COMMERCIAL ARBITRATION—ENFORCEMENT OF FOREIGN AWARDS

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IN AN earlier article an attempt was made to present the problems created by commercial arbitration in its international and interstate aspects, so far as they related to the validity and enforcement of the submission agreement.[1] To complete the survey it will be necessary to consider the award and its enforcement in other countries. As between many continental countries the enforcement of foreign awards is today governed by the Geneva Convention of 1927, or by bilateral treaties containing more favorable conditions for the enforcement of awards.[2] The Geneva Convention is substantially in force also in England, but not in the United States and Latin-America. With respect to these non-contracting countries, the former state of the law is still in force. A general presentation of the subject will require, therefore, a discussion of foreign awards apart from the Geneva Convention, and under the provisions of the Convention. No attempt will be made to deal with the bilateral treaties that have been entered into, and the discussion will be limited to a few European and Latin-American countries whose law is of special interest. Before proceeding to the consideration of foreign awards a few words will be necessary with respect to the validity and enforcement of local awards.[3]

I

VALIDITY AND ENFORCEMENT OF LOCAL AWARDS

In the United States common law awards need not be made, in the absence of special stipulations to the contrary, within any particular time.[4] They may be oral;[5] and they are final and irrevocable, without the necessity of notice to the parties, as soon as the requisite number of arbitrators

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1. Lorenzen, *Commercial Arbitration—International and Interstate Aspects* (1934) 43 YALE L. J. 716.

2. For example, German-Swiss Treaty of November 2, 1929, RGBl, 1930 II, 1065.

3. Attention may be called to the following abbreviations: CLUNET: JOURNAL DE DROIT INTERNATIONAL PRIVÉ; NUSSBAUM: INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESEN IN ZIVIL-UND HANDELSSACHEN, vols. 1-3 (1926, 1928, 1931). The first volume has been translated into English and the references in that volume are to this translation. (Oxford Univ. Press, N. Y. 1928). RABEL: ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT; REVUE: REVUE DE DROIT INTERNATIONAL PRIVÉ. (Since 1933 REVUE CRITIQUE DE DROIT INTERNATIONAL).

4. STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 520.

5. Id. at 526.

are in agreement.[6] Statutory awards must generally be made within a specified time. They must be in writing, signed by the arbitrators or a majority thereof, and frequently, acknowledged as a deed. A copy of the award must, in many states, be delivered to the parties.[7] In England, awards may be by parol if the arbitration is not within the provisions of the Arbitration Act.[8] Awards under the Arbitration Act must be in writing and, in the absence of agreement to the contrary, must be signed by all arbitrators.[9] Publication of the award by notice to the parties is not indispensable. However, the six months' period within which an award may be set aside begins to run only from the time of the publication of the award to the parties.[10] On the continent and in Latin-America, the award must invariably be in writing. Generally it is sufficient that it be rendered by a majority of the arbitrators.[11] Sometimes the requirement exists that the award must contain the reasons for such award.[12] Frequently a deposit of the award with a specified court is required.[13] In Italy it must be confirmed by a judge within five days after the filing of the award with the court.[14]

Common law awards can be enforced in the United States only by action, either upon the award, or, if a penal bond or promissory note or other express promise to perform the award has been given, upon such bond, note or contract.[15] For the enforcement of statutory awards most states provide some summary method. In some states the mere filing of the papers in the proceedings and of the award, upon failure of the opposing party to perform within the time provided, is sufficient to give the award the force and effect of a judgment at law.[16] The method provided by the New York statute[17] and others is by way of application or motion to the

6. Id. at 540.

7. Id. at 625-671.

8. RUSSELL, ARBITRATION AND AWARD (12th ed., V. R. Aronson, 1931) 452.

9. Id. at 431.

10. Id. at 455.

11. AUSTRIA, CODE CIV. PROC. § 590; CANTON OF BERNE, CODE CIV. PROC. § 388; GERMANY, CODE CIV. PROC. § 1038; ITALY, CODE CIV. PROC. art. 21; POLAND, CODE CIV. PROC. arts. 504, 506; SWEDEN, LAW CONCERNING ARBITRAL PROCEDURE OF JUNE 14, 1929, 3 NUSSBAUM 269, § 16; CANTON OF ZURICH, CODE CIV. PROC. § 385; FRANCE, CODE CIV. PROC. art. 1016.

12. HOLLAND, CODE CIV. PROC. art. 637; HUNGARY, CODE CIV. PROC. § 782; ITALY, CODE CIV. PROC. art. 21; POLAND, CODE CIV. PROC. art. 505.

13. GERMANY, CODE CIV. PROC. § 1039; HOLLAND, CODE CIV. PROC. art. 639; HUNGARY, CODE CIV. PROC. art. 782; ITALY, CODE CIV. PROC. art. 24; NORWAY, CODE CIV. PROC. § 465; POLAND, CODE CIV. PROC. art. 507, § 2.

14. CODE CIV. PROC. art. 24.

15. STURGES, op. cit. *supra* note 4, at 676.

16. See ALA. CODE ANN. (Michie, 1928) § 6161; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4297; TEX. ANN. CIV. STAT. (1928) art. 231.

17. N. Y. CIV. PRAC. ACT (1929) § 1456. Under the New York statute the court must grant the order confirming the award unless the award has been vacated, modified, or cor-

court to confirm the award. The summary statutory method of enforcement is available in some states only if the agreement stipulates that the award be entered as a judgment in a designated court.[18] The validity of the judgment on the award presupposes that the court had jurisdiction over the losing party. In a majority of states, where the award had not been confirmed and entered as a judgment of court pursuant to the arbitration statute, valid statutory awards have been held enforceable by non-statutory or common law methods as well.[19] Where, however, such judgment has been entered the award may be regarded as "merged" in the judgment.[20] Judgments upon common law awards are subject to the ordinary rules relating to appeals and writs of error which prevail in the different states. As regards statutory awards, there is a great deal of variance in the legislative provisions or uncertainty regarding the question whether an appeal or writ of error may be taken from a judgment entered on the award or from an order vacating the judgment.[21]

In England, the Arbitration Act of 1889[22] provides that an award on a submission may be enforced by leave of the court or a judge, in the same manner as a judgment or order to the same effect. This method displaced the less summary method by way of rule of court provided for in the Common Law Procedure Act of 1854. The order for leave to enforce the award is based upon an originating summons which formerly had to be served personally. An amendment of the Rules of the Supreme Court (of 1920) now expressly permits the Court or a judge to allow service out of its jurisdiction.[23] An appeal will lie from the decision of the Master in Chambers, to whom the application for the enforcement of the award must be made in the first instance, to a Judge in Chambers and from the

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rected. The judgment so rendered by the court is docketed as if rendered in an action and has the same force and effect and is subject to all provisions relating to a judgment in an action, and it may be enforced as if it had been so rendered. See STURGES, op. cit. *supra* note 4, at 708 et seq.

18. For example, Indiana (see STURGES, op. cit. *supra* note 4, at 279), Iowa (Id. at 282), Idaho and Montana (Id. at 275).

19. STURGES, op. cit. *supra* note 4, at 9. *Contra:* Older v. Quinn, 89 Iowa 445, 56 N. W. 660 (1893).

20. STURGES, op. cit. *supra* note 4, at 11.

21. Id. at 881 et seq.

22. Section 12. The method provided is a prompt and convenient one, as no objections to the award are sustainable. Application for leave to enforce the award is made by originating summons before a Master in Chambers. Section 12 does not, however, give to the court the power of directing that judgment be entered in the terms of the award; it merely places the award on a footing similar to that of a judgment, so far as enforcement is concerned. "It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, viz., an award." In re a Bankruptcy Notice, [1907] 1 K. B. 478, 482. And a party who has obtained leave to enforce an award is not precluded from bringing an action upon the award. See China Steam Navigation Co. v. Van Laun, 22 T. L. R. 26 (K. B. 1905).

23. RUSSELL, op. cit. *supra* note 8, at 275.

Judge in Chambers to the Court of Appeal.[24] An appeal lies likewise to the Court of Appeal from a judgment of a Divisional Court setting aside an award.[25]

In some continental countries action must be brought upon the award. In others a more summary procedure exists. In France, an award is rendered executory by a decree of the President of the Tribunal in a simplified proceeding in which the parties are not heard.[26] In Germany, prior to the Code of Civil Procedure of 1877, awards could be enforced in some states only by an action to obtain a judgment on the award (Erfüllungsklage). In others, they were enforceable on the same basis as foreign judgments.[27] According to Section 1040 of the Code of Civil Procedure the award has, as between the parties, the same effect as a final judgment. Therefore, an action on the award, or on the underlying contract, does not lie. Enforcement in a more simplified manner has been provided by means of an action for enforcement. (Vollstreckungsklage).[28] Since 1930 this enforcement proceeding has been further improved by the introduction of a summary method for enforcement.[29]

Much controversy exists in the various countries on the point whether a decree in a summary proceeding rendering the award enforceable by execution, operates to convert the award into a judgment.[30] This question may become of practical importance in a suit for the enforcement of the award in another state or country.

The grounds for the impeachment of awards in the United States vary in detail, but in general they have reference to the existence or non-existence of a binding contract of arbitration, to the improper constitution of the arbitral tribunal, or to the arbitral proceedings themselves, for

24. Id. at 276.

25. Id. at 266.

26. CODE CIV. PROC. art. 1020.

27. 1 WACH, HANDBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS (1885) 65 et seq. Regarding the Continental mode of enforcing foreign judgments, see text, p. 44.

28. CODE OF CIVIL PROCEDURE, § 1042.

29. Id. at § 1042 a-d.

30. See BRACHET, DE L'EXÉCUTION INTERNATIONALE DES SENTENCES ARBITRALES (1928) 86 et seq.

The Appellate Court of Douai has held that such exequatur would not convert the award into a judgment. Adair & Co. v. Leroy-Crépeaux, 29 Clunet 1023.

Nussbaum suggests that the question should not turn upon considerations of an internal or procedural nature, for example, upon whether the exequatur is granted by a full court or by a single judge, nor upon whether it is given in a summary or ordinary proceeding, nor upon whether the decision rendered is called a judgment or not, but upon whether or not the defendant had an opportunity to be heard. If, as in France and Belgium, he is not heard, the granting of the exequatur should not be regarded as converting the decree into a judgment. But in those countries in which the exequatur proceeding is one of contentious jurisdiction in which the defendant is afforded an opportunity to present his objections, the enforcement order is a regular judgment. 1 NUSSBAUM 26.

example, to the question whether the defeated party had notice of the proceedings and an opportunity to be heard, whether the arbitrators exceeded their authority or refused to hear pertinent testimony, or whether they were guilty of partiality, fraud, corruption, or other misconduct. There is no review of the merits, and in the absence of fraud or misconduct an award cannot be impeached for error of judgment, whether of law or fact.[31] Similar grounds for impeachment exist in England. Misconduct of an arbitrator is a ground for setting aside the award, but is not a defense in an action upon the award.[32] In addition, under the inherent powers possessed by the Court, an award will be set aside which is bad on its face, irrespective of whether the error is one of fact or of law.[33]

The mode of impeaching awards varies a great deal on the continent and in Latin-America. Some countries, following the French example, allow the ordinary remedy of appeal (appellation), provided the parties have not waived such right.[34] Others deny the right of appeal or allow it only where the parties provided for such right in the arbitration agreement.[35] Distinctions exist also between the cases in which the arbitrators were authorized to act as amicable compounders and those in which they were bound by rules of law. The countries denying the ordinary remedy of appeal generally provide for extraordinary remedies, by means of which the award can be vacated or declared invalid.[36] The grounds upon which awards may be impeached also vary a great deal in the different countries. Controversy exists likewise regarding the question whether an appeal or an application to have the award set aside suspends the enforcement of the award. The time limit within which the proceeding for impeachment must be brought is frequently that provided for appeals from judgments. Sometimes the period is fixed in the arbitration statute itself.[37]

31. STURGES, op. cit. *supra* note 4, at 787 et seq. See C. Itoh & Co., Ltd. v. Boyer Oil Co., Inc., 198 App. Div. 881, 191 N. Y. Supp. 290 (1st Dep't, 1921); Matter of Goff & Sons, Inc., and Rheinauer, 199 App. Div. 617, 192 N. Y. Supp. 92 (1st Dep't, 1922); Matter of Pine St. Realty Co., Inc. v. Coutroulos, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't, 1931).

An appeal from an order or judgment on the award, founded on a matter of law apparent upon the record, is allowed in Massachusetts. MASS. GEN. LAWS (1921) c. 251, § 12.

32. RUSSELL, op. cit. *supra* note 8, at 280.

33. Id. at 201, 218; see Buerger & Co. v. Barnett, 89 L. J. K. B. (N. S.) 161 (H. L. 1919).

34. FRANCE, CODE CIV. PROC. arts. 1010, 1023. There is some doubt in France whether the party can waive the right. André-Prudhomme, *The Present Position of the Arbitration Clause under the Law of France*, 1 NUSSBAUM 70, 75.

35. For example, Germany, see 2 GAUPP-STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (15th ed. 1934) § 1040(1).

36. CODE OF CIVIL PROCEDURE § 1041.

37. For example in Sweden, where the period is sixty days reckoned from the time of the service of the award. Law concerning Arbitral Procedure of June 14, 1929, 3 NUSSBAUM 272 § 21.

II

ENFORCEMENT OF FOREIGN AWARDS APART FROM THE GENEVA CONVENTION

A. *Enforcement in Foreign Countries of Awards Rendered Elsewhere*

Modes of Enforcement in General.[38] In many countries, in which the award is regarded as in the nature of a contract, and the action, for the performance of such contract, foreign awards may be enforced by an action to obtain a judgment on the award. An action to obtain a judgment on the award may be allowed notwithstanding the fact that an order rendering it executory has been obtained in the state of rendition. But if the award in the foreign country has been converted into a judgment, instead of having been merely rendered executory, suit must be brought as for the enforcement of a foreign judgment. On the continent, a foreign judgment is not enforced by an action on the judgment as a new cause of action, but by an execution-procedure to declare it executory (to provide it with an exequatur). In some countries the only mode of enforcing foreign awards is by having them declared executory in the home state, and then enforcing them as foreign judgments.[39] Such judgments are sometimes enforceable only if reciprocity exists, and in Austria and Hungary only if reciprocity is established by treaty or governmental decree.[40] It is generally held in these countries that no reciprocity exists with respect to the United States. Austria will not enforce oral awards of foreign countries even if the necessary reciprocity exists.[41]

In certain countries foreign awards are enforceable by the simplified procedure provided for the enforcement of domestic awards. This is the case in Belgium, where the award must be presented to the President of the Tribunal for the district in which execution is sought, or of the district in which either party is domiciled.[42] The order for enforcement (exequatur) will be granted without hearing the losing party, if the award

38. "Many aspects of the definition of a 'foreign arbitration agreement and award' are obscure." 1 NUSSBAUM 17. For a discussion of the problem see Jonas, *Anerkennung und Vollstreckung ausländischer Schiedssprüche* (1927) JW 1297 et seq.; Kahn, reviewing "Schiedsrecht" by Dr. Franz Prager, 6 RABEL 288-289; BRACHET, op cit. *supra* note 30, at 9 et seq.

39. For example, in Austria, where an action to obtain a judgment on the foreign award will not lie. OGH, April 28, 1931, 4 NUSSBAUM 117.

40. OGH, March 8, 1904, 1 NUSSBAUM 350; Dec. 16, 1908, 1 NUSSBAUM 353; Dec. 14, 1909, 6 REVUE 930; May 4, 1909, 41 CLUNET 982; Wehli, *Arbitral Tribunals under Austrian Law*, 1 NUSSBAUM 114, 123 et seq.; Fabinyi, *Schiedsgerichte nach Ungarischem Recht*, 3 NUSSBAUM 35, 49.

41. OGH, March 8, 1904, 1 NUSSBAUM 350.

42. Cass., Oct. 15, 1913, Pas. 1914, 1, 32; Sté Match Ltd. v. Adriaens, App. Ghent, May 5, 1927, 55 CLUNET 1245; Fritz & Co. v. Zaretksi, App. Brussells, March 28, 1928, 41 CLUNET 246, 3 NUSSBAUM 362; App. Liège, Nov. 7, 1896, 26 CLUNET 1041; Lloyd Royal Belge v. Société Corry Bros., Trib. Civ. d'Anvers, May 11, 1923, 62 Jurisp. du Port d'Anvers 446.

is formally correct and not contrary to mandatory provisions of the Belgian law or to its public policy. Although the provisions of the Belgian Code or Civil Procedure relating to arbitration are identical with those of France, there is considerable controversy in the latter country as to whether foreign awards can be enforced by the simplified procedure. Courts and authors have vacillated a great deal in this matter.[43] The hesitancy of certain French courts to apply the simplified procedure to foreign awards is based, at least in part, upon considerations of fairness to the party against whom the suit for enforcement is brought. As the exequatur is granted in such a proceeding without hearing the losing party, the latter, if a non-resident, might not learn of the proceedings in time to protect his rights. They conclude, therefore, that the application for the order of enforcement should be heard by the full court, as in the case of an ordinary proceeding for the enforcement of foreign judgments, which requires notice to the defendant.

Whether a foreign award could be rendered executory in Germany by means of the simplified procedure laid down in Section 1042 of the Code of Civil Procedure for domestic awards was subject to dispute.[44] According to the prevailing opinion a foreign award could be enforced until 1930 only by means of an action on the award. This controversy was settled in 1930, by an amendment to the Code, which specifically states that the simplified procedure is applicable to foreign awards.[45]

Requisites for Enforcement in General. In order to be entitled to enforcement the submission agreement must be valid according to the proper law, as determined by the rules of the Conflict of Laws of the state of enforcement. The award must have been validly rendered by an arbitral tribunal constituted in accordance with the terms of the submission agreement and the law governing the arbitration proceedings, as

43. In favor of simplified procedure before the President of the Tribunal, see Liquidation Max Jacques & Co., App. Douai, Dec. 10, 1901, Dalloz 1903, II, 129; Adair & Co. v. Leroy Crépeaux, App. Douai, May 30, 1902, 29 CLUNET 1023; Briens v. Zuckerhandelsunion Aktiengesellschaft, App. Lyon, Nov. 25, 1913, 41 CLUNET 1230; Desfossez & Dervaux v. John Burstall & Co., App. Douai, May 27, 1911, 8 REVUE 717. In favor of exequatur by the full court, see Marquis de Santa Cristina v. Prince and Princess del Drago, App. Paris, Dec. 10, 1901, Dalloz 1905, II, 128; Salles v. Hale & Co., App. Aix., Dec. 18, 1913, Cass. (Req.) Dec. 8, 1914, 43 CLUNET 1218; Landauer v. Betaille & Co., Trib. des Bouches du Rhône, March 18, 1927, Dalloz Hebd. 1927, 345; Hashimoto v. Galusset & Co., Trib. Civ. Seine, Feb. 10, 1922, 49 CLUNET 150; Campbell & Co. v. Bloch, Trib. Civ. Seine, Nov. 16, 1922, 50 CLUNET 78.

44. In favor of such simplified procedure, see KG, March 30, 1928, JW 1928, 1871. *Contra:* OLG Hamburg, Dec. 21, 1929, JW 1930, 768, NUSSBAUM 338; OLG Karlsruhe, March 13, 1929, Badische Rechtspraxis 1929, 43, 3 NUSSBAUM 350; LG Bremen, June 19, 1930, 3 NUSSBAUM 348.

45. CODE OF CIVIL PROCEDURE § 1044. Since 1930 an action to obtain a judgment on the award has been permissible only in the exceptional case where the award does not determine the ultimate liability of the parties. OLG Hamburg, Jan. 15, 1932; Hans. RG 1932, 238.

determined by the rules of the Conflict of Laws of the state of enforcement. The enforcement of the award must not contravene the public policy of the forum. Foreign awards will not be enforced until they are "definitive", but there is no agreement in continental countries regarding the meaning of the term.

The merits of the award will not be re-examined in any proceeding to enforce a foreign award either as to the facts or the law,[46] and without regard to the nature of the proceeding—whether it is an action on the foreign award or a proceeding to render the foreign award executory by the simplified procedure, or by means of a regular action, as in the case of a foreign judgment. The merits of a foreign award have been re-examined, however, to the extent that they were subject to re-examination in the country where the award was rendered.[47] In Italy the merits of an arbitral award will be re-examined whenever it is rendered by default;[48] also if the award was procured fraudulently by the plaintiff,[49] or if the award was based on forged or altered documents, the forgery or alteration having been discovered by the defendant only after the rendering of the award,[50] and under certain other circumstances.[51]

Enforcement in Specific Continental Countries. Belgium and France. There are no Code provisions relating to the enforcement of foreign awards. As has been shown above,[52] much difficulty has been experienced in these countries, especially in France, concerning the manner of their enforcement. Whenever the proceeding is before a single Judge of the Tribunal, in which the defendant is not heard, the order permitting enforcement may be reviewed by the full court.

46. For example, in France, notwithstanding the fact that foreign judgments are re-examined on their merits. Bernard & Lowagie v. The General Mercantile Co., Cass. (Req.) June 21, 1904, 31 CLUNET 888; Société des Fils Crémades v. Lindsay, Cass. (Req.) July 9, 1928, Dalloz 1928, I, 173, Sirey 1930, 1, 17, and note by Niboyet; Aff. Salles v. Hale & Co., App. Aix, Dec. 18, 1913, Cass. (Req.) Dec. 8, 1914, 43 CLUNET 1218. So also in Germany: M. G. Société Anonyme v. G. & Sohn, G.m.b.H., RG Jan. 28, 1927, 116 RG 76, 2 NUSSBAUM 301; RG, Feb. 7, 1928, 3 NUSSBAUM 324; RG Feb. 2, 1928, 3 RABEL, SONDERHEFT 173.

47. Cohn v. Kolonial-Produkten-Einfuhr A.G., OLG Hamburg, Oct. 31, 1924, Hans. Rechtszeitschrift, 1925, 63, 1 NUSSBAUM 302.

48. Thornett & Fehr v. Società Unione Commissionaria Ligure, Cass. Feb. 16, 1929, Foro It. 1929, I, 1, 617.

49. CODE CIV. PROC. art. 941, § 2, art. 494, no. 1.

50. CODE CIV. PROC. art. 941, § 2, art. 494, no. 2.

51. Namely, if the defendant regains possession of a vital document which he could not produce in the arbitration proceedings owing to plaintiff's conduct, or if the award resulted from a mistake of fact based upon documents and records in the case, provided the award was based upon the assumption of a fact which is erroneous beyond a doubt, or upon the assumption of the absence of a fact, the existence of which has been positively established, and such fact was not in issue in the arbitration proceedings and decided in the award. CODE CIV. PROC. art. 941, § 2, art. 494, nos. 3-4.

52. *Supra*, p. 45.

Before an exequatur is granted by a French court the President of the Tribunal will consider the following points:[53] (1) The validity of the arbitration agreement;[54] (2) the jurisdiction of the Arbitral Court; (3) the regularity of the arbitral proceedings, especially whether the losing party was duly cited and given an opportunity to be heard[55] (4) whether the enforcement of the award would violate French public policy.[56]

No order for enforcement need have been obtained in the state in which the award was rendered.[57]

Holland. There is no simplified procedure in Holland for the enforcement of foreign awards, a summary proceeding being allowed only with respect to domestic awards. Foreign awards can be enforced only by means of an action on the award.[58] The judge will inquire whether there was a valid submission agreement and a valid award and whether its enforcement would be contrary to Dutch public policy. It is not necessary that an order for the enforcement of the award was obtained in the state in which the award was rendered.[59]

Germany. The enforcement of foreign awards in Germany has been clarified by the Law of July 25, 1930.[60] According to this law the simplified procedure applicable to German arbitral awards is extended to foreign awards, unless treaties between the countries provide otherwise. The law contains an express provision that Section 1039 of the German Code of Civil Procedure, relating to the formal execution of awards, their service upon the parties and deposit with the proper German court, is not applicable to foreign awards. The foreign awards will be declared executory after the court has satisfied itself, ex officio, that the award is a subsisting, valid award under the foreign law and that it is final. It is

53. BRACHET, op. cit. *supra* note 30, at 128-129.

54. Hashimoto v. Galusset & Co., Trib. Civ. Seine, Feb. 10, 1922, 49 CLUNET 150; Campbell & Co. v. Bloch, Trib. Civ. Seine, Nov. 16, 1922, 50 CLUNET 78.

55. Hashimoto v. Galusset & Co., Trib. Civ. Seine, Feb. 10, 1922, 49 CLUNET 150; Campbell & Co. v. Bloch, Trib. Civ. Seine, Nov. 16, 1922, 50 CLUNET 78; Aff. Salles v. Hale & Co., App. Aix, Dec. 18, 1913, Cass. (Req.) Dec. 8, 1914, 43 CLUNET 1218.

56. Urania v. L'Eclair, Trib. Civ. Seine, Feb. 2, 1926, 54 CLUNET 436; and cases cited *supra* note 55.

57. See Briens v. Zuckerhandelsunion, App. Lyon, Nov. 25, 1913, 10 REVUE 109.

58. In re H. Wiener & Co. v. J. van den Bosch, Hooge Raad (Supreme Court), Dec. 8, 1916, Weekblad Van Het Recht, no. 10054, 1 NUSSBAUM 343. It was held in In re Pymon Bell & Co. v. C. H. Vernooy, Rb. Utrecht, Feb. 16, 1910, Weekblad, no. 8993, 1 NUSSBAUM 347, that an action on an English award would lie only if such action could be brought in England.

59. Kalker & Visser v. Browne, Drakeford & Co., Hof Amsterdam, Jan. 21, 1925, Weekblad, no. 11344. So, Le Comptoir Commercial Anversois v. J. E. Mulock Houwer Dzn., Rb. Zierikzee, March 17, 1903, Weekblad, no. 7935.

60. CODE OF CIV. PROC. § 1044. For a summary statement of the earlier law, see Rheinstein, *Die Vollstreckung ausländischer Schiedssprüche in Deutschland*, 5 RABEL 555.

not necessary that the award should have been declared executory in the foreign state. The losing party may prevent the enforcement of the award by proving any of the grounds enumerated in Section 1044 of the Code of Civil Procedure, as amended in 1930. These are:

(1) That the award is without legal effect. So far as treaties do not provide otherwise the effectiveness of the award is to be determined by the law governing the award; (2) that the recognition of the award would be *contra bonos mores* or the public order, especially if the award would compel a party to perform an act, the doing of which is prohibited by German law; (3) that the party was not duly represented, unless such party has ratified the proceedings either expressly or by implication; (4) that the party was not given a proper hearing.

In the above cases a foreign award—unlike a domestic award—will not be set aside by the German courts,[61] but a declaratory judgment may be rendered denying it enforceability in Germany. However, if the award is set aside in the country in which it was rendered after being declared executory in Germany, an action may be brought in Germany to vacate the enforcement order.

Sweden. The enforcement of foreign awards is regulated in Sweden today by the Law of June 14, 1929.[62] This law provides that foreign awards shall be valid in Sweden with the reservations contained in section 7 of the Law. According to these reservations foreign awards will not be enforced (1) if the arbitral agreement is invalid according to the applicable law; (2) if the award has been set aside in the country where it was rendered; (3) if some other circumstance exists by virtue whereof the award is without effect in the foreign state; (4) if suit is pending in the foreign state concerning the validity of the award, or the time allowed for setting aside the award has not yet expired; (5) if the award deals with a matter which cannot be brought before arbitrators according to Swedish law; (6) if the party against whom the award was rendered did not have a reasonable opportunity to defend his rights; (7) if the question submitted to arbitration has been decided in Sweden subsequent to the making of the arbitral agreement by an ordinary court or by the "chief executor"; (8) if a circumstance exists with respect to the arbitral procedure or the award which would make the enforcement of the award contrary to *bonos mores*. Provisions contained in subsections 3 and 6 will not invalidate the award in Sweden unless they are set up by the party against whom the award is sought to be enforced.

Switzerland. The legal situation in regard to the enforcement of foreign awards is very complex in Switzerland, there being no uniform law of procedure in the twenty-five cantons. Under the federal constitution the

61. According to the decision of the German Supreme Court in 116 RG 194, German courts have no jurisdiction to set aside foreign awards.

62. See 3 NUSSBAUM 281.

cantons are under a duty to recognize and enforce judgments rendered in other cantons.[63] The same obligation exists with respect to cantonal arbitral awards if by the law of the canton where they are rendered they are placed upon the same footing as judgments. With respect to awards of foreign countries, the cantons are bound by any federal treaty. The cantons also have the power to enter into treaties through the intermediacy of the Federal Council.[64] In the absence of federal or cantonal treaties relating to the enforcement of the awards of foreign countries, the procisions of the local codes of procedure control. As these are only very meager, or totally absent, with respect to foreign awards, there is great difficulty in ascertaining what the cantonal law is. Most of the cantons appear to assimilate foreign awards to foreign judgments and to subordinate their enforcement to the existence of reciprocity.[65] No reciprocity is required, however, in some cantons,[66] the principal one being that of Berne. Section 4 of Article 401 of the Code of Civil Procedure of Berne provides that the provisions relating to the enforcement of foreign judgments shall be applicable to foreign awards. These require that the judgment (award) be final and valid by the law of the place of rendition, that the defendant must have been duly cited, and that enforcement of the award should not contravene any public policy of the forum. For the enforcement of a foreign award in the Canton of Berne it is not necessary that an order rendering it executory should have been obtained in the home state.[67]

In some cantons a distinction is made between foreign judgments and foreign awards in the matter of reciprocity, permitting the enforcement of foreign awards,[68] without the existence of reciprocity. This attitude is taken also by the federal courts.[69]

63. SWISS CONST. art. 61.

64. SWISS CONST. arts. 9-10; BURCHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG (1905) 143.

65. See Sumobor v. Marcel Lob, Council of State of Wallis, July 12, 1928, 56 CLUNET 800, and note by Leresche; OG Zurich, Nov. 7, 1924, 24 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 329, 2 NUSSBAUM 358; LERESCHE, L'EXÉCUTION DES JUGEMENTS CIVILS ÉTRANGERS EN SWISSE (1927) 85-109. Compare decision by Swiss Supreme Court, March 26, 1920, 19 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 276, 2 NUSSBAUM 344.

66. See LERESCHE, op. cit. *supra* note 65, at 109-112.

67. So far as foreign awards fall within the purview of the Geneva Convention of 1927, the cantonal courts are not free to apply their own rules of the Conflict of Laws but are bound by the decisions of the Swiss Supreme Court. Accordingly, an arbitral agreement will be valid throughout Switzerland as regards "form" if the formalities of the law of the place of execution of the agreement or those of the law of the place in which the arbitration was to take place were satisfied. Supreme Court, Oct. 2, 1931, 57 Entscheidungen des Schweizerischen Bundesgerichts I, 295.

68. Super. Court of Zurich, March 19, 1926, 27 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPERECHUNG 36, 56 CLUNET 800; CANTON BASEL-STADT, CODE CIV. PROC. (as amended, Jan. 1, 1925) § 258.

69. Supreme Court, March 26, 1920, 19 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 276.

Italy. The Royal Decree of July 20, 1919, modifying Art. 941, Code of Civil Procedure (confirmed by law of May 28, 1925) placed foreign awards substantially on the same footing as foreign judgments[70] Foreign awards are enforceable, however, only if rendered between foreigners or between an Italian and a foreigner, and not when they are between two Italians.[71] The conditions under which foreign awards are enforced in Italy are the following:[72] (a) that the award must have been rendered by a competent tribunal and preceded by proper notice to, and hearing of the defendant; (b) must be irrevocable and executory, with the effect of a judgment, according to the law of the place of rendition; (c) must not be in conflict with an Italian judgment or concern a subject matter pending before an Italian court at the time enforcement is sought; (d) must not contravene Italian public policy or law; (e) can be declared executory, where the foreign award was by default and the defendant failed to appear in the Italian enforcement (exequatur) proceeding, only if the defendant was served personally in the enforcement proceeding.

Exequatur proceedings must be brought before the Court of Appeals of the district in which the enforcement of the award is sought. The merits of the award cannot be re-examined, with two important exceptions, first, in case the award was rendered by default, and, secondly, in case the circumstances indicated in Article 494, numbers 1-4 of the Code of Civil Procedure, occur.[73] From the above it is apparent that there are two ways in Italy by which the enforcement of foreign awards may be resisted; first, by not appearing, in which event the losing party may, if sued in Italy on the award, ask for a re-examination of the merits of the case;[74] second, by starting a suit in Italy with reference to the same matter even if he did appear in the arbitration proceedings.

Enforcement in Specific Latin-American Countries. Argentina. Foreign awards are regarded as judgments by the federal courts and enforceable as such. Exequatur proceedings are brought before the Judge of First Instance and will be granted if the provisions of Articles 558 to 562 of the Code of Civil Procedure are complied with.[75] According to

70. Art. 941, § 4.

71. Art. 941, § 4. The award is unenforceable if both parties are Italian subjects at the time of the rendition of the award, although they were not at the time the agreement for arbitration was entered into. Cominelli c. Cappelli, Cass. del Regno, Feb. 11, 1925, Riv. di Dir. Int. 1925, 429, and note by Perassi. An agreement between an Italian and a foreigner, entered into abroad but to be performed in Italy, which excludes the jurisdiction of the Italian courts and refers all disputes arising out of the contract to a foreign court, is void. Ragghianti v. Nardi, Foro It., Rep., vol. 55, no. 11 (1930).

72. Art. 941, §§ 1, 3, 4.

73. CODE CIV. PROC. art. 941, § 2. See *supra* p. 46.

74. See Hindley v. Canapificio, App. Trieste, Jan. 13, 1931, Giur. It. 1931, I, 2, 240. I, 2, 240.

75. With respect to awards of Bolivia, Paraguay, Peru, and Uruguay, the provisions of the Treaty of Montevideo (arts. 5 et seq.) control.

these, reciprocity is not required for the enforcement of foreign awards and the merits will not be re-examined.[76] The award must be valid and enforceable in the state in which it was rendered. It will not be enforced if the claim on which it was based would be invalid according to Argentine law; nor where the award is by default and the losing party was domiciled in Argentina. The state courts are governed by their own codes of civil procedure which do not always coincide with the provisions of the federal law.

Brazil. Foreign awards are said to be unenforceable in Brazil on principle, subject, however, to important qualifications. Article 13 of the Imperial Decree 6982 of July 27, 1878 provided that foreign awards, confirmed by a judgment of the foreign court, were to be enforceable in Brazil after an examination by the Supreme Court. Since the establishment of the Republic, Law 221, of November 20, 1894, introduced exequatur proceedings, with respect to foreign judgments, according to which foreign judgments could be enforced in Brazil without reference to reciprocity after being homologated by the Supreme Court. The above provisions are deemed applicable to foreign awards confirmed by a judgment in the home state. No reciprocity is required and no re-examination is made of the merits.[77] The court is to inquire whether (1) the award was valid and final, (2) the arbitral court had jurisdiction, (3) the defendant had notice and an opportunity to be heard, (4) the enforcement of the award would be contrary to the public policy or to the public law of Brazil.[78]

Chile. Just as in the case of foreign judgments, foreign awards will be enforced if there is a treaty to that effect, or if reciprocal treatment is given by the foreign country to Chilean awards.[79] The Chilean Code of Civil Procedure contains the following additional provisions,[80] the relation of which to the previously mentioned Code provisions appears doubtful. According to these, foreign judgments to which none of the foregoing provisions can be applied will have the same effect as Chilean judgments, provided: (1) They contain nothing contrary to the laws of Chile, excepting procedural laws; (2) they are not opposed to the Chilean jurisdiction, (3) the judgment is not by default; (4) they have been rendered executory according to the law of the country in which they were rendered.

76. Aff. Guilhermina Simões, Supreme Court, June 20, 1906, 34 CLUNET 483.

77. Valladão, *Die Schiedsgerichtsbarkeit in Zivil- und Handelssachen in Brasilien,* 3 NUSSBAUM 57.

78. Id. at 61-62.

79. CODE CIV. PROC. arts. 239-241, 243.

80. Art. 242. Quaere: (1) Can Art. 242 be harmonized with the foregoing articles, especially with Art. 241? (2) Does it refer to judgments of countries with respect to which no reciprocity has been *proved*? (3) Does Art. 242 lay down qualifications to the general requirements contained in Arts. 239-241?

Uruguay. In Uruguay likewise, foreign awards are enforced on the same terms as foreign judgments. In the absence of treaty provisions[81] the courts of Uruguay are guided in the enforcement of foreign judgments by the principle of reciprocity.[82] The Code of Civil Procedure of Uruguay contains the following additional provisions, the interpretation of which gives rise to the same doubts as the corresponding provisions of the Chilean Code of Civil Procedure.[83] If the foreign judgment does not fall within the foregoing provisions it will have executory force in Uruguay, if it is presented in "authentic" form and it is apparent that it satisfies the following requirements:[84] (1) that it was rendered by competent judicial authority; (2) that the defendant was duly cited and represented at the trial, or legally declared in default, notice of the judgment having been given to him even in this case; (3) that it is not opposed to the public order, good morals, to the Constitution and laws of Uruguay.[85]

Enforcement of foreign awards in England. Whether a foreign award, not governed by the Arbitration (Foreign Awards) Act, 1930,[86] be regarded as a judgment or a contract in England, the ordinary, if not exclusive, remedy for its enforcement will be in either case the ordinary action as upon a contract claim.[87] From a procedural point of view an action upon a judgment would present no substantial advantages over an action upon an award. On the other hand, since there is no reciprocity doctrine in England in the matter of enforcing foreign judgments, a judgment on the award would not render the award more difficult of enforcement than it would have been had no judgment been rendered thereon. However, the judgment and contract concepts have obtained peculiar significance in England from another point of view. In the case of *Merrifield Ziegler*

81. As between Uruguay and Argentina, Bolivia, Paraguay and Peru, the provisions of the Treaty of Montevideo (Arts. 5 et seq.) control.

82. Art. 513.

83. See *supra* note 80.

84. Art. 514.

85. Art. 515.

86. This Act reproduces in substance the provisions of the Geneva Convention of 1927 for the Enforcement of Foreign Awards. By the terms of this Convention, England, which is one of the ratifying states, is under a duty to enforce awards rendered in any of the Contracting States by the same procedure with which it enforces its own awards.

87. Section 12 of the English Arbitration Act provides for a summary procedure, the award being made enforceable by leave of the court or a judge in the same manner as a judgment or order to the same effect. The summons must be personally served upon defendant. Service out of the jurisdiction of any summons to remit, set aside or enforce an award is possible, since 1920, if the award is rendered in an English arbitration (Order XI, r. 8a (c) of the Supreme Court; RUSSELL, op. cit. *supra* note 8, at 275). The remedy under Section 12 is available, however, only when the award has definitely settled the rights and liabilities of the parties; nor will the court make an order if there is any doubt as to whether the award is valid or binding. RUSSELL, op. cit. *supra* note 8, at 272-273; 1 HALSBURY'S LAWS OF ENGLAND (1931) 461.

Enforcement by action is the appropriate remedy where a submission is by parol or where

& Co. v. Liverpool Cotton Association[88] suit was brought to have an award, rendered in Germany, declared invalid and void. There was a counterclaim that the award be declared binding and that payment be ordered as specified in the award. The court found that plaintiff had failed to establish that the award was void and invalid. Although the award was admitted to be valid and binding, the court refused, however, to order execution of it because no order to enforce had been issued upon the award in Germany. In answer to the argument that enforcement might be granted on the basis of an implied contract to abide by the award, Eve, J. declared:

> "The obtaining of an enforcement order is the only method known in practice for enforcing an award made in Germany, and there seems some ground for the proposition that it is the only legal method. But in Germany an action can be brought to enforce an award made in another country, and the German court, if satisfied that the award is valid according to the law of the country where it was made and is not in conflict with German law, will enforce it. The defendants' experts express the opinion that the ground upon which the German court enforces the foreign award is that the court implies in the submission a contract to be bound by and to carry out the award, and they found upon this the further opinion that the same implication arises in the case also of a German submission and a German award; but no authority is cited in support of this opinion, nor is it to be found advanced in any German commentary or textbook, and its soundness is emphatically disputed by the plaintiffs' experts. In this condition of the evidence, while not taking upon myself to determine whether or not the doctrine of implied contract is imported into a German submission, I am bound to hold that the defendants have not affirmatively proved that it is."

The Judge then takes up the question of enforceability of the award as a foreign judgment and finds the award,

> "of no force or effect unless and until the court determines that it is an adjudication made in proceedings regularly conducted upon matters clearly submitted to the jurisdiction of the tribunal. . . . This stage has not yet been reached with the award under consideration, and, were I to give judgment upon it here, I should be giving the defendants power to issue execution in this country on an award in respect of which no execution could be levied in the country where it was made."

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an award is not final or where the validity of an award is doubtful, and this action is available as of right to enforce any local award, even if Section 12 is applicable or has already been applied. This action is simply an action on the contract. Although it has been suggested (see Report of Committee on the Law of Arbitration, of March 1, 1927, RUSSELL, op. cit. *supra* note 8, at 644) that Section 12 of the Arbitration Act may be applicable to the enforcement of foreign awards not falling within the Geneva Convention, it may well be held that it has reference only to awards rendered in England. Even if applicable on principle to foreign awards this summary procedure may not be available for the reason that such awards will probably be unable to meet the requirements of clarity and certainty necessary for the application of the summary method.

88. 105 L. T. 97 (Ct. App. Ch. Div. 1911).

According to the *Merrifield* case, a foreign award may be enforced by action either upon the award as a contract, or upon the judgment on the award, provided, however, the award is so enforceable in the country where it was rendered. In order for the award to be enforceable in England as a *judgment,* it must have been rendered executory beforehand in the country where it was rendered. Likewise, in order to enforce the award by an action as upon a contract, it must be proved that such action would be allowed in the country where the award was rendered. The question, however, is whether the *Merrifield* case can be justified.[89] So far as the German law is concerned, the contractual character of an arbitral award is recognized, and, traditionally, an action on the award has been the appropriate remedy. This remedy is no longer necessary, however, in view of the fact that a simpler and less expensive method for the enforcement of awards has been substituted in modern law. From an English point of view the question whether at the time of the *Merrifield* case an action on the award was available in Germany, or whether it had been supplanted by a more summary method of procedure, should be of no concern, for this is a matter of procedure regarding which the law of the forum controls. "I submit," says Kahn,[90] "that this legal rule of an implied promise to perform an award is not, or at any rate not solely, an institute of English substantive law, but one which is equally adjective law or law of procedure. That the view taken above is correct becomes very clear when one considers the nature of a contract implied by English law to satisfy a foreign judgment. If the quasi-contract were substantive law, then inquiries would have to be made whether the foreign law also implied a quasi-contract. These inquiries cannot be made because they would be against the purpose of this rule of law. Therefore, the right inference to be drawn is that in the case of a foreign judgment the implied quasi-contract is part of the law of remedies, and in the case of an implied contract to perform an award, the conclusion cannot be different from the above general reasons."

The entire approach under the German law is from the standpoint of supplying a remedy to enforce the award. The order of enforcement required to render local awards executory is no more than the simple English decree for leave to enforce an award, and does not transform the award into a judgment any more than does the English leave to enforce,

89. See the criticisms of KAHN, JOURNAL OF COMPARATIVE LEGISLATION (1930) 244; and of OPPENHEIMER, 1 NUSSBAUM 316.

90. *Supra* note 89, at 245. "It cannot be denied that an enforcement order of a foreign country in respect of a foreign award may seem to save an English judge the very difficult task of examining a foreign award from the point of view of the foreign law; but what if the foreign enforcement order is only a clerical one without entering into the merits as in Belgium (CODE CIV. PROC. art. 1020) or a litigious one but not on the merits, as in Germany?" KAHN, op. cit. *supra* note 89 at 247.

and its purpose is purely for local execution of the award. It follows that an enforcement order of the foreign country should not be required and if it should have been made, it should have no effect upon proceedings in an English court.[91] This conclusion would appear to be inescapable where the enforcement order is procedural in character and not a condition precedent to the binding character of the award itself.

Awards rendered in the United States would not generally encounter in England the difficulties of the *Merrifield* case since the action upon the award is available for enforcement of local awards in most states. There might be some difficulty in case of statutory awards rendered in a state which permits only statutory methods of enforcement under statutory submission agreements. Here the English courts would doubtless require a local confirming judgment before enforcing the award.

Owing to a scarcity of decisions in England regarding the enforcement of foreign awards, little can be said concerning other conditions that must exist before such awards will be enforced and the defenses that may be available. This dearth of authority is due perhaps to the fact that arbitration is so ancient and well developed an institution in England that most arbitrations which had any connection with England were held in England. If the ordinary common law action is permitted in the same manner as where a local award is being sued upon, the merits of the award will not be re-examined, but the court will go into questions of the validity of the arbitration agreement, the competency of the arbitrators, the regularity of the arbitral proceedings and other questions affecting the validity of the award. These questions are determined with reference to the law governing the arbitration and award. Thus in *Bankers and Shippers Insurance Co. of New York v. Liverpool Marine and General Insurance Co.*,[92] the House of Lords refused to enforce a New York award on the ground that the arbitration proceeding was not held in accordance with the New York law.

Even the question whether a defense may be set up in an action on the award or can be availed of only by motion to set aside the award has been held to be controlled by the law governing the award. Thus in a suit in India upon an English award, the failure on the part of the de-

91. In Bremer Oeltransport v. Drewry, [1933] 1 K. B. 753, an agreement had been made in England for arbitration in Germany. In an action to enforce the German award against a defendant domiciled in France, the question was whether the suit was for a breach of contract "made within the jurisdiction," in order that service of the summons out of the jurisdiction might be allowed under the Rules of the Supreme Court. The Court of Appeal concluded that "the greater weight of authority is in favor of the view that in an action on the award the action is really founded on the agreement to submit the differences of which the award is the result." The court left open the question whether "an action may or may not be brought on any implied contract on the award itself." Does not the action rest upon both the submission agreement and the award?

92. 24 Lloyd's List Law Rep. 85 (H. L. 1926).

fendant to receive notice that the arbitrator was proceeding to arbitration was not allowed as a defense, as it constituted merely an irregularity in arriving at the award, which cannot be set up under English law as a defense to an action upon the award, but is available only as a ground for a motion to set aside or remit the award. Such a motion, the court held, could be made only in England, a foreign court having no jurisdiction to set aside an English award.[93]

B. *Enforcement of Foreign Awards in the United States*

Although the legal aspects of commercial arbitration in the United States are imperfectly developed and there are numerous differences to give rise to conflicts and litigation, there is a great scarcity of decisions regarding the enforcement of foreign arbitral awards.

Enforcement of Awards of Sister States. Since an action upon an award is an ordinary common law action upon a contract, such action should generally be available to enforce a foreign award, and in the few cases where suit has been brought upon a foreign award, this was the remedy used. There appear to be no cases where any attempt was made to enforce a foreign award by the summary statutory method at the forum. This is due to the fact, no doubt, that the statutory method for the enforcement of awards under the older types of statutes appeared to be limited to local awards. This was particularly the case under statutes requiring a stipulation that the award be confirmed by a specified court of the state, for in this instance it would be impossible for the foreign award to qualify. As regards the more liberal statutes, such as that of New York, there would appear to be no formalities with which a foreign award could not comply, and it might be argued that the matter is one of remedy or procedure to which the lex fori applies. However, the provisions will probably be interpreted as referring only to local awards. There would then remain only common law methods for the enforcement of foreign awards and the question is whether these are available in fact.

The extended controversies in continental countries as to whether the award should be regarded as a contract or as a judgment for purposes of enforcement would seem to have little, if any, significance in this country where the award itself without confirming judgment is concerned. As regards awards rendered in sister states, no suggestion has ever been made that they are judgments and as such entitled to full faith and credit.

Where a judgment has been rendered in the home state on an award or some court action has been taken there to render the award executory, the question is what its effect will be upon its enforcement in another state. Judgments rendered in an action upon a common law award in a sister

93. Oppenheim & Co. v. Mahomed Haneef, [1922] 1 A. C. 482.

state, it seems clear, are entitled to full faith and credit under the Constitution of the United States. In *Fauntleroy v. Lum*,[94] the Supreme Court of the United States held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri, although the transactions out of which the award arose had occurred in Mississippi, where they were criminal offenses. The courts cannot decline the enforcement of a judgment of a sister state upon an award, therefore, on the ground that such enforcement would be contrary to the public policy of the forum. The same conclusion will probably be reached where a judgment or order is entered confirming a statutory award in a sister state according to the summary statutory method, in view of the fact that in most states the proceedings to confirm give to the defendant due notice and an opportunity to be heard, so as to satisfy the due process requirements, and the judgment entered upon the award appears locally to be regarded as final and conclusive as judgments in ordinary civil actions.

A closely associated question is whether the confirming judgment *must* be obtained in the state of the award in order to render a statutory award enforceable elsewhere. As there is some difference of view among the decisions regarding the enforceability of statutory awards by common law methods, the situation might arise where a statutory award, enforceable at plaintiff's election by a common law action in the state of the award, is sought to be so enforced in a state in which statutory awards are enforceable exclusively by the statutory method. In such a case the plaintiff would probably be required to obtain a confirming judgment in the state of the award and sue in the second state on the judgment. The mode by which a foreign award is to be enforced being a procedural matter governed by the law of the forum, a state not allowing a common law action upon a statutory award would probably not allow it with respect to a foreign award.

Under the statutes in this country an award probably becomes so merged in the confirming judgment, as to preclude further action upon the award.[95] If differences of view regarding the merger of the award in the judgment should arise, the question would in all probability be determined with reference to the law of the state in which the award and judgment were rendered.

Enforcement of Awards of Foreign Countries. Foreign judgments are enforced in this country by an action on the judgment, and not by any summary process. The fact that an award may be regarded in the home country as a judgment is therefore of no consequence so far as the procedure of enforcement in this country is concerned. Nor would the labeling of the award either as a judgment or a contract decide the question

94. 210 U. S. 230 (1908).

95. See STURGES, op. cit. *supra* note 4, at 11.

as to how far the courts will go into the merits of the case. Whatever the award is called, it is admittedly effective to the extent of precluding review of the merits. One possible effect of such nomenclature might be that the courts subscribing to the reciprocity doctrine[96] with respect to judgments of foreign countries would carry over that doctrine to the enforcement of foreign awards. There is no valid reason, however, why this should be done. The reciprocity doctrine is defensible only from a political point of view and is entirely out of place in the enforcement of foreign awards, which rest primarily upon the agreement of the parties.

No doubt, the effect of court proceedings following an award in a foreign country may vary a great deal. In countries in which the award is not complete until it is confirmed by an order of the court or until it is declared executory, the award becomes converted into a judgment by such order or declaration, and its enforcement elsewhere may well be made to depend upon the principles relating to the enforcement of foreign judgments. It would seem equally clear, with respect to awards of countries which enforce awards by a simplified procedure without hearing the losing party, that an order for enforcement should not be regarded as having the effect of converting the award into a judgment. Difficulty exists, however, in those cases in which an enforcement order is granted only after an opportunity to be heard has been given to the losing party. Should the enforcement order in such a case be regarded as supplanting the award, so that if suit is brought in another country it should be for the enforcement of a foreign judgment? Locally, the enforcement order may have the effect of allowing execution on the award and no other. In such case it would seem that in an action in a foreign country the enforcement order should be ignored as a procedural matter and the award enforced as if there were no such order. Even if it should appear that under the local law the enforcement order was regarded as superseding or merging the award, it might be argued that as long as our courts do not apply the merger doctrine to judgments of foreign countries, they should not apply it to foreign awards. Upon this line of reasoning suit upon the foreign award might be allowed even in our federal courts without proof of existing reciprocity.[97]

There are no decisions in this country regarding the question whether the exequatur proceeding, or any other proceeding required to render the award executory in the home state is a pre-requisite to enforcement of the

96. Hilton v. Guyot, 159 U. S. 113 (1895).

97. The question of merger may likewise become important in case an award rendered and confirmed by a judgment in a state in this country is sought to be enforced abroad. If the award is regarded as being merged in the judgment, it may be a serious handicap to obtaining any remedy if defendant can be reached only in a country where the reciprocity doctrine as to enforcement of foreign judgments obtains.

award in this country. In England there is the *Merrifield* case,[98] holding that the necessity of exequatur proceedings before such award could be enforced in England should be determined by the law of the place where the award was rendered. This case, however, failed to inquire whether the requirement of an exequatur proceeding by the foreign law was not merely a local procedural one, which should be ignored in the enforcement of the award elsewhere.

A decision of the Court of Appeals of Georgia has held,[99] where the parties provided for arbitration under the English Arbitration Act, that the English award could not be enforced in Georgia as a common-law award for the reason that the parties had agreed upon a statutory award. As such foreign award could not be treated as a statutory award within the purview of the Georgia Civil Code, which applies only to local awards, the English award would be enforceable in Georgia only if it had been converted into a judgment. The conclusion drawn by the learned court from the agreement of the parties, would appear to be unjustified. An award under the English Arbitration Act need not be enforced by the statutory method in England but may be enforced by an action on the award.[100] There exists no sufficient reason, therefore, why the award could not be enforced as a common-law award in Georgia.

Defenses to Enforcement of Foreign Awards. In a recent case decided by the Court of Appeals of Ohio[101] an agreement providing for future arbitration was made between a resident of Ohio and a resident of New York. The contract stipulated, "The provision of this contract relating to arbitration shall be construed according to the laws of the state of New York." The defendant having refused to abide by this agreement to submit to arbitration, an award was rendered in New York in favor of plaintiff in accordance with the New York statute, and suit was brought upon the award in Ohio. The defendant pleaded that the arbitration clause in the contract was void under the laws of Ohio as ousting the jurisdiction of the courts. Agreeing with the defendant's contention, the learned court held that arbitration agreements under the New York arbitration statute related to the remedy and, since the remedy must be governed by the lex fori, which here was Ohio, only Ohio law could apply. As at the time of the decision Ohio did not have an arbitration act making agreements for the arbitration of future disputes irrevocable, the defendant was privileged under the local law of Ohio to revoke the submission agreement before the award was made. The defendant's refusal to proceed to arbitration was held to be a revocation of the submission agree-

98. 105 L. T. 97 (Ct. App. Ch. Div. 1911).

99. Wright, Graham & Co. v. Hammond, 41 Ga. App. 738, 154 S. E. 649 (1930).

100. RUSSELL, op. cit. *supra* note 8, at 276-277.

101. Shafer v. Metro-Goldwyn-Mayer Distributing Corp., 36 Ohio App. 31, 172 N. E. 689 (1929).

ment. According to the reasoning of this court no foreign award would be enforced in a state not having a modern arbitration act, where it appears that the defendant had revoked the authority of the arbitrators prior to the rendering of the award.

In *Gilbert v. Burnstine*,[102] the defendants, residents of New York, contracted to sell and deliver certain goods to plaintiff in New York. A clause in the contract provided that differences should be arbitrated at London, pursuant to the arbitration law of Great Britain. Disputes arose and plaintiff commenced arbitration proceedings in London, mailing due notice to defendants in New York, according to the English Arbitration Act, advising defendants that on failure to concur in the appointment of an arbitrator, plaintiff intended to apply to the High Court of Justice of England for appointment of an arbitrator. Defendants ignored the notice and, upon application by plaintiff, an arbitrator was appointed by the court. Notice of the originating summons for appointment by the court of an arbitrator and notice of the arbitration proceedings were served on each of the defendants in New York, according to the English Arbitration Act. The defendants ignored the notice and the arbitration hearing was held without their presence. An award was rendered in favor of the plaintiff and he brought action upon it in New York. The defendants contended that the contract provision contemplated merely an agreement to arbitrate in England, involving no submission to the sovereignty of England and that, in the absence of personal service of process or voluntary appearance, the English arbitral tribunal had, therefore, no jurisdiction to render the award. The Supreme Court[103] and the Appellate Division of the Supreme Court[104] accepted the defendant's contention and dismissed the complaint. The Court of Appeals reversed the decisions of the lower courts on the ground that the express provisions in the contract that the arbitration should be held in England and should be pursuant to the English Arbitration statute constituted "an implied submission to the terms of the act itself, and to any rules or procedural machinery adopted by competent authority in aid of its provisions."[105]

102. 255 N. Y. 348, 174 N. E. 706 (1931).

103. 135 Misc. 305, 237 N. Y. Supp. 171 (Sup. Ct. 1929).

104. 229 App. Div. 170, 241 N. Y. Supp. 54 (1st Dep't, 1930).

105. 255 N. Y. 348, 174 N. E. 706 (1931). The Court of Appeals made no reference in its opinion to the case of Skandinaviska Granit Aktiebolaget v. Weiss, 266 App. Div. 56, 234 N. Y. Supp. 202 (2d Dep't, 1929), cited by the Second Department of the Appellate Division. In this case plaintiff, a Swedish corporation, and the defendant, a citizen of the United States and a resident of New York, made a contract in Sweden providing that any dispute arising in reference to the performance of the contract was to be settled by arbitration and without appeal. The defendant instituted arbitration proceedings in Sweden, which were later abandoned. Thereafter another dispute arose and plaintiff subsequently demanded arbitration and appointed its arbitrator pursuant to the agreement and Swedish law. Notice to this effect was served upon the defendant in Brooklyn, New York, demanding that the defendant select an arbitrator. The defendant having failed to do so, the Administrator of

This decision is of great importance from the standpoint of the enforcement of awards rendered in foreign countries. Prior thereto it seemed that an American who had expressly agreed to submit to arbitration in a foreign country could defeat the agreement by merely staying away from such country, thereby rendering personal service in such country impossible. Under *Gilbert v. Burnstine* this mode of escape from contractual obligations will not be available where the agreement specifically provides for arbitration in a foreign country and pursuant to its laws, and the law of the foreign country allows service of process without the jurisdiction. Under such circumstances the defendant when sued upon the award in this country cannot resist its enforcement on the ground that the award was rendered without personal jurisdiction over him.[106]

In its opinion the learned Court says: "The case involves no more than this, whether staying out of the arbitration, they are bound by an award, made after due compliance with the requirements of the procedural machinery established by the British statute, unless they are able to show that no contract has been made or broken."[107] The question whether the defendant has entered into an arbitration agreement and defaulted thereon apparently can be put in issue in New York in a suit upon a foreign award.[108]

That the defense of "public policy" is available with respect to awards of foreign countries goes without saying. In that connection the learned court in *Gilbert v. Burnstine* says: "The serious problem is whether the proceedings were in fact conducted according to the English statute as interpreted by the English courts. . . . After evidence of the facts has been produced, then it will be timely for the court to determine . . . whether

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Justice of the Swedish Government appointed an arbitrator to act on defendant's behalf. The arbitrators proceeded and reported their findings in accordance with Swedish law. Judgment was entered in accordance with this report by the Court of the Administrator of Justice at Gothenburg, Sweden. The arbitration proceedings and notice thereof, the agreement and the arbitration clause therein, complied with the laws of Sweden. In an action upon the Swedish judgment in New York, judgment was given for the defendant on the ground that the court of Sweden had not acquired jurisdiction in personam over the defendant.

The case was followed in Matter of United Artists Corp. v. Gottesman, 135 Misc. 92, 236 N. Y. Supp. 623 (Sup. Ct. 1929).

The facts in the *Weiss* case differ, of course, materially from those in *Gilbert v. Burnstein*, for there was in that case no express agreement for arbitration in Sweden and pursuant to the Swedish law. Again, the action was on a Swedish judgment and not on a Swedish award, as was the case in *Gilbert v. Burnstein*. On the other hand, the defendant himself had instituted arbitration proceedings in Sweden in connection with the same contract.

106. See also Sturges & Burn Mfg. Co. v. Unit Construction Co., 207 Ill. App. 74 (1917); Mitsubishi Goshi Kaisha, Inc. v. Carstens Packing Co., 116 Wash. 630, 200 Pac. 327 (1921).

107. 255 N. Y. 348, 358, 174 N. E. 706, 709 (1931).

108. Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N. Y. 382, 171 N. E. 579 (1930), (holding that upon this issue the parties are entitled to a jury trial).

the English Arbitration Act taken in connection with the foreign rules of procedure, conforms or conflicts with our public policy."[109]

There are no cases throwing a clear light upon any other defenses that may be set up by way of defense in an action upon the award of a foreign country. If the award has been converted into a judgment in the home state and suit is upon such judgment, the ordinary rules applicable to judgments of sister states and those relating to judgments of foreign countries should govern.

If we stop for a moment to take a general inventory of the results so far obtained, it must be admitted that the outlook of commercial arbitration from the standpoint of its international and interstate enforcement by legal process is gloomy indeed. The widest differences of view exist in the first place regarding the validity of agreements for the submission of future disputes to arbitration and the governing law from the standpoint of the conflict of laws. Then there exists the greatest diversity of rules regarding the constitution of the arbitral courts and the detailed steps in the arbitral proceedings. Great uncertainty exists also in many countries regarding the relationship existing between the ordinary courts and the arbitral procedure, which makes the process full of hazards, possible delays, and unexpected expense. Where the award has to be enforced in another country, additional difficulties arise. Thus in countries in which foreign awards are placed on the same footing as foreign judgments the requirement of reciprocity will generally prevent the enforcement of foreign awards. In order to escape this conclusion it is often insisted—and the view is accepted in a number of countries—that an award is in its essence a contract instead of a judgment. New difficulties arise, however, when the award has been rendered enforceable by being made executory in the country in which it was made. As a judicial decree is necessary for the purpose, the question is whether the award

109. 255 N. Y. 348, 357, 174 N. E. 706, 708 (1931).

An interesting case came before the First Department of the Appellate Division in New York. The parties had agreed to submit to arbitration in New York disputes arising out of a contract. Personal service is expressly required by the New York Act for any application for an order directing that arbitration proceed. (New York Arb. Act 1920, Sec. 3). The defendant, a Maine corporation which was not doing business in New York, refused to arbitrate, whereupon the plaintiff served upon the defendant's treasurer, who was found in New York, a notice of motion for an order directing that arbitration proceed. Appearing specially, the defendant contended that the Court had not acquired jurisdiction over it because there was no valid service of process on it according to the statute. The Court held that the arbitration provision in the contract amounted to prior consent to the jurisdiction of the New York courts and granted the motion. One of the judges dissented on the ground that the defendant had consented to the jurisdiction of New York only if acquired in accordance with the terms of the arbitration law, which was not the case here, since the defendant was not doing business in New York and personal service required by the statute could not therefore be validly made. Matter of Heyman Inc. v. Cole, 242 App. Div. 362, 275 N. Y. Supp. 23 (1st Dep't, 1934). See Note (1935) 20 CORN. L. Q. 369.

has been converted thereby into a judgment, so as to become subject to the reciprocity requirement. Even if this is denied, the enforcement of the foreign award may be resisted on the greatest variety of grounds. These defenses may have reference to the validity of the submission agreement, to the proper constitution of the arbitral court, to the arbitral proceedings, or to the formal validity of the award itself. Much diversity exists in these regards in the local legislation of the different countries and the rules of the conflict of laws relating thereto are anything but settled. Where both parties have not participated in the proceedings leading to the award, enforcement may easily be refused on the ground of lack of jurisdiction or lack of proper notice, absence of which will render the enforcement of the award contrary to the public policy of the forum. Nor does the unsatisfactory nature of the international situation stop here, for, even if no objection of a substantive character to the enforcement of a foreign award exists from the standpoint of the law of the forum, there may be no summary procedure available there, so that the delay and cost of the enforcement proceedings may deprive the successful party of any advantage that the agreement for arbitration was intended to confer.

III

Enforcement of Foreign Awards Under the Geneva Convention of September 26, 1927, for the Enforcement of Foreign Arbitral Awards[110]

The Geneva Protocol on Arbitration Clauses, of September 24, 1923, sought to improve upon this chaotic condition by providing for the compulsory recognition of arbitration agreements as between the contracting states. No agreement could be had, however, upon the question what law should govern the validity of agreements for arbitration. The application of the Protocol is limited to parties of different contracting states and does not include agreements between nationals of one contracting state for arbitration in some other contracting state. Suits brought contrary to the terms of an agreement for arbitration governed by the Protocol are to be stayed and the parties are to be referred to the decision of the abitral court, except in the case where the arbitration cannot proceed or has become inoperative. As, according to the provisions of the Protocol, the awards are entitled to compulsory enforcement only in the state where rendered, and all other contracting states are under a duty to stay any action brought in violation of the submission agreement, the successful party in the arbitration would be without any remedy if the award could not be satisfied by execution in the country in which it was rendered, and the award as such was not enforceable in the state in which the de-

110. For the text of the convention, see 2 Nussbaum 237 et seq.

feated party lives or has property. The provisions of the Protocol of 1923 made an international convention for the enforcement of foreign awards, therefore, an absolute necessity.

As the Geneva Convention for the Enforcement of Foreign Arbitral Awards of September 26, 1927, was to supplement the Protocol of 1923, the adoption of the Protocol is made a prerequisite to becoming a party to the Convention. Adherence to the Convention however, constitutes adherence to the Protocol. The Convention extends only to submission agreements falling within the Protocol, which applies to agreements between parties of different contracting states, but not to submission agreements between nationals of the same contracting state for arbitration in some other contracting state.

Under the Convention the contracting states are to enforce awards falling within the Convention, in accordance with the procedure of the forum, if (1) the award was rendered pursuant to an arbitration agreement valid under the law applicable to the agreement, (2) the arbitral tribunal and the constituency thereof conformed with the arbitration agreement and the rules of law applicable to the arbitration proceedings, (3) the award has become definitive at the place of rendition, but it will not be so considered if it is subject to attack by the "ordinary" legal means or proceedings to annul it are then pending in the home country, (4) the object of the award is susceptible to settlement by arbitration under the law of the forum, and (5) that the recognition or enforcement of the award would not contravene the public policy of the forum. Even though these conditions have been met, the enforcement of the award may, according to Article 2, still be refused if (1) the award has been annulled in the country where it was rendered, (2) the party against whom the award has been invoked did not have notice of the arbitration proceedings nor an opportunity to be heard, or, if he be under legal disability, was not regularly represented, or (3) the award passes on a controversy not included within the terms of the arbitration agreement or contains decisions which go beyond the terms of the agreement.[111] The Convention does not specify that the conditions laid down in Article 2 must be proved by the defendant but leaves to the law of the state in which enforcement is sought the question whether the court may consider them ex officio.[112]

An award may be subject to impeachment in some countries on grounds other than those specified in Articles 1 and 2 of the Convention, for example, because of irregularity in the procedure, perjury, forgery, and the like. If the defendant establishes that such a ground exists under the law applicable to the arbitral proceeding, the judge, who may not be pre-

111. See 2 NUSSBAUM 238.

112. 2 NUSSBAUM 243.

pared to deal with questions closely connected with the peculiarities of procedure in a foreign country, is privileged under the terms of the Convention either to suspend the proceedings for enforcement, giving the party a reasonable time to have the award set aside in the country in which it was rendered, or else, if he is not allowed to suspend the proceedings under his law, to refuse enforcement.[113]

The party seeking enforcement of a foreign award must furnish (1) the original of the award or a copy authenticated according to the legislation of the country where it was rendered, (2) the papers and documents proving that the award has become definitive in the country where rendered, and, if there be occasion, (3) the papers and documents to establish that the conditions for recognition required by Article 1 (a and c)[114] have been fulfilled.

Since the provisions of the Convention are in many respects less favorable than the legislation of several countries and the provisions of bilateral treaties existing between some of the countries, Article 5 of the Convention provides that no interested party shall be deprived of the right to avail himself of an arbitral award in the manner and measure admitted by the legislation or treaty of the country wherein enforcement of the award is sought.

The Convention does not authorize the re-examination of the merits of the award, not even for the purpose of determining whether the enforcement of the award would be against the public policy of the forum.[115]

The Geneva Convention for the Enforcement of Foreign Awards, of 1927, has been put substantially into effect in England by the Arbitration (Foreign Awards) Act of 1930.[116] It is likewise in force in North Ireland and in many continental countries.[117] So far as the United States is concerned, the law of commercial arbitration has not yet reached that stage of legal development that adherence to any international convention, however excellent, would be possible. In many states arbitration is still limited to existing controversies. In the states having acts authorizing arbitration of future disputes, the legislation has generally in view only local arbitration and is not fully adjusted to the enforcement of agreements for commercial arbitration in some other state or country, or to the enforcement of foreign awards. The summary method allowed for enforcing awards appears to be limited to local awards, and is not extended even to awards of sister states. A more liberal attitude on the

113. Art. 3, 2 NUSSBAUM 244.

114. Art. 4, 2 NUSSBAUM 238. The substance of subdivisions (a) and (c) of the Convention has been given under (1) and (2) in the text.

115. Volkmar, *Das Genfer Abkommen über die Vollstreckung ausländischer Schiedssprüche vom 26 September 1927*, 2 NUSSBAUM 136-137.

116. See *supra* note 86.

117. See 4 NUSSBAUM 14-16.

part of our courts with reference to arbitration in general, and with reference to arbitration by citizens of the forum in other states or foreign countries in particular, is necessary before adherence to an international convention is practicable. A progressive step in the direction of facilitating interstate and international commercial arbitration was taken by the New York Court of Appeals in *Gilbert v. Burnstine*,[118] which will prevent parties to arbitration agreements from defeating them by the simple expedient of staying away from the jurisdiction in which the arbitration is to take place, provided the law of the different states or countries permit the judicial appointment of arbitrators and judgments on the award without personal service within the state or country but upon proper notice to the recalcitrant party, when such party has expressly or impliedly authorized such procedure. Consent to the exercise of jurisdiction would thus enable states and countries sanctioning ex parte awards to render awards which would be enforceable under the doctrine laid down in *Gilbert v. Burnstine*.

Apart from the practical difficulties which adherence to any international convention dealing with a procedural subject would present from the standpoint of the United States,[119] serious doubt may be entertained regarding the advantages of an international convention relating to arbitration at the present time. Whatever may be the ultimate solution of the problem, it is clear from the provisions of the Geneva Protocol on Arbitration Clauses of 1923, and of the Convention for the Enforcement of Foreign Arbitral Awards of 1927, that any attempt to deal with the subject of commercial arbitration internationally at the present moment is premature. The divergencies existing between the different countries, as regards legislation, business practises relating to arbitration, and the relation between arbitration and the courts are so great, as to make any general convention for the enforcement of foreign awards by legal process impracticable. Because of these differences it was found necessary to restrict the application of the Geneva Convention of 1927 to awards rendered on the basis of the Geneva Protocol of 1923. For similar reasons some of the most important provisions relating to the enforcement of foreign awards are either gone over in silence in the Convention or left exceedingly vague. Thus, there is nothing in the Convention concerning the vexed problem of the effect of the exercise of judicial control over awards, for no formula acceptable to all could be found.[120] Like the earlier Protocol, the Convention of 1927 fails to state by what law the validity of the arbitration agreement is to be determined. The German Government proposed a specific provision in this regard, but no agreement was possible and the matter was referred to the Hague Conference

118. 255 N. Y. 348, 174 N. E. 706 (1931).

119. See Chamberlain, *International Commercial Arbitrations from an American Viewpoint* (1930) 36 INTERNATIONAL LAW ASSOCIATIONS 493, 496 et seq.

120. 2 NUSSBAUM 242.

on Private International Law.[121] Nor could agreement be had regarding the question where an award made by correspondence should be deemed made. In view of the great diversity in the laws of the different countries with respect to the question when an award has become "definitive," no greater precision could be given to this condition, than its formulation in the Convention. Regarding the question whether a foreign award can be impeached on account of corruption, bias or misconduct on the part of an arbitrator, or on account of irregularities in the procedure, the Convention contains nothing beyond the general provision that if the award is subject to impeachment in the state in which it was rendered, a foreign judge may decline to enforce it, or may give to the defendant a reasonable time in which to have the award vacated in the foreign state.[122] In the event that the foreign award is not subject to impeachment in the state in which it was made, enforcement may be denied under the Convention, if such enforcement would be contrary to the public policy of the forum. The Geneva Convention does not specify what is meant by public policy and thus gives to each state entire freedom to apply its own notions.[123] It was recognized, of course, that an international convention was unable to lay down general rules for the arbitral proceeding itself, which must be adjusted of necessity to the law of each state; such rules can be provided only, and with difficulty, by bilateral treaties. No attempt was made either to regulate the procedure by which the foreign award is to be enforced. The question whether it will be enforced by an action on the award, or by a formal exequatur, or by the summary procedure applicable to local awards, continues to depend therefore upon the law of the state in which the proceeding is pending.

All this goes to show that the time is not ripe for the promotion of international arbitration in commercial matters by means of multi-lateral treaties. The best means available to that end at present would appear to be bilateral treaties between countries having the same procedural background; and such treaties have been entered into between a number of countries. As between countries having widely different legal institutions or modes of procedure, useful results would seem to be obtainable only if the treaty includes also the rules for the arbitral procedure.[124]

Resort to legal compulsion in commercial arbitration frequently produces unsatisfactory results, even when local arbitration is involved. This is true even of the English experience with arbitration, notwithstanding the fact that its system of arbitration is generally regarded as unsurpassed by that of any other country of the world. According to an English observer arbitration has been found mutually advantageous in England only "where

121. 2 NUSSBAUM 251.

122. Art. 3, 2 NUSSBAUM 238.

123. See Hornby, Hemelryk & Co. v. Spinnerei und Weberei—Firma X, 15 Hans. Rechts und Gerichtszeitschrift 786; OGH (Supreme Court, Austria), June 16, 1931, 4 NUSSBAUM 125.

124. Such a treaty was entered into between Germany and Russia in 1925.

(1) privacy, or (2) rapidity are essential, or (3) where the dispute involves simply a pure question of fact or technical opinion, such, for example, as whether goods are merchantable or up to sample, or whether a given piece of machinery will function."[125] Privacy can be secured in England only if the parties accept the arbitrator's award as conclusive, and awards can be made expeditious only if both parties desire it. Economy has been obtained in England only in the simpler cases.[126] Commercial arbitration is successful when conducted informally by arbitrators under institutions of high standing, whose rules governing the various steps in the proceedings are definite and conform to the law and custom of the country where the arbitration takes place, and when an experienced and responsible administrative agency is charged with the duty of interpreting such rules and putting them into effect. In the absence of such conditions, commercial arbitration is generally unsatisfactory. The best mode of promoting effective international commercial arbitration would thus appear to be through a development of such institutions throughout the world, and the preparation of standard rules and standard arbitration clauses with a view to their maximum efficiency in the various countries, and the enforcement of awards at the domicil of the parties. Owing to different views in the mercantile world and divergent interests of the various countries, real progress in international commercial arbitration can be expected, however, only if some permanent international agency charged with the duty of fostering arbitration is set up. The creation of the Inter-American Commercial Arbitration Commission by the Pan-American Union, pursuant to a resolution adopted by the Seventh International Conference of American States, for the purpose of establishing an Inter-American system of arbitration, constitutes, therefore, a significant event in the history of arbitration. A similar body created under the auspices of the League of Nations might render the same kind of service for the rest of the world. So far as legal compulsion is necessary with respect to recalcitrant parties, effective international legal control will be difficult—and probably impossible—of attainment, in view of the divergencies in the existing laws and procedures of the different countries. The attempt by the League of Nations to further the cause of international arbitration in commercial affairs by means of a multi-lateral convention was therefore ill-conceived. The International Conference of American States at its meeting in Montevideo proceeded along more practical lines, when it attacked the problem of Inter-American Commercial Arbitration from an administrative side by causing standard rules and a standard arbitration clause to be formulated for inter-American contracts and by providing the necessary machinery in the different countries for their enforcement.

125. Nordon, *British Experience with Arbitration* (1925) 83 U. OF PA. L. REV. 314, 323.
126. Id. at 323.