supra* note 85.

"A State is without power to modify by its statutes the terms, express or implied, of contracts made in other states in contemplation of their laws. The case may be supposed of an agreement made in Boston that a controversy shall be arbitrated by the Chamber of Commerce of that city, with the express provision that in no event shall there be arbitration by any one else. If the law of Massachusetts refuses to permit the appointment of a substitute, the law of New York may not modify by statute the content of the promise, and designate a substitute in the teeth of the agreement."⁹⁶

The case decides nothing more than that the power of the trial court to appoint an arbitrator could not, under the circumstances, be raised collaterally.

The cases so far discussed arose in a state having a modern arbitration act. What, in view of the modern trend in legislation relating to commercial arbitration, will be the attitude of courts in states where such agreements are still revocable appears from the decision in *Vita-phone Corp. v. Electrical Research Products*.⁹⁷ An agreement had been made in New York between a New York corporation and a Delaware corporation, providing that all disputes arising out of a certain contract were to be submitted to arbitration in New York. Two efforts were made to settle some of the disputes by arbitration. The third effort became nugatory by reason of the resignation of an arbitrator. After a successor had been appointed, the arbitration continued, and many hearings held at great expense, complainant requested the arbitrators to withdraw from the proceedings. On their refusal to do so, a bill was filed in Delaware praying for relief. The respondent pleaded the arbitration agreement as a substantive defense. The Chief Justice, sitting as Chancellor, overruled the plea on the ground that the contract and the New York Arbitration Law merely provided a remedy for the settling of disputes. With matters of remedy governed exclusively by the law of the forum, and the courts of Delaware still opposed to being ousted of jurisdiction by the agreement of parties to an arbitration, the learned Chief Justice concluded that no effect could be given to a different policy established in New York by statute. The Supreme Court of Delaware⁹⁸ overruled the decision of the lower court for the reason that in its opinion the arbitration proceedings had not broken down, so far as a Court of Equity was concerned, and the complainant

96. *Id.* at 294-295, 169 N. E. at 389.

97. 166 Atl. 255 (Del. Ch. 1933). See also 167 Atl. 845 (Del. Ch. 1933). See in regard to this case, Phillips, *Arbitration and Conflict of Laws: A Study of Benevolent Compulsion* (1934) 19 CORN. L. Q. 197, at 216, n. 78; also (1933) 47 HARV. L. REV. 125; (1933) 33 COL. L. REV. 1440.

98. Not yet reported.

was therefore not justified in repudiating the obligations providing for such proceedings. But aside from this fact and complainant's consequent lack of "clean hands," the higher court's views regarding the law seem to agree with those of the court below, as appears from the following:

"The respondent, therefore contends that the arbitration clauses of these contracts irrevocably bind the parties to them, not only in the State of New York, but elsewhere, and that its plea should have been sustained by the court below.

"This conclusion is based on the theory that the New York statute, and the contracts based thereon, relate to material and substantive rights, and that such rights are not only protected under the full faith and credit clause (Art. 4, Sect. 1) and the due process clause (14th Amendment) of the federal constitution, but, also, by the rule of comity between states.

"A contract, providing for arbitration, merely provides a remedy for the settling of disputes . . . The same rule applies, though by the terms of a statute arbitration contracts are made both irrevocable and enforceable . . . In considering the effect of the statute, Judge Cardozo, after reiterating his previous statement, that arbitration was merely a form of procedure for the settlement of differences, also added: 'It is not a definition of the rights and wrongs, out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.' That being true, *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, has no application to this case. The contract therein referred to was of statutory origin, but it clearly affected substantive rights, and not mere matters of procedure. Substantive contractual rights were also involved in *Home Ins. Co. v. Dick*, 201 U. S. 397."

The question arises as to whether the attitude of the federal courts with reference to arbitration agreements has been more favorable than that of the state courts. In this connection, it must be borne in mind that the United States Arbitration Act, modeled after that of the New York Act, was not adopted until 1925;⁹⁹ it must likewise be recalled that before this Act the remedy of specific performance was not available in our courts of admiralty. The question confronting the federal courts before 1925 was, therefore, whether they would recognize agreements for arbitration entered into in the state in which the court was sitting, or in some other state or country, and valid and enforceable by the law of such state or country, or valid and enforceable by the law of the state or country where the arbitration was to be held. The present article is concerned only with the attitude of the federal courts with respect to arbitration agreements entered into in a state or country other than

99. See p. 720, *supra*.

the one in which the federal court is sitting.¹⁰⁰ With respect to such foreign contracts the federal courts had held unanimously, prior to the United States Arbitration Act of 1925, that arbitration agreements made elsewhere, and valid both by the *lex loci* and the law of the state where the arbitration was to be held, were not enforceable.¹⁰¹

To what extent has the United States Arbitration Act of 1925¹⁰² changed the law so far as the federal courts are concerned? The Act is entitled "An act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime

100. The federal courts have declined to enforce the local state arbitration statute although the contract was made and the arbitration was to take place in the state in which the court was sitting. *Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319 (S. D. N. Y. 1921), *aff'd*, 5 F. (2d) 218 (C. C. A. 2d, 1924); *Lappe v. Wilcox*, 14 F. (2d) 861 (N. D. N. Y. 1926).

While the case of *Atlantic Fruit Co. v. Red Cross Line*, *supra*, was standing for trial in the lower federal court, proceedings were instituted in the state courts of New York for the specific performance of the contract. The case went up to the Court of Appeals, which held that the New York Arbitration Act could not apply to maritime contracts. The Supreme Court of the United States reversed the decision on the ground that the New York Act related to procedure and thus did not conflict with the uniformity doctrine established by the *Jensen* case. *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924). State courts may accordingly apply their arbitration statutes to maritime contracts with respect to which they have concurrent jurisdiction with the federal courts. Notwithstanding the decision by the Supreme Court, the Circuit Court of Appeals felt obliged to affirm the decision of the District Court on the ground that the New York Arbitration Act, being procedural in its nature, cannot affect the procedure and practice of the admiralty courts.

In the following year, 1925, Congress passed the United States Arbitration Act which provides for the specific performance of arbitral clauses in maritime and other contracts. See Poor, *Arbitration Under the Federal Statute* (1927) 36 YALE L. J. 67 (1927); Baum and Pressman, *Enforcement of Commercial Arbitration Agreements in the Federal Courts* (1930-1931) 8 N. Y. U. L. Q. 238, 428.

Regarding removal to a federal court of proceedings for arbitration under a state statute in a state court, see STURGES, *op. cit. supra* note 15, at 940-945; Baum and Pressman, *supra*, at 253-256; Note (1929) 42 HARV. L. REV. 801.

101. *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915). *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 232 Fed. 403 (S. D. N. Y. 1916), *aff'd*, 250 Fed. 935, and 252 U. S. 313 (1920); *The Eros*, 241 Fed. 186 (E. D. N. Y. 1916), *aff'd*, 251 Fed. 45 (C. C. A. 2d, 1918); see also *Tatsuuma Kisen Kabushiki Kaisha v. Prescott*, 4 F. (2d) 670 (C. C. A. 9th, 1925). The question whether the decisions of the highest court of the state in which the federal court is sitting or the decisions of the Supreme Court of the United States were controlling in this matter, was held to be one of general law and thus governed by the decisions of the United States Supreme Court holding arbitration agreements to be against public policy. *Insurance Co. v. Morse*, 20 Wall. 445 (U. S. 1874); *Doyle v. Continental Insurance Co.*, 94 U. S. 535 (1876). The same conclusion would be reached if suit were brought before a federal court in a state having a modern arbitration act. See *Atlantic Fruit Co. v. Red Cross Line*, 5 F. (2d) 218 (C. C. A. 2d, 1924); *California Prune and Apricot Growers' Association v. Catz American Co.*, 60 F. (2d) 788 (C. C. A. 9th, 1932).

102. 43 STAT. 883 (1925), 9 U. S. C. §§ 1-15 (1926).

transactions, or commerce among the states or territories or with foreign nations."¹⁰³ Section 2 of the Act makes agreements complying with its terms "valid, irrevocable, and enforceable." Section 3 provides that where an action is brought in any court of the United States in violation of the agreement for arbitration, the court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." Section 4 of the Act provides that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed . . ."¹⁰⁴

If an agreement for arbitration is of the type specified in the Act, does the fact that it calls for arbitration in a country other than the United States prevent the enforcement of the agreement by the federal courts? If the case is not within the federal statute, has the act so changed the policy of the federal courts that an agreement for arbitration, valid by the proper law, will be recognized and enforced? May a petition be filed in the federal courts of this country in such a case for an order to compel arbitration, and if suit is brought in violation of the agreement will a stay be granted? In *The Silverbrook*,¹⁰⁵ where the question was raised for the first time, suit was brought in admiralty on foreign bills of lading providing for arbitration in London. The claimant moved for a stay of suit¹⁰⁶ and reference of the issue to arbitration. The motion was denied and the cause ordered to proceed in the usual course on the merits. The court said:

103. A shipment between two foreign countries has been held not to constitute commerce among the several states or with foreign nations within the meaning of the United States Arbitration Act. *The Volsinio*, 32 F. (2d) 357 (E. D. N. Y. 1929).

104. Section 8 of the Act provides as follows: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

105. 18 F. (2d) 144 (E. D. La. 1927).

106. A motion for a stay of suit is the proper method of raising the question; an exception to the jurisdiction will not do. *The Fredensboro*; see also *Danielsen v. Entre Rios Rys. Co.*, both *supra* note 88.

"Although the basis of jurisdiction in this case is a cause of action otherwise justiciable in admiralty, and begun by a libel and seizure of a vessel according to the usual course of admiralty proceedings, and therefore of the class contemplated by section 8 of the United States Arbitration Act, this court is without jurisdiction to direct the parties to proceed to arbitration as required by the concluding clause of that section, because the place and manner of arbitration prescribed by the terms of the contract are beyond the jurisdiction of this court, since the hearings and proceedings thereunder cannot be held conformable to the terms of this statute, and particularly to section 4, which requires the arbitration to proceed within the district in which the petition for an order directing such arbitration was filed."¹⁰⁷

The language of Section 4 of the Act is, of course, not free from doubt from the standpoint of statutory construction, but the question is whether it should be so limited as to nullify the provisions of the same section that the order directing the parties to proceed with the arbitration shall be "in accordance with the terms of the agreement."¹⁰⁸ The District Court for the Southern District of New York reached the same conclusion as did the court in *The Silverbrook*.¹⁰⁹ On the other hand, Judge Coleman in *Danielson v. Entre Rios Rys. Co.*¹¹⁰ has expressed the view¹¹¹ that even if the remedy of specific performance under Section 4 were limited to agreements performable in the United States, the broad language of Section 3 would warrant the granting of a stay in cases where the arbitration is to take place in a foreign country.

"The effect of the act then seems to be that it requires the courts to stay trial, upon motion of one of the parties, until arbitration is had, and to order arbitration if, as provided in section 4, 'the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.' In other words, there is nothing in the Act which indicates that, although the arbitration provided for may be beyond the jurisdiction of the court, this shall forestall or in any way curtail jurisdiction which the court would normally have of maritime suits. On the contrary, as is seen from the language of the sections of the act above quoted, it is contemplated that the proceedings may be brought in the usual manner and jurisdiction over the arbitration assumed if the arbitration provided for is to take place within the court's jurisdiction; if not, then the proceedings shall be stayed until the foreign arbitration is perfected, whereupon the court has power to enter a decree upon the award. That is to say, the only limita-

107. *Supra* note 105, at 147.

108. STURGES, *op. cit. supra* note 15, at 929-930.

109. *The Beechwood*, 35 F. (2d) 41 (S. D. N. Y. 1929).

110. *Supra* note 88. Judge Campbell in *The Volsinio*, *supra* note 103, stated that he agreed with Judge Coleman and disagreed with *The Silverbrook*, *supra* note 105.

111. The question of whether the foreign arbitration was a condition to assumption of jurisdiction, was denied by the court.

tion imposed upon the court is a stay pending the perfection of what cannot be accomplished within the jurisdiction of the court, and such a stay is to be clearly distinguished from prohibition against assumption of jurisdiction in the first instance."¹¹²

A stay has been denied also where a bill of lading provided that all controversies should be referred to the Court of Trieste with exclusive jurisdiction.¹¹³

In view of the strict construction given by the federal courts to the United States Arbitration Act, it is obvious that their attitude with reference to agreements for arbitration not falling within the Act remains as it was before the passage of the federal Act.¹¹⁴

England. Dicey states that "at one time effect would not be given to arbitration clauses in contracts, wherever made, as ousting the jurisdiction of the courts in England."¹¹⁵ Although no early English cases involving the conflict of laws have been found, the English courts no doubt would have declined to enforce foreign contracts for arbitration as being opposed to the public policy of England. The attitude of the English courts was changed, however, as a result of the early adoption of the English arbitration acts recognizing arbitration agreements as valid and irrevocable. In the leading case of *Hamlyn & Co. v. Talisker Distillery*,¹¹⁶ an agreement was entered into in England between a Scottish concern and a London company for the sale and purchase of grain to be delivered in Scotland. The contract contained the following clause:

112. *Supra* note 88, at 327-328.

113. *American Tobacco Co. v. Lloyd Triestino Società di Navigazione*, 1 A. M. C. 1135 (1928).

114. A federal court sitting in California has therefore no jurisdiction to compel the parties to proceed to arbitration in accordance with the California Arbitration Act, where the parties agreed that the disputes should be settled by arbitration in California. In reaching the above conclusion in *California Prune and Apricot Growers' Association v. Catz American Co.*, *supra* note 101, Judge Sawtelle made the following points: (1) the difficulty, if not impossibility, of harmonizing the California Arbitration Act with the federal law and procedure; (2) the federal courts are without power to enforce purely remedial or procedural state laws; (3) the Conformity Act (28 U. S. C. § 724) does not govern if the case is in the nature of an equity suit and thus excepted from the Conformity Act; (4) the case does not fall within the Rules of Decision Act (28 U. S. C. § 725), which refers only to substantive law.

In the earlier case of *Pacific Indemnity Co. v. Insurance Co.*, 25 F. (2d) 930 (C. C. A. 9th, 1928), the court had granted a stay, but the question of the jurisdiction of the federal court to enforce the local state statute had not been raised nor considered in that case.

See also the discussion of the subject by Baum and Pressman, *supra* note 100, at 447 *et seq.*

115. DICEY, *CONFLICT OF LAWS* (5th ed., Keith 1932) 632 n.

116. [1894] A. C. 202.

"Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." It was contended that the law of Scotland, where the contract of sale was to be performed, should govern, and that the clause was invalid in Scotland for failure to name the arbitrators. But the House of Lords reversed the decision of the Scottish court which had held the law of Scotland applicable, Lord Hershell declaring:

"In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance . . . In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract . . . Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England . . .¹¹⁷

"But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the courts of Scotland . . . But the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts of Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail."¹¹⁸

The case of *Spurrier v. La Cloche*,¹¹⁹ decided by the Privy Council, likewise rejected the *lex fori* in favor of the intention of the parties, and stayed an action upon an insurance policy in Jersey on the basis of a stipulation for arbitration made there but providing for arbitration in accordance with the English Arbitration Act.

From the standpoint of the conflict of laws, therefore, the validity of a foreign contract for arbitration is determined with reference to the law governing contracts. If a valid arbitral contract has been entered into in conformity with such rule, and suit is brought in England with reference to the matter to be submitted to arbitration, the English courts

117. *Id.* at 207-208.

118. *Id.* at 210.

119. [1902] A. C. 446.

"may"¹²⁰ grant a stay of proceedings. The granting of the stay is within the discretion of the court.¹²¹ A stay has been allowed also where an English contract called for arbitration abroad and suit was brought in England with reference to the matter in dispute.¹²² Where a stay has been prayed by a non-resident foreigner, the order granting it has been made on the condition that he give security for the costs of the arbitration.¹²³ An agreement to submit disputes to a foreign court is held to be an arbitration agreement within the English Arbitration Act, entitling a party, in the absence of good reasons to the contrary, to an order staying an action brought in England contrary to the agreement.¹²⁴ In *Kirchner v. Gruban*,¹²⁵ the court, holding that such an order should be granted at defendant's request, required the defendant to give an undertaking or bond that he would submit to the jurisdiction of the foreign tribunal. The above cases were decided before the enactment of the Arbitration Clauses (Protocol) Act, 1924, which, in those cases where it is applicable, apparently deprives the court of all discretion in the matter of granting a stay.¹²⁶

The English law contents itself with granting a stay, but, it seems, never orders the parties to proceed to arbitration. Lord Justice Fletcher-Moulton, in summarizing the present English law, states:

"The parties could not be compelled to go to arbitration. They cannot now; but an appeal to the courts can be stopped, and that indirectly enforces the arbitration clause. Therefore the status of an arbitration clause in England is that it will not be specifically enforced, but by proper proceedings you can prevent the other party from appealing to the English courts in respect of any matter which by contract ought to be decided by arbitration."¹²⁷

120. ARBITRATION ACT (1889) § 1.

121. RUSSELL, *op. cit. supra* note 36, at 104 *et seq.* No discretion seems to exist under the corresponding provisions of the Scotch Act. *Crawford Brothers v. Commissioners of Northern Lighthouses*, [1925] S. C. (H. L.) 22.

122. *The Dawlish*, [1910] P. D. 339.

123. *In re Bjornstad and the Ouse Shipping Co.*, [1924] 2 K. B. 673.

124. *Law v. Garrett*, 8 Ch. Div. 26 (1878); *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society*, [1903] 1 K. B. 249; *The Cap Blanco*, [1913] P. D. 130.

125. [1909] 1 Ch. 413.

126. Under the Act of 1924, the court "shall" make an order staying the proceedings. See RUSSELL, *op. cit. supra* note 36, at 519.

127. *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.*, 105 L. T. 846, 852 (1911). But although the English courts do not specifically enforce the reference to arbitration and will not grant an injunction which would have the same effect [RUSSELL, *op. cit. supra* note 36, at 73], such injunction was granted in the above case to restrain a suit in a foreign country in violation of an arbitration agreement under the following facts. An agreement was made between an English company and a Belgian company, both doing business in Spain, for the construction of a railway. The contract stated that it should be

To what extent the local provisions for appointment of arbitrators and supervision of the arbitral proceedings are applicable to agreements made outside of England, and specifying either no place for performance or a foreign place, does not appear from the English cases. It is doubtless safe to assume that if there is an express stipulation for arbitration under the English law, the English Act will apply in toto although the agreement may have been made in another country.

France. As indicated above,¹²⁸ before the French legislation of December 31, 1925, the local French law refused to recognize the validity of an arbitration agreement which did not indicate the objects in dispute and the names of the arbitrators, as required by Article 1006 of the Code of Civil Procedure. This article refers to agreements to submit existing disputes to arbitration (the so-called *compromis*), but it became the settled French law that this article applied likewise to clauses in contracts providing for the arbitration of future disputes (clause *compromissoire*). By virtue of Article 332 of the Commercial Code an exception existed in matters of marine insurance where arbitration of future disputes is recognized. The early decisions made no distinction between transactions local in character and those involving international elements. Such arbitral clauses were therefore regarded as void, irrespective of their place of making or performance, or of the nationality of the parties. Article 1006 was regarded as laying down a rule of international public order, which precluded the recognition under any circumstances of the validity of agreements for the arbitration of future disputes. Hence suit might be brought before any French court with respect to matters included in an arbitration agreement entered into in a foreign country between foreigners or between a Frenchman and a foreigner, without regard to the fact that it was a valid agreement under the law of the place where made.¹²⁹ The later cases, however, abandoned this strict policy and recognized the validity of these agreements.¹³⁰ The reason given for recognition was in both cases the prin-

construed and given effect as a contract made in England and in accordance with the law of England, that any disputes arising under the contract were to be referred to arbitration in conformity with the provisions of the English Arbitration Act of 1889, and that the award was to be a condition precedent to any liability of either party on the contract. The court held that it had power to restrain the suit abroad and that its power should be exercised under the facts of the case.

128. See p. 721, *supra*.

129. 3 LAPRADELLE AND NIBOYET, *RÉPERTOIRE DE DROIT INTERNATIONAL* (1929) 449, no. 4.

130. App. Poitiers, Oct. 28, 1907, (1908) 35 *CLUNET* 460; App. Alger, Dec. 27, 1907, (1910) 37 *CLUNET* 538; App. Rouen, May 6, 1908, (1909) 5 *REVUE* 178; App. Paris, Nov. 7, 1913, (1917) 44 *CLUNET* 590; App. Caen, Dec. 23, 1915, (1918) 45 *CLUNET* 180.

principle of the autonomy of the will. Such agreements, when made in France between two foreigners or between a foreigner and a Frenchman, were recognized as valid if the arbitration was to take place abroad, or the parties intended that the contract should be governed by foreign law.¹³¹

Logically, under the principle of autonomy of the will, an agreement made in France between two Frenchmen should have been recognized as valid, if the parties clearly manifested their intention to submit the contract to a foreign law. The courts hesitated, however, to recognize the validity of a clause of this kind under these circumstances, but the Court of Cassation¹³² has recently declared that such an agreement would be upheld in a proper case.¹³³

The law of December 31, 1925, purports to authorize stipulations for the arbitration of future disputes in commercial matters. As this legislation lacks any detailed provisions¹³⁴ it leaves in doubt many matters connected with commercial arbitration, both from a local and international point of view.¹³⁵ But, although constituting an amendment to

131. Cass. (Req.) July 17, 1899, (1899) 26 CLUNET 1024; App. Besancon, Jan. 5, 1910, (1910) 37 CLUNET 857; Trib. Civ. Lyon, July 30, 1913, (1914) 41 CLUNET 901; Cass. (Req.) Jan. 8, 1924, (1924) 51 CLUNET 974; App. Aix, Nov. 3, 1930, (1931) 26 REVUE 308.

132. Cass. (Civ.) Feb. 19, 1930, 25 REVUE 232 (1930), 26 *id.* 514 (1931).

133. See in general, Perreau, *De la Validité de la Clause Compromissoire insérée dans un Contrat passé à L'Étranger* (1910) 37 CLUNET 787; GODRON, *op. cit. supra* note 56; *La Clause Compromissoire dans les Rapports Internationaux devant les Tribunaux Français* (1919) 46 CLUNET 57, 654, Picard, *La Clause Compromissoire et L'Arbitrage dans les Rapports Internationaux* (1923) 50 CLUNET 508; André-Prudhomme, *supra* note 29.

134. The law consists of a single article and reads:

"Art. 631 of the Commercial Code is modified as follows: The courts of commerce are competent in the following cases:

"1. Controversies relating to transactions between merchants and bankers.

"2. Controversies between partners of a commercial company.

"3. Controversies relating to commercial matters between all persons.

"The parties may, however, at the time of concluding the contract agree to submit to arbitrators any of the controversies above enumerated, should such controversies arise in the future." 1 NUSSBAUM 203.

See Palewski, *L'Arbitrage en Matière Commerciale et la Jurisprudence de la Cour de Cassation* (1933) 60 CLUNET 845; Hamel, *La Clause Compromissoire dans les Rapports de Commerce Internationaux*, (1922-23) 18 REVUE 721; LANDRAU, *L'ARBITRAGE DANS LE DROIT ANGLAIS ET FRANÇAIS COMPARÉS* (1932) 88 *et seq.*; André-Prudhomme, *supra* note 29.

135. For example, is the Act applicable where one of the parties is a foreigner? Professor André-Prudhomme is of the opinion that the French courts will give an affirmative answer. *Supra* note 29, at 70-71.

A decision of the Appellate Court of Aix concluded that an agreement to arbitrate was not binding under the law of 1925 unless it was entered into formally. App. Aix, March 2, 1929, Gaz. Pal. 1929, 2, 704, cited in 60 CLUNET 852. The law has been set-

Article 631 of the Commercial Code dealing with the jurisdiction of the French courts of commerce, it is not regarded as a procedural law and is therefore not applicable to contracts entered into prior to its enactment.¹³⁶

The jurisdiction of French courts with respect to the person is held to be a matter of privilege established in the interest of the individual, which may be renounced by contract or otherwise.¹³⁷ Consequently, French courts recognize and enforce contracts conferring exclusive jurisdiction upon foreign courts, and any action brought in France in violation of such agreement will be dismissed. In a late case the Court of Cassation stated:

"Article 14 of the Civil Code, according to the terms of which a foreigner may be sued before the French courts on account of obligations contracted by him in a foreign country with respect to a Frenchman, is not a disposition of public policy, and may be waived by the interested parties."¹³⁸

Belgium. Differing from the earlier French attitude, the Belgian courts have declined to recognize contracts for the arbitration of future disputes (clause compromissoire) as being governed by Article 1006 of the Code of Civil Procedure, which specifically refers only to the submission of existing disputes (compromis).¹³⁹ Agreements for arbitration are governed, therefore, from the standpoint of the conflict of laws, by the ordinary rules applicable to contracts.

Germany. In view of the fact that agreements to arbitrate future disputes have been recognized throughout Germany since the adoption of the Code of Civil Procedure of 1877, it has become the established law that a valid arbitration agreement will constitute a defense to any suit brought in Germany in violation of such agreement.¹⁴⁰ In connection with this defense the courts will determine only whether the subject-matter of the suit falls within the scope of the arbitration agreement; when this appears the court must dismiss the suit.¹⁴¹

tled, however, in a contrary sense by the Court of Cassation. Cass. (Civ.) June 9, 1933, D. H. 1933, 164.

136. LANDRAU, *op. cit. supra* note 134, at 91-93. There have been some differences of view on the subject. But there is no suggestion that the proponents of the procedural view as regards retroactivity would regard the statute in the same light from the standpoint of the conflict of laws, so as to apply the *lex fori* to foreign contracts.

137. See NIBOYET, *MANUEL DE DROIT INTERNATIONAL PRIVÉ* (2d ed. Pillet & Niboyet, 1928) nos. 770, 780, 784.

138. Cass. (Req.) June 19, 1928, (1929) 56 *CLUNET* 336, 337.

139. Cass. Belg. June 8, 1849, *PAS.* 1850, pt. 1, 81; GODRON, *op. cit. supra* note 56, at 94-95n.

140. *CODE CIV. PROC.* § 274, par. 2, no. 3.

141. *OLG Munich*, Oct. 4, 1911, 25 *OLG* 94.

The law governing the validity of the arbitration agreement is not clearly defined.¹⁴² There is accord, however, on the point that notwithstanding the fact that some of the requirements for the validity of agreements for arbitration are contained in the Code of Civil Procedure, they are substantive in character. Contrary to the *Berkowitz* case, the Supreme Court of Germany has held that the provisions of the German Code of Civil Procedure relating to the validity of agreements for arbitration were not applicable to contracts entered into before the Code went into effect.¹⁴³

The question whether an order can be had compelling the defendant to proceed to arbitration does not appear in any of the reported decisions that have been found. In view of the fact, however, that under German law the remedy of specific performance of contracts is the normal one,¹⁴⁴ it would seem that it should be available for the breach of arbitration contracts. But where suit is brought in a foreign country in violation of an agreement for arbitration, the German courts have no jurisdiction to grant an injunction.¹⁴⁵ Neither do the German courts have the power to appoint an arbitrator where the contract calls for arbitration in a foreign country.¹⁴⁶

The rules relating to jurisdiction over the person are regarded in Germany also as laid down for the benefit of individuals, and may be waived by them. Contracts conferring exclusive jurisdiction upon foreign courts are therefore recognized on principle as valid.¹⁴⁷

142. See Supreme Court, Nov. 8, 1882, 27 GRUCHOT 1053.

To the effect that the law governing the award should control, see Jonas, *Anerkennung und Vollstreckung ausländischer Schiedssprüche* JW (1927); 2 STERN-JONAS, *DIE ZIVILPROZESSORDNUNG FÜR DAS DEUTSCHE REICH* (14th ed., Jonas, 1929) 1085.

To the effect that the validity of the arbitration clause depends upon the law governing the main contract, at least in case of doubt where the main contract is void, see Neuner, *Zum Problem der ausländischen Schiedssprüche*, 3 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (1929) 43, n. 6; also, Nussbaum, *supra* note 74, at 17 *et seq.*

143. Supreme Court, Nov. 10, 1881, 38 SA 158.

144. See CIV. CODE § 249.

145. Kahn, *Arbitration in England and Germany* (1930) J. COMP. LEG. 228, 241.

146. OLG Rostock, Sept. 23, 1915, 33 OLG 140. Where there is an express agreement that the arbitration shall be held in Germany and is to be subject to German Law, or the parties have deemed to have contracted with reference to German law, the German provisions relating to the appointment of arbitrators are applicable, without reference to the law of the domicile or to the national law of the contracting parties. OLG Hamburg, May 27, 1914, 29 OLG 283.

147. OLG Colmar, March 31, 1903, 6 OLG 384; OLG Dresden, May 30, 1904, 9 OLG 51; see also Supreme Court, May 16, 1926, JW (1926) 1336, and KG, Feb. 6, 1926, JW (1926) 1353; Lorenzen, *The Conflict of Laws of Germany* (1930) 39 YALE L. J. 804, 825-827.

Italy. Article 69 of the Italian Code of Civil Procedure provides that "The jurisdiction [of courts] cannot be prorogued by the parties, except in the cases established by law." The rules governing jurisdiction are regarded as matters of public policy, involving the sovereignty of the state and the freedom of individuals. Any contract attempting to oust the jurisdiction of the Italian courts is therefore null and void. This has been held to be true even where the contract was one between two Italians contracting abroad.¹⁴⁸ The same conclusion has been reached in the case of contracts made in Italy between an Italian and a foreigner.¹⁴⁹ A minority holding considers a stipulation conferring jurisdiction on a foreign court as invalid only in cases with respect to which the Italian courts have exclusive jurisdiction.¹⁵⁰ It is recognized, on the other hand, that foreigners may confer jurisdiction on the Italian courts in cases other than those specified in Articles 105-106 of the Italian Code of Civil Procedure.¹⁵¹

Agreements for arbitration in a foreign country have given rise to much contrariety of view among the Italian courts. These differences result in part from antagonistic theories entertained by Italian writers and courts concerning the nature of arbitration agreements.¹⁵² Prior to the decree of July 20, 1919, the courts were practically unanimous in holding such agreements for foreign arbitration to be invalid where the contract containing the arbitral clause was between Italian subjects and was to be performed in Italy.¹⁵³ No agreement existed where both parties were foreigners or one of the parties an Italian and the other a foreigner. Some courts held such agreements for arbitration to be

148. App. Milan, Apr. 23, 1927, (1928) RIV. DIR. INT. 110.

149. Cass. del Regno, March 16, 1926, (1926) RIV. DIR. INT. 385; March 15, 1927, (1927) RIV. DIR. INT. 389; Carnelutti, *Clausole di Rinunzia alla Giurisdizione Italiana* (1923) 89 ARCH. GIUR. 172.

150. App. Naples, Feb. 13, 1925, (1925) RIV. DIR. INT. 546; Cavaglieri, *Lezioni di Diritto Internazionale Privato* (3d ed. 1933) 368; Rocco di Torrepadula, *La Proroga della Giurisdizione Italiana nel Diritto Internazionale Processuale* (1932) RIV. IT. DIR. INT. PRIV. & PROC. 553.

151. Cass. Jan. 24, 1927, (1928) RIV. DIR. INT. 249.

152. Some courts draw inferences from Art. 22, Code of Civ. Proc., providing that arbitration awards must be pronounced in Italy. Others rely on Arts. 105-106 of the Code of Civ. Proc. specifying the instances in which the Italian courts have jurisdiction over foreigners.

153. Cass. Turin, Sept. 9, 1914, (1914) MON. 844 (not clear where to be performed); May 17, 1918, (1918) MON. 369; June 6, 1919, (1919) MON. 814; June 17, 1919, (1919) MON. 421. App. Milan, Oct. 23, 1917, (1918) MON. 49; July 30, 1918, (1918) MON. 569. Cass. del Regno, Apr. 8, 1927, (1927) RIV. DIR. INT. 387 (contract made in Italy and to be performed partly in Italy and partly abroad). But see Cass. Palermo, Feb. 23, 1912, (1912) MON. 752.

valid;¹⁵⁴ others that they were valid only if the agreement was made or to be performed abroad or if the parties had their domicile abroad.¹⁵⁵ The 1919 decree authorized the enforcement of foreign awards between foreigners or between an Italian and a foreigner, but denied recognition to foreign awards between two Italian subjects. The question whether it validated by implication agreements for arbitration between an Italian and a foreigner where the contract was made in Italy and called for arbitration abroad, was further complicated by the Geneva Protocol on Arbitration Clauses. This Protocol, adopted September 24, 1923, provided for the recognition of agreements for arbitration between parties belonging to different Contracting States, whether or not the arbitration was to take place in a third country. Although ratified by Italy on July 28, 1924, it was not enacted into law until May 8, 1927, and the issue arose as to whether the new policy indicated by the previous ratification might be taken into consideration by the Italian courts prior to the establishment of the Protocol as positive law.¹⁵⁶ During this period, 1919-1927, the decisions of the Italian courts were in a state of great confusion, those of the Court of Cassation of the Kingdom being themselves inconsistent with one another.¹⁵⁷

That the law of May 8, 1927, has not changed the Italian attitude with regard to agreements for arbitration in general but exerts only a limited influence with respect to the Contracting States, is indicated by a recent decision of the United Chambers of the Court of Cassation of the

154. Cass. Rome, Feb. 5, 1909, (1909) MON. 645; App. Milan, Sept. 23, 1913, (1914) MON. 135 (contract made or to be performed in Italy); App. Milan, Feb. 27, 1917, (1917) MON. 782 (contract to be performed in Italy).

155. App. Milan, July 30, 1918, (1918) MON. 569 (valid where domicile abroad); Cass. Turin, June 17, 1919, (1919) MON. 421 (invalid if to be performed in Italy); App. Genoa, June 17, 1922, (1923) MON. 507 (invalid if to be performed in Italy); Cass. Turin, Aug. 30, 1923, (1924) MON. 87 (valid where part performance abroad).

156. See Sereni, *Sulla Validità e gli Effetti della Clausola Compromissoria per Arbitrato Estero* (1931) RIV. DIR. INT. 394; Betti, *Sulla Validità della Clausola Compromissoria per Arbitrato Estero Secondo il Diritto Italiano* (1927) 2 RIV. DIR. PROC. CIV. 266.

157. In favor of validity: Cass. del Regno, Nov. 10, 1926, (1927) MON. 204; Apr. 22, 1927, (1927) RIV. DIR. INT. 388; May 18, 1927, (1927) MON. 561; June 4, 1929, (1929) 54 REP. FORO IT., under Arbitramento, no. 5.

Against validity: Cass. Regno, March 16, 1925, 1 NUSSBAUM 336; Apr. 8, 1927, (1927) RIV. DI DIR. INT. 387.

See note by Ascarelli, 2 NUSSBAUM 333; Betti, *supra* note 156.

An agreement entered into in Italy between an Italian and a citizen of Switzerland for submission to foreign arbitration is valid under the Geneva Protocol of 1923, although the Swiss was a resident of Italy, Italy and Switzerland having both adhered to the Geneva Protocol. Cass. del Regno, March 15, 1932, (1932) 57 FORO. IT. 1932, pt. 1, 538, and note by Cavaglieri.

Kingdom.¹⁵⁸ The question arose with respect to a contract for arbitration entered into by an Italian and a Brazilian, calling for arbitration in Brazil. The Appellate Court of Naples held the contract valid, notwithstanding the fact that the Geneva Protocol had not been ratified by Brazil.¹⁵⁹ But the highest court reversed the decision, on the ground that the Italian law had been modified only within the limits of the Protocol, that is, with respect to nationals whose countries had ratified the Geneva Protocol.

The law governing the validity of arbitration agreements is discussed by the Court of Cassation of the Kingdom¹⁶⁰ in a case in which the contract was made in Italy between an Italian and a Brazilian firm and provided for arbitration in Italy. The Court said:

"The law of the country where this arbitration agreement was concluded applies without doubt to its validity, as follows from Article 9 of the Introductory Provisions to the Code of Civil Procedure."¹⁶¹

It was held that the agreement was invalid under Italian law.

Sweden. Of particular interest are the provisions of the conflict of laws adopted in Sweden by the Law of June 14, 1929.¹⁶² Under them, if a suit is brought in Sweden on a dispute falling within a valid agreement for arbitration, the action will be dismissed.¹⁶³ It matters not whether the agreement for arbitration may be regarded as a Swedish one or a foreign one. Where the agreement for arbitration specifies the place where the arbitration is to take place, the law of that state or country will determine the validity and effect of the agreement.¹⁶⁴ Where the place of arbitration does not appear, Swedish law will apparently govern if both parties, or one of them, is domiciled in Sweden.¹⁶⁵

158. Jan. 22, 1931, (1931) *Riv. Dir. Int.* 392, and note by Sereni, (1931) *Riv. It. Dir. Int. Priv. & Proc.* 185, and note by Cereti.

159. App. Naples, July 22, 1929, 3 *NUSSBAUM* 385.

160. Cass. del Regno, Jan. 28, March 16, 1925, 1 *NUSSBAUM* 336.

161. *Id.* at 337. Art. 9 of the Introductory Provisions to the Italian Civil Code provides as follows:

"The substance and effects of obligations are governed by the law of the place in which the acts were done, and, if the parties have the same nationality, by their national law; excepting in each case proof of a will to the contrary."

Art. 13 of the Draft of the New Italian Code contains the following provision: "Obligations arising from contracts are governed by the law to which the parties have expressly referred. In the absence of an express declaration that law will control which the parties are presumed to have chosen in view of the provisions of the contract and the surrounding circumstances."

162. The text may be found in German in 3 *NUSSBAUM* 269, 274 §§ 1-4.

163. *Id.* § 3.

164. *Id.* § 2.

165. *Id.* § 4.

If both parties are domiciled outside of Sweden, the rule of the conflict of laws governing the validity and effect of the agreement is not indicated, but recognition of the foreign arbitral agreement, valid under the proper law, will be refused in Sweden on grounds of public policy, if the dispute is one that could not be submitted to arbitration under the local Swedish law.¹⁶⁶

Proceedings for arbitration may be instituted in Sweden and the aid of the Swedish courts obtained if arbitration is to take place in Sweden; so also where the agreement does not specify the country in which arbitration is to take place, if both parties or one of the parties is domiciled in Sweden. If only one of the parties has his domicile in Sweden at the time of the making of the agreement, or has established his domicile there subsequently thereto, proceedings can be brought in Sweden against the party domiciled therein, but not against the other party.¹⁶⁷

It seems therefore that where the contract calls for arbitration abroad, the Swedish courts will not entertain jurisdiction to compel the parties to proceed to arbitration, nor to appoint an arbitrator; nor will they do so where the contract is silent with respect to the place of arbitration and suit is instituted against a party who is domiciled in some country other than Sweden.

Geneva Protocol on Arbitration Clauses. This Protocol, signed at Geneva under the auspices of the League of Nations, on September 24, 1923, seeks to facilitate international arbitration in civil and commercial matters.¹⁶⁸ Although it provides for the recognition of agreements to arbitrate both existing and future disputes, "whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject," it is for some seemingly insufficient reason limited by Article 1 to parties of different Contracting States and does not include agreements between nationals of one Contracting State for arbitration in some other Contracting State. Moreover, a Contracting State can under Article 1, paragraph 2, stipulate for a limitation of the Protocol as to it to commercial contracts and a number of ratifying nations have taken advantage of this reservation.¹⁶⁹

The Protocol does not specify what law should determine the validity of agreements for arbitration. The arbitral proceedings themselves, however, including the constitution of the arbitral tribunal, are, under

166. *Id.* § 3.

167. ARBITRATION LAWS, *supra* note 61, § 4.

168. League of Nations Publications II, Economic and Financial, (1923) no. 5. The text may be found also in RUSSELL, *op. cit. supra* note 36, at 517; 1 NUSSBAUM 239.

169. 1 NUSSBAUM 239.

Article 2, governed by the law of the country in whose territory the arbitration is to take place, unless the parties have agreed otherwise.¹⁷⁰

The object of the Protocol, which has now been ratified by Great Britain and nearly all of the continental countries,¹⁷¹ was to prevent any action from being brought in any Contracting State between nationals of different Contracting States on a contract containing an arbitration clause. According to Article 4, if a suit is brought contrary to the terms of the agreement, the court shall refer the parties to the decision of the arbitrators, except in the case where the arbitration cannot proceed or has become inoperative. The duty to enforce awards under the Act is limited to local awards.¹⁷² The enforcement of awards of other Contracting States is provided for in the Geneva Convention on the Execution of Foreign Arbitral Awards, of September 26, 1927.¹⁷³

IV

Arbitration Law—Substantive or Procedural?

The foregoing account, though confined to the law of a few of the leading commercial countries of the world, gives some conception of the present complexity of the law governing commercial arbitration in its international and interstate aspects. Not only are there wide differences among the individual continental countries, but also between England and the United States. One thing stands out above all else, namely, that from the standpoint of the conflict of laws the attitude of the United States toward commercial arbitration is not shared by any other country, not even Great Britain. The dominant point of view in our law is that agreements for arbitration relate to procedure or remedy.

Judge Cardozo gave prominence to this view in his concurring opinion in the *Meacham* case,¹⁷⁴ and in voicing for the majority of the court in *Matter of Berkowitz v. Arbib & Houlberg*¹⁷⁵ the opinion that the New York Arbitration Act was procedural in character. The New York Act has also been held to be procedural by the Supreme Court of the United States in *Red Cross Line v. Atlantic Fruit Co.*¹⁷⁶ The problem before the Supreme Court was whether agreements for arbitration of disputes arising under maritime contracts (a charter party) were within the scope of the New York Arbitration statute, and whether, if so construed

170. Art. 2.

171. 1 NUSSBAUM 239; 2 NUSSBAUM 237; 3 NUSSBAUM 301.

172. Art. 3.

173. 2 NUSSBAUM 237.

174. *Supra* note 79.

175. *Supra* note 82.

176. *Supra* note 100.

and applied, the state law conflicted with the Constitution of the United States. In holding that the controversy was not within the exclusive jurisdiction of admiralty and that the New York courts had the power to compel the charter owner to proceed to arbitration, Mr. Justice Brandeis made the following observations: "The Arbitration Law (of New York) deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty."¹⁷⁷ Clearly, the Supreme Court was of the opinion that the application of the New York Arbitration Act to maritime law would not interfere with the "uniformity doctrine" established by a majority of the Supreme Court in the *Jensen* case.¹⁷⁸

No issues in the conflict of laws were presented either in *Matter of Berkowitz v. Arbib & Houlberg* or in *Red Cross Line v. Atlantic Fruit Co.* In the former the question before the court was one of the retrospective application of the New York Arbitration Act. If the answer to this question, in the absence of an express declaration on the part of the legislature, depended upon the "substantive" or "procedural" character of the legislation, it does not follow that the line drawn by the majority of the court should be the same for purposes of the conflict of laws. The mere fact that the majority labelled the statute as "procedural," in order to make it applicable to contracts entered into before the passage of the statute, should not cause the same label to be attached to the statute in connection with conflict of laws problems. Nor from the fact that the Supreme Court of the United States also regarded the New York Arbitration statute as procedural so far as the "uniformity doctrine" in admiralty is concerned, does it necessarily follow that it should be so classified from the standpoint of the conflict of laws.¹⁷⁹

Professor Cook has called attention in a recent article¹⁸⁰ to the confusion caused by attaching the label "substantive" or "procedural" without reference to the type of question before the court. The mere fact that a statute has been held procedural for one purpose does not make it incumbent upon the court to attach to it the same construction for some other purpose. Professor Cook enumerates eight groups of cases in connection with which the problem may arise and with respect to them says:

177. *Id.* at 124.

178. *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917).

179. In a number of cases in which arbitration statutes were held to be procedural the immediate issue before the court was the enforceability of a state arbitration statute by the federal courts, which is again a problem by itself.

180. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333.

"Only after the most careful consideration ought it to be concluded that decisions relating to one of these problems are to be followed as 'precedents' for the decision of cases in another group. This is not to say that they ought to have no weight at all; far from it. It is merely to point out that at most they make out a *prima facie* case, and even that is perhaps to overstate the case for their use as precedents in really doubtful cases involving different purposes."¹⁸¹

Attention has been called elsewhere¹⁸² to the fact that Anglo-American courts have been inclined to give too wide a meaning in the conflict of laws to the term "procedure." Difference of opinion may fairly exist with regard to the line which should be drawn in some instances between procedure and substance. For example, the statute of limitations is generally regarded in Anglo-American Law as procedural and in continental countries as substantive. American courts disagree as to whether the statute of frauds should be deemed procedural or substantive. The same disagreement exists also with respect to presumptions and the burden of proof. Much confusion could have been avoided if our courts had followed Professor Cook's suggestion that the line between substance and procedure should be consciously drawn with especial reference to the purpose to be sought. Another source of confusion in this country results from the fact that the "procedural" and public policy arguments are frequently used interchangeably. Where the local law of the forum has severer requirements than that of the foreign state or country, the result obtained is, of course, the same; but fundamentally different conclusions are reached where the requirements of the law of the forum are less severe or simply different from those of the state or country in which the cause of action had its origin. In this situation the parties may have no right or cause of action under the law of the foreign state or country but would have one by the *lex fori*; or the reverse may be true, that is, the parties may have a right by the law of the foreign state or country and none by the law of the forum, when the differences of law are not of such a fundamental character that the public policy argument would be available from the standpoint of the conflict of laws.

The arbitration statutes thus present two problems, first, whether from the point of view of the conflict of laws they should be classified as procedural; and, second, if they are not procedural, to what extent, if any, effect may be denied them on the ground that their recognition and enforcement would conflict with the public policy of the forum.

181. *Id.* at 344.

182. Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311.

At the time of the decision of the *Meacham* case, common-law agreements for arbitration were not enforceable in this country, except in Pennsylvania. Hence it is not surprising that the New York Court of Appeals was of the unanimous opinion that the Ohio contract, which was to be wholly performed in Pennsylvania, could not be recognized in New York. As agreements for arbitration would "oust the jurisdiction of the courts," and such agreements were regarded practically universally in this country as opposed to public policy, it was natural that such policy should be held to extend to foreign contracts, enforceable by the proper law.

But if the public policy argument had been the only one to prevent the enforcement of the foreign contract in the *Meacham* case, a different result would be reached today in New York as a result of the Arbitration Act of 1920, which has changed the policy of that state with respect to arbitration. In states retaining the revocability doctrine, the question would be whether their local policy should be regarded as still of such paramount importance that it should prevent the recognition and enforcement of agreements for arbitration made elsewhere and valid under the proper law, or whether in view of the modern general trend in favor of arbitration the local point of view should yield in favor of the larger policy of giving effect to agreements for commercial arbitration.¹⁸³ If a foreign contract for the submission of future disputes to arbitration, valid where made, should come before the courts of a state which has no modern statute authorizing such agreements but which regards the submission of existing disputes as irrevocable, it would seem that the public policy argument against the enforcement or recognition of the agreement would be without solid foundation; for under these circumstances the difference between the two types of legislation should not be regarded as so fundamental as to make it a matter of public policy in the international sense.

The problem assumes quite a different aspect if arbitration statutes are to be classified as procedural for conflict of laws purposes, and leads the writer to conclude that they should not be so classified.¹⁸⁴ It seems to him that too much stress has been laid on the argument that agreements for arbitration were valid at common law and lacked only en-

183. Cardozo, J., in *Loucks v. Standard Oil Co. of New York*, 224 N. Y. 99, 120 N. E. 198 (1918).

184. See also Heilman, *Arbitration Agreements and the Conflict of Laws* (1929) 33 YALE L. J. 617; Corbin, *Conditional Rights and Functions of an Arbitrator* (1928) 44 L. Q. REV. 24; Baum and Pressman, *supra* note 100, at 449; and notes in (1928) 28 COL. L. REV. 472; (1933) 33 COL. L. REV. 1440; (1929) 42 HARV. L. REV. 801, 804; (1933) 47 HARV. L. REV. 126, 315.

forceability which the modern statutes have supplied. Even from a technical point of view, it would seem a new right has been created instead of merely an additional remedy being added to an existing right. Formerly the contract was said to be "valid" but either party could withdraw from it at pleasure before the award was rendered; suit might be brought for damages, but these would normally be only nominal; whereas under the modern arbitration acts, the rights of the parties have become irrevocable. This transformation of a revocable right to one that is irrevocable must certainly be deemed to go to the substance instead of merely to the remedy.

Ultimately the question should be answered from a broader point of view. With the enactment of the modern statutes favoring the arbitration of commercial disputes, the question has become one of the attitude which the courts will adopt toward this movement. Traditionally our courts have been opposed to arbitration agreements, but is there any sound reason why this attitude should be perpetuated notwithstanding the modern arbitration statutes? Why should arbitration agreements be singled out in the conflict of laws from all other agreements and subjected to the local law of the forum? Other contracts made or to be performed in another state or country are governed by the proper law and, if valid, will be recognized and enforced, unless, under exceptional circumstances, such recognition and enforcement should violate the public policy (in the international sense) of the forum. On the other hand, if the contract is invalid by the proper law it will not be recognized and enforced by the law of the forum, notwithstanding the fact that under the local law the contract would be valid. Why should contracts for arbitration form an exception to this rule? It is important from the standpoint of commercial arbitration that the rights of the parties should be governed by some definite law, instead of being determined by the law of the state where the plaintiff may happen to bring the suit.¹⁸⁵ Contracts to submit disputes to arbitration differ, of course, from other contracts in that the statutes applicable thereto contain procedural elements. But these are incident to the performance of the contract and not to its inception. So far as the validity of the contract is concerned, it should be dealt with from the same standpoint as are all other contracts. It should be governed by its proper law, which should be determined with reference to the peculiar requirements of this type of contract. This is the English point of view as expressed

185. The confusion resulting from the *lex fori* doctrine appears very vividly from Phillips, *supra* note 97.

by Lord Herschell in *Hamlyn & Co. v. Talisker Distillery*¹⁸⁶ and it should be ours.

Classification of arbitration statutes as procedural or remedial leads to positively harmful results. Prior to the modern arbitration acts the consequence of calling these statutes procedural was the refusal of our courts to recognize agreements for arbitration, valid and enforceable under the proper law. As the courts of practically all of our states were opposed to such agreements at that time, the result seemed to express the general policy of this country. Today the situation is greatly changed. In a dozen of our states, including the leading commercial states, arbitration agreements for the submission of future disputes are enforceable at the present time, the legislatures in these states having changed the policy formerly expressed by our courts. The logical effect of the view that these statutes are procedural would make the law of the forum applicable without regard to the law of the state or country where such contract was made or the arbitration was to take place. A contract for arbitration would be enforceable in New York, if personal service could be had on the defendant, although it was made and the arbitral tribunal was to sit in a state or country where the contract remained unenforceable. In the absence of other considerations, a stay and an order to compel arbitration would be granted.¹⁸⁷ And a contract for arbitration made in one of the states in which a modern arbitration act exists and providing for arbitration in such a state would be unenforceable if the defendant lived in a state where such contracts are not enforceable and no jurisdiction could be had over him in a state having a modern act. In other words, the enforceability or unenforceability of the contract would depend primarily upon plaintiff's ability to obtain jurisdiction over the defendant in a state having a modern arbitration statute, without reference to the circumstances existing at the time of the making of the agreement. Provision in the arbitration statutes authorizing ex parte arbitrations might enable the proceedings to continue though no personal service could be had over the other party, provided no appointment of arbitrators by the court was required.¹⁸⁸ Courts following *Leroux v. Brown*,¹⁸⁹ it is true, have reached this result, which the writer regards as untenable and improper,¹⁹⁰ where the defense to a contract was the statute of frauds. But however that may be, it is certain

186. *Supra* note 116.

187. The state courts have granted a stay but some have refused to order the parties to proceed to arbitration in another state. See pp. 731-732, *supra*.

188. Phillips, *supra* note 97, at 222 *et seq.* (1934).

189. 12 C. B. 801 (1852).

190. Lorenzen, *supra* note 182, at 320 *et seq.*

that an extension of the doctrine to arbitration agreements would prevent the proper development of commercial arbitration from an interstate and international point of view.¹⁹¹ The only proper and legitimate position is that the difference in the legislation on the subject of agreements for arbitration is one relating to the substantive rights of the parties, and that these contracts should be governed in the conflict of laws by their proper law, subject to the rules of public policy of the forum. This is the view accepted in England and in all other countries, including Italy, where the law is opposed on principle to stipulations ousting the jurisdiction of the Italian courts.

V

The Governing Law

Granted, then, that an agreement for arbitration creates substantive rights, the question arises as to what law should govern its validity from the standpoint of the conflict of laws. Is it to be governed by the intention of the parties or by some fixed rule of law? If the latter, is it to be determined by the law of the state or country where the contract is made, or where the arbitration is to take place, or is it to be controlled by the law of the common domicil or common nationality of the parties, or possibly by some other law? As far as ordinary contracts are concerned, support can be found for any of these propositions.¹⁹² Most of the courts seem divided between the law of the place of contracting and the law of the place of performance. On the continent the statement must be qualified by limiting it to matters affecting validity other than capacity and formalities. As regards capacity the personal law (generally the law of domicil or national law) controls, except that in commercial contracts a disability existing under the foreign personal law may be disregarded in the interest of commercial security if it does not exist under the local law.¹⁹³ The contract is regarded as valid from the standpoint of formal requisites if it satisfies the law of the place of contracting.¹⁹⁴ Frequently it is valid also if it complies with some other law, as for example in Germany¹⁹⁵ the law of the place of performance. Much effort has been expended in the attempt to find a uniform rule applicable to all contracts, but it must be recognized

191. Phillips, *supra* note 97, at 235-236.

192. LORENZEN, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565.

193. LORENZEN, *CASES ON THE CONFLICT OF LAWS* (3d ed. 1932) 333-335n.

194. *Id.* at 345n.

195. *Ibid.*

that this is futile and that the special requirements of particular contracts should be considered. The fundamental requirement of our law at the present moment is that the rules of the conflict of laws which have been handed down to us shall be cast into a more liberal and flexible mould in order that it may be possible for our courts to take into consideration all economic or social factors bearing upon the problem. Whether the case before the court contains conflict of laws elements or not, the ultimate goal is the same, namely, the reaching of a decision that will satisfy the sense of justice of the community.

As regards arbitration agreements it would seem that where the parties have designated the place of arbitration, the courts should normally look to the law of the state or country so designated. It is highly desirable that an award that is properly rendered should be recognized and enforced in other countries. Now it is clear that in the very nature of things the law of the place where the arbitral court is to sit figures prominently in the matter of commercial arbitration. It will be binding upon the arbitrators, at all events as to any procedural matters not covered by the arbitration agreement. If judicial aid is required, such aid will of necessity be given in accordance with the law of that state. The award as such must satisfy the requirements of the law where it is rendered unless the parties have validly provided otherwise. Convenience would suggest, therefore, that the validity of the arbitration agreement be regarded in general as subject to this law. Most of the writers who have given special attention to this problem have been forced to this conclusion, notwithstanding their divergent views regarding the law governing contracts in general.¹⁹⁶ Sweden has accepted the same view by statute.¹⁹⁷ It would seem that the law of the place of arbitration should also govern where such place, although not specifically designated by the parties, is ascertainable from the circumstances of the case.¹⁹⁸

But the question of the manner in which the validity of arbitration agreements is to be determined if the place of arbitration is not indi-

196. Note 142, *supra*.

197. See p. 749, *supra*.

198. Under what circumstances, if any, it might be advisable to allow the courts to consult in addition some other law, such as the law of the place where the arbitration agreement was made, need not be discussed at this point. In continental law the maxim *locus regit actum* is firmly embedded, according to which the validity of agreements is recognized, as regards formal requisites, if the *lex loci contractus* is satisfied. There would be no objection, of course, if arbitration agreements were everywhere sustained on this basis. Exclusive rules may not always produce the best results. See Lorenzen, *supra* note 192, at 671 *et seq.*

cated directly in the agreement or by the surrounding circumstances involves greater difficulty. The Swedish statute¹⁹⁹ provides that where one of the parties at the time of the execution of the contract is domiciled in Sweden, Swedish law will control; the arbitration agreement can be enforced in Sweden against the party domiciled there, but not against the other party. In this country the *lex domicilii* has been discarded so far as commercial contracts are concerned, even in the matter of capacity, because of the difficulty involved in determining questions of domicil.²⁰⁰ The same objection may be raised against the application of the law of domicil in the matter of commercial arbitration, so that our courts would probably look to the *lex loci contractus*. If the agreement specifically provides that the arbitration shall be governed by the law of a particular state or country, other than the law that would normally apply, the courts of the forum should give effect to the intention of the parties, provided the law chosen has a reasonable connection with the facts of the case and the enforcement of the particular provision is not opposed to the public policy of the forum.

The law of the place of arbitration should determine also the revocability of the agreement and all substantive rights and duties derived therefrom. Thus it would seem clear that the powers and duties of the arbitrators should be governed with reference to this law. Where the arbitration is to take place in a foreign country, one of the important questions would be, in the absence of a specific provision in the agreement, whether the arbitrators are to be bound by the ordinary rules of law or whether they are free to follow their own conception of justice and right.

The validity of foreign agreements for arbitration, valid by the proper law, would not be recognized, in accordance with the general exception found in the conflict of laws, if they came into conflict with the public policy of the forum. For example, all courts would decline to enforce the arbitration clause if it were contained in a gambling contract, the enforcement of which would be deemed contrary to the public policy of the forum. The courts might agree also with the provision in the Swedish statute,²⁰¹ although there would seem little room for the application of this exception in the field of commercial arbitration, that the foreign agreement would not be recognized if the matter in dispute could not be submitted to arbitration under the local law of the forum. Countries like Germany having a requirement that the arbitration clause

199. See p. 749, *supra*.

200. See *Nichols & Shepard Co. v. Marshall*, 108 Iowa 518, 79 N. W. 282 (1899).

201. See p. 750, *supra*.

must refer to some "definite legal relationship"²⁰² might regard the requirement as one of international public order so as to defeat any foreign contract, valid by the proper law, if it violated such provision. On the other hand, it is submitted that the Supreme Court of Austria clearly went too far in the matter of public policy in declining to recognize the validity of an oral agreement for arbitration made in Germany and valid by German law, for the reason that the Austrian law required a writing.²⁰³

There remain to be considered the effects of a valid arbitration agreement, whether domestic or foreign, when the substantive character of such agreements is granted. One effect would be that the parties cannot resort to the ordinary courts for the settlement of any dispute falling within the scope of the agreement. Except in states which regard the recognition and enforcement of arbitration agreements, both local and foreign, as opposed to public policy, any proceedings brought in violation of the arbitration agreement, would, upon motion, be stayed. Whether or not such a stay is mandatory when it appears that the agreement is valid and the dispute within the terms of the agreement, would seem to relate primarily to the organization of courts and the power of judges, and should be controlled, therefore, by the law of the forum, rather than by the law governing the contract. As a matter of local law it would be desirable if American courts were given some discretionary power with respect to the granting of stays. When granted, an order should provide that unless the arbitration is held within a reasonable time an application may be made to the court for its revocation.²⁰⁴

Another effect of a valid agreement for arbitration is that it imposes a duty upon the parties to take whatever steps may be necessary to carry out the agreement. If the contract provides for arbitration in the state of the forum and jurisdiction can be had over the defendant, the availability of the remedy of specific performance will be governed by the law of the forum. In some countries there is a reluctance to grant specific performance in any case; in others it is the normal remedy for the breach of all ordinary contracts.²⁰⁵ Here again, as a matter of local law, some discretionary power should be vested in the courts. If

202. See p. 722, *supra*.

203. Supreme Ct. of Austria, March 8, 1904, 1 NUSSBAUM 350.

204. Phillips, *supra* note 97, at 221. See *Ring v. Menger, Ring and Weinstein, Inc.*, N. Y. L. J. Aug. 14, 1925, where the order read as follows:

"Motion for a stay is granted, but with leave to plaintiff to move to vacate such stay if defendants fail to give notice of the appointment of an arbitrator within ten days after service of this order, or if the arbitration is otherwise unduly delayed."

205. GERMANY, CIV. CODE § 249.

the recalcitrant party cannot be served in the state, ex parte arbitration should be allowed, provided the agreement calls for arbitration in that state and no assistance is necessary on the part of the courts in the appointment of arbitrators.

Where the contract provides for arbitration in another state or country, the granting of a stay and of an order to compel raises additional problems. In foreign countries courts are frequently without power to order arbitration abroad. In this country courts of equity have frequently declared that they have no power to order the defendant who is before the court to do a positive act abroad.

A more accurate way of stating the American law would be that the power exists, but that it will not be exercised except where it seems necessary and proper. Under the existing legislation, which makes both the stay and order to compel mandatory, our courts may well hesitate before ordering a foreign arbitration, even though they have the power to do so. The bargaining power of the parties may not have been equal and the provision for arbitration in some other state or country may appear to the court to be unfair or too onerous as to one of the parties,²⁰⁶ or the agreement may provide for arbitration in a state or country where the courts will not lend their aid in carrying out the agreement. Again, it may be impossible to obtain personal jurisdiction over the recalcitrant party in the other state or country and there may exist no authorization there for ex parte arbitrations. The situation forcibly indicates the necessity that the courts have a certain discretionary power in an application for a stay or for an order to compel, and also the desirability of a statutory provision that where a submission agreement provides for arbitration in the state the courts thereof shall have irrevocable power to order the arbitration to proceed.²⁰⁷ The fact that both parties are citizens of the state of the forum has been held in *Matter of Inter-Ocean Food Products, Inc.*²⁰⁸ to be a sufficient reason for denying the remedy of specific performance where the arbitration is to take place in some

206. Judge Hough called attention to this problem in *Atlantic Fruit Co. v. Red Cross Line*, *supra* note 101, at 221, where he said:

"The situation above depicted is beyond all question one that calls for remedial action. Yet those recognizing the evil, recognize also the difficulty of devising a remedy suitable to agreements like charter parties, made in all parts of the world, to be performed on any waters and where the natural, yet tyrannical inclination of the stronger party to the bargain will be to insert a clause requiring arbitration in his own 'home town.'"

207. Such provision, however, would be effective only if it is not necessary to apply to the court for the appointment of an arbitrator, for which personal service is required. *Phillips*, *supra* note 97, at 221.

208. *Supra* note 85.

other state. But it is submitted that citizenship or residence as such should not be the determining factor in the solution of the problem. If two citizens of a state have agreed to arbitrate in some other state, they should be subject to the compulsory process of the law of the state to the same extent as citizens of other states, or non-residents in general.²⁰⁹

There would appear to be no sufficient reason for the distinction made by some courts²¹⁰ between the granting of a stay and an order to compel. In allowing a stay of trial and refusing the order to proceed with the foreign arbitration, there is danger that the party staying the proceeding may escape all liability on the main contract by failing to arbitrate and remaining outside the foreign jurisdiction designated as the place of arbitration. Such party should be required therefore to post a bond that he will proceed with the foreign arbitration, as a condition precedent to the granting of the order for a stay,²¹¹ or the order should provide that unless the arbitration is held within a reasonable time an application may be made for a revocation of the order. A similar bond may be required on an application for an order to compel arbitration abroad.

A further question relates to the circumstances in which the courts of a state should render active assistance in arbitration proceedings, as for instance, by appointing arbitrators. Such power relates to the local organization of courts and must be exercised in conformity with the law of the forum, regardless of the law of some other state or country governing the arbitration agreement. Although the law of the forum controls in this matter, there remains the problem of the conditions under which the power should be deemed to exist and the time when it should be exercised.²¹² The first requisite would seem to be personal jurisdiction over the recalcitrant party in order that he may have an opportunity to be heard in regard to the application. Mere service on such party in the state should not be deemed sufficient, however, if the arbitration has no other connection with the state. But if the arbitration agree-

209. One of the arguments advanced under the existing legislation in this country against the power of the court to order arbitration in another state has been that the foreign award would not be enforced in the simplified manner provided for local awards. See *In re California Packing Corp.*, *supra* note 85. Such a difference in the enforcement of foreign and local awards should not affect, however, the power of the court to issue an order to compel, and if it seemed desirable to facilitate the enforcement of foreign awards, this could be done by a statute in an appropriate way.

210. See pp. 731-733, *supra*.

211. See *Kirchner v. Gruban*, *supra* note 125.

212. See *Matter of Marchant v. Mead-Morrison Manufacturing Co.*, *supra* note 85.

ment provides for arbitration in the state the courts of that state should be deemed to have jurisdiction in the matter. This would seem to be true also when no place of arbitration is specified and the arbitration may be properly had at the forum. The arbitration statutes should express themselves in the sense indicated.

Before the appointment of arbitrators the party living in a state which does not have a modern arbitration act can defeat the agreement to arbitrate by the simple means of remaining in his jurisdiction.²¹³ He can have it enforced against the other party, a resident of a state having a modern arbitration act, by going there and asking for an order to compel, but it cannot be enforced against him in his own state. A way out of this difficulty can be found through legislation when there is no necessity to appeal to the courts for the appointment of an arbitrator, for under such circumstances *ex parte* arbitrations may be authorized by statute. Fairness to the non-resident requires, in the opinion of Phillips,²¹⁴ that *ex parte* arbitrations should be allowed only (1) if the submission agreement provides for arbitration in the state; or (2) if the law of the state governs the contract either as the place of contracting or the place of performance; or (3) both parties live in the state.

Where the arbitration agreement between *A* and *B* provides for arbitration according to the law of state *X* and suit is brought in state *Y* contrary to the agreement, an issue may arise as to whether the courts of state *X* will enjoin the plaintiff from continuing the suit if *A* can be served in state *X*. The Court of Appeal of England²¹⁵ granted an injunction under similar circumstances. If the injunction were granted in state *X* the courts of state *Y* would probably feel free to disregard it.²¹⁶

A final problem may be alluded to briefly. In England²¹⁷ and in this country²¹⁸ the courts have refused to recognize the power of individuals to "oust the courts of their jurisdiction." Agreements that some court other than those of the forum shall have exclusive jurisdiction to determine disputes between the parties have been regarded as contrary to public policy and therefore invalid. The possibility of recourse to the courts is held to be for the protection of the individual and therefore cannot be set aside by contract. A similar view has been entertained

213. (1930) 43 HARV. L. REV. 824.

214. *Supra* note 97, at 222-224. See also *Finsilver, Still & Moss v. Goldberg M. & Co.*, 253 N. Y. 382, 171 N. E. 579 (1930).

215. *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.*, *supra* note 127.

216. Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217, 1245.

217. DICEY, *op. cit.* *supra* note 115.

218. See Note (1929) 59 A. L. R. 1445.

also in Italy.²¹⁹ At the present time there naturally arises the question of the effect, if any, of the adoption of the modern arbitration statutes upon the validity of such contracts. It is curious that Article 69 of the Italian Code of Civil Procedure, which prohibits contracts diminishing the jurisdiction of the Italian courts, has been used in Italy for the purpose of defeating agreements for arbitration, whereas in England similar agreements are regarded as valid submission agreements, falling within the protection of the Arbitration Act of 1887. Any action brought in England contrary to an agreement that the dispute shall be decided by a foreign court will therefore be stayed.²²⁰ What the attitude of our courts will be in this regard is as yet uncertain.²²¹ One fact, however, is significant. The arbitration agreements that have come before the English courts have generally provided for arbitration in England, the cases in which the arbitration is to take place abroad being relatively rare. In Italy, on the other hand, many of the cases coming before the courts have called for arbitration in a foreign country, notably in England. This may explain in part why the English courts have taken a liberal view, and the Italian courts a rather narrow one, with respect to this matter.

The settlement of commercial disputes by arbitration is the established mode in England, and has proved to be a most satisfactory method. Its high repute is due to a long experience with arbitrations and to the close cooperation between the courts, the legislature and the commercial bodies. In this country, commercial arbitration is still in its earliest stages. Its utility is not as yet fully recognized throughout the country even in commercial circles. Legislation authorizing the settlement of future disputes by arbitration exists only in some twelve states. Our courts give the statutes a technical construction and adhere to their traditional view that arbitration statutes relate to procedure. The *lex fori* therefore plays a dominant rôle in the law of arbitration from the standpoint of the conflict of laws, thereby impeding most seriously the development of arbitration in its interstate and international aspects. Unless arbitration can be relieved in this country of technicality and conflicting legal rules it can never be fully successful, and yet the difficulties to be surmounted are great. The best solution, as between the different states of this country, would no doubt be the adoption of a uniform and adequate arbitration law, and as between this country and foreign countries, adherence to the Geneva Protocol on Arbitration Clauses in a revised and

219. See p. 747, *supra*.

220. See p. 742, *supra*.

221. See pp. 732, 740.

improved form. Such solution, however, lies only in the distant future. In the meanwhile the responsibility of producing a more satisfactory system of commercial arbitration rests with the courts and the legislatures. In the light of our experience with arbitration under the State Draft Arbitration Act since its first enactment in 1920, it seems necessary that certain amendments to the Act be adopted. Some of these have reference to the general machinery of arbitration.²²² Others have more directly to do with commercial arbitration in its interstate and international aspects. In this regard the most important change that should be made is the insertion of a specific provision in the Act that from the standpoint of the conflict of laws arbitration agreements affect the substantive rights of the parties. The Act should contain also certain guide posts for the courts with respect to arbitration agreements made without the state or providing for arbitration without the state, including reference to the validity and irrevocability of such agreements, the conduct of the proceedings, and the power of the courts in the appointment of arbitrators and in otherwise lending their assistance to the arbitration. When the proper relationship between the courts and arbitral proceedings has been established, there is no reason why arbitration in this country should not become as effective a means in the settlement of commercial disputes as it is in England.

222. These have been dealt with fully by Phillips, *supra* notes 50, 97; *Rules of Law on Laissez-Faire in Commercial Arbitration* (1934) 47 HARV. L. REV. 590. See also Isaacs, *Two Views of Commercial Arbitration* (1927) 40 HARV. L. REV. 929.