

ON THE ENFORCEMENT ABROAD OF AMERICAN ARBITRATION AWARDS

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In memoriam Frances Kellor

The enforcement of an arbitration award in a country other than the one in which it was rendered has always been an important issue in international commercial arbitration. Business firms engaged in foreign trade usually carry out awards in good faith since they have undertaken in their contracts to abide by an award and are eager to maintain trade relations. It is one of the advantages of commercial arbitration that an award rendered by persons experienced in special fields will not be reviewed by courts on its merits, and therefore parties voluntarily accept the decisions of the arbitrators.¹ Sometimes trade organizations to which a recalcitrant party belongs are called upon to secure compliance with an award.² Thus the situation does not arise too often of instituting court procedures in a foreign country where the application of different principles of law and procedure causes hazards, expense, and delay. Moreover, the status of law and practice as to the enforcement of foreign awards cannot be easily ascertained, since the statutes of various countries usually do not provide for the execution of foreign, but only of domestic, awards. This article, which is confined to the enforcement abroad of awards rendered in the United States, will not deal with all of the many questions relating to the enforcement of foreign awards; court decisions and legal writings on this general subject,

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¹ See Rosenthal, *Arbitration in the Settlement of International Trade Disputes*, 11 LAW & CONTEMP. PROB. 808 (1946), *A Businessman Looks at Arbitration*, 2 ARB. J. (N.S.) 138 (1947), and TECHNIQUES OF INTERNATIONAL TRADE 22 (1950). The International Chamber of Commerce stated in INTERNATIONAL COMMERCIAL ARBITRATION, PRACTICAL HINTS 8 (1935) that "87% of the awards concerning which we have been able to obtain information, have been enacted freely by the losing party," and in Resolution 22(I) of its XIIIth Congress, held at Lisbon, Portugal, in June, 1951: "The International Chamber of Commerce is glad to note that in the majority of cases arbitration awards are carried out voluntarily by the parties." (BROCHURE No. 161, p. 75). The same experience prevails in the United States. See FRANCES KELLOR, ARBITRATION IN ACTION 8 (1941): "It is a remarkable tribute to the high prevalence of good faith that less than 6 per cent of the agreements or awards, arbitrated under the Rules of Procedure of the American Arbitration Association, are referred to the courts for legal enforcement."

² The Rules of Conciliation and Arbitration of the International Chamber of Commerce expressly provide in Article 26 that "in case the party against whom the award is made does not comply therewith within thirty days of the notification of the award," the Court of Arbitration will ask the National Committee of the Chamber or "any other organization to which the recalcitrant member belongs, to take suitable measures."

though rather scarce in the United States,³ are manifold in the civil law countries of continental Europe.⁴

The procedure under which American arbitration awards will be enforced in other countries is derived mainly from the concepts which prevail for the enforcement of foreign decisions. First, it may be based on provisions in treaties, both multilateral and bilateral, concluded between the country where the award was rendered and the country where it has to be enforced (I). In the absence of treaty provisions, conditions of comity of nations may prevail, especially the concept of reciprocity, whereby foreign awards have the same force as is granted to awards of the country in which enforcement is sought, *e.g.*, American awards would have the same force in Uruguay that American law grants to Uruguayan awards (II). Enforcement of a foreign award is possible only by an order of the competent judicial authority, in observance of the requirements of the law of the foreign country (III-IV). Finally, the question of universal enforcement of foreign awards, as recently advocated by the International Institute for the Unification of Private Law at Rome, Italy, has to be considered briefly from the American point of view and in the light of the experience of American traders in international commercial arbitration (V).

I

International agreements, both multilateral and bilateral, have at various times dealt with efforts to facilitate the enforcement of foreign awards. The United States is not a party to any such agreements. It did not ratify either of the two international agreements which were concluded by several countries of the Western Hemisphere: the Montevideo Treaty of International Procedural Law, of February 12, 1889,⁵ and the Code of International Private Law (*Código Bustamante*), which was adopted by the Sixth International Conference of American States at Habana in February 20, 1928.⁶ Nor is the United States a party to the Treaty of Interna-

³ WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 931 (1930); Lorenzen, *Commercial Arbitration—Foreign Awards*, 45 YALE L. J. 39 (1935), reprinted in SELECTED ARTICLES ON THE CONFLICT OF LAWS 506 (1947); Heilman, *The Enforceability of Foreign Awards in the United States*, 3 ARB. J. 183 (1939).

⁴ For surveys of foreign literature, see Rudolf Pohle, *Schiedsvertrag*, in 6 RECHTSVERGLEICHENDES HANDWOETERBUCH FUER DAS ZIVIL-UND-HANDELSRECHT DES IN-UND AUSLANDES 159, 179 (1936); ALFRED BERNARD, L'ARBITRAGE VOLONTAIRE EN DROIT PRIVÉ 517 (Brussels, 1937); I ADOLPH SCHOENKE, DIE SCHIEDSGERICHTSBARKEIT IN ZIVIL-UND HANDELS SACHEN IN EUROPA (1944) and II *id.* (1948); ERWIN RIEZLER, INTERNATIONALES ZIVILPROZESSRECHT UND PROZESSUALES FREMDENRECHT 595 (1949); 2 ADOLF F. SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS 745 (3d ed., Basle, Switzerland, 1950).

⁵ Arts. 5-7: *Execution of Judgments and Arbitral Awards*, in VINCENTE VITA, COMPARATIVE STUDY OF AMERICAN LEGISLATION GOVERNING COMMERCIAL ARBITRATION 59 (Inter-American High Commission, United States Section, Washington, D. C., 1928). The treaty was ratified by Argentina, Bolivia, Paraguay, Peru, and Uruguay.

⁶ Title X, Arts. 423-433: *Execution of Judgments Rendered by Foreign Courts*, in VITA, *op. cit. supra* note 5, at 58; 4 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 2279 (1931), and 2 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 86 (1941). The Code is in force in Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela. On the non-adherence of the United States, see ARTHUR H. KUHN, COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW OR CONFLICT OF LAWS 62 (1937) and OPINION ON THE POSSIBILITY OF REVISION OF THE BUSTAMANTE CODE OR THE CODE OF PRIVATE INTERNATIONAL LAW 30 (Inter-American Juridical Committee, Pan American Union, Washington, D. C., May, 1951).

tional Procedural Law signed by Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru, and Uruguay at Montevideo on March 19, 1940.⁷ This treaty, which provides for a summary procedure of enforcement of awards rendered in a signatory country, has not yet been ratified by any of the participating states.

Neither does the United States adhere to the Geneva Convention of September 26, 1927 on the Execution of Foreign Arbitral Awards (or to the Geneva Protocol on Arbitration Clauses of September 23, 1923),⁸ nor did any other country of the Western Hemisphere ratify these Geneva Agreements.⁹ The Geneva Convention of 1927, which applies to "differences between parties subject respectively to the jurisdiction of different Contracting States," has been instrumental in improving the arbitration laws of many countries which enacted legislation to give effect to the Convention by embodying it in their domestic law. Either special statutory enactments to that effect were passed as in Great Britain, Italy, the Netherlands, and India, or the principles were incorporated in the general arbitration statute, as in Sweden, France, and Germany.¹⁰ These statutory provisions and court decisions on their interpretation are not directly applicable to instances where arbitration awards rendered in the United States have to be enforced abroad, since this country is not a party to the Geneva Convention of 1927.¹¹

It may further be noted that there is no prospect whatever that the United States may adhere to that Convention in the future. The Convention is definitely influenced (as is the Protocol) by continental European conceptions of arbitration law. Says the leading British treatise on arbitration:¹² "The framers of the Protocol and Convention obviously had in mind the Continental rather than the British view of arbitration," a statement which is strongly supported by the outstanding American authorities, Lorenzen and Nussbaum.¹³ To the same effect, it was stated at the 1936 Conference of the International Law Association in Paris, France: "It is not surprising that the U.S.A. should not have seen its way to ratify either the Protocol (1923) or the Convention (1927), consequent on its unwillingness to introduce certain principles into their system deemed to be unacceptable."¹⁴ Various reasons, such as the division of power under the Federal Constitution between the

⁷ Title III, Art. 5: *On the Enforcement of Letters Requisitorial, Judgments and Arbitral Awards*, translated in 37 *AM. J. INT'L L. Supp.* 118 (1943).

⁸ Text in *INTERNATIONAL YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION* 239, 240 (Nussbaum ed., 1928).

⁹ With the exception of Brazil, which ratified the Protocol of 1923. For a survey of countries which ratified the Convention, see *COMMERCIAL POLICY IN THE INTER-WAR PERIOD* 92 (League of Nations, 1942).

¹⁰ A profound discussion is to be found in Nussbaum, *Treaties on Commercial Arbitration—A Test of International Private-Law Legislation*, 56 *HARV. L. REV.* 219 (1942).

¹¹ *Cf.* however, note 23 *infra*.

¹² FRANCIS RUSSELL, *ON THE POWER AND DUTY OF AN ARBITRATOR, AND THE LAW OF SUBMISSION AND AWARDS* [hereinafter *RUSSELL ON ARBITRATION AND AWARDS*] V (12th ed., Aronson, 1931).

¹³ *Supra* note 3, at 506, and note 10, at 242.

¹⁴ THIRTY-NINTH REPORT OF THE INTERNATIONAL LAW ASSOCIATION 98 (1937). In view of the use of the word "ratify" it should be noted that the United States was not even a signatory country to either of the Geneva Agreements. See Macassey, *International Commercial Arbitration: Its Origin, Development, and Importance*, in 24 *TRANSACTIONS OF THE GROTIUS SOCIETY* 191 (1938).

Federal Government and the various states, and the limitation of federal law in so far as procedural matters are concerned, make such an attempt hardly advisable. Thus, no reference whatsoever to the Geneva Protocol on Arbitration Clauses of 1923 was made in the congressional hearings on the United States Arbitration Act of February 12, 1925, though the latter deals also with "commerce with foreign nations."¹⁵ Nor was an early and interesting proposal for a Commercial Arbitration Treaty which was initiated by the Committee on Arbitration of the Chamber of Commerce of the State of New York and unanimously approved by the American Bar Association, ever submitted for congressional consideration.¹⁶

For all these reasons, it may be suggested that the recent resolution of the XIIIth Congress of the International Chamber of Commerce in Lisbon, Portugal, in June 1951, for "an immediate effort (whether by amendment of the Geneva Convention of 1927 or by a new Convention),"¹⁷ will not find the support of American commercial organizations which would seem indispensable for any consideration of such a proposal by federal authorities of both the executive and legislative branches. Moreover, such a move for the United States' adherence to a multilateral convention is not urgent at all, since recently the modern bilateral commercial treaties of this country have undertaken to facilitate the use of international trade arbitration.

II

The attitude toward enforcement of foreign awards by countries which are parties to the international conventions of the Western Hemisphere or the Geneva Agreements may play a role in those instances in which bilateral agreements of the United States with those countries were concluded recently. Bilateral agreements for the enforcement of foreign awards are in existence between various European countries. Switzerland, *e.g.*, concluded such agreements with Germany in 1929, with Sweden in 1936, and with the Soviet Union and Yugoslavia in 1948.¹⁸ Most notable, in view of its activities in state trading and the immunity of government-

¹⁵ 43 STAT. 883 (1925), 9 U. S. C. §§1-15 (Supp. 1946), now codified and enacted into positive law by the Act of July 30, 1947, c. 392, 61 STAT. 669; see SEN. REP. No. 664 and H. REP. No. 255, 80 Cong., 1st Sess. (1947). By the same Act the Arbitration Act of 1925 was repealed; for the history of the latter, see *The United States Arbitration Law and Its Application*, by the Committee on Commerce, Trade and Commercial Law, American Bar Association, in 11 A.B.A.J. 153 (1925).

¹⁶ Although the then Secretary of State, Charles Evans Hughes, declared himself "sympathetic to the principle." REPORT OF THE COMMITTEE ON ARBITRATION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK 2 (Oct. 5, 1922). See also REPORT OF THE FORTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 53, 321 (1922).

¹⁷ "An immediate effort should be made (whether by amendment of the Geneva Convention of 1927 or by a new Convention) to remove the main defect which militates against the effectiveness of international arbitration and to permit the immediate enforcement of international arbitral awards. The International Chamber of Commerce calls on all governments concerned to cooperate towards that end." INTERNATIONAL CHAMBER OF COMMERCE (BROCHURE No. 161) 75 (1951). On the difficulties arising out of the Geneva Convention, see Herbert, *The Prompt Enforcement of International Arbitral Awards*, in INTERNATIONAL CHAMBER OF COMMERCE, BROCHURE No. 160, INTERNATIONAL COMMERCIAL ARBITRATION AND FREEDOM OF CONTRACT 7 (1951).

¹⁸ References in MAX GULDENER, DAS INTERNATIONALE UND INTERKANTONALE ZIVIL-PROZESSRECHT DER SCHWEIZ 130, 166 (1951). Cf. Nussbaum, *American-Swiss Private International Law*, 1 BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW 35 (1951).

controlled corporations, has been the attitude of the Soviet Union which has concluded, since the twenties, many elaborate commercial arbitration treaties with other European countries.¹⁹

More recently, the United States, in its modern bilateral Treaties of Friendship, Commerce and Navigation, began to provide for the enforcement of arbitral awards rendered in disputes between nationals and corporations of the respective countries. The first instance was the Treaty with China of November 4, 1946, whereby arbitration awards would be accorded full faith and credit by the courts of the respective countries where they were rendered, without, however, providing for the enforcement of awards in the other country.²⁰ The next important forward step in the use of international commercial arbitration was taken not earlier than 1950, when the Treaty of Friendship, Commerce and Navigation with Ireland, of January 21, 1950,²¹ included in Article X what became a standard clause in later commercial treaties, namely, those with Colombia of April 26, 1951, with Israel of August 23, 1951, with Denmark of October 1, 1951, and in the Supplemental Agreement of September 26, 1951 to the Treaty with Italy (of February 2, 1948), reading as follows:

Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.

A somewhat improved provision regarding international commercial arbitration is to be found in Article VI(2) of the Treaty with Greece of August 3, 1951.²² It is

¹⁹ See Hilton, *Commercial Arbitration in the Treaties and Agreements of the U.S.S.R.*, 12 DEP'T STATE BULL. 890 (1945); Rashba, *Settlement of Disputes in Commercial Dealings with the Soviet Union*, 45 COL. L. REV. 530 (1945).

²⁰ TREATIES AND OTHER INTERNATIONAL ACTS SERIES NO. 1871, Art. VI(4), reading as follows: "In the case of any controversy susceptible of settlement by arbitration, which involves nationals, corporations or associations of both High Contracting Parties and is covered by a written agreement for arbitration, such agreement shall be accorded full faith and credit by the courts within the territories of each High Contracting Party, and the award or decision of the arbitrators shall be accorded full faith and credit by the courts within the territories of the High Contracting Party in which it was rendered, provided the arbitration proceedings were conducted in good faith and in conformity with the agreement for arbitration."

²¹ TREATIES AND OTHER INTERNATIONAL ACTS SERIES NO. 2155.

²² "Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public

only in the Treaty of Friendship, Commerce and Economic Development between the United States and Uruguay of November 23, 1949, and in the Treaty of Amity and Economic Relations with Ethiopia of September 7, 1951, that no provision for the enforcement of arbitration awards was made. The standard clause quoted above is somewhat comparable to that of the Geneva Convention of 1927, to which most of the European countries are parties. It may be assumed that, after ratification of the recent treaties with the United States, the courts of these countries, when called upon to enforce American awards, will apply to some degree the principles governing that Convention.²³

This article will not try to present even a summary of the numerous concepts and differences of opinion on the enforcement of foreign awards which have appeared in numerous court decisions and legal writings in various countries. However, it will be necessary to review briefly the instances in which foreign arbitration awards have been enforced in the United States, in view of the concept of reciprocity prevailing in some countries for the enforcement of foreign decisions. It will be seen that even in the absence of any treaty obligation or statutory provision, a most liberal practice has been followed in the United States in cases where personal jurisdiction upon the American parties appeared to have been obtained abroad, both in the arbitration and the ensuing court proceeding.

In the leading case of *Gilbert v. Burnstine*,²⁴ the defendants, residents of New York, agreed to deliver zinc to the plaintiff in New York. A clause in the contract provided for arbitration "at London, pursuant to the Arbitration Law of Great Britain." When a dispute arose, the buyer instituted arbitration proceedings in London, by duly notifying the seller in New York of his intention to apply, pursuant to Article 5 of the (British) Arbitration Act of 1889, to the High Court of Justice for the appointment of an arbitrator should the defendants fail to agree upon an arbitrator.²⁵ The defendants ignored the notices served on each of them in New York. An award was rendered in favor of the buyer who brought action on it in New York.²⁶ The contention of the defendants that they had not submitted to the English proceedings, in the absence of personal service of process or voluntary appearance, was sustained by the lower New York courts,²⁷ which dismissed the

policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof."

²³ See Tavlaridis, *Die Schiedsgerichtbarkeit im Griechischen Recht*, in II SCHOENKE, *op. cit. supra* note 4, at 241, and Racca, *Enforcement in Italy of Awards Between Americans and Italians*, 6 *ARB. J. (N.S.)* 235 (1951).

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

²⁵ The power of the court has been enlarged by §5(1) of the Arbitration Act, 1934, now consolidated in §10 of the Arbitration Act, 1950, 14 *Geo. 6, c. 27*.

²⁶ Not on the English judgment which had been obtained on the award. See Weiss, *The Arbitration Award and the Non-Resident: Nuance in New York*, 48 *Col. L. Rev.* 366, 370 n. 15 (1948).

²⁷ 135 Misc. 305, 237 N. Y. Supp. 171 (Sup. Ct. 1929), *aff'd*, 229 App. Div. 170, 241 N. Y. Supp. 54 (1st Dep't 1930).

complaint; but the Court of Appeals reversed the decisions, holding that the New York parties' agreement constituted "an implied submission to the terms of the act itself [British Arbitration Act], and to any rules or procedural machinery adopted by competent authority in aid of its provisions."²⁸ Since the law of the foreign country (England) to which the parties had made express reference, allowed service of process outside of its jurisdiction, the defendants could not resist the enforcement on the ground that the award was rendered without personal jurisdiction over them. Said the Court of Appeals:^{28a} "They [defendants] contracted that the machinery by which their arbitration might proceed would be foreign machinery operating from the foreign court."

No reference was made by the Court of Appeals to *Skandinaviska Granit Aktiebolaget v. Weiss*,²⁹ where the defendant, a New York resident, had agreed in a contract for the purchase of black granite that any dispute was to be settled by arbitration and without appeal. When a dispute arose, the defendant instituted arbitration proceedings in Sweden, but abandoned them later. When another dispute arose, he did not participate in proceedings initiated in Sweden by the plaintiff, pursuant to Swedish law, neither in the arbitration nor in the ensuing action for entry of a judgment on the award in the Court of the Administrator of Justice at Gothenburg, Sweden. The New York courts held, in an action upon the Swedish judgment, that the Swedish court had not obtained personal jurisdiction over the defendant. The case is to be distinguished from the *Burnstine* case since the defendant had not expressly agreed to arbitration in Sweden pursuant to Swedish law, although he himself had instituted an arbitration in Sweden in a previous dispute arising out of the same contract. No reference was made either in the *Burnstine* case, to a decision of the Court of Appeals of Georgia, in *Wright, Graham & Co. v. Hammond*,³⁰ where the parties had provided for arbitration "subject to the English Arbitration Act of 1889." An enforcement of the English award, as a common law award, was denied for the reason that "in contemplation of the parties it was to be made an order of His Majesty's High Court of Justice" and there was no allegation as to whether the award was ever made the order of the English court. Since the Georgia arbitration law applies only to domestic awards, the courts of that state would only enforce the award if it were converted into a judgment. Lorenzen³¹ rightly considered the decision unjustified, since under English law an award does not have to be enforced by the statutory method but may also be enforced by an action on the award, and there were no reasons why the award could not be enforced in Georgia as a common-law award.

²⁸ 255 N. Y. 358, 174 N. E. 708. See annotations in 73 A. L. R. 1460, 31 COL. L. REV. 679, 43 HARV. L. REV. 653, 17 CORNELL L. Q. 165, 13 MICH. L. REV. 653, and 78 U. OF PA. L. REV. 905 (all 1931).

^{28a} 255 N. Y. 354, 174 N. E. 707.

²⁹ 226 App. Div. 56, 234 N. Y. Supp. 202 (2d Dep't 1929).

³⁰ 41 Ga. App. 738, 154 S. E. 649 (1929).

³¹ *Supra* note 3 at 528. See RUSSELL ON ARBITRATION AND AWARDS 249 (15th ed., T. A. Blanco White, 1952).

Another state, Washington, was more liberal in the enforcement of a foreign award, though its own statute at that time was not much different from the Georgia act.³² In *Tiefenbacher v. Dulien Steel Products, Inc.*,³³ an award rendered in a proceeding in Shanghai, China, was enforced against a Seattle corporation which in 1937 had sold steel plates to a German resident of Shanghai. The buyer refused the first shipment as not in accordance with specifications, whereupon the American exporter withheld further shipments. The contract provided for arbitration to be arranged by the Shanghai Metal Merchants' Association. A proceeding before two arbitrators, resident representatives of British and French firms respectively, was instituted in Shanghai, the American party not participating though duly notified. An award for 18,000 American dollars was rendered in favor of the buyer, long before Pearl Harbor. Since the arbitration proceedings were in conformity with all requirements for ample notice, opportunity for hearings, and production of evidence, there was no reason for the Washington court to deny recognition and enforcement to the award which had been obtained abroad in an orderly procedure.³⁴

In three further New York cases, foreign arbitration awards were recognized as valid titles and were summarily enforced. In *Coudenhove-Kalergi v. Dieterle*,³⁵ an award had been rendered before World War II in Berlin by an arbitral tribunal for the theatrical profession (Buehnenschiedsgericht), and in *Stern v. Friedman*,³⁶ judgment was entered upon "an adjudication which under German law has the effect of a final judgment." Another case, *H. P. Drewry, S. A. R. L. v. Onassis*,³⁷ gave rise to various decisions on the right to sue by the French company (of limited responsibility) with seat in Paris, France, in then German-occupied territory, and for that reason technically an enemy. An award on a claim for damages for alleged breach of a charter party had been rendered in London in favor of the French plaintiff, and confirmed by a judgment of the English court.³⁸ The right to enforce in New York the English judgment on the award was not challenged as such. The New

³² Sec. 5031 of the Georgia Civil Code of 1910; sec. 264 of the Washington Code of 1881, repealed by Wash. Laws 1943, c. 138, as amended by Wash. Laws 1947, c. 209. See Wesley A. Sturges and William W. Sturges, *Some Confusing Matters Relating to Arbitration in Washington*, 25 WASH. L. REV. 16 (1950).

³³ Superior Court, King County, Seattle, Washington, No. 308263 (1943).

³⁴ The interesting expert deposition on Chinese arbitration law and practice by Charles S. Lobingier, who had served for many years as judge of the U. S. Court for China, is published in *The Law Student*, May, 1943, p. 15; see 2 ARB. MAG. 24 (1944); 1 INT'L ARB. J. 67 (1945).

³⁵ 36 N. Y. S. 2d 313 (1942) where the court erroneously said, at 316, that "those tribunals satisfied a reasonable definition of a court."

³⁶ N. Y. L. J., Feb. 21, 1945, p. 691, col. 7 (City Ct., N. Y., McCullen, J.). In *Manasse v. Heine & Co.*, 68 N. Y. S. 2d 494 (1947), recognition was given to the discharge of a French award for which an enforcement by a French court had been granted. Cf. Domke, *Arbitral Clauses and Awards: Recent Developments in French Law*, 17 TULANE L. REV. 447, 454 (1943). As to a recent confirmation (with modification) of a British arbitration award in a dispute on the delivery of crimson clover seed from France rendered "in London as per rules of American Seed Trade Association (Edition 1948)," see *Cerf v. La Maison du Paysan du Sud-Ouest*, 110 N. Y. S. 2d 127 (1952).

³⁷ 179 Misc. 578, 39 N. Y. S. 2d 688 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 292, 42 N. Y. S. 2d 74 (1st Dep't 1943); 291 N. Y. 779, 53 N. E. 2d 243 (1944); *further*: 188 Misc. 912, 69 N. Y. S. 2d 850, *aff'd*, 272 App. Div. 870, 72 N. Y. S. 2d 262 (Sup. Ct. 1947).

³⁸ 71 Lloyd's List L. R. 179 (C. A. 1941).

York court, moreover, mentioned³⁹ the fact "that the English authorities had explicitly permitted the plaintiff to institute and prosecute the arbitration proceedings."

More recently, the leading New York case of *Gilbert v. Burnstine* was followed in *Sargant v. Monroe*.⁴⁰ Here a contract provided for arbitration "in London, in the usual manner, according to the rules of the General Produce Brokers' Association of London." The American party, who refused to accept delivery of the merchandise (pepper), appointed, upon request, an arbitrator and a representative in London "for all purposes of the arbitration." A unanimous award of November 27, 1935 in favor of the English exporter was confirmed in the form of a "stated case,"⁴¹ on July 22, 1936, by the English court, against which decision no appeal was taken. A judgment on the award was then entered by the British court on March 1, 1937. In an action to recover on the award of 1936 and on the British judgment of 1937, the Appellate Division, New York Supreme Court, unanimously held that the New York defendant was not duly represented in the British court procedure for the enforcement of the award as a judgment. "Once the award became final," said the court, "the authority [of the representative of the defendant] ceased unless the defendant submitted to the jurisdiction of the English courts personally or through his duly authorized agents." Summary judgment, however, was given on the arbitrators' award of 1935, confirmed by the British court order of 1936, making the award final (as distinguished from the proceeding to enforce the award as a judgment), since that proceeding was part of the procedure for obtaining a final award to which the New York party had clearly consented. The New York party could not be heard to impeach the finding of the arbitrators, since the order of the British court of 1936, which was not appealed from, made the award valid and binding upon the defendant, and since "the parties submitted to arbitration, selected their own arbitrators, impliedly agreed to abide by their decision, and participated in the arbitration which proceeded to a final award. . . ."⁴²

It appears that, with the sole exception of the *Drewry* and *Stern* cases, the New York decisions and the Washington decision had to deal with the enforcement of awards and not with the enforcement of judgments entered upon the awards. The courts affirmed the well-settled rule that the validity of an award depends on observance of the law of the place where the award was rendered. That rule

³⁹ 39 N. Y. S. 2d 688, 694 (1942). See MARTIN DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* 191, 223 (1943), and *THE CONTROL OF ALIEN PROPERTY* 145 (1947).

⁴⁰ 67 N. Y. S. 2d 591, *as modified*, 268 App. Div. 123, 49 N. Y. S. 2d 546 (1st Dep't 1944).

⁴¹ In that case the award based on the findings of the arbitrator is made subject to the determination of a stated legal question by the court. See Cohn, *Commercial Arbitration and the Rules of Law: A Comparative Study*, 4 U. OF TORONTO L. J. 1, 6 (1941). In passing it may be mentioned that the Seventh Conference of the Inter-American Bar Association held in November 1951 in Montevideo, Uruguay, resolved to eliminate the provision (instituto) of special cases from the recommended modification of arbitration laws. See 4 *ARB. J. (N.S.)* 233 (1951).

⁴² 49 N. Y. S. 2d at 548. See, more recently, *International Refugee Organization v. Republic S. S. Corporation*, 93 F. Supp. 798, 803 (D. Md. 1950): "The law is well established that provision for arbitration outside the United States embodied in a contract such as that in the charter in the present case, is valid."

has been stated in *Moyer v. Van-Dye-Way Corp.*,⁴³ a case where the enforcement of a New York award was sought in Pennsylvania, as follows: "The general authority is to the effect that the validity of an arbitration award is determined by the law of the place of its rendition. 2 Beale, *The Conflict of Laws* (1935) sec. 347.6."⁴⁴ It is true that the principles of enforcement in the United States of awards and judgments entered upon awards in sister states do not apply to the enforcement of foreign awards. Nevertheless, instances should briefly be mentioned in which awards rendered in New York were to be enforced in other states of the Union against parties who had not participated either in the arbitration or in the ensuing court action for entry of judgment on the award. Such judgments were recently enforced, besides the aforementioned Massachusetts and Pennsylvania cases, in Illinois,⁴⁵ Missouri,⁴⁶ Oregon,⁴⁷ and Tennessee.⁴⁸ A reference to these cases may be appropriate for another reason, which plays a role in the enforcement of foreign awards. When a statute of a state does not provide, unlike modern arbitration statutes, for the enforcement of future arbitration clauses, but only for submission agreements of existing disputes, is that legislative intent an expression of public policy which would prevent the enforcement of awards and judgments of sister states entered upon such awards?⁴⁹ The answer is no. The Illinois, Missouri, and Tennessee decisions, all being rendered in states where the respective statutes do not provide for the enforcement of future arbitration clauses, enforced New York judgments against parties residing in the respective states who had not participated in the New York proceedings. In the Tennessee case the principle was stated⁵⁰ that "parties to an arbitration contract may consent in advance to the manner of obtaining jurisdiction over the person of the absentee party and such agreement, if followed, will give jurisdiction." Thus it may fairly be submitted that the attitude of American courts, both federal and state, is most favorable to the execution of foreign awards rendered outside of the state, either abroad or in a sister state of the Union.

⁴³ 126 F.2d 339, 341 (3d Cir. 1942). See also *Mulcahy v. Whitehill*, 48 F. Supp. 917 (D. Mass. 1943), where an award rendered *ex parte* in New York in favor of an Argentine firm was enforced against the debtor in Boston.

⁴⁴ Beale says, *op. cit. supra*, at 1249: "Its validity [the award's] is determined by the law of the place where rendered, regardless of the law of the forum. But the foreign law must be pleaded, or it will be assumed to be similar to the *lex fori*. *Woodrow v. O'Connor*, 28 Vt. 776 (1856)," dealing with an award rendered in Canada.

⁴⁵ *Tanbro Fabrics Corporation v. Hymen*, 341 Ill. App. 396, 94 N. E. 2d 93 (1950); *Ripley Fabrics v. Hymen*, 91 F. Supp. 1007 (N. D. Ill. 1950).

⁴⁶ *Marvlo Fabrics, Inc. v. Jarus*, 87 F. Supp. 245 (W. D. Mo. 1949).

⁴⁷ *Cohen & Sons v. Thompson and Starr*, District Court, Marion County, Oregon, Felton, J., Sept. 8, 1949 (unreported).

⁴⁸ *Hirsch Fabrics Corporation v. Southern Athletic Co.*, 98 F. Supp. 436 (E. D. Tenn. 1951).

⁴⁹ For a well documented discussion of this general problem of arbitration, see Mezger, *L'Arbitrage Commercial et l'Ordre Public*, 1 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 611 (1948), and Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. OF CHI. L. REV. 339 (1952).

⁵⁰ *Supra* note 48, at 438. The statement by Lorenzen, *supra* note 3, at 529, on *Shafer v. Metro-Goldwyn-Mayer Distributing Corporation*, 36 Ohio App. 31, 172 N. E. 689 (1929), that "according to the reasoning of this [Ohio] court no foreign award would be enforced in a state not having a modern arbitration act" is no longer justified, in view of the recent Illinois, Missouri, and Tennessee cases (*supra*, notes 45, 46, 48).

III

Before considering various aspects of foreign law on the enforcement of American awards abroad, instances should briefly be mentioned where such enforcement was already specifically considered by foreign courts. As far as research discloses, there are only three cases: one in England in 1926, another in Portugal in 1946, and the third in Colombia in 1950. This may be explained partly by the role which American foreign trade played in international commerce in the period before the First World War and even in the period before the Second World War, when foreign traders seldom provided for arbitration to be held in the United States.⁵¹ This situation resulted mostly from the overwhelming importance of British foreign trade and its numerous arbitration institutions in chambers of commerce, trade associations, and commodity exchanges, covering a considerable part of international commercial arbitration, about which Lorenzen said in 1935⁵² that the English "system of arbitration is generally regarded as unsurpassed by that of any other country of the world." The lack of foreign court decisions on the enforcement of American arbitration awards may further be explained by the development of arbitration in the United States where trade discipline and the amicable settlement of commercial controversies, especially with Latin American countries,⁵³ made court actions abroad less necessary.

The three cases in which the enforcement of American awards was considered by foreign courts are not of a decisive character, as will be seen immediately. In *Bankers & Shippers Insurance Co. of New York v. Liverpool Marine & General Insurance Company, Ltd.*,⁵⁴ the parties had entered in New York into a re-insurance contract which contained a clause providing for arbitration in New York. It was one of the terms of the arbitration clause that if either party should fail to name an arbitrator within one month after demand, the party making the demand might name both arbitrators, and these two should select the umpire. The New York corporation demanded arbitration but the British insurance company failed to appoint its arbitrator. Acting under the provision of the Arbitration Law of New York, the claimant, being unable to secure jurisdiction over the British company in New York to require specific performance of the arbitration agreement, proceeded to appoint both arbitrators and the latter appointed an umpire with the result that an award was made in favor of the New York corporation. Suit on the award was brought in England against the British company which resulted in

⁵¹ Of the over 700 cases which up to 1939 had been submitted to the Court of Arbitration of the International Chamber of Commerce, United States citizens were involved as plaintiffs in 14 and defendants in 35. Boissier, *International Commercial Arbitration—Twenty Years of Growth*, 10 *WORLD TRADE* 64, 68 n. 1 (1939). Not a single American, and for that matter no citizen of any country of the Western Hemisphere among the arbitrators appointed by the Court of Arbitration, was mentioned in the survey *PRACTICAL HINTS*, *op. cit. supra* note 1, at 6.

⁵² *Supra* note 3, at 538.

⁵³ See Domke, *Inter-American Commercial Arbitration*, 4 *MIAMI L. Q.* 425 (1950).

⁵⁴ 24 *Lloyd's List L. Rep.* 85 (H. L. 1926), *reversing* 21 *Ll. L. L. Rep.* 86 (C. A. 1925), which had reversed 19 *Ll. L. L. Rep.* 335 (K. B. 1924).

a judgment for the defendant, solely on the ground that in appointing the arbitrators and securing the appointment of the umpire, the New York corporation did not conform with the requirements of the New York Arbitration Law of 1920. The decision was based on the authority of *Bullard v. Morgan H. Grace Co.*,⁵⁵ which involved an interpretation of the provision of the New York Arbitration Law on the designation of arbitrators where one of the parties was in default under the submission agreement by refusing to proceed to arbitrate an issue covered by the agreement. The House of Lords, regarding the question as one involving the domestic law of New York, followed the ruling of the highest court of that state. It must be observed, however, that the New York Arbitration Law later was amended to modify the proposition of the *Bullard* case so that now no court procedure is necessary to proceed ex parte in an arbitration.⁵⁶ Thus, the question of enforcement of an American award in England can hardly be determined on the authority of the *Bankers* case.⁵⁷

In *Edmond Weil, Inc. v. Sociedade Industrial e Mercantil dos Olivais, Lda.*,⁵⁸ the New York corporation had obtained a judgment in New York upon an award rendered against the Portuguese corporation in an arbitration proceeding ex parte under the Rules of the Chamber of Commerce of the State of New York. A judgment in favor of the plaintiff by the lower Portuguese court was reversed on appeal since the claim for damages for non-delivery of skins was, pursuant to Portuguese law, "to be filed in the court of the locality in which, according to law or written agreement, said obligation should be fulfilled." As the delivery had to be made in Lisbon, the exclusive competence of the Portuguese court prevented arbitration proceedings abroad. In another case, *Hide Trading Corporation, Inc. v. Field Echenique Compania Ltda.*,⁵⁹ an award obtained by the New York corporation against the Colombian defendant was confirmed by a judgment of the Supreme Court of New York against which no appeal had been taken. The allegation in the enforcement action in Colombia that the representative of the Colombian firm in the New York proceeding had no power to represent the defendant, was refuted by the court, since the defendant was unable to prove the lack of authority. Execution of the New York judgment was granted, since reciprocity existed because Colombia judgments would

⁵⁵ 240 N. Y. 388, 148 N. E. 559 (1925).

⁵⁶ See STURGES, *op. cit. supra* note 3, at 446, and Nordlinger, *Commencement of Arbitration Proceedings Without a Court Order*, 3 ARB. J. 279 (1939).

⁵⁷ Cf. London Sack & Bag Co., Ltd. v. Dixon & Lugton, Ltd., [1943] 2 All E. R. 763 (C. A.), and Crease, *The Enforcement of Awards Made Abroad*, 17 JOURNAL OF THE INSTITUTE OF ARBITRATORS 27 (London, 1951). Still of value is the official British publication, 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, CMD. No. 6126 (London, 1912).

⁵⁸ Supreme Court of Justice, Lisbon, Portugal, No. 53194, Nov. 5, 1946.

⁵⁹ Supreme Court of Justice of Colombia, Oct. 26, 1951, Gaceta Judicial tomo 68 no. 2087-88, p. 139, transl. 6 ARB. J. (N.S.) 159 (1951). The Colombian Law No. 2 of Feb. 25, 1938, Diario Oficial No. 23727 of Mar. 12, 1938, p. 888, transl. 1 INT'L ARB. J. 212 (1945), the only modern arbitration statute of a Latin American republic which provides for the enforcement of future arbitration clauses, does not deal with the enforcement of foreign awards; therefore it has not been invoked in this case. Cf. A. H. MEDINA, CONTRIBUCION AL ESTUDIO DEL ARBITRAJE COMMERCIAL INTERNACIONAL 50 (Bogota, 1944).

be enforced in New York and since the procedural requirements of the Colombian Judicial Code for enforcement of foreign judgments were fulfilled.

The question of enforcement of awards abroad does not occur often when the losing party participated in the proceeding, as in the Colombian case. The two other decisions do not reveal any definite trend of foreign law. The British decision of 1926 is based on a New York court decision which gave rise to an amendment of the statute; the Portuguese decision of 1946 rests on a provision of the Portuguese law on the exclusive competence of the court at the place where delivery of the goods should be made.

IV

What are the principles which govern the enforcement of American awards abroad? Brief statements on the law of some countries would serve no practical purpose if they did not refer to specific statutory provisions and their interpretation through recent court decisions, or to pertinent foreign writings. Only such references would enable American counsel of the American party to secure information on necessary legal source material for any consideration of enforcement measures abroad.⁶⁰

Another method will be followed here, namely, discussion of the problems encountered in the enforcement of American awards abroad in a case of current practice: an American importer who claims damages for breach of contract against a German exporter has obtained an award in an arbitration held in New York City. How does he enforce such an award in Germany, since the German debtor does not maintain any assets here from which satisfaction could be secured by attachment proceedings in New York? The example seems appropriate in view of the fact that trade with Germany has recently increased, and that many contracts with German traders provide for the settlement of disputes by arbitration, a method which has been in considerable use in German business relations for a long time. Finally, German law expressly provides for the enforcement of foreign awards, by a statutory amendment to the German Code of Civil Procedure (C. C. P.)⁶¹ which will greatly facilitate international commercial arbitration.

⁶⁰ Limitations of space and the general inaccessibility of foreign language material make it advisable to refrain from citing references, except to 1-4 INTERNATIONALES JAHRBUCH FUER SCHIEDSGERICHTSWESSEN IN ZIVIL-UND HANDELSACHEN (Nussbaum ed., 1926, 1928, 1931, 1934) of which only Volume 1 was translated (note 8, *supra*), and to the European source material in the more recent two volumes edited by Adolph Schoenke, *supra* note 4. For references to Latin American countries, see the chapters on Civil and Commercial Arbitration (contributed by this writer) in the Latin American Series, Law Library, Library of Congress: A GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO 100 (1945); BOLIVIA 26 (1947); ECUADOR 29 (1947); PARAGUAY 14 (1947); PERU 52 (1947); URUGUAY 39 (1947); VENEZUELA 33 (1947); CHILE 1917-1947 35 (1947); ARGENTINA 1917-1946 65 (1948). Cf. also Kessler, *Commercial Arbitration in Civil Law Countries*, 1 ARB. J. 277 (1937), and Valladao, *EXECUCAO DE SENTENCAS ESTRANGEIRAS NO BRASIL*, in *ESTUDOS DE DIREITO INTERNACIONAL PRIVADO* 717 (1947).

It may be mentioned that the Research Department of the American Arbitration Association (New York) maintains an extensive collection of foreign treatises, court decisions, and legal periodicals; they are available for consultation by interested lawyers.

⁶¹ By the law of July 25, 1930, [1930] REICHSGESETZBLATT I, 361. A translation of the Tenth Book of C. C. P., ARBITRATION PROCEDURE §§1025-1048, was published in *COMMERCIAL ARBITRATION UNDER GERMAN LAW*, BROCHURE No. 72, INTERNATIONAL CHAMBER OF COMMERCE 21 (Rev. ed. 1936).

German law does not subordinate the enforcement of foreign awards to the concept of reciprocity which prevails in many countries for the enforcement of foreign judicial decisions.⁶² The enforcement of American awards in Germany is not dependent on recognition of German decisions in the United States, since Article 1044 C. C. P.⁶³ exclusively regulates the enforcement of foreign awards; therefore the requirement of reciprocity for the recognition of foreign judgments in Germany is not to be applied, by way of analogy, to foreign awards.⁶⁴ However, the American claimant who has to proceed in a German court for the enforcement of the arbitral award, is subject to the general requirement of depositing security for costs (*cautio judicatum solvi*) since in the United States non-resident aliens are likewise obliged to do so; in this respect reciprocity prevails under German law.⁶⁵ It may be mentioned in passing that Article 1(III) of the Treaty between the United States and Germany of Friendship, Commerce and Consular Rights, of December 8, 1923,⁶⁶ providing for "freedom of access to the courts" by the nationals of each signatory country, does not eliminate the necessity of depositing security for costs.

Article 1044 C. C. P. applies only to "foreign awards" (auslaendische Schieds-prueche). An award rendered in an arbitration proceeding held in the United States, as in the case here under consideration, is without any doubt a foreign award under German law concepts. The prevailing opinion of the much discussed question of the "nationality" of a "foreign award" attaches decisive importance to the place of its rendition.⁶⁷ If rules of an agency which administers arbitration pro-

⁶² See Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COL. L. REV. 783, 790 (1950).

⁶³ Transl. (ours): "A foreign award which has become final pursuant to the law which is applicable to it, shall, unless state treaties do provide otherwise, be declared enforceable in accordance with the procedure prescribed for domestic awards. Paragraph 1039 shall not apply.

"An application for an order for enforcement shall be rejected:

"1. If the arbitration award is invalid [rechtsunwirksam]; for the validity of an award, unless state treaties provide otherwise, the law governing the arbitration procedure shall apply.

"2. If recognition of the arbitral award would offend *bonos mores* [gute Sitten] or public order, especially if the award would compel a party to perform a transaction [Handlung] which is forbidden by German law.

"3. If the party was not duly represented, in so far as the party has not expressly or tacitly consented to the proceedings.

"4. If the party has not obtained the legal right to be heard in the proceedings.

"The setting aside of the award is replaced by a declaration that the award cannot be recognized within the country [im Inland].

"If after having been declared enforceable the award is set aside in a foreign country, an action can be instituted for the setting aside of the order for enforcement. To such action the provisions of Par. 1043, 2 and 3 apply by analogy subject to the reservation that the time-limit [Notfrist] commences on the day on which the party has knowledge of the final [rechtskraeftig] setting aside of the award."

⁶⁴ We follow here the recent treatises by RIEZLER, *op. cit. supra* note 4, at 627; LEO ROSENBERG, LEHRBUCH DES ZIVILPROZESSRECHTS 776 (4th ed. 1949); and II GAUPP-STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (17th ed., Schoenke, 1951), where numerous authorities in court decisions and legal writings are cited.

⁶⁵ 104 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [hereinafter R. G. Z.] 189; 146 R. G. Z. 8; RIEZLER, *op. cit. supra* note 4, at 437; SCHOENKE, *op. cit. supra* note 64, Introductory Note to Art. 110 C. C. P.

⁶⁶ 44 STAT. 2132. See 2 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 569 (1942).

⁶⁷ See references in RIEZLER, *op. cit. supra* note 4, at 615, and SCHOENKE, *op. cit. supra* note 64, note 1 to Art. 1044 C. C. P.

ceedings ("institutional arbitration") are referred to by the parties in their arbitration agreement, the seat of such agency will determine the "nationality" of the award.⁶⁸ The question is of minor importance for the American practice since all American institutional arbitration, under the Rules of the American Arbitration Association, the General Arbitration Council of the Textile Industry, the National Federation of Textiles, the Association of Food Distributors, the American Spice Trade Association, and of many other trade associations and commodity exchanges, is held exclusively within the United States.

The foreign award to be enforced in Germany has to be a final award pursuant to the applicable foreign law, namely, definitive (*verbindlich*), of legal force and effect under foreign law, and not vacated pursuant to that foreign law. Such award need not be "final" in the specific meaning of the term as it is used in Article 39 of the (English) Arbitration Act, 1950, whereby "an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made."⁶⁹ In that case, however, the German judge will most probably stay the proceeding for enforcement pursuant to Article 148 C. C. P. The reference to the foreign law, the American one in our case, is made manifest by the statute itself, since it expressly excludes (second sentence of paragraph 1 of Section 1044) the application of Section 1039 C. C. P.; the foreign award therefore need not be filed with the clerk of the (German) court, where execution is being sought. The latter requirement is mandatory for domestic awards under German law, even if the award was served upon the parties, contrary, for example, to Section 1460 of the New York Civil Practice Act providing for the delivery of the award to one of the parties (or his attorney) *or* the filing with the court. The (American) claimant has only to prove that the award complies with the law of the country where it was rendered and which governs its validity. It has to be *maengelfrei*, free of any deficiencies of foreign law, *e.g.*, the award has to cover only questions within the scope of the arbitration agreement, and must not go beyond the authority which the arbitration agreement granted the arbitrators. If the German debtor objects to the award on the allegation that it has no validity under foreign (American) law, *e.g.*, that only a unanimous and not a majority award could have been rendered,⁷⁰ the debtor cannot force the American claimant to obtain in the United States a final determination of that issue and thereby cause new expense to the American claimant. The German courts will decide whether the requirements of the American law are

⁶⁸ 116 R. G. Z. 193 (arbitration tribunal of Commodity Exchange in Strasbourg, Alsace). As to recent cases dealing with references to arbitration rules ("Hamburg Friendly Arbitration"), see Oberster Gerichtshof (Cologne), Sept. 22, 1950, 5 MONATSSCHRIFT FUER DEUTSCHES RECHT 28 (1951), Hanseatisches Oberlandesgericht (Hamburg), July 14, 1950, 4 *id.* 560 (1950).

⁶⁹ The recent consolidation in Part II of the Arbitration Act, 1950, 14 GEO. 6, c. 27 (*Enforcement of Certain Foreign Awards*), applies, pursuant to Sec. 35, only to those territories to which the Geneva Convention of 1923 is applicable, in this case not the United States.

⁷⁰ For recent conflicting American decisions as to the requirement of a unanimous award, see *Fleming v. KCKN Broadcasting Co.*, 233 S. W. 2d 815 (Kansas City Court of Appeals, Mo. 1950); *Carhal Factors, Inc. v. Salkind*, 5 N. J. 485, 76 A. 2d 252 (Supreme Court of New Jersey, 1950).

fulfilled and not force upon the American claimant new proceedings in the United States.

Possible objections of the debtor, based on alleged deficiencies of the award under American law, lead directly to the question which very often occurs at the outset of an attempt to enforce an American award abroad: shall the award first be confirmed by a judgment of the court at the place where it was rendered? No doubt there is hardly any better proof of compliance of the award with all requirements of the domestic law than a judgment entered upon the award. This is indeed the best certificate the American claimant could obtain for use in enforcement proceedings abroad. Though a foreign judgment is not necessary in Germany, in view of the (exclusive) regulation of Article 1044 C. C. P., such proof of compliance with the foreign law will nevertheless facilitate enforcement in a summary procedure.

It is obvious that the award in itself is not a sufficient basis for enforcement abroad. An *exequatur* has to be obtained from the court of the place where satisfaction is to be sought. The procedure in the various countries depends on the available machinery and on the legal concept which has been developed as to the character of a foreign award;⁷¹ whether it has to be considered an executory title which was created by a foreign authority, or more in the nature of a contract, as part of the "performance" of the agreement of the parties. The attitude of the legislator toward the enforcement of foreign awards was recently stated by Riezler⁷² as (transl.) "not so much influenced by the faith in the correctness of a certain theoretical construction, but by an attitude more or less motivated by reasons of law-policy, namely, to recognize, within its own territory, foreign decisions without substantial review of their merits and to facilitate international legal transactions, especially by assistance in the enforcement of foreign awards."

We have seen that the American claimant in German court procedure has only to prove that the requirements of the law governing the award have been complied with. He has to do it in a summary procedure which is indeed one of the most important means of facilitating the enforcement. The American claimant is not even allowed to institute court action based on the award, as he is forced to do in other countries.⁷³ The necessary premise for such action under German law, the "need for legal protection" (*Rechtsschutzbeduerfnis*, Article 259 C. C. P.), does not exist because a specific remedy (Section 1044 C. C. P.) is available to the claimant. What is the specific remedy under German law? It is an action for enforcement (*Vollstreckungsklage*, Article 1042 C. C. P.), a summary procedure where an application for an order of enforcement has to be submitted to the court without compliance with other pro-

⁷¹ An excellent survey is to be found in Rene David, *Rapport sur l'Arbitrage Conventionnel en Droit Prive*, U. D. P. [Unification de Droit Prive] Etudes III-S. D. N. [Societe des Nations] 1932-C. P. 1932, p. 132.

⁷² *Op. cit. supra* note 4, at 631.

⁷³ Cf. DICEY, *CONFLICT OF LAWS* 433 (Rule 95) (6th ed. 1949): "A foreign arbitration award has no direct operation in England, but if it fulfills the conditions requisite for the validity of a foreign judgment, it may be enforced by an action at the discretion of the court."

visions for the enforcement of domestic awards. The German judge who, as we have seen, has to investigate *ex officio* whether the award is definite and without deficiencies under foreign (American) law, has also to investigate, pursuant to Section 1044 (II) C. C. P., whether the award is against the public policy of the forum, whether the defendant was duly represented (unless he consented to the proceedings), and whether he was granted a proper hearing (*rechtliches Gehoer*). As to the two latter conditions, the court has to investigate these circumstances, not *ex officio*, but only in case of objection by the (German) defendant, and then pursuant to the *lex fori*⁷⁴ and not, as are the first two prerequisites mentioned above (definiteness and absence of deficiencies), under the foreign law applicable to the award.

However, the most important condition to be investigated *ex officio* is that which prevails everywhere, whether written into statutory provisions or unwritten: no enforcement of foreign awards is possible if it violates the public policy of the forum, "especially if the award would compel a party to perform a transaction which is forbidden by German law" (Section 1044 (II 2) C. C. P.). In this respect one instance has been considered by German courts; a foreign (Dutch) award which adjudicated damages against a German debtor for breach of contract resulting from his inability to transfer money abroad, was enforced though the transaction was prohibited under German foreign exchange law unless licensed by proper authorities.⁷⁵ Foreign exchange law, so widely accepted now in nearly all countries of the world, with the exception of the United States, Canada, Tangier, and Switzerland, remains a decisive impediment to the development of international commercial arbitration. An interesting effort has been made to eliminate the risks of not securing a license for payments abroad: Ecuador, by a Decree of December 14, 1948,⁷⁶ subjected to arbitration all foreign commercial contracts, not only those with United States traders. An arbitration clause referring to the Rules of the Inter-American Commercial Arbitration Commission is incorporated in all import and export permits granted by the Banco Central del Ecuador, in order to avoid tying up foreign exchange by long drawn-out court litigation. In any event, the uncertainty of foreign exchange control under ever-changing conditions of the national economy creates a serious barrier to international trade relations and thus to the functioning of commercial arbitration between different countries.

No other conditions for the enforcement of foreign awards are provided in German law; it may, however, be questionable whether the provision of Article 1041 No. 5 C. C. P., whereby awards are to be vacated if reasons are not stated, are

⁷⁴ See *Hanseatisches Oberlandesgericht*, May 23, 1950, 4 *MONATSSCHRIFT FUER DEUTSCHES RECHT* 480 (1950); *Bundesgerichtshof*, Oct. 10, 1951, 5 *id.* 734 (1951).

⁷⁵ See Cohn, *The Enforcement of Foreign Awards in Germany*, 21 *J. Soc'y Comp. Leg.* 75 (1939). See Court of Appeals (OLG) Hamburg, *Hochstrichterliche Rechtsprechung* 1941 No. 823, and SCHOENKE, *op. cit.* *supra* note 64, at p. 5 n. 19 to Art. 1044.

⁷⁶ Decree No. 468 of Dec. 14, 1948, *REGISTRO OFFICIAL*, No. 106, p. 840, transl. in 3 *ARB. J. (N.S.)* 79 (1949).

also applicable to foreign awards. Article 1044 of the German C. C. P. makes no reference to that provision, nor does it expressly exempt its application (as in case of the requirement of filing of the award with the court). It was stated⁷⁷ that the provision "does not offer sufficient grounds to deny the recognition of an arbitral award rendered without statement of reasons therefor, under a foreign law which does not require such reasons. In other words, parties in accepting the foreign law, may be assumed to have waived their right to demand the reasons for the award." This question brings to the fore an issue of great practical importance, since in American arbitration, awards very seldom contain reasons for the determination of the arbitrators. Be that as it may, for fear of court review of obviously erroneous statements or for other reasons of expediency, arbitrators are not only experts in their specific calling, but are usually no less skilled in the art of expressing in clear and understandable language the reasons for arriving at certain findings and conclusions. At least in international commercial arbitration, where the foreign trader has been used to seeing domestic awards rendered with reasons, awards should also be rendered in the United States giving the reasons for the arbitrators' determinations. Along these lines, it was recently said:⁷⁸

The bar's confidence in arbitration would be increased if arbitrators published their findings of fact and gave reasons for their conclusions. Such opinions would not have to become binding as precedent nor expand the scope of judicial review. Those interested in promoting commercial arbitration should encourage the writing of opinions in order to clarify for lawyers the considerations which arbitrators deem relevant.

The principal defense available to the German debtor, as in all jurisdictions, domestic and foreign, will be that no jurisdiction over the losing party was obtained either in the arbitration or the ensuing court procedure for entry of judgment upon the award. That challenge is hardly tenable in cases where the foreign party participated in the proceedings. Here the party, either directly or by an authorized agent, will, by its very participation, have waived many requirements of the local (American) law. The party who did not participate in the (American) proceedings will most often challenge the existence of a valid arbitration agreement and, for that and other reasons, the validity of an award. When arbitration in New York City was expressly provided by the parties in the arbitration clause, there will be no great difficulty in proving that the parties submitted themselves to the procedure prevailing in New York. Nor will difficulties arise when the parties referred in their agreement to the rules of an agency administering arbitration, and thereby authorized the agency to determine the place of arbitration in case of failure of the parties to agree later on such place. Here, American courts⁷⁹ considered the determination

⁷⁷ Nussbaum, *Problems of International Arbitration*, *supra* note 8, 1, at 22. As to German court decisions on the waiver of that provision (of stating reasons), see *SCHOENKE, op. cit. supra* note 64, at 9 n. 44 (erroneously printed 41) to Art. 1041.

⁷⁸ Note, *Predictability of Result in Commercial Arbitration*, 61 HARV. L. REV. 1022, 1033 (1948).

⁷⁹ *Bradford Woolen Corp. v. Freedman*, 189 Misc. 242, 71 N. Y. S. 2d 257 (1947); *Tarrant Co. v. Consolidated Chemical Corp.*, N. Y. L. J., Jan. 27, 1949, p. 334, *Hecht, J., aff'd without opinion*, 275 App. Div. 918, 90 N. Y. S. 2d 672 (1st Dep't 1949).

of the place of arbitration by an agency, such as the American Arbitration Association, binding upon the parties, who by reference to the rules made the determination a part of their agreement to arbitrate. Since under German law the validity of the award has to be determined according to the law governing the arbitration procedure, here New York law, there is no reason to believe that German courts, or for that matter, courts of other countries, will not recognize the American practice. This is all the more true as the (American) principle that the law of the place where the award was rendered governs its validity is generally recognized in many countries.⁸⁰

As to the obtaining of jurisdiction by the court which entered judgment upon an award, the provision in many arbitration clauses is of interest, whereby service by mail is authorized upon either the party or his agent or his attorney. American court decisions⁸¹ have recognized the binding force of such a provision, which the parties adopted as part of their agreement to arbitrate, either directly or by reference to arbitration rules of an agency. The further question arises whether the court of the place where the award was rendered, in our case New York City, was also competent to enter judgment upon the award against the non-participating debtor, here the German defendant. The recent amendment of Section 1450 of the New York Civil Practice Act, by Chapter 260 of the Laws of 1951, makes it clear that an agreement to arbitrate in the state of New York "shall be considered consent of the parties to the jurisdiction of the Supreme Court to enter judgment upon the award."

Another question is regulated by an express provision of Section 1044 (II 3) of the German C. C. P., namely, that the party had to be "duly represented, in so far as the party has not expressly or tacitly consented to the proceedings." Here it may be of interest to note that the rules of some trade associations in New York provide for the exclusion of lawyers from arbitration proceedings and that such practice was recognized by the courts.⁸² The Judicial Council of the State of New York recommended to the legislature in 1949, and again in 1950, 1951, and 1952,⁸³ that

⁸⁰ Under English law, the plaintiff has to prove that the parties submitted to arbitration and that the arbitration was conducted in accordance with the submission. He has further to prove that the award is valid by the law of the country where it has been rendered, *Norske Atlas Insurance Co., Ltd. v. London General Insurance Co., Ltd.*, 43 T. L. R. 541 (1927). See G. C. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 769 (3d ed. 1947), and MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* 257 n. 3 (2d ed. 1950).

⁸¹ *Cf. Merger Fabrics, Inc. v. Coill-Shuman Co.*, 74 N. Y. S. 2d 76 (1947); *Application of Liberty Country Wear, Inc.*, 197 Misc. 581, 96 N. Y. S. 2d 134 (1950).

⁸² *Pennsylvania Iron Works Co. v. East St. Louis Ice & Cold Storage Co.*, 96 Mo. App. 563, 70 S. W. 903 (St. Louis Court of Appeals, 1902); *Kayser v. Skulnik*, N. Y. L. J., Jan. 14, 1925, *Wagner, J., aff'd*, 212 App. Div. 870, 208 N. Y. S. 885 (1st Dep't 1925), reprinted in FRANCES KELLOR, *ARBITRATION AND THE LEGAL PROFESSION* 8 (1952); *Knickerbocker Textile Corp. v. Ginsberg*, N. Y. L. J., Feb. 5, 1948, p. 468, *Dineen, J.*, where it was said: "The exclusion of counsel under the terms of the contract entered into applied equally to both. The contract was not void or against public policy. Refusal to permit counsel under these circumstances did not constitute a violation of due process of law." To the same effect: *Leo Benjamin, Inc. v. McPhail Candy Corp.*, 81 N. Y. S. 2d 547 (1948). Art. 1034 (I 2) German C. C. P., as amended July 20, 1933, *REICHSGESETZBLATT I* 522, prohibits the exclusion of attorneys at law (*Rechtsanwaechte*) from any arbitration proceedings and declares void any contrary agreement of the parties.

⁸³ *EIGHTEENTH ANN. REP.* (1952). This finally became law, Chapter 547 of April 7, 1952.

Section 1454 C. P. A. be amended to provide expressly for the right of a party to be represented by an attorney in the arbitration and that the right be waived only with the full awareness of the party, such as participation in the hearings without objection.

Other questions may arise when a German debtor, who did not participate in the arbitration and the ensuing court action for entry of judgment, will object to the proceedings on the ground that the appointment of arbitrators by a trade association which administered the arbitration did not afford him an unbiased arbitration board, in view of the so-called monopoly-like control by trade organizations of the affairs of non-members.⁸⁴ Under the German concept, American practice will prevail here too, it being the foreign law governing the arbitration proceeding and the validity of the award. Other questions, such as the power of the arbitrator to subpoena witnesses and the competence of the court to review the award on its merits, are also determined by American law which in the main does not permit court review of the merits of the award.⁸⁵

If any of the challenges of the award prevails upon the German judge, he is not allowed to set it aside. This would be assuming rights which are incompatible with the relation of independent jurisdictions. The German judge will deny by a declaratory judgment the enforcement of the foreign award in Germany, and his decision will have no effect as *res judicata* of the foreign award. He has no authority to refer the case back to the foreign jurisdiction; the American plaintiff may have the German court action suspended pursuant to Article 148 German C. C. P., until appropriate or necessary clarification has been obtained by him from the proper foreign (American) jurisdiction. If the award was set aside in the country in which it was rendered after being declared executory in Germany, an action may be instituted in Germany, pursuant to Article 1044 IV C. C. P., to set aside the order of enforcement.

This example of a modern statute which greatly facilitates the enforcement of foreign awards in Germany, shows that among practical approaches to the solution of many problems of arbitration, one is of decisive value: the improvement of the

⁸⁴ Cf. Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L. J. 36 (1944), *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945), and Hans Nef, *Unabhaengige Schiedsgerichte*, in *FRAGEN DES VERFAHRENS-UND KOLLISIONSRECHT* 99 (Zurich, Switzerland, 1952).

Art. 1025 II German C. C. P., added by law of Oct. 27, 1933, REICHSGESETZBLATT 1933 I, 780, renders an arbitration agreement invalid if "one party has made use of its economic or social superiority for the purpose of forcing the other party to conclude the agreement or to accept terms which grant such party a better position in the proceedings, especially with regard to the appointment and challenging of arbitrators." See Karl Blomeyer, *Betrachtungen Zur Schiedsgerichtsbarkeit*, in *BEITRAEGE ZUM ZIVILPROZESS* 51, 71 (1949); Riehle, *Probleme des schiedsgerichtlichen Verfahrens*, NEUE JURISTISCHE WOCHENSCHRIFT 853 (1950); and Landgericht Hamburg, Nov. 29 1950, 5 MONATSSCHRIFT FUER DEUTSCHES RECHT 177 (1951).

⁸⁵ *Delma Engineering Corp. v. John A. Johnson Contracting Corp.*, 267 App. Div. 410, 45 N. Y. S. 2d 913 (1st Dep't 1944), *aff'd*, 293 N. Y. 653, 56 N. E. 2d 253 (1944). It is stated in AN OUTLINE OF ARBITRATION PROCEDURE PREPARED BY COMMITTEE ON ARBITRATION, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (revised to June 1, 1946) 11: "There is thus no expensive aftermath of appeals, records and briefs with possibility of a new trial that often follows a litigated judgment." See Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681 (1950).

respective statutory arbitration law. This is indeed the way which should primarily be pursued in many countries—and also in some states of the United States of America—where outdated arbitration statutes should be amended to adopt some, if not necessarily all, features of modern arbitration laws. Statutory improvement of the arbitration laws of many countries is certainly preferable to the attempt for a universal solution of the problem here under consideration: the enforcement of foreign arbitral awards.

V

Recently, efforts of many years have been resumed to facilitate the execution of foreign awards through the conclusion of international agreements. The International Institute for the Unification of Private Law in Rome, Italy, which had prepared in 1936 a Draft of an International Law on Arbitration,⁸⁶ submitted a final draft in December 1940.⁸⁷ It provided for the universal enforcement of arbitral awards in its Article 28 as follows:

When leave has been given to issue execution of an award by a judicial authority of one of the countries in which the present law is in force, the award may be the subject of proceedings for enforcement in any one of such countries. Enforcement shall nevertheless be refused if the award is contrary to public policy in the country where execution is claimed or if it has been made in respect of some matter which the law of such country does not permit to be submitted to arbitration.⁸⁸

This Draft of a Uniform Arbitration Law was considered at the Conference on International Commercial Arbitration held in Paris, France, in June 1946, under the auspices of the International Chamber of Commerce.⁸⁹ A Working Committee on Unification of the Law on Arbitration and the Enforcement of Arbitral Awards, established with the London Court of Arbitration, has not yet terminated its deliberations. It may be permitted to refer to statements of this writer, who is the

⁸⁶ See Wortley, *A Proposed Preliminary Draft Uniform Law on Arbitration*, 14 CAN. B. REV. 326 (1936); Cohn, *The Unification of the Law of Commercial Arbitration*, 24 TRANSACTIONS OF THE GROTIUS SOCIETY 1 (1938).

⁸⁷ *Avant-Projet d'une Loi Uniforme sur l'Arbitrage dans les Rapports Internationaux en Droit Prive et Rapport Explicatif*, U. D. P. 1940—PROJECT III; transl. of the Preliminary Draft (but not of the Report) in the Institute's general survey, UNIFICATION OF LAW 187 (1948).

⁸⁸ The Institute characterizes the proposal, *op. cit. supra* note 87, at 37, as follows: "The draft is based on the main idea of allowing the universal execution of arbitration awards in accordance with the uniform rules. This principle is supported by guarantees which allow of avoiding eventual conflicts arising out of the national laws of the countries concerned; this is why the procedure of execution is subject to the examination of the local authorities notwithstanding the exequatur granted in a country where the uniform rules have been adopted. In order to avoid as far as possible any conflicts that might arise owing to discrepancies between national laws, the draft provides for instance that the cancellation of the award must be asked in the country where the exequatur has been requested." It may, however, be submitted that the reason mentioned by the Institute in its Preliminary Draft, *supra* note 87, at 38, namely, that appeals against orders of execution should be left solely to the determination of national laws as intimately connected with their judicial organization, seems also—and even more—prevalent in the question of a universal effect of an exequatur.

⁸⁹ CONFERENCE SUR L'ARBITRAGE COMMERCIALE INTERNATIONALE—COMPTE RENDU DES SEANCES 38, 51 (INTERNATIONAL CHAMBER OF COMMERCE, 1946), and 2 ARB. J. (N.S.) 137 (1947).

representative of the American Arbitration Association on this Committee,⁹⁰ that "an international law on arbitration should first have its roots in a more or less uniform arbitration practice in many nations," and that ". . . a unification of arbitration practice has to be achieved to a certain degree before any legislative attempt on an international basis can be undertaken." It is still hoped that other legislative attempts will be pursued,⁹¹ among them the inclusion in bilateral commercial treaties of provisions facilitating international commercial arbitration. More will be achieved by a coordination of the rules of the principal agencies administering arbitration in the various countries. Such unification of the rules and a coordination of practice⁹² will greatly contribute to the aim which international commercial arbitration has always maintained: voluntary compliance with the determination of arbitrators in whose expert knowledge and fairness the parties put their confidence when adopting arbitration as the means of settling commercial controversies.

⁹⁰ OBSERVATIONS ON THE DRAFT OF AN INTERNATIONAL LAW ON ARBITRATION, OF APRIL 15, 1948, pp. 1 and 18, supported by Phanor J. Eder and David E. Grant, STATEMENTS ON THE DRAFT OF AN INTERNATIONAL LAW OF ARBITRATION OF JULY 28, 1948. Cf. Schoenke, *Die Vereinheitlichung der schiedsrichterlichen Gesetzgebung*, 2 WIRTSCHAFT UND RECHT 81 (Zurich, Switzerland, 1951).

⁹¹ The topic has also been considered in deliberations on the establishment of an International Trade Organization. The Habana Charter of March 24, 1948 provides in Art. 72 (7 c ii), as one of the functions of the organization to "make recommendations, and promote bilateral or multilateral agreements concerning measures designed to facilitate commercial arbitration." United Nations Conference on Trade and Employment, Final Act and Related Documents (E/Conf. 2/78) 44 (1948). See Domke, *The Havana Charter (ITO) and Commercial Arbitration Within the Western Hemisphere*, 4 ARB. J. (N.S.) 105 (1949).

⁹² Lorenzen, *op. cit. supra* note 3, at 538; Rosenthal, *Voluntary International Arbitration Tribunals*, 6 ARB. J. (N.S.) 21 (1951), and *The Promotion of International Commercial Arbitration*, *id.*, at 223.