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DEFAULT JUDGMENTS CONFIRMING EX PARTE ARBITRATION AWARDS — SISTER STATE ENFORCEMENT

MARK W. KAY*

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INTRODUCTION

In the year 1960, assume that a contract is executed in New York between *Buyer*, a resident of Florida, and *Seller*, a resident of New York. The contract calls for the settlement of all disputes arising thereunder by arbitration, the arbitral proceedings to be held in New York under the New York Arbitration Statute. The agreement further provides that the parties are to abide by the rules of *Seller's* trade association.

A dispute arises and *Seller* seeks to settle it by arbitration. *Seller* communicates his intentions to *Buyer*, who, having been a businessman for many years, takes the rather cynical approach that: contracts are made to be broken; arbitration is a device solely designed to cheat him out of his just due by denying him his day in court; and, the rules of *Seller's* association are not binding on him since in addition to his not being a member, he has never seen a copy of its rules. *Buyer* also knew that he owned no property in New York, and that he was not licensed to, nor did he do any business in New York. It therefore was obvious to him that the only place *Seller* successfully could assert his claim for

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alleged breach of contract was in Florida. Based on all of this "misinformation," *Buyer* concluded that he could safely ignore *Seller's* notices.

Imagine *Buyer's* surprise when *Seller* eventually filed suit in Florida based on a default judgment rendered by the New York Supreme Court, confirming an ex parte arbitration award in favor of *Seller*. It is a fairly safe assumption that *Buyer's* attorney will lose no time in pointing out to the Florida court the alleged defects upon which the New York Court erroneously based its jurisdiction over *Buyer's* person. The concluding factor that will appear to determine who shall prevail in *Seller's* Florida action will be couched in terms of whether full faith and credit should or should not be accorded the New York judgment. However, such a "conclusion" can be reached only after Florida has made intelligent inquiry concerning New York's exercise of in personam jurisdiction over *Buyer*. When viewed from this approach it becomes apparent that the critical area as to the enforceability of a sister state's judgment is not whether full faith and credit *per se* must be given, but rather whether any of the alleged jurisdictional defects were sufficient to make the New York judgment a nullity.

The foregoing fact picture is designed to give a fleeting impression of some of the circumstances that could be presented in a Florida action on a sister state judgment. The hypothet, although somewhat typical, falls quite short of encompassing the many factual issues that are raised by the cases dealing with sister state enforcement. Its purpose is primarily one of orientation to provide a point of departure for further discussion.

The first part of this article will deal with the general rules relating to the full faith and credit that must be accorded a sister state judgment based on an ex parte arbitration award. The second part of the article will be devoted to an examination of those jurisdictional defects which are bred most frequently by an ex parte arbitration, wherein the defaulting party allegedly has consented to a sister state's jurisdiction.

I. FULL FAITH AND CREDIT

A. General Rule

A judgment entered on an arbitral award is a judgment on the merits¹ and is entitled to full faith and credit.² This general rule is applicable, as is the case with most rules of law, only in light of the qualifications

1. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *United States Plywood Corp. v. Hudson Lumber Co.*, 127 F. Supp. 489 (S.D.N.Y. 1954); *Merritt-Chapman & Scott Corp. v. State Road Dept.*, 98 So.2d 85 (Fla. 1957); *Springs Cotton Mills v. Buster Boy Suit Co.*, 88 N.Y.S.2d 295 (App. Div.), *aff'd*, 300 N.Y. 586, 89 N.E.2d 877 (1949); *E. Arthur Tutein, Inc. v. Hudson Valley Coke & Products Corp.*, 245 N.Y.Supp. 125 (App. Div. 1930), *aff'd*, 256 N.Y. 530, 177 N.E. 127 (1931); *STURGES. COMMERCIAL ARBITRATION AND AWARDS* 932 (1930).

2. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

and exceptions that surround it. The first and most important exception is that only those judgments rendered by *courts of competent jurisdiction* are entitled to full faith and credit.³ When a defendant has never had his day in court with respect to jurisdiction, the above qualification permits him to relitigate the rendering court's jurisdiction over the parties and the subject matter.⁴

A court's jurisdiction over the person, and subsequent attempts to litigate that issue, presents one of the greatest drawbacks to the growth

prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONSR., art. IV, § 1.

Congress has prescribed the credit to be given by providing that such acts, records, and judicial proceedings must be given "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1958).

For cases illustrating the general rule stated in the text see: *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir. 1953); *Pan Am. Foods Co. v. Lester Lawrence & Son, Inc.*, 147 F. Supp. 113 (N.D. Ill. 1956) (enforced in a jurisdiction lacking a modern arbitration statute); *United States Plywood Corp. v. Hudson Lumber Co.*, 127 F. Supp. 489 (S.D.N.Y. 1954); *Hirsch Fabrics Corp. v. Southern Athletic Co.*, 98 F. Supp. 436 (E.D. Tenn. 1951) (enforced in a jurisdiction lacking a modern arbitration statute); *Ripley Fabrics Corp. v. Hymen*, 91 F. Supp. 1007 (N.D. Ill. 1950) (enforced in a jurisdiction lacking a modern arbitration statute); *Marvello Fabrics, Inc. v. Jaris*, 87 F. Supp. 245 (W.D. Mo. 1949) (enforced in a jurisdiction lacking a modern arbitration statute); *Mulcahy v. Whitehill*, 48 F. Supp. 917 (D. Mass. 1943); *Pacific Mills v. Hillman Garment, Inc.*, 87 So.2d 599 (Fla. 1956) (enforced in a jurisdiction which at the time lacked a modern arbitration statute); *Tanbro Fabrics Corp. v. Hymen*, 341 Ill. App. 396, 94 N.E.2d 93 (1950) (enforced in a jurisdiction lacking a modern arbitration statute); *Catz Am. Co. v. Westco Products*, 8 ARB. J. (n.s.) 209 (Los Angeles Munic. Ct. 1953); *Wernwag v. Pawling*, 5 Gill. & J. 500, 25 Am. Dec. 317 (Md. 1833) (enforced in a jurisdiction lacking a modern arbitration statute); *Samincorp So. Am. Minerals & Merchandise Corp. v. Lewis*, 337 Mass. 298, 149 N.E.2d 385 (1958); *Cohen & Sons v. Thompson & Starr*, 4 ARB. J. (n.s.) 307 (Ore. 1949). See also *Milliken v. Meyer*, 311 U.S. 457 (1940); *Rothschild & Co. v. Marshall*, 44 F.2d 546 (9th Cir. 1930); *In re Norris' Estate*, 78 Cal. App.2d 152, 177 P.2d 299 (1947).

This article examines foreign judgments in the interstate context. See *Bata v. Hill*, 139 A.2d 159 (Del. Ch. 1958), where the court classified foreign judgments as international and interstate. However, it should be noted that although the concept of full faith and credit is inapplicable to foreign awards rendered abroad against a party resident in the United States and international judgments confirming them, the New York courts, in the absence of any constitutional compulsion, have upheld them as illustrated in the leading cases of *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931), and *Sargant v. Monroe*, 49 N.Y.S.2d 546 (App. Div. 1944). Both these cases followed the American conflict of laws view that validity depends on the observance of the law of the place where the award or judgment was rendered. RESTATEMENT, CONFLICT OF LAWS § 450(1) (1934).

3. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873); *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850).

4. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912); *Wetmore v. Karrick*, 205 U.S. 141 (1907); *Hart v. Sansom*, 110 U.S. 151 (1884); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873). *But see Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Trienies v. Sunshine Mining Co.*, 308 U.S. 66, 78, n.26 (1939), discussing an *implied* finding of jurisdiction by the rendering court, thus making the jurisdictional issues *res judicata*.

For some excellent articles discussing the issue of full faith and credit and jurisdiction see, *Reese & Johnson, The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 176 (1949); *Rashid, The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues*, 36 GEO. L.J. 154 (1948); *Cheatham, Res Judicata and the Full Faith and Credit Clause*, 44 COLUM. L. REV. 330, 351 (1944); *Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940); *Medina, Conclusiveness of Rulings on Jurisdiction*, 31 COLUM. L. REV. 238 (1931).

of interstate arbitration. This is particularly true in situations like the one posed in the introductory hypothet, namely, where a default judgment is rendered against a nonresident defendant who never made an appearance, which judgment the plaintiff now seeks to enforce in the state where defendant resides. In the absence of an appearance by the defendant, neither the doctrines of *res judicata* nor estoppel by judgment become operative to foreclose the question of jurisdiction.⁵ Therefore, the forum is completely free to inquire into the jurisdiction of the rendering court, and if it is found lacking, the judgment will be declared a nullity.

Florida is the only state that *legislatively* has expressed a policy favorable to the enforcement of award confirming judgments, both sister state and foreign, by providing for their expeditious enforcement through the use of motion practice.⁶ Section 57.27(2) of the recently enacted Florida Arbitration Code provides:

Any judgment entered upon an award by a court of *competent jurisdiction* of any state, territory, the Commonwealth of Puerto Rico or foreign country shall be enforceable by application as provided in § 57.26 and regardless of the time when such award may have been made. (Emphasis added.)⁷

The above section, although it establishes a climate favorable to enforcement, is persuasive but certainly not conclusive insofar as the jurisdiction of the rendering court over the defendant's person and the subject matter is concerned. The question of "competent jurisdiction" is still open to attack.⁸

B. Choice of Law

Another facet of full faith and credit is the choice of law governing the validity of the judgment sought to be enforced. The question of choice of law for purposes of full faith and credit is to be distinguished from the problem of whether arbitration should be characterized as substantive or procedural for purposes of enforcing the arbitration agreement, an area beyond the scope of this article.⁹ The general authority is to

5. See cases cited note 4 *supra*. See also *Harris v. East India Trading Co.*, 144 N.Y.S.2d 894 (Sup. Ct. 1955) (participation in selection of the arbitrators, or in any of the proceedings, *estops* the raising of the jurisdictional issue as to the making of the contract providing for arbitration).

6. Section 57.26 of the Florida Arbitration Code provides:

[A]n application to the court under this law shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. FLA. STAT. § 57.26 (1959).

7. FLA. STAT. § 57.27(2) (1959).

8. See note 3 *supra*.

9. *E.g.*, *Moyer v. Van-Dye-Way Corp.*, 126 F.2d 339, 341 (3d Cir. 1942); 2 BEALE, CONFLICT OF LAWS § 347.6 (1935); RESTATEMENT, CONFLICT OF LAWS § 450(1) (1934). For articles dealing with choice of law generally see, Wientraub, *Due Process and Full Faith and Credit Limitations on State's Choice of Law*, 44 IOWA L. REV. 449 (1959); Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

the effect that the validity of an arbitration award and judgments rendered thereon is determined by the law of the state of rendition.¹⁰ There is, however, no constitutional compulsion under the full faith and credit clause which requires a forum to follow this rule. Notwithstanding the lack of constitutional compulsion, the rule governing validity in a judgment enforcement context would seem to be fairly well settled.

Although further discussion on this point would appear unnecessary, certain disturbing language in several recent Florida decisions make this writer wonder whether these opinions might serve as a basis for turning this so-called settled area into a boiling controversy.

In *Pacific Mills v. Hillman Garment, Inc.*,¹¹ a complaint alleging an arbitration proceeding conducted according to the provisions of the New York Arbitration Act,¹² participation by the defendant; and a judgment confirming an award in favor of plaintiff, was held to have stated a cause of action. Although the Florida Supreme Court took judicial notice¹³ of the default provisions of the New York Act,¹⁴ its evaluation thereof entailed an admixture of New York and Florida law, with the latter definitely predominating. The following excerpts from the opinion illustrate the evaluative process used to determine the validity of the New York judgment.

We are next confronted with the question as to whether these provisions of the New York Civil Practice Act so *comport with our notions of due process* as to accord to the New York judgment full faith and credit. . . . (Emphasis added.)¹⁵

Our traditional ideals of fair play and substantial justice demand that when a person is sued, he should have notice of the suit and an opportunity to defend. (Emphasis added.)¹⁶

The unique methods utilized to determine the validity of a sister state judgment in the *Hillman* case, unfortunately, have not gone unnoticed. In *Futterman v. Gerber*,¹⁷ the specially concurring opinion, based on the

10. These problems have been particularly acute in the federal courts where the rule of *Eric v. Tompkins*, 304 U.S. 64 (1938), has been playing havoc. See, e.g., *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (arbitration *substantive* for purposes of *Erie*); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960) (United States Arbitration Act applicable in diversity cases where agreement qualifies under the act); *Miller v. American Ins. Co. of Newark, N.J.*, 124 F. Supp. 160 (W.D. Ark. 1954) (motion to stay suit on Texas insurance contract, executed in Texas to Texas resident, granted holding that Arkansas law of revocability would not control unless the Texas law of irrevocability "offended a strong public policy of the forum").

11. 87 So.2d 599 (Fla. 1956).

12. N.Y. CIV. PRAC. ACT art. 84.

13. In Florida, the Uniform Judicial Notice of Foreign Law Act, FLA. STAT. § 92.031 (1959), requires the party to plead the foreign law that he intends to rely upon in order to secure the benefits of such law. See *Kingston v. Quimby*, 80 So.2d 455 (Fla. 1955) (strictly construing the statute); Stern, *Florida Conflict of Laws*, 10 MIAMI L.Q. 260 (1956); Stern, *Florida Conflict of Laws*, 8 MIAMI L.Q. 209 (1954).

14. N.Y. CIV. PRAC. ACT § 1450. See text accompanying note 32 *infra*.

15. *Pacific Mills v. Hillman Garment, Inc.*, 87 So.2d 599, 602 (Fla. 1956).

16. *Id.* at 602.

17. 109 So.2d 575 (Fla. App. 1959).

authority of *Hillman*, contended that "it was incumbent upon the trial judge to determine whether the manner employed to effect service of process . . . comports with *our* notions of due process." (Emphasis added.) After comparing the Illinois statute that was used as a standard in *Hillman*, it was found to be "agreeable to *our* traditional ideals of fair play and substantial justice. . . ." ¹⁸

If the comparisons made with Florida statutes are solely for the purpose of achieving a better understanding as to how the sister states have implemented their statutes, then they are harmless ones. However, if Florida statutes are to be set up as standards to which sister state practices are to be compared, harmless enlightenment has been perverted to permit an evaluation of validity under the law of Florida.¹⁹ This latter type determination directly contravenes the prevailing conflict of laws rule that the validity of a sister state's judgment is determined by the law of the state of rendition.²⁰ Under the "newly reinvigorated full faith and credit

18. *Id.* at 576 (Emphasis added). In *Pacific Mills v. Hillman Garment, Inc.*, 87 So.2d 599, 603, the following comparison was made:

Our own state has enacted analogous statutes

We cannot in principle distinguish between an Act that provides that a party subjects himself to the jurisdiction of the courts of a particular state when he voluntarily sets in motion a quasi-judicial proceeding that might ultimately lead to a judgment as a part of the same proceeding under the laws of that state and a statute which by its own force subjects a non-resident to a form of substituted service in a state by engaging in business in that state. (Emphasis added.)

19. The type of thinking which results in deviations from the general rule concerning the law governing the validity of a sister state judgment is not without precedent in Florida. The applicability of the doctrine of *res judicata* received a severe jolt when the Supreme Court of Florida refused to give full faith and credit to a sister state judgment. This peculiar result obtained in *Mabson v. Mabson*, 104 Fla. 162, 169, 140 So. 801, 803-4 (1932), a decision which is apparently still good law in Florida. A decree of divorce was granted to the husband, in Florida, based on constructive service. The wife, in New York at the time, instituted a suit against her husband, based on personal service, for separate maintenance and support. The New York court dismissed the wife's action on the ground that at the time her suit was instituted, the matrimonial domicile of the parties was in Florida, and not in New York. This finding was based on the fact that the Florida court had so held by granting a final decree of divorce to the husband. The wife then brought a bill in the nature of a bill of review to invalidate the Florida decree. The husband set up the New York proceedings as being *res judicata* on the issue of the Florida court's jurisdiction, this question having been fully litigated in New York. In reversing the lower court's dismissal of the wife's bill, the court held that:

The right of a Florida Court to determine whether or not its jurisdiction has been properly invoked and exercised, cannot be barred by what has been determined by the courts of any other state. The courts of this state retain at all times jurisdiction to entertain a bill or other proceeding making a direct attack upon the validity of decrees rendered here, so whatever may have been decided in some state in a collateral proceeding, whether between the same parties or not, would constitute no bar to a proceeding in the courts of this state in which the courts of this state are called upon to determine for themselves their own jurisdiction and the regularity of their own judgments.

20. Another example of when doubt was cast upon the language of the *Restatement* was in the case of *Newport News Shipping & Drydock Co. v. Seaboard Maritime Corp.*, 174 F. Supp. 466, 469 n.17 (D. Del. 1958). The court raised, but did not decide, the apparent conflict between the *RESTATEMENT, CONFLICT OF LAWS* § 450, comment *d* (1934),

The law of a state where a valid judgment is rendered determines who are in privity with the parties to the judgment. If by the law of a state, privity

clause"²¹ and the announced public policy of the forum,²² such thinking has no place in the opinions of the Florida courts.

II. ACQUISITION OF JURISDICTION OVER A DEFAULTING NON-RESIDENT

It is to be noted at the very outset that the agreement to arbitrate is the sole referent from which a court can acquire jurisdiction over a nonappearing party. The rendering court's power depends on the existence and terms of such an agreement. To place in proper perspective the judicial and legislative technicalities and ambiguities which sometimes cloud the issues, it is necessary to realize that they play a role which is subservient to that played by the agreement. Their only proper function is to facilitate the court's determination of whether or not the agreement to arbitrate confers jurisdiction over the parties.²³

Factually, the scope of this section is limited to situations where there has been an alleged consent to jurisdiction followed by an *ex parte* proceeding. Such jurisdictional facts as the making of the agreement to arbitrate, consent and notice are the issues to be resolved.

"The large stream of commerce and industry which is generated in or flows through New York"²⁴ has made it the center of arbitration in

is imposed upon persons over whom the state has no jurisdiction, the judgment is to that extent invalid. and the decision in *Bigelow v. Old Dominion Mining & Smelting Co.*, 225 U.S. 111 (1912), when it noted that "The penultimate sentence of § 450d causes the court some concern; for if a judgment of a court cannot be binding on persons outside the jurisdiction of the state, it would seem violative of procedural due process for a foreign forum to accord greater efficacy to a decree than the adjudicating court."

The court in *Bigelow v. Old Dominion Mining & Smelting Co.*, *supra* at 139, stated that:

[I]t is clear that the conclusive effect of a judgment *in personam* which is recognized when questioned in the courts of another state depends upon whether it is the judgment of a court which had jurisdiction over the person of the defendant sought to be bound. The estoppel here insisted upon is grounded not upon actual notice or appearance, but upon a theory as to the relation between joint tort-feasors under the laws of New York. *If the Massachusetts court was of the opinion that under the general law that relationship was not such as to make Bigelow a party by either privity or representation, it was under no obligation to treat the New York judgment as a bar to the suit in which it was pleaded.* (Emphasis added.)

21. Stern, *The Conflict of Laws in Commercial Arbitration*, 17 LAW & CONTEMP. PROB. 567, 575 (1952).

22. See text accompanying note 7 *supra*.

23. The outlook of Chief Judge Cardozo which enabled him to resolve these recurring technicalities and ambiguities was succinctly stated in *Finsilver, Still & Moss v. Goldberg, Maas & Co.*, 253 N.Y. 382, 392, 171 N.E. 579, 582 (1930):

The task of judicial construction would be easier if statutes were invariably drafted with unity of plan and precision of expression. Indeed, adherence to the same standards would be useful also in opinions. *The ideal being unattainable, we must not exaggerate the significance of deviations from the perfect norm.* (Emphasis added.)

24. Weiss, *The Arbitration Award and the Non-Resident: Nuance in New York*, 48 COLUM. L. REV. 366 n.4 (1948), one of the leading articles on the jurisdictional problems of non-residence. For other articles concerning the enforcement of arbitral awards and judgments rendered thereon see, Heilman, *Enforceability of Foreign Awards*, 3 ARB. J. (n.s.) 183 (1939); Heilman, *Arbitration Agreements and the Conflict of Laws*,

the United States. As a result of its dominant position, the majority of cases dealing with the question of full faith and credit have involved award confirming judgments rendered by New York courts. It thus will become necessary to pay particular attention to the statutory and decisional law of New York dealing with the acquisition of in personam jurisdiction by its courts.

A. Contractual Consent as a Basis for Jurisdiction

It is well settled that parties by contractual consent can confer jurisdiction over their person.²⁵ The verbalization of such an intent is limited only by the imagination of the parties, and the ingenuity of the courts in apprehending their objectives. Some of the more commonly used forms are: (1) an express provision in the "container" contract²⁶ designating a particular jurisdiction²⁷ or alternative jurisdictions²⁸ as the situs for arbitration, usually coupled with a clause stipulating that the arbitration statute of the selected situs shall govern the proceeding;²⁹ (2) a provision in the "container" contract *incorporating by reference*³⁰ either the rules of the American Arbitration Association or the arbitration rules of some trade association.³¹

38 YALE L.J. 617 (1929); Jones, *Judicial Review of Arbitral Awards*, 31 So. Cal. L. REV. 1 (1957); Jones, *Three Centuries of Commercial Arbitration in New York*, 1956 WASH. U.L.Q. 193; Lorenzen, *Commercial Arbitration — Enforcement of Foreign Award*, 45 YALE L.J. 39 (1935); Lorenzen, *Commercial Arbitration — International and Interstate*, 43 YALE L.J. 716 (1934); Popkin & Jacobson, *Jurisdiction Over the Non-Resident in Arbitration Proceedings*, 17 N.Y.U.L. REV. 527 (1940); Stern, *The Conflict of Laws in Commercial Arbitration*, 17 LAW & CONTEMP. PROB. 567 (1952); Comment, *Commercial Arbitration and the Conflict of Laws*, 56 COLUM. L. REV. 902 (1956).

25. *Wilson v. Seligman*, 144 U.S. 41 (1892); BEALE, CONFLICT OF LAWS § 81.1 (1935); RESTATEMENT, CONFLICT OF LAWS § 96 (1934); 21 C.J.S. Courts § 85(c) (1940).

26. The term "container" contract refers to the main agreement between the parties, covering the subject matter of their transaction. One of the matters which may be contained therein is a provision providing for the settlement by arbitration of all disputes arising under the "container" contract.

27. *Matter of Gantt (Hurtado & Cia)*, 297 N.Y. 433, 79 N.E.2d 815 (1948); *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); *Matter of Zimmerman v. Cohen*, 236 N.Y. 15, 139 N.E. 764 (1923).

28. *Prosperity Co. v. American Laundry Mach. Co.*, 67 N.Y.S.2d 669 (App. Div.), *aff'd without opinion*, 297 N.Y. 486, 74 N.E.2d 188 (1947) (where arbitration agreement provided for arbitration either under the laws of New York or Ohio, selection of Ohio by the party who sought arbitration was held sufficient to constitute consent to the jurisdiction of that state). See also *Amazon Cotton Mills Co. v. Duplan Corp.*, 245 N.C. 496, 96 S.E.2d 267 (1957) (suit by North Carolina seller seeking to enjoin a New York buyer from arbitrating in New York as per agreement and to have all matters pertaining to the controversy decided by the courts of North Carolina; held for buyer, since he was the only party asserting a claim, he alone had the right where to elect to bring suit).

29. See cases cited note 27 *supra*.

30. For further discussion of "incorporation by reference" see text accompanying notes 40-53 *infra*.

31. Where the agreement fails to specify the situs for arbitration but does incorporate the arbitration rules of the American Arbitration Association, rule 10 gives the association the authority to fix the situs.

In giving effect to the intent of the parties, the courts tend to view the problem in light of the general purpose sought to be achieved by the provision for arbitration.³² The dominant theme which serves as a backdrop to the determination of contractual intent is that parties who choose to settle their controversies by arbitration are bound by this choice, and a recalcitrant party will not be relieved of the contractual obligations he has assumed.³³

One of the key provisions of the New York Arbitration Act is section 1450, which provides that:

The making of a contract . . . providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme court of this state to enforce such contract . . . and to enter judgment on an award thereon. A party . . . may petition the supreme court . . . for an order directing that such arbitration award proceed in the manner provided for in such contract. . . . Service thereof shall be made in the manner specified in the contract . . . and if no manner be specified therein, then in the manner provided by law for personal service of a summons, within or without the state, or substituted service of a summons, or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice as shall be served in such manner as the court or judge may direct. (Emphasis added.)³⁴

10. *Fixing of locality.* . . . If the locality is not designated in the Contract or Submission, or if within seven days from the date of filing the Demand or Submission, the parties do not notify the Administrator of such designation, it shall have the power to determine the locality and its decision shall be final.

In *Bradford Woolen Corp. v. Freedman*, 189 Misc. 242, 71 N.Y.S.2d 257 (Sup. Ct. 1947), the association's selection of New York as the situs for arbitration was upheld as a consent by the parties to the jurisdiction of the New York courts.

"New York is the situs of arbitration designated by many associations which handle a considerable volume of disputes with rules similar to that of the American Arbitration Association." (Emphasis added.) Weiss, *The Arbitration Award and the Non-Resident: Nuance in New York*, 48 COLUM. L. REV. 366 n.4 (1948).

32. *Arlington Towers Land Corp. v. John McShain, Inc.*, 150 F. Supp. 904 (D.D.C. 1957) (in determining the validity of an award the court must give effect to the intent of the parties as evidenced by the agreement itself, which will be liberally construed to that end); *Amsterdam Dispatch, Inc. v. Devery*, 4 N.Y.S.2d 908 (App. Div.), *aff'd*, 278 N.Y. 688, 16 N.E.2d 403 (1938). See also *Matter of Wenger & Co. v. Propper Silk Hosiery Mills*, 239 N.Y. 199, 203, 146 N.E. 203, 204 (1924) ("When [parties] have selected their tribunal, the courts ought not to interfere unless very substantial reasons are shown").

33. See, e.g., *Matter of Amtorg Trading Corp.*, 304 N.Y. 519, 109 N.E.2d 606 (1952) (motion to stay granted, party who agreed to arbitrate in Russia will not be relieved of the contractual obligation it assumed); *Gilbert v. Burnstine*, 255 N.Y. 344, 174 N.E. 706 (1931); *Republique Francaise v. American Foreign S.S. Corp.*, 129 N.Y.S.2d 330 (Sup. Ct. 1953).

34. FLA. STAT. § 57.27(1) (1959), is the Florida counterpart of section 1450 of the New York Civil Practice Act. It provides:

The making of an agreement or provision for arbitration subject to this law and providing for arbitration in this state shall, whether made within or outside this state, confer jurisdiction on the court to enforce the agreement or provision under this law, to enter judgment . . . vacate, modify or correct an award rendered thereunder

The legislative construction given to arbitration agreements by the above provision has provided the New York courts with a guide which removes any doubt that might previously have existed concerning their acquisition of jurisdiction over defaulting nonresidents.³⁵

The courts have encountered little difficulty in finding the consent provision of section 1450 applicable when the agreement for arbitration specifically designates New York as the situs for arbitration,³⁶ but in the absence of such a designation, the results have not been consistent.³⁷

In *Bradford Woolen Corp. v. Freedman*,³⁸ the New York Supreme Court held that under section 1450, a contract calling for arbitration in New York³⁹ was a consent to the jurisdiction of the New York Supreme Court to enter judgment upon the award. In upholding the constitutionality of the section, the court stated:

[T]he consent to arbitrate in New York was the establishment of contact with this State and service of the papers by mail gave sufficient notice to respondents, both at the arbitration proceedings proper and on this application to bring forth objections from them as to jurisdiction.⁴⁰

In answer to the contentions that section 1450 was not within the established limits for founding *compulsory judicial jurisdiction* upon the performance of acts within the state, the New York Supreme Court was of the opinion that:

Only in a limited sense, if, at all, can the jurisdiction conferred by the section be said to be compulsory. Initially the jurisdiction springs from the voluntary act of the nonresident himself who by written contract has obligated himself to arbitrate a controversy in this state. All section 1450 . . . does is to infuse this undertaking with practical utility by making it enforceable in the courts of the state where the arbitration itself is to be held. In so making the local forum accessible to the parties the law merely fashions a remedy which presumably they themselves would have chosen to implement their agreement. When so understood, the deemed consent to jurisdiction becomes a true and actual consent, rather than one imposed by force of law.⁴¹

35. See Weiss, *The Arbitration Award and the Non-Resident: Nuance in New York*, 48 COLUM. L. REV. 366 (1948), for a detailed analysis of those cases arising prior to the 1944 amendment to section 1450.

36. See note 27 *supra*.

37. Compare *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929), with *Application of L. N. Jackson & Co.*, 106 N.Y.S.2d 725 (Sup. Ct. 1951).

38. 189 Misc. 242, 71 N.Y.S.2d 257 (Sup. Ct. 1947).

39. See *Bradford Woolen Corp. v. Freedman*, note 31 *supra* for the type of contract used.

40. *Bradford Woolen Corp. v. Freedman*, 189 Misc. 242, 246, 71 N.Y.S.2d 257, 260 (Sup. Ct. 1947).

41. *Application of Liberty Country Wear*, 197 Misc. 581, 585, 96 N.Y.S.2d 134, 138 (Sup. Ct. 1950).

B. *The Making of an Agreement to Arbitrate*

In the preceding section, there was little dispute as to the making of an agreement to arbitrate. The main controversy, whether the parties had consented to the jurisdiction of the rendering court by their contractual expressions, presupposed the existence of an agreement to arbitrate. An investigation into this most basic of issues, the making of an agreement to arbitrate, is the subject of this section.

One of the most difficult objections to overcome, in an action to enforce a default judgment, is the contention by the defendant that he never entered into an agreement to arbitrate. In the absence of such an agreement, all the legislative implementation in the world would be for naught, insofar as giving vitality to the jurisdiction of the rendering court is concerned.

The situations under which such a contention arises fall into three basic factual categories. They are: (1) when the only reference to arbitration is made in material *incorporated by reference* into the "container" agreement; (2) when the defendant denies ever having entered into a "container" contract with the plaintiff or denies ever having entered into an agreement to arbitrate disputes arising thereunder; and finally, (3) when the defendant admits entering into an agreement to arbitrate disputes arising under the "container" contract, but denies the validity of the "container" contract on grounds sufficient to void it, such as, that the acceptance was induced by fraudulent misrepresentation.

1. INCORPORATION BY REFERENCE

The jurisdiction of a rendering court has proved highly vulnerable when the "container" agreement omits the customary language expressing an intent to settle all future disputes arising thereunder by arbitration. In such situations, the court must find that it was the intent of the parties to be bound by an arbitration provision contained in a set of rules which, as a totality, were *incorporated by reference* into the main agreement.⁴² Unless such an intent can be found, the court lacks power to hear and determine the cause.

In *Samson v. Bergin*,⁴³ the defendant, in a suit brought in Connecticut on a New York judgment, denied the existence of an agreement to arbitrate. The precise issue presented was whether "the New York court had jurisdiction to render judgment in personam against the defendant,"⁴⁴ a resident of Connecticut. The "container" contract, through an arbitration provision in same, stipulated that all disputes other than those relating to quality

42. See WILLISTON, *CONTRACTS* § 628 (Students' ed. 1938); *RESTATEMENT, CONTRACTS* § 230 (1932).

43. 138 Conn. 306, 84 A.2d 273 (1951).

44. *Id.* at 308-9, 84 A.2d at 274.

of merchandise "shall be submitted to the American Arbitration Association." A dispute arose concerning a failure to make delivery, and plaintiff demanded arbitration in New York under the rules of the American Arbitration Association. Defendant ignored the notices, and refused to partake in the hearings. The Supreme Court of Connecticut, in denying full faith and credit to the New York judgment, held that there were insufficient facts to support the inference that defendant even had "constructive knowledge" of the arbitration *rules* of the American Arbitration Association. In the absence of express consent, or an incorporation of those *rules* by reference, and the provision for arbitration being silent on the situs of the arbitration, the court concluded that the defendant could not be held to have agreed either to be bound by the *rules* of the American Arbitration Association or to arbitrate in New York.

It has been held on the other hand that when the arbitration provision does provide for arbitration *under the rules and regulations* of the American Arbitration Association, "the fact that no copy of the rules and regulations . . . was furnished to the judgment debtor is immaterial."⁴⁵

The results of the *Samson* case are not so shocking when viewed in light of the confused state of affairs that presently exists in New York with regard to incorporation by reference. Three recent decisions of the New York Court of Appeals form the basis for this confusion.⁴⁶ In *Level Export Corp. v. Wolz, Aiken & Co.*,⁴⁷ contracts for the purchase of textiles were *held to incorporate the arbitration clauses of a standard textile sales note*. The contracts provided that such note "is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller."⁴⁸

In *Riverdale Fabrics Corp. v. Tillinghast-Stiles Corp.*,⁴⁹ the "container" contract contained a provision making it subject to the Cotton Yarn Rules of 1938, as amended. The court, going contrary to, but not overruling its prior decision in *Level Export*, held that the clause in the sales contract was not legally sufficient to incorporate by reference an arbitration provision in the referred to Cotton Yarn Rules. In an approach similar to that taken in the *Samson* case, the court stated that "the intent must be clear to render arbitration the exclusive remedy; parties are not to be led into arbitration unwittingly through subtlety."⁵⁰

45. *American-British T.V. Movies, Inc. v. KOPR-TV, Cooper Broadcasting Co.*, 144 N.Y.S.2d 548 (Sup. Ct. 1955).

46. *In re American Rail & Steel Co.*, 308 N.Y. 577, 127 N.E.2d 562 (1955); *Riverdale Fabrics Corp. v. Tillinghast-Stiles Corp.*, 306 N.Y. 288, 118 N.E.2d 104 (1954); *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 111 N.E.2d 218 (1953).

47. 305 N.Y. 82, 111 N.E.2d 218 (1953).

48. *Id.* at 84, 111 N.E.2d at 219 (all italicized in original.)

49. 306 N.Y. 288, 118 N.E.2d 104 (1954); Annot., 41 A.L.R.2d 867 (1955).

50. *Id.* at 291, 118 N.E.2d at 106.

In the most recent case, *In re American Rail & Steel Co.*,⁵¹ the court was confronted with an incorporating clause very similar to the one used in the *Level Export* case.⁵² It seemed clear that all of the provisions of the incorporated form were intended to apply, including the arbitration provision. Notwithstanding this similarity, and the court's finding of incorporation in the *Level Export* case, it was held, on the authority of *Riverdale*, that the arbitration provision was not validly incorporated into the sales contract.

The decision in the *American Rail & Steel* case, although not overruling the *Level Export* decision,⁵³ requires that extreme caution be exercised in the use of an incorporating clause. Until the court resolves this apparent conflict, the only safe solution, short of a formalistic adherence to the clause used in *Level Export*, is to include all arbitration provisions in the body of the "container" contract.⁵⁴

The case of *Wilson & Co. v. Fremont Cake & Meal Co.*,⁵⁵ decided in 1948, by a federal district court in Nebraska, is one of the few decisions dealing with incorporation by reference to view contractually assumed obligations as promises to be kept, and not compromised at the expense of the future growth of arbitration. In an excellent review of most of the arguments for and against incorporation, the court held that the proviso "Rules: National Soybean Association" bound the parties to arbitrate as provided in one of the association's rules. It is unfortunate that the positive reasoning of the *Wilson* case has not been adopted by those courts whose decisions chart the course of arbitration.

51. 308 N.Y. 577, 127 N.E.2d 562 (1955).

52. The container agreement provided that:

This contract is placed in accordance with the conditions of contract Form ISM 826 Rev. Copy attached and can be modified or supplemented only in writing and signed by both parties hereto. *Id.* at 579, 127 N.E.2d at 562.

Paragraph 25 of the aforementioned form, which was *not* attached, nor were its contents brought to the seller's attention, provided that:

Arbitration: All questions and controversies arising in connection with this contract shall be submitted to arbitration in New York, N.Y., in accordance with the rules of arbitration of the American Arbitration Association. *Id.* at 579, 127 N.E.2d at 562.

53. The court's attempt to distinguish *Level Export* is rather weak. In both cases the party denying the making of an agreement to arbitrate was not a member of the association whose rules were incorporated, nor were the incorporated materials attached to the container contract or seen by the parties in either case.

54. But see *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364, 373 (D. Neb. 1948):

The plaintiff urges . . . that the parties to the present contract might have manifested their agreement to arbitrate by a short and simple paragraph in the memorandum explicitly declaring such a purpose, or by a clause to the effect that, in adopting the association's rules, they intended to adopt rule 115 dealing with arbitration. To this court, such a position seems utterly untenable. If any of the rules were *not* to be operative their omission ought, indeed, to have been expressly incorporated into the memorandum by appropriate language. But having adopted by adequate descriptive language the entire group of rules, the addition of such a phrase as, 'and we intend to include Rule 115,' would appear to be the ultimate in supererogation.

55. 77 F. Supp. 364 (D. Neb. 1948).

2. MAKING OF CONTRACT DENIED

A default judgment based on an ex parte arbitration award has proved as vulnerable to a jurisdictional attack in the federal courts, under the United States Arbitration Act,⁵⁶ as in state proceedings, when the issue raised was the making of the agreement to arbitrate.

In *Hanes Supply Co. v. Valley Evaporating Corp.*,⁵⁷ a federal district court in Oregon entered a default judgment against a nonresident, in proceedings brought under the United States Arbitration Act,⁵⁸ to confirm an ex parte arbitration award. Defendant made no appearance, and service was perfected by mail under section 9 of the Act which allows personal service upon nonresidents in any district where they may be found.⁵⁹ Jurisdiction was founded upon a written contract *which defendant did not sign, but allegedly assumed*. The venue for a motion to confirm, in the absence of a particular court being specified by the parties, is the district within which the arbitral award was made. The situs of the arbitration was to be whichever of the cities listed in the agreement that was closest to the destination point. *Notwithstanding the fact that Cincinnati was the city closest to Atlanta, the plaintiff proceeded to arbitration in Portland, Oregon* where the award was rendered. Suit was instituted on the judgment in Atlanta, the district where the defendant resided.

The court of appeals for the Fifth Circuit, reversing a judgment for plaintiff, held that the trial court erred in excluding, as a matter of law, from its considerations the contentions of defendant that: no agreement

56. 9 U.S.C. §§ 1-14 (1958).

57. 261 F.2d 29 (5th Cir. 1958).

58. The pertinent portions of sections 2 and 9 of the United States Arbitration Act which enable a party to make application to a federal district court for confirmation of an award are:

§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, 9 U.S.C. § 2 (1958).

§ 9. *Award of arbitrators; confirmation; jurisdiction; procedure.* If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected. . . . If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. 9 U.S.C. § 9 (1958).

59. 9 U.S.C. § 9 (1958):

Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. . . . If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

to arbitrate had ever been made by him; or if one had been made, it was not to arbitrate at the place where arbitration was held; and, therefore, the default judgment based on such purported arbitration was *void for want of proper venue*. The court noted that to foreclose to defendant "the right ever to challenge the existence of the peculiar circumstances which alone gave the court [jurisdiction] . . . would be an extreme case of 'lifting oneself by his own bootstraps.'"⁶⁰

Despite the extreme facts of the *Hanes* case, where the defect in venue was patent,⁶¹ it would seem to be the rule in the Fifth Circuit that unless the defendant makes an appearance,⁶² or is personally served in the state where the district court is located, in an action under the United States Arbitration Act he can subsequently attack the court's jurisdiction on either of the alternate grounds stated by the defendant in the *Hanes* case.⁶³

Section 1458(2) of the New York Civil Practice Act provides a means whereby the issue of the contract's making can be settled conclusively at an early stage in the proceedings. The section states that:

A party who has not participated in the selection of the arbitrators or in any of the proceedings had before them and who has not made or been served with an application to compel arbitration under section fourteen hundred fifty may also put in issue the making of the contract or submission or the failure to comply therewith, either by a motion for a stay of the arbitration or in opposition to the confirmation of the award. *If a notice shall have been personally served upon such party of an intention to conduct the arbitration pursuant to the provisions of a contract or submission contract or submission specified in such notice, then the issues specified in this subdivision may be raised only by motion for a stay of the arbitration, notice of which motion must be served within ten days after the service of the notice of intention to arbitrate.* Such notice must state in substance that unless within

60. *Hanes Supply Co. v. Valley Evaporating Corp.*, 261 F.2d 29, 34 (5th Cir. 1958).

61. The patency of the error is of course dependent upon the court's interpretation of the venue requirements of section 9, "the district within which such award was made," would seem to indicate that the only thing significant is the ultimate fact that an award was rendered within the district. Under such a construction, the requirements of the agreement as to the situs would not appear to be controlling.

62. In a footnote the court observed that once an appearance is made in the rendering court, even a special appearance to contest jurisdiction, "the rule of *res judicata* would apply." The rule laid down in *Baldwin v. Iowa State Traveling Men's Association*, 282 U.S. 522, 525 (1931) "states the principle we apply here, where there was no appearance; 'It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction.'" (Citations omitted.) *Hanes Supply Co. v. Valley Evaporating Corp.*, 261 F.2d 29, 34 n.7 (5th Cir. 1958).

63. The language of the opinion would seem to indicate that the making of the agreement to arbitrate would still be in issue and open to inquiry even if the agreement specified the rendering court as the one to enter judgment or in the absence of such specification named as the situs for arbitration a place wherein the rendering court presided. *Hanes Supply Co. v. Valley Evaporating Corp.*, 261 F.2d 29, 33 (5th Cir. 1958).

ten days after its service, the party served therewith shall serve a notice of motion to stay the arbitration, *he shall thereafter be barred from putting in issue the making of the contract or submission or the failure to comply therewith.* (Emphasis added.)

New York is the only state that thus far has enacted such a provision. Research has failed to reveal a case involving an action on a sister state's judgment when failure to answer a notice sent under section 1458(2) was pleaded as barring an inquiry into the making of the "container" contract or the agreement to arbitrate disputes arising thereunder.

The issue, however, has arisen in an intrastate context. In *Schrafran & Finkel v. M. Lowenstein & Sons*,⁶⁴ the plaintiff brought a plenary action in equity to restrain the entry of a judgment on an ex parte award rendered against him. Plaintiff maintained that the award was a nullity as he had not bought goods from defendant, had not agreed to any submission to arbitration, and had not signed a contract to arbitrate. The lower court granted defendant's motion to dismiss on the ground that the letter sent by defendant to plaintiff notifying him of an intent to arbitrate was sufficient to bar plaintiff's action under section 1458(2). Plaintiff's failure to move for a stay of arbitration under section 1458(2), in response to the notice, was held to bar him forever from setting aside the award on the ground that there was no valid contract. The New York Court of Appeals reversed, holding that the notice was insufficient to bind plaintiff. "The notice should state where and at what time the party is to proceed and the consequences of his failure to act as the law specifies."⁶⁵ The court seriously doubted how a party who made no contract could be "bound by an award of arbitrators who had no jurisdiction."⁶⁶ However, the court begrudgingly *seemed* to admit that a notice fulfilling the above requirements would constitute due process of law.

It seems that in the modern scheme of things, disputes and suits arising therefrom are an unavoidable by-product of economic commercial endeavor. Under such circumstances, it may be contended that businessmen have an affirmative duty to bring their differences to as expeditious a conclusion as is possible. Simply stated, this means that there are some notices which should not be permitted to go unnoticed without dire conse-

[A]ppellant denied the existence of any written contract binding on it agreeing to an arbitration and, a fortiori, the existence of any contract which specified Portland as the place for any arbitration, or the district court of the district of Oregon as the court which could enter final judgment as contemplated in Section 9; that without the existence of such an agreement the provisions of that section for service on a non-resident never became applicable, and since the defect in service under the usual venue and service requirements were not waived by a voluntary appearance, the Oregon district court never obtained jurisdiction over the person of appellant in order to make a binding determination on the existence of the agreement to arbitrate. (Emphasis added.)

64. 280 N.Y. 164, 19 N.E.2d 1005 (1939).

65. *Id.* at 172, 19 N.E.2d at 1008.

66. *Id.* at 171, 19 N.E.2d at 1007.

quences attaching. This is the result that section 1458(2) seeks to accomplish. Whether this duty should extend to situations like *Schafraan*, where they deny ever having entered into a legal relationship, is highly debatable.

How sister state courts will react to section 1458(2) is unknown. If the reaction of the court in *Schafraan* is any indication, it will not be a favorable one. The failure of the New York legislature to provide for a uniform type notice is an oversight which many courts will undoubtedly seize upon, as did the court in *Schafraan*, to hold the notice insufficient. A similar result could be achieved by narrowly construing section 1458(2) as barring only the question of whether the defendant entered into an agreement to arbitrate in New York. Such a construction would leave the issue of the making of the "container" contract open to inquiry in the subsequent action.

3. CONTRACT INDUCED BY MISREPRESENTATION

An action was brought in a Tennessee federal district court on a New York default judgment confirming an ex parte arbitration award.⁶⁷ Defendant made no appearance in the New York proceedings, and for the first time contended that there was no contract to arbitrate between the parties, in that defendant was induced to sign the contract by the alleged misrepresentations of the plaintiff.

In granting full faith and credit to the judgment, the court held that those contentions should have been raised in the New York court "and the defendant having failed to make them there cannot make them here, for the reason that . . . under section 1458 [part one], defendant was given an opportunity to attack the contract and, having failed to do so, is now foreclosed from raising the question."⁶⁸ The defendant made the further objection that since he made no appearance in response to plaintiff's notice, plaintiff's failure to move for an order to proceed prior to instituting proceedings was fatal. The court quickly disposed of this objection holding that such a motion was unnecessary under the authority of section 1458.⁶⁹

The finality of the rendering court's determination of its jurisdiction as being conclusive of whether an agreement to arbitrate had been made is a jurisdictional issue which has threaded its way through much of the discussion in this section. The decision in the above case is particularly

67. *Hirsch Fabrics Corp. v. Southern Athletic Co.*, 98 F. Supp. 436 (E.D. Tenn. 1951).

68. *Id.* at 439.

69. The pertinent provisions of section 1458 of the New York Civil Practice Act provide: "An award shall be valid and enforceable according to its terms and under the provisions of this article, without previous adjudication of the existence of a submission or contract to arbitrate. . . ."

significant in that the court refused to inquire into the making of the agreement, viewing the New York proceeding as being conclusively determinative of that issue. The case is factually distinguishable from a *Schafran* type situation in several major respects. First, the defendant admitted entering into a contract with plaintiff which called for arbitration and consent to the jurisdiction of the New York courts;⁷⁰ secondly, defendant received notices of all proceedings, and had ample opportunity to object until judgment was entered; and finally, plaintiff did not attempt to limit defendant's right of objection by sending him a notice of intention to arbitrate as provided for in section 1458(2) of the New York Arbitration Act.⁷¹

The result, viewed in the light of the facts which gave rise to it, would appear to be a desirous one. It places a reasonable duty on the defendant to protect his interests. No longer can a party who has admitted entering into a legal relationship with another, stand idly by while an attempt is being made to resolve a dispute by the methods prescribed in their agreement. It would seem that such a result might conceivably be extended to the incorporation by reference cases. The case of *Samson v. Bergin*⁷² renders little assistance since the court did not consider the issue of finality, although, by implication, its failure to consider the matter may be viewed as a denial of its applicability. However, the view taken by New York in the *American Rail & Steel*⁷³ case seems presently to preclude such an extension.

C. Other Jurisdictional Grounds

If the contract between the parties be construed as evidencing an intent to consent to the jurisdiction of a particular forum, it is vital to note further whether provisions in the contract and the requirements of due process make implicit in such an intent the fulfillment of other conditions precedent. These prerequisites, which must be met before consent can become an established fact, are comprised of such jurisdictional facts of life as: notice; service of process; and capacity to institute proceedings. The list is not complete, but it is illustrative of the complications that can

70. The contract between the parties provided that: "Buyer and seller consent to the jurisdiction of the Supreme Court of the State of New York and further consent that any process or notice of motion or any application to the court, including for application for judgment upon an award, may be served outside the State of New York by registered mail or by personal service, provided a reasonable time for appearance is allowed." (Emphasis added.) *Hirsch Fabrics Corp. v. Southern Athletic Co.*, 98 F. Supp. 436, 438 (E.D. Tenn. 1951).

71. Cf. *Lipman v. Haeuser Shellac Co.*, 289 N.Y. 76, 43 N.E.2d 817 (1942) (once the making of a valid contract or submission and the failure to comply therewith are admitted, a claim that the contract has been cancelled or terminated by the act of one or both of the parties will have no effect on the validity of the award and the judgment rendered thereon).

72. 138 Conn. 306, 84 A.2d 273 (1951).

73. 308 N.Y. 577, 127 N.E.2d 562 (1955).

arise and forever remain to haunt a subsequently rendered judgment. This is particularly true when one of the parties attacking the judgment is a non-resident who never appeared in the proceedings which gave rise to the judgment.

1. NOTICE

The fact that a party fails to partake in arbitration after he has consented to jurisdiction and received notice was recognized in the leading case of *Gilbert v. Burnstine*⁷⁴ as having no effect on the validity of the award rendered. But, even though one consents to jurisdiction, such consent, nevertheless, generally contemplates process in the form of notice.⁷⁵ The "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."⁷⁶

In most "container" contracts, the arbitration rules which are incorporated by reference into the arbitration provision provide for out-of-state service by registered mail.⁷⁷ This manner of service has been upheld as a means provided for by the parties in their contract, and was sufficient to confer jurisdiction on the rendering court.⁷⁸ However, it has been held that the notice must be actually received, and that informal knowledge is not sufficient.⁷⁹

2. CAPACITY OF AGENT

A jurisdictional defect which rarely has received the attention of the courts is the legal capacity of an agent who institutes arbitration proceedings in his own name without joining his principal.⁸⁰ The two cases that have considered the question held that an agent *can* institute arbitration

74. 255 N.Y. 348, 174 N.E. 706 (1931).

75. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

76. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

77. *E.g.*, by incorporating the rules of the American Arbitration Association into their arbitration provision, each party "shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules and for any court action in connection therewith or for the entry of judgment or any award made thereunder may be served upon such party (a) by mail addressed to such party or his attorney at his last known address . . . provided that reasonable opportunity to be heard with regard thereto has been granted such party." Rule 39, Commercial Arbitration Rules of the American Arbitration Association.

78. *Ripley Fabrics Corp. v. Hymen*, 91 F. Supp. 1007 (N.D. Ill. 1950) (arbitration rules of the National Federation of Textiles); *Battle v. General Cellulose Co.*, 23 N.J. 538, 129 A.2d 865 (1957) (rules of the American Arbitration Association); *Merger Fabrics, Inc. v. Coill-Shuman Co.*, 74 N.Y.S.2d 76 (Sup. Ct. 1947) (rules of the American Arbitration Association).

79. *Republique Francaise v. Cellosilk Mfg. Co.*, 309 N.Y. 269, 128 N.E.2d 750 (1955), Note, 56 COLUM. L. REV. 955 (1956). But see *Stafford Int'l Corp. v. Hartman Hosiery Co.*, 89 N.Y.S.2d 172, 173 (Sup. Ct. 1948) (party who inexplicably refused six registered letters of notice was held to have been "afforded every reasonable opportunity of participation in the arbitration. . . . [I]ts default was not unintentional, and in the interests of justice it is not entitled to put the petitioner to the time, expense and burden of a repeat arbitration proceeding.")

80. "In every suit there must be a legal entity [known] as the real plaintiff, either a natural or artificial person, or a quasi-artificial person, such as a partnership; and where a suit is brought in a name which is neither, it is a nullity. . . ." Board of Road &

proceedings if he is vested with sufficient authority.⁸¹ What determines the sufficiency of the agent's authority is a question of fact.⁸² In *Watts v. Phillip-Jones Corp.*,⁸³ the New York Supreme Court held that the plaintiff was more than a mere agent because the contract was made in his own name, and all the dealings were to be made through him. Therefore, under the circumstances, he came within one of the exceptions of the New York Code of Civil Procedure⁸⁴ which permitted him to bring suit. *Application of Eimco Corp.*⁸⁵ followed the principle of *Watts*, in that an agent authorized to conduct arbitration proceedings on behalf of his principal could not, as a matter of law, be said to be an improper party, but held that a hearing was necessary for it to determine whether the agent had sufficient authority.

Under section 210 of the New York Civil Practice Act, a "trustee of an express trust" has been construed to include a person with whom or in whose name a contract is made for the benefit of another, and such party may sue without joining the person for whose benefit the action is prosecuted.⁸⁶ This interpretation has been upheld even though the plaintiff is *not* the real party in interest.⁸⁷ The meaning of the exceptions, created under the various codes, to the real party in interest requirement is in a muddled state at best,⁸⁸ especially with regard to agents being the proper parties to institute arbitration.

In a recent unreported Florida case,⁸⁹ plaintiff-agent, who contracted in his own name for disclosed principals, instituted arbitration proceedings

Revenue Comm'rs of Candler County v. Collins, 94 Ga. App. 562, 95 S.E.2d 758, 759 (1956). See also *Bartlet v. Knight*, 1 Mass. 401 (1805) (denying full faith and credit only because of incapacity, in accordance with the "principles as well as natural justice as of the common law.")

81. *Application of Eimco Corp.*, 163 N.Y.S.2d 273 (Sup. Ct. 1957); *Watts v. Phillip-Jones Corp.*, 207 N.Y. Supp. 493 (App. Div. 1925). See also *Considerant v. Brisbane*, 22 N.Y. 389 (1860) (the leading New York case on the issue of agents as real parties in interest, holding that a contract is with an agent and in his name, although he is described as an agent on its face, when it is negotiated with him, and is by its terms to be performed by or to him); *Albany & Rensselaer Co. v. Lindberg*, 121 U.S. 451 (1887) (construed section 449 of the N.Y. Code of Civil Procedure as allowing an agent who makes a contract for his principal to bring suit).

82. *Ibid.*

83. 207 N.Y. Supp. 493 (App. Div. 1925).

84. New York Code of Civil Procedure § 499 provided that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, and defines a trustee of an express trust as a person with whom or in whose name a contract is made for the benefit of another. Section 449 may presently be found in substantially the same form in section 210 of the New York Civil Practice Act.

85. 163 N.Y.S.2d 273 (Sup. Ct. 1957).

86. See note 83 *supra*.

87. *Newmark v. National Bank & Trust Co. of Norwich*, 147 N.Y.S.2d 565 (Sup. Ct. 1955).

88. See Atkinson, *The Real Party in Interest Rule: A Plea for its Abolition*, 32 N.Y.U.L. REV. 926 (1957); Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259 (1925); Simes, *The Real Party in Interest*, 10 KY. L.J. 60 (1922). For a compilation of the code states having statutes similar to New York's see CLARK, CODE PLEADING 158 n.17 (1947). Rule 1.17 of the FLA. R. CIV. P. and Rule 17 of the FED. R. CIV. P. are basically the same.

89. *Motion Pictures for Television, Inc. v. Gulfport Broadcasting Co.*, B-124, Court of Record, Escambia County, Fla., Dec. 19, 1958 (unreported case).

in New York against defendant for breach of contract. Defendant failed to appear or answer any of the notices received by him regarding the arbitration, the award for plaintiff, or the judgment entered thereon. In a suit upon the New York judgment, it was held void for lack of jurisdiction and not entitled to full faith and credit since, *as a matter of law*, the agent was not the real party in interest and lacked legal capacity, the principals being the only ones with whom the defendant had consented to arbitrate.

The uncertainty of the New York law in this area, the factual nature of the issue involved, and the prima facie case made out by the plaintiff which overcame defendant's initial objections, and which defendant further failed to rebut, make highly suspect the court's granting of summary judgment for defendant, *sua sponte*.⁹⁰ There is no question that the public policy of the State of Florida, as embodied in the recently enacted Florida Arbitration Code, is clearly in favor of the enforcement of foreign arbitration awards.⁹¹ In view of this policy, any issues regarding the "competency" of the rendering court should not be colored by the fact that arbitration by consent is involved.⁹² Unfortunately, the above case would appear to exude latent overtones of just such an involvement as evidenced by the court's preliminary statement that:

The defendant did not participate in the arbitration proceeding in New York; it was not served with process of the State of New York, and did not participate in the judicial proceedings in the Court that entered up the judgment here sought to be enforced.⁹³

The deleterious effect that the overtones of the above case might have on the progress of commercial arbitration in Florida is deserving of serious consideration by our courts. Undoubtedly the court could have, consonant with full faith and credit and due process of law, come to the conclusion that under the evidence adduced, the plaintiff had the legal capacity to invoke jurisdiction by bringing arbitration.

Another approach would be to characterize capacity as a "non-jurisdictional fact" as has been done in several cases involving foreign

90. "[A]nybody opposing recognition of an extrastate judgment because of lack of local jurisdiction of the rendering court, must in general, bear the burden of proof since a sister state judgment is presumed to be valid. Where he [the defendant] has established, however, some fact which ordinarily negatives jurisdiction, it is incumbent upon his opponent to prove the validity of the judgment under the law of the judgment court." EHRENZWEIG, *CONFLICT OF LAWS* 211 (1959). See also *Markham v. Nisbet*, 60 So.2d 393 (Fla. 1952) (confession judgment); *Stern, Florida Conflict of Laws*, 8 *MIAMI L. Q.* 209, 236 (1954).

91. See *FLA. STAT. § 57.27(2)* (1959).

92. *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931).

93. *Motion Pictures for Television, Inc. v. Gulfport Broadcasting Co.*, B-124, Court of Record, Escambia County, Fla., Dec. 19, 1958 (unreported case).

administrators.⁹⁴ The *capacity of an agent* loses some of its "fundamental nature" when it is considered that the only real objection of defendant is that the principals are not bound by the outcome of the award, and the defendant could therefore once again be subjected to suit.⁹⁵ This objection would lose all validity however, if, even in the absence of express authority, the principals were found to have ratified arbitration by the agent either prior to, during, or after the arbitration award.⁹⁶

3. CAPACITY OF FOREIGN UNLICENSED CORPORATION

A foreign corporation, which neither does business nor is licensed to do business in New York, is prevented by statute from bringing an action in New York on a contract executed there.⁹⁷ This disability, it has been contended, should also prevent a foreign corporation from enforcing an agreement to arbitrate in New York.⁹⁸ However, the New York Court of Appeals refuted this contention when it refused to stay an arbitration begun by an unlicensed foreign corporation, concluding that arbitration was a *special proceeding* to which the statutory prohibition was inapplicable.⁹⁹

III. CONCLUSION

"Arbitration has been heralded as a ready and speedy relief from the intricacies of the law."¹⁰⁰ Why then should these objectives be compromised when it becomes necessary to seek the enforcement of an award confirming judgment in a sister state action? Too many courts have thwarted the concept of "ready and speedy relief" by narrowly construing contractual intent and by permitting expensive relitigation of many issues that should have been settled conclusively in the rendering forum.

The courts must realize that "these business contracts are not drawn with the precision of deeds or judgments."¹⁰¹ They must be read "with

94. In *Wikoff v. Hirschell*, 258 N.Y. 28, 179 N.E. 249 (1932), Chief Judge Cardozo was confronted with a situation somewhat analogous to the problems presented by the *Gulfport* case, *supra* note 93. Defendant on appeal contended for the first time that the foreign administratrix lacked the capacity to bring suit. *Held*, that even though the cases are in conflict as to whether a foreign administrator has capacity, an objection which is not seasonably made is waived.

95. See *e.g.*, *Canfield v. Scripps*, 15 Cal. App.2d 642, 59 P.2d 1040, *cert. denied*, 300 U.S. 658 (1936); EHRENZWEIG, *CONFLICT OF LAWS* 51 (1959).

96. See STURGES, *COMMERCIAL ARBITRATION AND AWARDS* §§ 49-54 (1930).

97. N.Y. GENERAL CORP. LAW § 218.

98. *In re Vanguard Films, Inc.*, 188 Misc. 796, 67 N.Y.S.2d 893 (Sup. Ct. 1947); *In re Levys*, 73 N.Y.S.2d 801, *aff'd*, 94 N.Y.S.2d 924 (App. Div. 1950) (held that the statute precluded a foreign corporation from successfully resisting a motion to stay arbitration in New York, even though at the time it made the motion authorization to do business had been obtained).

99. *Tugee Laces, Inc. v. Mary Muffet, Inc.*, 297 N.Y. 914, 79 N.E.2d 744 (1948).

100. *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 307, 169 N.E. 386, 394 (1929) (Crane, J., dissenting).

101. *Id.* at 306, 169 N.E. at 394.

the liberality of meaning which attaches to the laconism of business men."¹⁰² However, the courts are not the only ones to blame, although their conservative approach has contributed greatly.

A party seeking arbitration must evidence his good faith by adhering to the statutory procedures. His attorney should have enough foresight to realize that eventually he will be involved in a sister state action, and govern himself accordingly. It is hoped that the jurisdictional defects which have been reviewed in this article will indicate the necessary steps that must be taken for businessmen who seek to employ arbitration as an effective means for settling disputes with non-residents.

102. *Ibid.*