

# Arbitration and Conflicts of Laws A Study of Benevolent Compulsion

Philip G. Phillips

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Philip G. Phillips, *Arbitration and Conflicts of Laws A Study of Benevolent Compulsion*, 19 Cornell L. Rev. 197 (1934)  
Available at: <http://scholarship.law.cornell.edu/clr/vol19/iss2/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# ARBITRATION AND CONFLICTS OF LAWS: A STUDY OF BENEVOLENT COMPULSION

PHILIP G. PHILLIPS\*

## INTRODUCTION

Renvoi seems at last displaced as the most puzzling rule in conflicts of laws. The modern Draft State Arbitration Acts, aimed to put at an end commercial strife and assure speedy disposition of business controversies, when applied to arbitrations involving residents of different states, offer situations far more puzzling than the renvoi. In the latter at least our minds wandered from the law of state *A* to state *B* and back again until we decided to call a halt; and a solution is easily reached. But in this new field of arbitration, we can furnish employment not only to lawyers in the two jurisdictions of the parties, but in many others, and the possibility of a mad race between jurisdictions, not unlike the old race for corporate business or the modern divorce racket. At least, we lawyers are not to blame this time—for the modern commercial arbitration acts have been passed at the alleged insistence of business, passed in the exact form requested by business, passed despite the opposition of the Bar.<sup>1</sup>

## THE MODERN ARBITRATION STATUTES

These acts have proven one of the most prolific source of writing in recent years. Much of it has been propaganda, ghost written or otherwise; a lot of it deep examination of new legal trends. Despite this, there has been little critical analysis. It is generally assumed that the modern arbitration acts must be right; any decision which limits their scope is *ipso facto* bad; and any one expanding it, is *ipso facto* good. Because of their zeal for the arbitration process, most writers have assumed that the new Arbitration Law was entitled to the same feeling.

The modern arbitration acts have been passed in twelve states<sup>2</sup>

---

\*Member of the Massachusetts Bar.

<sup>1</sup>See (1925) 50 A. B. A. REP. 135 *et seq.*, 577 *et. seq.*; (1931) 36 COMMERCIAL L. J. 145. But *cf.* Sturges, *Arbitration Under the North Carolina Statute* (1928) 6 N. C. L. REV. 363.

<sup>2</sup>We refer here to the Draft State Arbitration Act of the American Arbitration Association. It has been passed in: ARIZ. CODE (Struckmeyer, 1928) as amended by Laws 1929, c. 72, 1-4; CAL. CODE CIV. PROC. (Deering, 1931) §§1280-93; CONN. GEN. STAT. (1929) §§5840-56; LA. GEN. STAT. (Dart, 1932) §§405-22; N. H. PUB. LAWS (1929) c. 147; N. J. COMP. STAT. (Supp. 1925) §§9, 21-36; N. Y. ARBITRATION LAW (1920), as added by Laws 1923, c. 2 §6-a, *id.* 1927, c. 352; N. Y. CIV. PRAC. Act §§1448-65, 1469; OHIO GEN. CODE (Page, 1932) §12148 (1-17);

whose main purpose is to make all arbitration agreements irrevocable and specifically enforceable. It will be recalled that the old common law was that such agreements were revocable, in fact a provision in a contract to arbitrate a dispute thereafter arising out of it was said to be void and condemned by the courts.<sup>3</sup> This the new laws changed, aiming to strengthen arbitration agreements, and thereby increase the use of the arbitration process. In order to further their purposes, the proponents of commercial arbitration had a similar law passed through Congress applying to maritime transactions and disputes involving interstate commerce.<sup>4</sup> It was hoped that this would make it possible to enforce arbitration agreements in jurisdictions whose state courts did not enforce them.

The advantages of arbitration in the settlement of certain types of business disputes are so well known that they need not be set out here.<sup>5</sup> Unfortunately the advantages of the new arbitration acts are not so apparent. The net result seems to have been the plaguing of the New York courts with untold litigation regarding the statute,<sup>6</sup> and the absolute absence of its use in most of the other states which

---

ORE. CODE ANN. (1930) §§21-101, 21-103, Laws 1931, Act No. 38; PA. STAT. ANN. (Purdon, Supp. 1932) tit. 5, §§161-81; R. I. ACTS AND RESOLVES 1929, c. 1408, §§1-18; WIS. STAT. (1931) 298.01-298.18. The acts are exhaustively treated in: STURGES, *COMMERCIAL ARBITRATION AND AWARDS* (1930). See also Popkin, *Judicial Construction of the New York Arbitration Law of 1920* (1925) 11 CORNELL LAW QUARTERLY 329; Frankel, *The New York Arbitration Law* (1932) 32 COL. L. REV. 623. An unusually good succinct statement of the arbitration statutes and law in general, together with a full bibliography of law review authorities may be found in CHAFEE AND SIMPSON, *CASES ON EQUITY* (1933) 552 ff. The Commissioners on Uniform Laws have an arbitration act of their own, the so-called Uniform Arbitration Act. It does not contain the specific enforcement provisions of the Draft State Act, and applies only to agreements to arbitrate an existing dispute. It has been passed only in four states: NEV. COMP. STAT. (Hillyer, 1929) §§510-34; N. C. CODE ANN. (Michie, 1931) §§898a-898x; UTAH, REV. STAT. (1933) tit 104, c. 36 §§1-22; WYO. REV. STAT. ANN. (1931) §§7-101 to 7-124. It is bitterly opposed by the proponents of the Draft State Act.

<sup>3</sup>See for example *Cocalis v. Nazlides*, 308 Ill. 152, 139 N. E. 95 (1923); cf. *Hulvey, Arbitration of Commercial Disputes* (1929) 15 VA. L. REV. 238-239.

<sup>4</sup>43 STAT. 883 (1925), 9 U. S. C. §§1-15 (1926). For articles on the act in general see Baum and Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (1931) 8 N. Y. U. L. Q. REV. 238, 428; Poor, *Arbitration Under the Federal Statute* (1927) 36 YALE L. J. 667; Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 VA. L. REV. 265.

<sup>5</sup>For a collection of several articles setting forth the advantages of arbitration see (1925) 9 J. AMER. JUDICATURE SOC. No. 3.

<sup>6</sup>A study of the daily issues of the NEW YORK LAW JOURNAL or of the recent issues of the WEST DIGEST will furnish ample proof of this statement. The amount of litigation over the arbitration statute is nothing short of startling.

have passed the act, for the simple reason that arbitration does not seem to have spread to those states. The plugging of New York courts would not be the cause of worry to most of us outside her jurisdiction were it not for the fact that the New York Arbitration Law has been the cause of *litigation* in other states—and most recently we find the Chancery Court of little Delaware besieged by high-powered counsel from the neighboring metropolis with claims of “full faith and credit” all because of this simple act which was supposed to end litigation. And the United States Arbitration Act, far from simplifying the state and federal law, has made it more complicated, and instead of making it difficult to revoke arbitration agreements, in some instances has furnished skillful counsel with new devices for evading them.

The Draft State Arbitration provides three methods of enforcing an arbitration agreement: (1) direct specific enforcement, *viz.* an order to arbitrate; (2) collateral enforcement, *viz.* the appointment of arbitrators by court order; and (3) indirect specific enforcement, *viz.* the staying of an action brought in violation of an agreement to arbitrate. We have heretofore examined at some length the direct enforcement of arbitration agreements under these acts;<sup>7</sup> and in view of its peculiar bearing on interstate arbitration, now a problem beginning to assume large proportions, we will here examine the *indirect* method of enforcing arbitration agreements as prescribed in these new acts. We will further examine the peculiar jurisdictional problems raised by the Federal Arbitration Act, which obviously bear a close relation to arbitration-conflicts-of-law; and touch also the problem of conflicts in arbitration laws, their extraterritorial force, *ex parte* arbitrations and the enforcement in state *B* of an arbitration award obtained in state *A*. We will examine methods used to evade the arbitration laws in this connection, and try to see if there is some remedy for the situation. The interstate angle has made overly complicated a problem already difficult.

The staying of an action brought in violation of an arbitration agreement was used at common law under certain circumstances. In many states, if a dispute already the subject of an action was submitted to arbitration, the submission agreement automatically stayed the action, and a court order to that effect would be granted.<sup>8</sup> A general arbitration clause (that is to say a provision in a contract to submit disputes *thereafter* arising to arbitration) would not be

<sup>7</sup>Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to Voluntary Proceeding* (1933) 46 HARV. L. REV. 1258.

<sup>8</sup>Schlanbusch v. Schlanbusch, 102 Neb. 462, 167 N. W. 557 (1918).

enforced, but if certain disputes, as distinguished from all disputes, were to be determined by arbitration as a condition precedent to liability, the courts would stay any action brought until the arbitration was had.<sup>9</sup> But the clause had to be carefully drawn, and could not be too general in its nature. As was stated in *Oregon Short Line v. Titus Coal Company*:<sup>10</sup>

“Where, however, the contract contains no covenant, express or implied, indicating that arbitration of disputes shall be a condition precedent to a right of action, but there is simply a covenant to pay and another covenant to arbitrate, they are distinct and collateral, and the covenant to arbitrate is not in such a case a condition precedent.”

In Colorado and Washington, however, contrary to the general rule, and without any statutory provision, all arbitration clauses, regardless of their nature, would be enforced as a condition precedent to an action,<sup>11</sup> and the Massachusetts Arbitration Act specifically so provides.<sup>12</sup>

The Draft State Arbitration Act changes the general rule. Any action brought in violation of an arbitration clause or agreement will be stayed. The language is mandatory on the court, and it would seem that even provisional remedies would be brought within its purview. The provision of the New York Act regarding stay of action follows:

“If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission . . . the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission . . . shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”<sup>13</sup>

This is the method, and the only method used in England for the specific enforcement of arbitration agreements, except that the court

<sup>9</sup>See *Blodgett Company v. Bebe Company*, 190 Cal. 665, 214 Pac. 38, (1923) and the elaborate citation of cases in (1923) 26 A. L. R. 1070. The courts of Nebraska, however, would not thus enforce such agreements. *Hartford, Connecticut Fire Insurance Company v. Hon*, 66 Neb. 555, 92 N. W. 736 (1902).

<sup>10</sup>35 F. (2d) 919, 923 (C. C. A. 9th, 1929).

<sup>11</sup>See *Ezell v. Rocky Mountain Bean and Elevator Company*, 76 Colo. 409, 232 Pac. 680 (1925); *Zindorf Construction Company v. Western American Company*, 27 Wash. 31, 67 Pac. 374 (1901).

<sup>12</sup>MASS. GEN. LAWS (1932) c. 251, §21.

<sup>13</sup>NEW YORK ARBITRATION LAW (1920) §5. Any important differences in the other state acts will be pointed out in the text.

in England is given discretion to deny the motion to stay the action when it seems equitable for it to do so.<sup>14</sup> The idea of undiscretionary equitable relief is shocking to the English mind.<sup>15</sup>

Naturally the petitioner in a motion to stay an action must show an arbitrable dispute,<sup>16</sup> and the procedure for the stay is somewhat similar to that of a motion to compel,<sup>17</sup> except that no jury trial may be had as to the existence of the contract to arbitrate or default in proceeding as is the case in an order for direct enforcement of the arbitration agreement.<sup>18</sup>

Some speed must be used in asserting one's right to compel arbitration, and frequently the laches of the plaintiff are urged as a defense to equitable enforcement of an arbitration agreement.<sup>19</sup> How much speed the petitioner should use is a matter to determine in accordance with the terms of the contract and the facts of the case.<sup>20</sup> If the contract makes for a speedy demand for arbitration, this must be done;<sup>21</sup> on the other hand, there are times when the situation is such that the fact that arbitration has not been demanded for a long period of

---

<sup>14</sup>Cf. ARBITRATION ACT 1889, §§1, 4; 52 & 53 VICT. c. 49. "The present position, therefore of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements, but if duly appealed to, it has the power in its discretion to refuse a party the alternative of having a dispute settled by a court of law, and thus leaving him the position of having no other remedy than to proceed to arbitration." *Doleman and Sons v. Ossett Corporation*, (1912) 3 K. B. 257, 269, per Fletcher-Moulton, J. See also *Locus Poenitentiae in Arbitrations* (1929) 167 LAW TIMES 432. Provision is made in the English Act for the court appointment of arbitrators, ARBITRATION ACT 1889, §5.

<sup>15</sup>*Arbitration with Foreigners* (1924) 159 LAW TIMES 130; REPORT OF COMMITTEE ON ARBITRATION presented by Lord High Chancellor to Parliament, 1927, §43.

<sup>16</sup>Cf. *Matter of General Silk Importing Company, Inc.*, 200 App. Div. 786, 792, 194 N. Y. Supp. 15 (1st Dept. 1922). Counsel have gone to all kinds of extremes to prove that the action is not within the scope of the arbitration clause in order to evade arbitration, especially in rigorous standardized contracts. The latest ruse seems to be to bring an action in tort despite the fact that the relations between the parties originated in a contract containing a general arbitration clause. Thus in *Reichlin v. Reliable Van and Storage Co.*, N. Y. L. J., Oct. 31, 1933, *A* stored goods with *B* on a standardized warehousemen's contract. The allegation was conversion instead of for damages under the contract, and the court refuses to stay the action despite the arbitration clause in the contract.

<sup>17</sup>*Cf. Street and Finney Inc. v. Kelley*, N. Y. L. J., Aug. 24, 1929.

<sup>18</sup>*Gold. v. Newburger*, N. Y. L. J., Jan. 20, 1930.

<sup>19</sup>*In re Richards*, N. Y. L. J., Mar. 29, 1929.

<sup>20</sup>*Matter of Van Neyenrod*, N. Y. L. J., Feb. 19, 1924.

<sup>21</sup>*Matter of Smith*, 119 Misc. 324, 198 N. Y. Supp. 237 (1922), contract provided for demand of arbitration within ten days after dispute arose; *In re California Packing Corporation*, N. Y. L. J., June 6, 1931, arbitration "immediately" after dispute arises.

time after a dispute arose would not affect the petitioner's right to obtain equitable enforcement of his arbitration agreement.<sup>22</sup> A few cases take the position that whether there has been a waiver of the benefits of the arbitration clause by a delay in making a claim is a matter to be determined by the arbitrators.<sup>23</sup>

These provisions for staying an action because of an arbitration clause have impelled many efforts to block honest attempts to obtain justice. If two business men, *after* a dispute arises, agree to arbitrate, there is rarely any difficulty. The fact that they were sufficiently friendly then to agree to arbitrate, augurs well for the success of the arbitration proceeding. The remarks in this paper, and the cases cited, apply almost exclusively to arbitration clauses in contracts executed prior to dispute. *A* and *B*, on the friendliest terms make a contract and include therein a clause providing for the arbitration of all disputes thereafter arising. Sometimes bad feeling develops as a result of disputes and *A*, no longer desiring to settle them by "friendly" arbitration, commences suit. *B* in no hurry to have the matter settled, joins issue and long months are consumed waiting for trial. If the defendant in the suit then moves to stay the action on the ground of the arbitration clause, he will if successful gain more delay. It is obvious that a doctrine of waiver would have to be built up, and there now exists a fairly well-formed set of rules regarding it.

In the first place the previous refusal of a party to arbitrate will bar him from thereafter claiming the benefits of an arbitration clause.<sup>24</sup> The voluntary abandonment of an arbitration before it was com-

<sup>22</sup>"We do not see how the company's silence for nine months can be construed as a legal waiver of the right of arbitration . . . It was as much the duty of one party as the other to initiate the proceeding unless it may have possibly been more the duty of the plaintiff as the affirmative party. The company might have been led to suppose the insured would not press his claims in the fact of the accusation of fraud . . ." *Smith v. California Insurance Company*, 87 Me. 190, 32 Atl. 872, 873 (1895). By his conduct the respondent may have waived his right to object to the petitioner's delay. *New v. Union Automobile Company* 137 So. 563, (La. App. 1931), *reversed* on other grounds, 141 So. 416, (La. App. 1932).

<sup>23</sup>"There is nothing in the contract which fixed a time to demand arbitration, and whether by delay or custom of the trade there has been a waiver is a question of law and fact to be determined by the arbitrator." *Shechter v. Arbib*, N. Y. L. J., Sept. 17, 1925.

<sup>24</sup>*Nagy v. Arcas Brass and Iron Company*, 242 N. Y. 97, 150 N. E. 614 (1926). Even the refusal to arbitrate in a foreign jurisdiction may bar. *Kroeger v. Colli-shaw*, N. Y. L. J., May 12, 1924. Suppose one side informs the other it denies all liability and will pay only "if sued". *Evans v. Farmers Reliance Insurance Company*, 110 N. J. L. 159, 164 Atl. 258 (1933), seemingly indicates such action would work a waiver of arbitration rights.

pleted will likewise have that effect.<sup>25</sup> There is a split in authority over the effect of the previous refusal to arbitrate controversies other than those for which arbitration is demanded.<sup>26</sup> While an accord and satisfaction should bar arbitration, the attempt to obtain a voluntary settlement will not.<sup>27</sup> Surprisingly enough, however, the latter point has been urged as a defense to a motion to compel arbitration, showing the extremes to which counsel can go to prevent court compulsion of the proceeding.

A plaintiff's mere threat to bring suit is not sufficient to work a waiver of his right to arbitration,<sup>28</sup> but bringing any actual proceedings works an immediate waiver,<sup>29</sup> unless they are brought in ignorance of the arbitration clause, and are immediately discontinued when the latter is discovered.<sup>30</sup> Even the commencement of a provisional remedy will work a waiver of the arbitration agreement.<sup>31</sup>

Recently the New York courts have developed a doctrine that if a suit is brought in the absence of knowledge of any arbitrable controversy and discontinued as soon as discovered, the plaintiff may still insist upon arbitration. The doctrine, which has a curious history, was brought about to cure a grave abuse arising out of the decision in *Webster v. Van Allen*,<sup>32</sup> which required that the petitioner in a motion to compel arbitration must show that a controversy or dispute exists.

<sup>25</sup>Matter of Levine, N. Y. L. J., June 12, 1930.

<sup>26</sup>Such action fatal, see *Young v. Crescent Company*, 240 N. Y. 244, 148 N. E. 510 (1925). *Contra*: Matter of Kadner, N. Y. L. J., Sept. 19, 1928.

<sup>27</sup>Matter of Hill Silk Corporation, N. Y. L. J., March 22, 1928.

<sup>28</sup>Matter of Farone, N. Y. L. J., Aug. 13, 1925.

<sup>29</sup>"Nothing could be more inconsistent with the demand for arbitration than the institution and maintenance of an action." Matter of Bostwick, N. Y. L. J., March 3, 1926. Though of course the defendant in the action has not waived anything. One plaintiff who brought an action in violation of an arbitration clause, tried to argue that by doing so *both* sides were barred from claiming arbitration. *Ely v. Lloyd, et al.*, N. Y. L. J., Oct. 31, 1930. The case while not important indicates the attitude some members of the bar assume towards the arbitration law. *Quaere*, if the rules regarding waiver are different when the arbitration clause specifically provides arbitration is only a condition precedent to a suit. See *Samuels v. Samis*, 124 Misc. 35, 207 N. Y. Supp. 249 (1923). Most modern arbitration clauses are not so drawn.

<sup>30</sup>Matter of Weinberg, N. Y. L. J., March 19, 1928.

<sup>31</sup>*Young v. Crescent Company*, 240 N. Y. 244, 148 N. E. 510 (1925). But see *Lehay Inc. v. Pathe Exchange*, 237 App. Div. 468, 261, N. Y. Supp. 495 (4th Dept. 1933). For recent decisions on the effects of arbitration on mechanics liens see *Park Lane Properties, Inc. v. Fisher*, 89 Colo. 591, 5 P. (2d) 577 (1931); *Askovitz v. Gabay*, 229 App. Div. 258, 241 N. Y. Supp. 394 (2nd Dept. 1930); *Brescia Const. Co. Inc., v. Walart Const. Co. Inc.*, 238 App. Div. 360, 264 N. Y. Supp. 862, (1st Dept. 1933).

<sup>32</sup>217 App. Div. 219, 216 N. Y. Supp. 552 (4th Dept. 1926).

If the respondent admits that the petitioner is right in his contention, as for example that the debt claimed is due but the respondent will not pay because of a counterclaim, the plaintiff cannot obtain judgment by means of a speedy arbitration but must wait his turn in the courts. Suffice it to say that *Webster v. Van Allen* furnished to defendants who had a contract containing an arbitration clause, a real opportunity to delay in the payment of just debts. There grew up a practise of refusing to reply to creditors' demands so that it was difficult to procure evidence of a controversy and thereby compel arbitration. On the other hand, if the plaintiff started suit the defendant would procure a stay of the action *after* several months had gone by, and it was believed could effectively stop any efforts of the plaintiff to procure arbitration if the motion to stay the action was not resorted to. In *Newburger v. Lubbell*,<sup>33</sup> a creditor unable to procure a reply from the alleged debtor, knowing of no controversy between them, demanded a declaratory judgment that no controversy existed between them and that the defendant be ordered to pay the balance claimed due, or in the alternative if a controversy existed, that arbitration be directed to proceed in accordance with the contract. The court, per Cardozo, C. J., in sustaining the lower court's refusal to grant the declaratory judgment outlined the method which a plaintiff could pursue, and, it is hoped, eliminated the dilatory tactics made possible by *Webster v. Van Allen* saying:

"The plaintiffs may sue at law and reduce their claim to judgment. If the defendant does not contest the debt, they will have judgment by default. On the other hand, if he does contest . . . with the result that a controversy develops, they will be free to discontinue and get the benefit of the contract that whatever controversy arises shall be settled by arbitration. We see no force in the objection that a waiver . . . of arbitration could be inferred from the mere commencement of an action in the absence of notice that a controversy existed . . . The plaintiffs are not restricted, however, to an action at law. If the defendant fails to pay the debt and refuses to declare himself as to the reason for the failure leaving the plaintiffs uncertain whether he contests it or not, they may file their petition under Section 3 of the Arbitration Act, alleging their uncertainties and praying that the defendant be required to submit to arbitration whatever controversies exist. If the defendant in response . . . concedes the debt, the court will not appoint arbitrators to compose a nonexistent difference or one not within the scope of the defendant's promise (cases cited), but the defendant may be estopped . . . from interposing a defense thereafter."

---

<sup>33</sup>257 N. Y. 383, 178 N. E. 669 (1931).

This is a satisfactory solution, doubtless, but the decision does focus attention on the abuses which this act, aimed to end commercial litigation, has caused. Whether *Webster v. Van Allen*, and its resulting corollary *Newburger v. Lubbell* will be followed in other Draft Act states is an open question.<sup>34</sup>

When a party to a contract containing an arbitration clause is sued, he must take some steps to insist on his rights and to obtain arbitration or he too will be considered as waiving his rights thereto, according to the language of the decisions.<sup>35</sup> That his answer to the plaintiff's action does not set forth the arbitration claim will not necessarily prove fatal.<sup>36</sup> Nevertheless an answer pleading the

---

<sup>34</sup>We submit that *Webster v. Van Allen* is wrong in principle. The strong dissent of Mr. Justice Taylor in the case correctly sets forth the view to be followed, see (1926) 36 YALE L. J. 137. In *Dayton Rubber Manufacturing Co. v. Groth Rubber Company*, unreported, decided by the District Court for the Eastern District of New York, May 27, 1931, a decision *contra* to *Webster v. Van Allen* was given, the court saying: "The failure of the defendant to pay a demand is sufficient evidence of the existence of a controversy." The New York statute provides for the enforcement of a provision in a contract to settle by arbitration: "A controversy thereafter arising *between the parties to the contract*." (Sec. 2, italics inserted). Arizona, Louisiana, Ohio, Oregon, Pennsylvania, Rhode Island and Wisconsin omit the italicized words and add in their place: "Out of such contract or out of the refusal to perform the whole or any part thereof"; California and New Jersey omit and add: "Out of the contract or the refusal to perform the whole or any part thereof"; Connecticut omits and reads: "Out of such contract or out of the failure or refusal to perform the whole or any part thereof"; New Hampshire omits and reads: "Out of such contract." This language, except in New Hampshire, would seem to destroy the argument of the majority in *Webster v. Van Allen* that: "It is essential that some genuine controversy exists . . . I cannot discover in the arbitration law any legislative purpose or intent to furnish a new method of granting default judgments", and hence it does not seem likely the decision would be followed in the states above set forth. However, so much odd arbitration law has been appearing of late, that it will take judicial interpretation of the language to settle finally the above question.

<sup>35</sup>*Nagy v. Arcas Brass and Iron Company*, 242 N. Y. 97, 150 N. E. 614 (1926).

<sup>36</sup>"The mere interposing an answer, without asserting the right to arbitrate, does not of itself constitute a waiver. There must be further acts on the part of the defendants which could be interpreted as an election to submit the controversy to court and waive the contract provisions as to arbitration." *Hosiery Manufacturers Corporation v. Goldston*, 238 N. Y. 22, 149 N. E. 779 (1924). *Cf. Zimmerman v. Cohen*, 236 N. Y. 15, 139 N. E. 764 (1923). *Contra: Fravert v. Fesler*, 11 Colo. App. 378, 53 Pac. 288 (1898). The Colorado decision seems preferable. Suppose the contract containing an arbitration clause is set forth in the answer, but not specifically pleaded, or suppose the plaintiff sets forth the contract containing the arbitration provision in his declaration, is it demurrable? See *Musgrave v. Kastor*, N. Y. L. J., April 13, 1928. It seems clear that courts will not pay any attention to the arbitration clause set forth in the pleadings, unless their attention is specifically directed towards it by a motion to stay. See

arbitration clause, while not a defense to the action, is evidence from which it can be found that no waiver was intended by the defendant.<sup>37</sup> Merely pleading the arbitration clause will not protect him however. He must use *some* diligence in staying the action<sup>38</sup> (or bringing the motion to compel), though it must be admitted that long delays have been allowed defendants,<sup>39</sup> and certain it is that any defendant who is anxious to obtain a delay is allowed ample opportunity to do so under the many decisions rendered in New York. The New York rule that action must be taken by a defendant to a suit within a reasonable time is obviously open to grave abuses. Even if the lower court finds that the defendant who waits almost up to the time the case is ready for trial to make his motion to stay an action, has not acted within a reasonable time, he may nevertheless appeal that decision, and thus gain valuable time before either the suit may be continued against him or an arbitration had!<sup>40</sup>

And even when a stay of the law suit is granted, there is little guarantee that arbitration will proceed with dispatch, for on granting a stay the court does not order the arbitration to proceed! The usual order given in New York enjoins the suit "until the arbitration is

---

Spencer, White and Prentis, Inc. v. 233 East 94th Street Corporation, N. Y. L. J., Nov. 10, 1928 (App. Div.). As to the effect of a counterclaim in defendant's answer, see Hiltl Company, Inc. v. Bishoff, 119 Misc. 572, 197 N. Y. Supp. 617 (1922); Chapman-Kruege Co. v. Jaffe, 263 N. Y. Supp. 737 (App. Div. 2nd Dept. 1933). As to the effect of amending answer to plead arbitration clauses, see Zawilski v. Prah Construction Company (App. Div. 2nd Dept. 1932), AMERICAN ARBITRATION SERVICE (1933) p. 321.

<sup>37</sup>Hosiery Manufacturers Corporation v. Goldston, 238 N. Y. 22, 149 N. E. 779 (1924).

<sup>38</sup>Matter of Bauer Company v. Anderson Chemical Company, 206 App. Div. 423, 201 N. Y. Supp. 438 (1st Dept. 1923) (wait of three years after action started, on eve of trial defendant moves for stay of action, motion denied); Joquel v. Charles Mieg, Cie, N. Y. L. J., Dec. 29, 1931, (delay of almost three years after action commenced, during which time defendant had participated in examination of witnesses on depositions in Paris, France, at great expense to the plaintiff in original action, motion for stay denied, primarily on latter ground rather than on delay.)

<sup>39</sup>Some lower court cases adopt the doctrine that a stay on the eve of trial will be examined more minutely than otherwise to see if reasons, technical or otherwise, can be found to deny the arbitration, since "The purpose of the arbitration law is not to aid in the preference of one court over another, but to discourage litigation", Villa-Real v. Lissauer, N. Y. L. J., June 11, 1931. But cf. Goldstein v. Schleiffer, 209 App. Div. 899, 205 N. Y. Supp. 399 (2nd. Dept. 1924).

<sup>40</sup>Matter of Hosiery Manufacturers Corporation v. Goldston, 238 N. Y. 22, 143 N. E. 779 (1924), such a motion is "subject to direct review" on appeal. *Contra*: Petition of Jardine, Matheson Company Ltd., 100 Cal. App. 572, 280 Pac. 697 (1929) (rehearing denied, hearing by Supreme Court denied, 280 Pac. 697 (1929)), distinguishing the New York cases on local statutory grounds.

completed"<sup>41</sup> though occasionally a wise order is given enjoining the suit only if arbitration is entered upon within a named short period.<sup>42</sup> And generally after the defendant has obtained the stay the only way the plaintiff in the stayed action can obtain an arbitration is by forcing an arbitration by compulsory process! The bad faith of defendants and the opportunity for mischief provided by the act is shown by the fact that on many motions to compel arbitration by plaintiffs whose actions were stayed, the self-same defendants who insisted upon the arbitration agreement in their effort to obtain the stay, come forward with excuses why the arbitration should not be compelled. Fortunately the courts will not allow defendants thus to take an inconsistent position. The favorite plea that the petitioner has waived his right to compel arbitration is denied on the ground of estoppel,<sup>43</sup> and defendants have been unable to show that the arbitration agreement was invalid or the dispute not arbitrable.<sup>44</sup> Plaintiffs have often voluntarily discontinued actions upon defendants complaining that there should be an arbitration, without a direct motion to stay, only to find themselves later compelled to move for affirmative compulsion of arbitration and being met with a defense that the arbitration agreement is invalid. Estoppel again is used by the courts,<sup>45</sup> but that such playing fast and loose is possible is evidence of the breakdown of the arbitration law, and the need of amendments in its provisions.

One California case<sup>46</sup> decided that the mere pleading of an arbitra-

<sup>41</sup>See for example *Vandeweghe v. Vandeweghe*, N. Y. L. J., Feb. 15, 1932.

<sup>42</sup>In *Ring v. Menger, Ring and Weinstein, Inc.*, N. Y. L. J., Aug. 14, 1925, the stay was granted, "With leave of plaintiff to move to vacate such stay, if defendant fail to give notice of the appointment of an arbitrator within ten days after service of this order, or if the arbitration is otherwise unduly delayed." This form of order is to be commended highly, and is certainly exemplary and should be followed. And see the excellent decision in *Seidman v. Mount Hope Finishing Company*, N. Y. L. J., June 22, 1928: "In view of the fact that it has not demanded arbitration, I cannot assume that it will do so, and until it has taken some affirmative action to do so, this motion is premature", but note that the defendant was a foreign corporation against whom attachment had been had in New York, the defendant not answering the action, and part of the relief asked for was the dissolution of the attachment as well as staying the action.

<sup>43</sup>*Kraus Bros. Lumber Company v. Louis Bossert and Sons, Inc.*, 62 F. (2d.) 1004 (C. C. A. 2d. 1933), which considers the answer of the defendant pleading an arbitration agreement, as an offer to arbitrate, which, when accepted by the plaintiff, becomes binding on the defendant.

<sup>44</sup>*Cf. Matter of Kraus Lumber Company*, decided by the District Court for the Eastern District of New York, September 17, 1931, unreported. See (1931) AMERICAN ARBITRATION SERVICE, No. 6, p. 99.

<sup>45</sup>*Matter of Dai-Ichi Raw Silk Corporation*, N. Y. L. J., Jan. 16, 1931.

<sup>46</sup>*Palmer v. Fix*, 104 Cal. App. 562, 286 Pac. 498 (1930). The point was a dictum, and the decision was not well considered.

tion agreement by a defendant was not sufficient, and that the defendant must take *immediate* active steps in order to avail himself of the benefits of an arbitration clause. The decision is good as far as it goes, but the word "immediate" is still open to judicial construction. Popkin proposes:

"The better rule would be to require the defendant to move for arbitration before answering or at least to assert his right to arbitration in the answer. In that way the plaintiff would not go to the trouble and expense of continuing the action at law, only to be confronted long after with a stay of further proceedings on his part."<sup>47</sup>

This too falls short of achieving simple justice. A defendant should not be allowed to answer at all; he should be able to obtain his stay only by moving, before answering, to compel arbitration in the same court where the action was brought, if such court possesses equity jurisdiction, or if not, in a higher court. His motion should be entertained only if he has taken no steps at any time inconsistent with his claim for arbitration and is willing and ready to proceed thereto. Otherwise his rights to arbitration should be lost. Two Acts provide that only one specific court may grant the enforcement of arbitration agreements.<sup>48</sup> This should be so changed that any court possessing equity jurisdiction should be able to grant the order and the entire matter could be cleaned up in the court where the action is brought. If the defendant is sincere in his desire to obtain arbitration, he should ask for it for its own sake immediately after suit, otherwise he should not have it,—wanting it as he generally does only for delay and its nuisance value.

The language of the British Arbitration Act is, on this point, excellent. The Court is given the discretionary power to stay the action *IF*: (1) the party making the motion has not delivered "any pleadings or taken any other steps in the proceedings" (except the filing of an appearance) and (2) the court be "satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing

<sup>47</sup>*Op. cit. supra* note 2, p. 339.

<sup>48</sup>In New York: "The Supreme Court or judge thereof"; in New Jersey: "Any justice of the Supreme Court or judge of a Circuit Court, holding court for any county where either party resides", has jurisdiction to stay the action; in the remainder of jurisdictions the court in which the suit or proceeding is pending shall act. *Cf. Kipp v. Hamburg-American Line*, 134 Misc. 481, 235 N. Y. Supp. 450 (1929), *aff'd*. 288 App. Div. 802, 239 N. Y. Supp. 914 (1st. Dept. 1930) and *Chapman-Kruege Company v. Jaffe*, 263 N. Y. Supp. 737 (2nd. Dept. 1933).

to do all things necessary to the proper conduct of the arbitration."<sup>49</sup> But the American advocates of commercial arbitration desired no discretion in the court; they desired arbitration at all events; and in their earnest zeal for a worthwhile proceeding they have passed an oppressive and unwise law, not tended to increase the popularity of arbitration, overlooking the British Arbitration Act, which by its more moderate and well-considered provision has made arbitration the popular worthwhile method of settling commercial controversies it is in the British Isles.

The arbitration statutes in many of the states adopting the Draft State Act declare that the stay shall be granted "provided that the applicant for the stay is not in default in proceeding with such arbitration,"<sup>50</sup> which would seem to indicate that the New York rules regarding waiver and laches would be adopted by the courts of these states. In Connecticut and Massachusetts<sup>51</sup> the stay will be granted if the applicant for the stay is "ready and willing" to proceed with the arbitration. Under this language it is possible for a defendant who has been guilty of all kinds of delay and laches to obtain an order staying the trial providing he shows his readiness and willingness then to proceed with arbitration. Note also the anomalous provision in Massachusetts allowing either plaintiff or defendant to obtain the stay, while in Connecticut *any* party to an arbitration agreement may obtain the stay.<sup>52</sup> Thus in a tri-partite agreement it is possible to have a suit stayed by one not a party to the action. The sponsors of the arbitration acts certainly have furnished the material for complications.

#### THE UNITED STATES ARBITRATION ACT AND FEDERAL JURISDICTION

Before examining the further complications raised in interstate problems, let us examine, however, the jurisdictional questions raised by the United States Arbitration Act. The United States Arbitration Act is limited to the enforcement of:

"A written provision in any maritime transaction<sup>53</sup> or a con-

<sup>49</sup>ARBITRATION ACT, 1889, §4. Cf. *The Growth of Arbitration* (1929) 67 LAW JOURNAL (London) 251.

<sup>50</sup>Arizona, California, Louisiana, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Wisconsin, and the United States.

<sup>51</sup>CONN. GEN. STAT. (1930) §5841; MASS. GEN. LAWS (1930) c. 251, §21.

<sup>52</sup>*Supra* note 51.

<sup>53</sup>Note the restrictive definition of "maritime transactions", viz. "Charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels, collisions, or any other matters in foreign commerce which if the subject of the controversy, would be embraced within admiralty jurisdiction." 43 STAT. 883, (1925) 9 U. S. C. §1 (1926). Note that this does not cover all

tract evidencing a transaction involving commerce<sup>54</sup> to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal."<sup>55</sup>

Actions are stayed by "the court in which such suit is pending".<sup>56</sup> A motion to compel arbitration may be granted by:

"any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties."<sup>57</sup>

It is impossible to gain the benefits of the terms of the United States Arbitration Act by mere agreement for submission to it.<sup>58</sup> The mere fact that a justiciable federal dispute, for example a patent controversy, is made subject to arbitration by the agreement, is not sufficient.<sup>59</sup> While there has been much argument pro and con as to whether diversity of citizenship alone was sufficient to come within the purview of the act, it was generally believed that any dispute involving interstate commerce would fall within its terms.<sup>60</sup> Authors seem to feel that in order to be friendly to the arbitration process they must lean over backwards to place any and every arbitration agreement within the terms of the act; which we submit is an unsound attitude. Nevertheless, the question seems settled by a recent

---

possible maritime commerce: see Poor, *op. cit. supra* note 4, p. 668; *Marine Transit Corporation v. Dreyfus* 284 U. S. 263, 52 Sup. Ct. 166 (1932).

<sup>54</sup>"Commerce" is defined as "Commerce among the several states, or with foreign nations, etc." 43 STAT. 883 (1925), 9 U. S. C. §1 (1926).

<sup>55</sup>43 STAT. 883 (1925), 9 U. S. C. §2 (1926).

<sup>56</sup>43 STAT. 883 (1925), 9 U. S. C. §3 (1926).

<sup>57</sup>43 STAT. 883 (1925), 9 U. S. C. §4 (1926).

<sup>58</sup>Thus an agreement that the arbitration should be held "pursuant to the United States Arbitration Act and judgment on the award entered in the District Court, etc." did not bring the arbitration under the act, where there was no diversity of citizenship, etc. "The jurisdiction of the District Court cannot be enlarged by consent or a stipulation that judgment might be entered, etc. The National Arbitration Act provides for arbitrations in maritime, etc. This suit does not arise under the laws of the United States wherein a decision depends upon the construction of the statute." *In re Woerner*, 31 F. (2d) 283, 284 (C. C. A. 2d, 1929).

<sup>59</sup>*Zip Manufacturing Co. v. Pep Manufacturing Co.*, 44 F. (2d) 184 (D. C. Del. 1930).

<sup>60</sup>*Cf. REPORT OF ARBITRATION COMMITTEE OF CHAMBER OF COMMERCE OF NEW YORK STATE* (1932) p. 2; Cohen and Dayton, *op. cit. supra* note 4. In fact it was thought that jurisdiction was coextensive with normal Federal jurisdiction. But *cf. Presser and Baum, op. cit. supra* note 4.

decision of the Circuit Court of Appeals to the effect that there must be diversity of citizenship *and* interstate commerce in order to come within the terms of the United States Arbitration Act. Jurisdiction under this Act is not even coextensive with normal federal jurisdiction. The Circuit Court of Appeals for the Second Circuit clearly defined jurisdiction under the Act when it said:

"A difficulty might arise if jurisdiction depends only upon the fact that the contract 'involved commerce', *i.e.* required shipment from one state to another; but the statute does not rest the courts' power upon that ground . . . The text is entirely clear that the court must be one 'which, save for such agreement, would have jurisdiction . . . of the subject matter. . . ' The remedy is not even coextensive with the jurisdiction; for instance, the controversy may arise between citizens of different states and the contract not 'involve commerce'. A citizen of New Jersey may enforce arbitration against a citizen of New York upon a contract which requires him to ship the goods from Newark to Manhattan, but not upon one where they are to go from Manhattan to the Bronx. Conversely a citizen of New York may not come to the District Court to enforce arbitration against another citizen of that state, though the goods must be shipped across a state line."<sup>61</sup>

It may be noted that this case determines jurisdiction to compel arbitration, and that it might be argued that the jurisdiction to stay an action because of an arbitration clause is not thus limited.<sup>62</sup> If, however, the courts were to adopt a different ground of jurisdiction for compelling arbitration from that for staying an action because of an arbitration agreement, the ridiculous situation would be presented of a defendant being able to stay an action, and the plaintiff unable to compel arbitration. The courts should read into the stay of action section the limitation that it would not be stayed unless they could similarly compel arbitration. The act should be so clarified that the jurisdiction in both cases is clearly defined.

<sup>61</sup>Kraus Brother Lumber Co. v. Bossert, 62 F. (2d) 1004-06 (C. C. A. 2d, 1933). And note even if the other requirements are met, judgment will not be entered on an award under the United States Act unless provision be made therefore in the arbitration agreement. Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F. (2d) 1038 (App. D. C. 1932). The note in (1933) 46 HARV. L. REV. 517, criticizing the decision seems sound.

<sup>62</sup>See *supra* notes 55, 56, 57 and the text covering the same. It would seem that the requisites of the arbitration agreement together with the jurisdictional provisions cited in notes 55 and 56 would make the Kraus limitation apply to staying of actions. Cf. The Silverbrook, 18 F. (2d) 144 (E. D. La. 1927); Danielson v. Entre Rios Ry. Co., 22 F. (2d) 326 (D. Md. 1927). But see Presser and Baum, *op. cit. supra* note 4, p. 441 ff. "It would be an anomaly if the court could grant such a stay and could not direct the arbitration to proceed." Marine Transit Corporation v. Dreyfus, 284 U. S. 263, 274, 52 Sup. Ct. 166, 169 (1932).

In spite of the passage of the Federal Act, a federal court will not enforce a state arbitration act. Except for those cases clearly within the purview of the United States Arbitration Act the law still is that arbitration agreements will not be specifically enforced by the courts of the United States.<sup>63</sup> Again there was much argument that since Congress had shown a new public policy by passing the United States Arbitration Act, there was no reason for the United States courts to fail to specifically enforce all arbitration agreements. These courts it was said had frequently condemned the public policy argument supposed to make for the revocability of arbitration agreements, and had held them revocable only because of *stare decisis*.<sup>64</sup> Thus ran the argument, but unfortunately it did not appeal to the federal courts. In *California Prune and Apricot Growers Association v. Catz American Company*<sup>65</sup> the Circuit Court of Appeals of the Ninth Circuit affirmed an order of the District Court refusing to enforce specifically an arbitration agreement under the Draft State Arbitration Act of California. One argument used by the court was that the state statute provides specific state courts for its enforcement, and therefore it was not intended for enforcement by a federal court. In *Lappe v. Wilcox*<sup>66</sup> a Pennsylvanian brought suit against a New York defendant in the Federal District Court in New York in violation of the provisions of an arbitration clause. The defendant asked that the action be stayed, on the ground that since New York Arbitration Act made such arbitration agreements irrevocable the federal court should therefore stay the action. But the court did no such thing. It held that the state arbitration act is procedural, not substantive,<sup>67</sup> and

<sup>63</sup>*Cf.* *The Atlantan*, 252 U. S. 313, 40 Sup. Ct. 332 (1919); *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 49 Sup. Ct. 274 (1923); *The Howick Hall*, 10 F. (2d) 162 (E. D. La. 1925); (Note) (1926) 10 MINN. L. REV. 415.

<sup>64</sup>*Cf. e. g.* *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915). The argument that because a particular type of arbitration agreement is enforceable, the public policy against all of them is changed seems fallacious. Otherwise, why did not the statute so provide, at least for all those within the terms of federal jurisdiction? But *cf.* *Ezell v. Rocky Mountain Bean and Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925) where a somewhat similar argument was accepted by the Colorado Supreme Court.

<sup>65</sup>60 F. (2d) 788 (1932). A view opposed to that adopted in the case set forth in *Baum and Pressman*, *supra* note 4, p. 448 ff. And see *Morris*, *Specific Performance in Federal Courts Under State Arbitration Laws* (1933) 1 GEO. WASH. L. REV. 245.

<sup>66</sup>14 F. (2d) 861 (N. D. N. Y. 1926). The case is commented upon, generally adversely, in (1927) 1 CIN. L. REV. 222; (1928) 28 COL. L. REV. 472, 476; (1926) 40 HARV. L. REV. 649; (1926) 36 YALE L. J. 571.

<sup>67</sup>It seems well settled law that federal courts are not bound by state arbitration law. *Cf.* *Atlantic Fruit Company v. Red Cross Line*, 276 Fed. 319 (S. D. N. Y. 1921); *id.* 5 F. (2d) 218 (C. C. A. 2d, 1924); *Aktieselskabet Korn-Og, etc. v.*

therefore is not binding on the federal courts. And that was the main contention of the court in the Prune Growers Case.

THE NATURE OF ARBITRATION ACTS: PROCEDURE OR SUBSTANCE:  
ITS EFFECT ON INTERSTATE ENFORCEMENT, USE AS AN ESCAPE  
FROM ARBITRATION AGREEMENTS

In the United States Courts at least, arbitration acts are thus considered procedural. The New York propagandists of arbitration, who now so bitterly complain of this doctrine and assert that the acts are substantive, have themselves and their own courts alone to blame for this. Up to 1920, when New York passed its now famous arbitration act, it made little difference whether an arbitration act was procedural or substantive. In 1914 however the New York courts themselves laid the groundwork for our present law. In *Meacham v. Jamestown etc. Ry.*<sup>68</sup> two Pennsylvania parties executed a contract in Ohio for the construction of a railway in Pennsylvania, providing for arbitration of disputes in connection with the contract. The arbitration clause was specifically enforceable in Pennsylvania, but the New York courts allowed a suit to be brought saying that the arbitration provision was procedural and hence that the *lex fori* applied.<sup>69</sup> The real reasoning of the courts seemed to be that these agreements were void and against public policy in New York and they were not going to enforce them.<sup>70</sup> "Procedural law—*lex fori*"—the easiest way out.

*Rederiaktiebolget, etc.*, 250 Fed. 935 (C. C. A. 2d, 1918). "Whatever the content, however, of this arbitration statute of New York State, it could not affect the jurisdiction of the Federal Courts. It is the duty of the Federal Courts to exercise their powers in every case to which their jurisdiction extends.", *Lappe v. Wilcox*, *supra* note 66, at p. 864.

<sup>68</sup>211 N. Y. 346, 105 N. E. 653 (1914), Ann. Cas. 1915C 851.

<sup>69</sup>*Accord*: *Aktieselskabet, etc. v. Rederiaktiebolget, etc.*, 250 Fed. 935 (C. C. A. 2d, 1918), *aff'd.*, 252 U. S. 313, 40 Sup. Ct. 332 (1919). And the rule is true even where the place of arbitration is designated in the arbitration agreement, and the law of the place holds such agreements irrevocable. *U. S. Asphalt Refining Company v. Trinidad Lake Petroleum Co.*, 22 Fed. 1006 (S. D. N. Y., 1915); *The Eros*, 241 F. 186 (S. D. N. Y., 1916), *aff'd.* 251 Fed. 45 (C. C. A. 2d, 1918); *Tatsuuma Kisen Kabushiki Kaisha v. Prescott*, 4 F. (2d) 670 (C. C. A. 9th, 1925) holding the federal courts will not even follow state common law rules regarding revocability of arbitration agreements.

<sup>70</sup>If the judgment of the court below is to stand, jurisdiction over controversies arising under such contract may be withdrawn from our courts and the litigation submitted to arbitrators in distant states. The presence of the parties here, the ownership of property in this jurisdiction, these and other circumstances may make resort to our courts here essential to the ascertainment of justice. If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have ex-

In 1921 after New York had passed its Act, its constitutionality was attacked. The proponents of the Act saw an easy avenue of escape in "procedure, not substance" and besides if it were a procedural act, it would apply even to contracts entered into prior to its passage which was the fact in the case at bar. Enforcement at all costs was their motto.

The Court of Appeals makes a strong argument for its position when it said:

"The common-law limitation upon the enforcement of promises to arbitrate is a part of the law of remedies. [cases cited] The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."<sup>71</sup>

Heilman has examined in great detail all the arguments pro and con and sets forth the cases in such detail that we will not further examine the law on the subject.<sup>72</sup> He answers the New York courts thus:

"'lex fori' should not apply to arbitration cases. It is believed that this rule should be confined to questions of procedure arising in relation to the machinery of litigation . . . If in a given case a particular court has to decide whether or not to hold an arbitration stipulation valid and binding . . . the question, being one of legal consequences of the stipulation, should be treated as substantive from the standpoint of conflicts of law." (p. 620.)

The English, on the other hand, consider the enforcement of an arbitration clause a matter of the enforcement of a contractual term, a matter of substantive law to be determined by the place of performance.<sup>73</sup> They foresaw long ago that to hold otherwise would mean

---

pressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. [cases cited] If jurisdiction of our courts is established by law, it is not to be diminished, any more than it is to be increased, by the agreement of the parties.", per Cardozo, J., p. 354.

<sup>71</sup>Berkovitz, *et al. v. Arbib and Houlberg Inc.*, 230 N. Y. 261, 270, 130 N. E. 288, 289-90 (1921).

<sup>72</sup>Heilman, *Arbitration Agreements and the Conflicts of Laws* (1929) 38 YALE L. J. 617. See also Corbin, *Conditional Rights and Functions of an Arbitrator* (1928) LAW QUARTERLY REV. 24. Cf. Delimitation of "Procedure" in the Conflict of Laws (1933) 47 HARV. L. R., 315, 318 *et seq.*

<sup>73</sup>Hamlyn and Co. v. Talisher Distillery, (1894) A. C. 202; Spurrier v. LaCloche, (1902) A. C. 446. In the Hamlyn Case, Lord Watson, while admitting that *lex fori* applied to matters of procedure and proof said: "But all the rules . . . refer to the action of the court in investigating the merits of a suit in which its jurisdiction has already been established." (p. 213).

that if a party with a clause valid in state *A* could somehow or other find a defendant in *B*, a state not enforcing arbitration agreements, or obtain jurisdiction in the federal courts (and not fall under the jurisdiction of the United States Act), an arbitration could easily be defeated.<sup>74</sup> Sturges foresaw the difficulty, and suggested as a possible way out that the federal courts should stay the action in conformity with the state arbitration act; and it seems an amendment to the United States Arbitration Act is desirable.<sup>75</sup> But due to our law being as it is, it seems that any ruse to obtain jurisdiction in a federal court or in a non-enforcing state can defeat the carefully drawn arbitration laws which mean to specifically enforce all arbitration agreements. Regardless of theoretical arguments pro and con, it is simply another instance of courts applying the *lex fori* any chance they obtain, and the "remedial statute" offers an easy "talky-talk"

<sup>74</sup>"I am not prepared to affirm a rule which does not appear to me to be recommended by any consideration of principle or expediency. One result of its adoption would be that if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested." *Hamlyn v. Talisher Distillery*, (1894) A. C. 202, 214, per Lord Watson.

<sup>75</sup>"Unless . . . *Lappe v. Wilcox* prevails it seems plausible to urge that the Conformity Act may be invoked to require the stay of trial according to the state statute. That statute provides as follows: 'The practise, pleading and modes of proceeding in civil cases, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practise, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, and rule of court to the contrary notwithstanding.' U. S. Rev. St. §914, 28 U. S. C. A. §724. The application of this statute, in such cases, could be made without prejudice to the general principle that state statutes will not be recognized to enlarge or restrict the jurisdiction of the federal courts . . . The exception in the Conformity Act, excluding 'equity causes', offers little encouragement to suppose that the act will be applied as concerns the remedies for specific enforcement of the arbitration agreement." STURGES, ARBITRATIONS AND AWARDS (1931) p. 937. (*sed quaere* if staying an action is not assisting equity jurisdiction.) The only satisfactory solution, unless we obtain a decision of the Supreme Court, is for the United States Arbitration Act to be amended to provide that the federal courts may enforce a state arbitration act; assuming of course that public policy does not dictate an easy escape from arbitration agreements. We personally are opposed to the mandatory enforcement of every arbitration agreement (see our *Paradox in Arbitration Law*, *supra* note 7); and feel that the evasive process herein outlined is simply another avenue utilized to escape the rigors of a law, theoretically sound perhaps, but certainly psychologically impossible of achieving its object. The recently developed trick used by New York counsel of bringing an action in tort instead of contract in order to defeat arbitration clauses is but another example of this evasive process. See *supra* note 16.

escape.<sup>76</sup> And it seems logical enough on second thought that the courts of one state should not want to enforce arbitration agreements in a new and novel way, against all their well-established law, merely because the legislatures of some other states at the besieging of certain types of business interests have declared arbitration agreements irrevocable.<sup>77</sup>

Very recently the Court of Chancery of Delaware refused to stay an action brought there against a Delaware corporation by a New York plaintiff, in violation of an arbitration agreement.<sup>78</sup> It developed that in this case the arbitration had already been proceeding in New York for three years, that \$750,000 had been spent in conducting the arbitration, which would be entirely lost if the suit continued; but to no avail. The court rested on the *Meacham* and *Berkovitz* cases and refused to stay the suit. Had the contract provided specifically for arbitration in New York, the result would have been the same.<sup>79</sup> The federal court's decision in *Lappe v. Wilcox* does not stand alone; its logic seems to appeal to our state courts as well.

#### REMOVAL OF ARBITRATION ACTIONS TO FEDERAL COURTS

Whether a motion to specifically enforce arbitration may be removed to a federal court on the ground of diversity of citizenship, assuming the required amount involved, has proven the cause of much difficulty. The problems raised are far without the scope of this

<sup>76</sup>And note that even in the English cases above set forth, these cases were enforcing *lex fori* of England. The arbitration agreement in each case provided for English arbitration (according to the English court) and hence a decision of the Scotch court and the Isle of Wight court refusing to apply the English arbitration law was reversed.

<sup>77</sup>Thus Lord Watson, admitted in *Hamlyn and Co. v. Talisher Distillery, et. al.*, (1894) A. C. 202, that if arbitration agreements were never enforced in the forum, that *lex fori* would apply.

<sup>78</sup>*Vitaphone Corporation v. Electrical Research Corporation*, 166 Atl. 255 (Del. Ch. 1933). See also 167 Atl. 845 (Del. Ch. 1933) refusing to modify original decision. In addition to the usual substantive argument presented, counsel for the applicant for the stay tried to argue that *Home Insurance Co. v. Dick*, 281 U. S. 397, 50 Sup. Ct. 338 (1930) and *Brandford Electric Light Co. v. Clapper*, 286 U. S. 145, 52 Sup. Ct. 571 (1932) made the enforcement of the New York statute compulsory on the Delaware court. It would have seemed that in view of the irreparable loss to the parties were the arbitration not held, that the court on general equity jurisdiction might have enjoined the action. This view is well argued in a note on the principal case (1933) 47 HARV. L. REV. 126, and *contra* 33 COL. L. REV. 1440; both reviews disapproving the case, however. But the prejudice against specific enforcement of arbitration agreements is so deep-seated, that the ultimate decision of the court really was to be expected.

<sup>79</sup>See the cases cited *supra* note 69.

paper.<sup>80</sup> Suffice it to say that a motion to compel arbitration under a state act was not removable to the federal courts even though the matter involved a "maritime dispute",<sup>81</sup> nor was a motion to remove because of diversity of citizenship with the proper amount in controversy.<sup>82</sup> It almost seems that the law is such as to encourage parties from different jurisdictions who have contracts containing arbitration clauses to attempt all the jurisdictional tricks to stage the litigation in a state which will or will not compel arbitration or stay the action, according to their desires. That such a situation is undesirable is obvious.

#### ENJOINING FOREIGN SUITS BECAUSE OF ARBITRATION AGREEMENTS

The normal arbitration agreement does not provide for its enforcement under any particular law. Even if it did provide, however, for arbitration in accordance with the laws of a particular state, or under the arbitration law of a particular state, it is believed that such a clause would be disregarded under the *lex fori* doctrine previously advanced.<sup>83</sup> On the other hand, suppose an arbitration clause provides for arbitration according to the law of New York and one party starts suit in Delaware, where, as we have already seen, the Delaware Courts will not decline the action. It is possible, in such a case, however, that if the courts of New York obtain jurisdiction over the parties, they might enjoin the bringing or continuing of the action in Delaware. In *Pennsylvania Copper Mines Ltd. v. Rio Tinto Co. Ltd.*<sup>84</sup> a Spanish-made contract between English firms provided for arbitration and in addition that the contract should be construed according to the laws of England. In granting an injunction against a suit brought in Spain, Fletcher Moulton, L. J. said:

"In the present case by bringing an action in the Spanish court, the Rio Tinto Co. are depriving the Pennsylvania Company, the

<sup>80</sup>The problem is excellently and fully set forth in STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* (1931), c. 17, §480, p. 937-945, wherein the abuses and peculiar doctrines of the law are explained.

<sup>81</sup>*Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 Sup. Ct. 274 (1924). Other phases of the case may be found in 233 N. Y. 373, 135 N. E. 821 (1922) (which decision was reversed by the Supreme Court); 277 Fed. 853 (S. D. N. Y., 1921).

<sup>82</sup>*Marchant v. Mead-Morrison Manufacturing Co.*, 7 F. (2d) 511 (S. D. N. Y., 1925); *id.*, 11 F. (2d) 368 (C. C. A. 2d, 1926); *id.*, 29 F. (2d) 40 (C. C. A. 2d, 1928); *cf.* (Note) (1929) 42 HARV. L. REV. 801; Baum and Pressman, *supra* note 4, p. 253*f.*

<sup>83</sup>*Cf.* for example, the cases *supra* note 69; *Shaeffer v. Metro-Goldwyn-Mayer*, 36 Ohio App. 31, 172 N. E. 689 (1930); and the discussion in the text pp. 213-214.

<sup>84</sup>105 T. L. R. 846 (1912).

plaintiffs in the present action, of the right to apply to our courts to prevent this dispute from being decided in any other way than by arbitration. Therefore, we ought to exercise our powers *in personam* to prevent that line of conduct taking effect which is certainly contrary to their contractual duties.<sup>85</sup>

Unless the courts of the state which enforces an arbitration clause enjoins the suit in another state, it is unsafe to commence an arbitration in the first state without an order directing arbitration to proceed, unless one wants to risk the consequences of the recent Delaware decision, with its concomitant loss and delay. And quære if the Delaware courts would have to respect such an order?<sup>86</sup> Obviously a defendant, if in New York, would have to do so. On the other hand, to commence an arbitration by a court order means a vanishing of the voluntary and friendly nature of arbitration, and a spirit of litigation prevails. It is just the sort of thing to wound the pride of the compelled party and to cause him to take such steps as the commencement of an action in a non-enforcing state. The matter is indeed puzzling, and does present almost unsurmountable difficulties unless we have a uniform arbitration law in all states, or unless all states will agree that *lex contractus* governs.

#### ENFORCEMENT OF ARBITRATION IN JURISDICTION OTHER THAN FORUM

Suppose that a contract provides that arbitration is to be had in Delaware and an attempt is made to enforce it in New York, or another state having the modern Draft State Act. The New Jersey courts would directly order arbitration in a foreign jurisdiction,<sup>87</sup> Pennsylvania has refused to pass on the question by subtle evasions,<sup>88</sup> while New York declined to order an arbitration directly in a foreign jurisdiction.<sup>88a</sup> Under the United States Arbitration Act, arbitration

<sup>85</sup>*Id.*, at page 852.

<sup>86</sup>*Cf.* Miller v. Gittings, 85 Md. 601, 37 Atl. 372 (1897); Philadelphia Company v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340 (1912); Royal League v. Kavanaugh, 233 Ill. 175, 84 N. E. 178 (1908); Kempson v. Kempson, 58 N. E. Eq. 94, 43 Atl. 97 (1899). See (1912) 26 HARV. L. REV. 292.

<sup>87</sup>"There can be no question but what the court has jurisdiction to do this if the parties have so agreed because the act reads: 'shall . . . order . . . arbitration in accordance with the terms of the agreement.'" *In re California Lima Bean Growers Association*, 9 N. J. Misc. 362, 364, 154 Atl. 532, 533 (1931).

<sup>88</sup>*Katakura & Co. Ltd. v. Vogue Silk Hosiery Co.*, 307 Pa. 544, 161 Atl. 529 (1932), note (1933) 7 TEMP. L. Q. 512, refusing to comment on the lower court decision *id nomine*, 15 D. & C. 389 (1931) ordering arbitration in New York.

<sup>88a</sup>*Matter of Inter-Ocean Food Products Inc.*, 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dept. 1923); *Matter of California Packing Corporation*, 121 Misc. 212, 201 N. Y. Supp. 158 (1923). The Court of Appeals refused to pass on the question. *Apiritusfabriek Astra v. Sugar Products Co.*, 230 N. Y. 261, 130 N. E. 288 (1921). The *Inter-Ocean* case is approved in (1924) 24 COL. L. REV. 204.

can be ordered only within the district wherein the order is made,<sup>89</sup> while under the California Act an arbitration shall be held in California, unless the parties have agreed in writing after the dispute arises that it shall be held outside the state.<sup>90</sup> There are dicta to the effect that an arbitration ordered in another jurisdiction would have to be conducted according to the laws of the state which orders it.<sup>91</sup> As a matter of fact, courts which enforce arbitration agreements, if possible, will order the arbitration to take place within their own jurisdictions, either on a forced construction of the contract,<sup>92</sup> or by plainly disregarding it by saying that since they cannot order the arbitration to take place abroad, they must do the next best thing by ordering it to take place within its own jurisdiction.<sup>93</sup> This in the ordinary case seems bad, inasmuch as the locale of an arbitration may be more important than the arbitration itself.

Nevertheless, there has been little attempt to compel arbitration abroad. The older generation of lawyers seems to cling to too rigid views on the jurisdiction of equity to have attempted it. But there have been many efforts to stay a suit in state *A* when a contract provides for arbitration in state *B*. The New York courts, pointing out that to stay an action in New York is entirely different to enforcing the arbitration to proceed abroad, uniformly grant the order for the stay.<sup>94</sup> On the other hand, there is no uniformity of decision in

<sup>89</sup>43 STAT. 883 (1925), 9 U. S. C. §4 (1926).

<sup>90</sup>CAL. CODE CIV. PROC. (Deering, 1931) §1286. The Statute applies: "Except in contracts that fall within the scope of the United States Arbitration Act." Does this mean that if a contract comes within the scope of the United States Arbitration Act that arbitration can be ordered in another state, thus giving the California courts powers greater than possessed by the federal courts under the Act or does it mean that the California courts cannot act on them at all?

<sup>91</sup>Matter of Hedworth, Fletcher & Co. Line, N. Y. L. J., April 6, 1923. Collishaw v. Kroeger, 211 App. Div. 809, 206 N. Y. Supp. 802 (2nd Dept. 1924).

<sup>92</sup>Cf. Katakura & Co. Ltd. v. Vogue Silk Hosiery Co., 307 Pa. 544, 161 Atl. 529 (1932). Cf. Marchant v. Mead-Morrison Company, 252 N. Y. 284, 169 N. E. 386 (1929).

<sup>93</sup>Matter of Nozaki Bros., Inc., N. Y. L. J., Aug. 5, 1921. Cf. Matter of Howard P. Foley Co., Inc., N. Y. L. J., Oct. 26, 1928. But see also Direct United States Cable Co. v. Dominion Telegraph Company, 84 N. Y. 153 (1881).

<sup>94</sup>Cases *supra* note 88a. "To decline to hear a case . . . is very different from ordering the parties to proceed to a foreign jurisdiction in order to arbitrate their differences before a foreign tribunal . . . The general trend of authority, it seems to me, is that no court will willingly relinquish its jurisdiction over controversies arising between those who are amenable to its jurisdiction, nor will any sovereign order its citizens or subjects to go before the tribunals of another sovereign and submit to its jurisdiction, that their differences may be adjudicated." Matter of Inter-Ocean Food Products Inc., 206 App. Div. 426, 210 N. Y. Supp. 530 (1st Dept. 1923). But compare the anomalous, but well thought out and excellent

the federal courts. *The Silverbrook*<sup>95</sup> refused to stay an action brought in violation of an arbitration clause providing for arbitration in England. The court thought that since it had no jurisdiction under the federal act to order arbitration abroad, it would be unfair for it to stay the action, it being unable to supervise the proceedings abroad or act on the award. *Danielsen v. Entre Rios Railroad Company*<sup>96</sup> on the other hand did stay the action under similar circumstances, arguing that *The Silverbrook* was erroneous:

"The language of these sections makes it evident that the intent of Congress was to change the existing rule and make contracts arbitration effectual . . . The *Silverbrook* . . . seems erroneous under the broad language of Section 3 . . . There is nothing in the act which indicates that, although the arbitration provided for may be beyond the jurisdiction of the court, this should forestall or in any way curtail jurisdiction . . . On the contrary, as is seen from the language of the sections of the act above quoted, it is contemplated that the proceedings may be brought in the usual manner and jurisdiction over the arbitration assumed if the arbitration provided for is to take place within the court's jurisdiction; if not, then the proceedings shall be stayed until the foreign arbitration is perfected, whereupon the court has power to enter a decree upon the award." (pp. 327, 328.)

*The Fredensboro*<sup>97</sup> is often cited as being in accord with *The Silverbrook*, but an inspection of its decree shows that the court's decision was very limited.<sup>98</sup> Judge Mack has pointed out the unfairness in the *Silverbrook* decision:

"Nor should it be overlooked that an unfortunate situation is created if arbitration agreements can be repudiated in American

---

decision in *Seidman v. Mount Hope Finishing Co.*, N. Y. L. J., June 22, 1928, where a foreign defendant, upon whom attachment had been had, does not appear in the action brought against it, or answer, and then moves to stay the action until arbitration can be had in accordance with the contract: "In view of the fact that it has not demanded arbitration, I cannot assume that it will do so, and until it has taken some affirmative action to do so, this motion is premature."

<sup>95</sup>18 F. (2d) 144 (E. D. La., 1927); (1927) 36 YALE L. J. 1016; accord: *The Breecrood*, 35 F. (2d) 41 (S. D. N. Y., 1929).

<sup>96</sup>22 F. (2d) 326 (D. C. Md., 1927). The case is approved in (1928) 41 HARV. L. REV. 664.

<sup>97</sup>18 F. (2d) 983 (E. D. La., 1927).

<sup>98</sup>"It is apparent, therefore, that the agreement to arbitrate contained in the charter party does not oust the jurisdiction of the court. In view of the fact that the *res* is within the jurisdiction of the court, that the witnesses are within the jurisdiction, that either party may avail itself in the suit of the arbitration clause in accordance with the United States Arbitration Act, I fail to see any sound reason why the court should not take jurisdiction." *The Fredensboro*, *supra* note 97, at page 985.

courts while American citizens can insist upon their enforcement in their favor as a bar to litigation abroad."<sup>99</sup>

On the other hand, in spite of an alleged criticism of confusion in the decision of *The Silverbrook*<sup>100</sup> there is much force to the argument that the court cannot compel arbitration abroad and therefore should not stay the action. Suppose an agreement to arbitrate in Delaware. The Delaware plaintiff cannot obtain jurisdiction in Delaware over a New York defendant, knows an arbitration in New York will prove abortive and hence sues the defendant in New York. The New York defendant stays the suit, and eats his cake and has it too, while the Delaware plaintiff is powerless, either to sue or obtain an arbitration. Staying an action for an arbitration to be held abroad or in another state brings forward all the vices above set forth with regard to staying an action in connection with a local arbitration, in addition to which there is often no way, even by compulsory process to obtain justice. If an action is stayed because of an agreement providing for an arbitration in another jurisdiction, the party staying the action should be required to post a bond conditioned on his carrying out the foreign arbitration,<sup>101</sup> or better still, an order providing that unless the foreign arbitration be held within a reasonable time the suit might be continued. And we would require the stay action to be brought with all the requirements mentioned above for a "local" arbitration.

The citizen of a state which has the modern arbitration act is in some ways handicapped if he provides for an arbitration within that state in his contracts with a party from another jurisdiction not having it. Under normal circumstances he cannot compel arbitration against the non-resident and the non-resident can compel it against him. Generally his only remedy is to sue in the foreign jurisdiction. The Ohio Arbitration Act attempts to remedy the situation and provides that a provision in an arbitration agreement to hold the arbitration in a particular county of Ohio confers irrevocable jurisdiction on the courts of that county to order arbitration to proceed.<sup>102</sup>

<sup>99</sup>*Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319, 322 (S. D. N. Y., 1921); see also Baum and Presser, *supra* note 4, page 1. But *cf.* *Marine Transit Corporation v. Dreyfus*, *supra* note 62.

<sup>100</sup>For example see (Note) (1927) 36 YALE L. J. 1016, arguing that the New York rule should be followed, says of *The Silverbrook*, *supra* note 95: "In the instant case, specific performance of the agreement was not sought, there being only a motion to stay the proceedings, and the court appears to have been misled in basing its decision on its assumed inability to direct arbitration."

<sup>101</sup>*Cf.* *Kirchner v. Gruban* (1909) 1 Ch. 413; *Interstate Silk Corporation v. M. Salzberg & Sons, Inc.*, N. Y. L. J., April 14, 1933.

<sup>102</sup>OHIO GEN. CODE (Page, 1932) §§12148-8. *Cf.* *Sturges and Burn Manufacturing Co. v. Unit Construction Co.*, 207 Ill. App. 74 (1917).

This particular provision cures the difficulty above set forth; but presents certain evils in connection with surreptitiously inserted arbitration provisions in standardized contracts. It can be used as an instrument of hardship and oppression.<sup>103</sup>

#### ARBITRATIONS HELD EX PARTE

It was generally thought that a statute making arbitration agreements irrevocable would allow arbitrators appointed to proceed *ex parte* in the event one side proved recalcitrant. This would of course provide a remedy in the extra-territorial cases where service of process for an order to compel was impossible, for no court order would be necessary. Unfortunately the New York Court of Appeals intimated that an *ex parte* arbitration could not be held and without a court order a party with an arbitration clause is powerless to proceed, unless the other side consents.<sup>104</sup> This decision surprised the bar, and completely astonished the British Court of Appeals, but was followed in their interpretation of the New York Act.<sup>105</sup> The New York Act has since been amended and provides that an *ex-parte* arbitration may now be held.<sup>106</sup> So that if our New York business man has a contract providing for arbitration with a Delaware customer, and the latter proves recalcitrant, the New Yorker can hold his arbitration *ex parte*, providing he does not need collateral enforcement by the New York courts for the appointment of arbitrators; which like a motion to compel requires personal service within the jurisdiction. Whether the statutes of the other states having the Draft Act would need amendment to provide for an *ex parte* arbitration is still an open question.<sup>107</sup>

<sup>103</sup>See Phillips, *supra* note 7, 1275 ff.

<sup>104</sup>Bullard v. Morgan H. Grace & Co., 240 N. Y. 388, 148 N. E. 559 (1925).

<sup>105</sup>See Bankers and Shippers Insurance Co. v. Liverpool Insurance Co., 24 Lloyd's List Reports (1925). The argument against the Bullard decision is that the statute makes an arbitration agreement irrevocable, which confers irrevocable authority on the arbitrators and hence they can proceed *ex parte*. See *In re Smith etc.*, 25 Q. B. D. 545 (1890). Cf. *State ex rel. Fancher v. Everett*, 144 Wash. 592, 258 Pac. 486 (1927).

<sup>106</sup>ARBITRATION LAW §4a, added by LAWS 1927, c. 352. The constitutionality of the act, when applied to a contract, both parties to which were residents of New York, the contract and arbitration to be performed entirely in New York, has been sustained. *Finsilver, Still and Moss v. Goldberg, Maas & Co.*, 253 N. Y. 382, 171 N. E. 579 (1930), reversing 227 App. Div. 90, 237 N. Y. Supp. 100 (1st Dept. 1929), noted (1930) 43 HARV. L. REV. 824.

<sup>107</sup>When other arbitration decisions regarding the Draft State Act have occurred in states outside of New York, the New York decisions have been followed. But cf. *Stiringer v. Toy*, 33 W. Va. 86, 10 S. E. 26 (1889); *State ex rel. Fancher v. Everett*, 144 Wash. 592, 258 Pac. 486 (1927) which are *contra* to Bullard v. Mor-

It seems doubtful whether an *ex parte* arbitration should be had against a non-resident unless the contract specifically provided the state wherein the arbitration could be had.<sup>108</sup> If arbitration is remedial only, and does not pertain to substance, that would allow the law of the forum to govern, but it does not seem quite fair or legal for the *lex fori* to govern unless there has been some consent to its jurisdiction in the first place. *Lex contractus* is fairer; but there is no law to that effect as shown before. If a provision for arbitration which mentions no *venue* for the arbitration would allow an arbitration to be conducted *ex parte* in any state permitting them, we might have the ridiculous situation of a contract made in Connecticut between a resident of Massachusetts and one of New York, providing for arbitration but not naming the locus. Therefore, each state allows *ex parte* arbitrations, so neither party is willing to come to the other state, and each holds an *ex parte* arbitration in his state, obtains an award against the other and comes to the other's jurisdiction to en-

---

gan H. Grace & Co., *supra* note 104. In Connecticut and Massachusetts specific provision is made for the *ex parte* arbitrations. CONN. GEN. STAT. (1930) §5846; MASS. GEN. LAWS c. 251, §§6, 18. Under IOWA CODE (1927) §12701, MICH. COMP. LAWS (1927) §15416, MINN. STAT. (1927) §9513 and under the COMMISSIONERS ACT §7 in force in Nevada, North Carolina, Utah and Wyoming, *ex parte* arbitrations can be held. This, of course, applies only to agreements to arbitrate an existing dispute, and provisions to arbitrate a future dispute arising out of a contract are clearly not thus enforceable. Cf. Curtis, *Comparison of Recent Arbitration Statutes* (1927) 13 AM. BAR ASSOC. J. 567.

<sup>108</sup>But see: "The order it is said is void because the parties in agreeing to arbitrate their differences had in view an arbitration in Massachusetts, and not performance somewhere else. Whether this was their meaning was, however, a question of construction, to be determined by the judge receiving the petition. Jurisdiction was not dependent on his determining it correctly. We must distinguish between the place of performance in respect of manufacture and delivery and the place of performance for the settlement of differences. The contract was to be performed in Massachusetts to the extent that the things to be sold were to be there manufactured and delivered. The conclusion does not follow of necessity that the remedy prescribed for the settlement of differences was to be sought in the same forum . . . The statute of New York does not bring the contract into being, but adds a new implement, the remedy of specific performance for its more effectual performance. The remedy may lawfully be extended to contracts of manufacture made in Massachusetts and there to be performed, unless it is one of the terms of the arbitration clause, implied, if not express, that the arbitration shall proceed in a particular locality . . . Express restriction there is none in the contract now before us." *Matter of Marchant*, 252 N. Y. 294-5, 169 N. E. 368 (1929). We agree with the conclusion of the notewriter in (1930) 43 HARV. L. REV. 809, 810, that arbitration is enforceable in New York, "unless the contract by its express terms contemplates arbitration in some other jurisdiction," but note an *ex parte* arbitration is not enforcing arbitration, for there is no jurisdiction over the defendant, gained by service of process.

force it! And these are the laws to make for simplicity in business proceedings! Unless the contract specifically provides for an arbitration in a particular jurisdiction, or unless the *lex contractus* rule is adopted, and the law of the state wherein the contract was made, (or to be performed—we care not which so long as there is some uniformity about it) is utilized, there should be no allowance of *ex parte* arbitrations except where all the parties involved live in one state and that is the state where the *ex parte* arbitration is held. But the earnest advocates of arbitration would not approve of such rules, “get an arbitration held at all costs” seems to be their motto and the language quoted in note 108 leads us to suspect that an *ex parte* arbitration might be attempted under a general arbitration clause naming no venue for the proceedings.<sup>109</sup>

Sturges has cast some doubt on the application of the *lex fori* doctrine heretofore set out. In 1930, *before the decisions in many of the cases set forth herein*, he wrote:

“These views, if fairly summarized, manifest considerable restriction upon the general doctrine . . . that questions concerning the revocability and enforceability of an arbitration agreement are matters of remedy to be determined by the local rule of the forum.”<sup>110</sup>

At the time this was written we agreed—later cases herein cited have changed our opinion. He draws his conclusion in the main from *Matter of Marchant*<sup>111</sup> intimating:

“that if the arbitration clause in such a foreign contract designates a place for holding arbitrations which is not within the State of New York, the Court of Appeals is likely to rule that an order appointing an arbitrator is a nullity . . . .”<sup>112</sup>

Even then, the *lex fori* as a procedural matter might apply. The Court might well mean that since the arbitration cannot be held in New York, the Court cannot order it abroad or appoint arbitrators on a narrow view of equity jurisdiction.

Note the facts in the *Marchant* case. A Maine corporation contracted to sell and deliver tractors to a New York corporation; the contract was made in Massachusetts, the merchandise to be there made and delivered, and provided for arbitration without designating a *locus* therefor. The New York Court appointed an arbitrator under the arbitration act. Unless the Court is clearly applying *lex fori*, it would never have appointed arbitrators in the case at all. Under *lex*

<sup>109</sup>But cf. *infra* notes 117, 118 and 119 *infra*.

<sup>110</sup>STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 920.

<sup>111</sup>*Supra*, note 108.

<sup>112</sup>*Op. cit. supra*, note 110.

*contractus* they would not; under the law of the place of performance they would not; unless the rather illogical view is taken that the place of performance of the contract is not the place for the performance of the arbitration. Sturges cites one other case, *Hudson v. Estates Coal Company*,<sup>113</sup> where there was a New York action brought on a Pennsylvania lease of Pennsylvania properties, and the court intimated that if the Pennsylvania arbitration statute were pleaded, it might grant a stay of the action. The case, however, is but a lower court decision and not at all well-considered.<sup>114</sup> And note that the courts never seem to discuss in the ordinary case of this sort where the contract was made, or where the parties reside, or where performance is to take place. In the *Inter-Ocean Case*,<sup>115</sup> the facts show performance of the main contract was to take place in California; in the *California Packing Case* it was not discussed. Yet in both cases, a suit was enjoined in New York, because of a clause providing for arbitration in California, *at a time when it was impossible to compel arbitration in California*. The decisions left the plaintiff in the action totally without rights, for unless it could find the New York defendant in another jurisdiction, it could not compel arbitration, or sue. That was applying *lex fori* with a vengeance, and since the same court admitted that it lacked the power to compel arbitration in another jurisdiction, while staying an action, since the Court of Appeals approved the *Inter-Ocean* decision in the *Marchant Case*, it would seem that *lex fori* procedural law is the real thought of the court, in spite of nicely spun words given by them. The cases above set forth compelling arbitration abroad apply *lex fori* and the facts when examined show the contract was not made in the state ordering arbitration, the performance was not to take place there, and *ex hypothesi* the arbitration was not to take place there. We conclude that the confusion and hardship caused by the many decisions is the result of applying *lex fori* in any event, regardless of the excuse for so doing. The reader may find some help, and likewise some confusion in the cases construing an agreement to restrict suits under a contract to a court of a foreign jurisdiction.<sup>116</sup>

<sup>113</sup>132 Misc. 590, 230 N. Y. Supp. 372 (1928). The case is noted in (1929) 29 COL. L. REV. 668.

<sup>114</sup>For example the court assumed that the Pennsylvania Arbitration Act would apply to the particular contract made in 1898 involved, when by the very terms of the act a contract, entered into before the passage of the act (1927) was excluded from its purview. <sup>115</sup>*Supra* note 88a.

<sup>116</sup>At early common law, an agreement in a contract to settle disputes in a foreign court was disregarded by the courts; and oddly enough it was treated as analogous to an arbitration agreement. The latter were revocable and their enforcement procedural, and from that it was concluded that agreement to confer

In the now famous case of *Gilbert v. Burnstine*<sup>117</sup> a citizen of New York and another from England entered into a contract wherein they agreed to arbitrate in London, according to the British Arbitration Act and according to certain named British rules. The Britisher demanded arbitration, but the American rested on his happy thoughts about extra-territorial protection, due process and the like. The Britisher, as he could under the English law, obtained permission from the courts of England to serve the American with notice regarding the arbitration by mail; and the arbitration was held *ex parte*, though note the English courts appointed an arbitrator on behalf of the American. And, lo and behold the New York courts in a suit on the award by the Britisher held that there could be recovery unless the defendant could prove that he had not agreed in his contract to a

---

exclusive jurisdiction on a foreign court should be likewise treated. See for example *Gough v. Hamburg*, 158 Fed. 174 (S. D. N. Y., 1907), though compare the anomalous *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425 (1903) explained later due to the exceptional nature of the facts. See *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N. E. 678 (1916). There is a full citation of this type of case in (1929) 59 A. L. R. 1445. When the British passed their arbitration act they treated agreements to confer exclusive jurisdiction on a foreign court as entitled to the protection of the stay section under the arbitration act. See for example *The Cap Blanco*, (1913) P. 130; *Australian Lloyd Steamship Co. v. Gresham Life Assurance Society*, (1903) 1 K. B. 249. See DICEY, *CONFLICTS OF LAWS* (Keith's 4th ed. 1927) 549. One federal court decided that the UNITED STATES ARBITRATION LAW entitled the defendant who had agreed to the exclusive jurisdiction of a foreign court to a stay of action brought in the United States courts. *American Tobacco Co. v. Lloyd Triestino, etc.*, (1929) A. M. C. 1135 (S. D. N. Y.); (1929) 29 COL. L. REV. 195. Two New York cases stayed an action in accordance with the arbitration law, *Kelvin Engineering Co. v. Blanc*, 125 Misc. 728, 210 N. Y. Supp. 10 (1926); *Kipp v. Hamburg-American Line*, 135 Misc. 715, 238 N. Y. Supp. 331 (1929); *aff'd.* 228 App. Div. 802, 239 N. Y. Supp. 914 (1st Dept. 1930); two other cases refused to stay the action despite the passage of the Arbitration Act, *Sudbury v. Ambi Verwaltung K. A. A.*, 213 App. Div. 98, 210 N. Y. Supp. 164 (1st Dept. 1925); *Slisberg v. New York Life Insurance Co.*, 217 App. Div. 685, 217 N. Y. Supp. 226 (1st Dept. 1926).

<sup>117</sup>255 N. Y. 348, 174 N. E. 706 (1931). The reports of the case in the lower courts reversed by the Court of Appeals, should also be read, 229 App. Div. 170, 241 N. Y. Supp. 54 (1st Dept. 1929); 135 Misc. 305, 237 N. Y. Supp. 171 (1929). The case is commented on in (1931) 11 B. U. L. REV. 426; (1930) 4 CIN. L. REV. 61; (1930) 31 COL. L. REV. 679, approving decision as preventing avoidance of foreign arbitration agreements by staying out of jurisdiction; (1931) 17 CORNELL LAW QUARTERLY 165, noting the necessity of finding consent to jurisdiction; (1930) 43 HARV. L. REV. 653, disapproving lower court decision on the ground that consent to jurisdiction was obtained in advance; (1930) 30 MICH. L. REV. 159, thinking case went pretty far; (1930) 78 U. PA. L. REV. 905, approves lower court decision in that parties had not agreed to be bound to arbitrate without personal service. Cf. also *Skandinaviska Gramit Aktiebolaget v. Weiss*, 226 App. Div. 56, 234 N. Y. Supp. 202 (2nd Dept. 1929).

British arbitration! The decision is often cited as holding that an award rendered by an *ex parte* arbitration can be enforced in another jurisdiction; but it did not go nearly that far. Consent to the foreign jurisdiction is essential:

"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 state, unless they are able to show that no contract has been made . . . etc. . . ." <sup>118</sup>

While *Gilbert v. Burnstine* has received the plaudits of the professional sponsors of arbitration, not so much attention or praise has been devoted to *Shaffer v. Metro-Goldwyn-Mayer Distributing Company*.<sup>119</sup> There an Ohio exhibitor and a New York distributor of motion pictures agreed in their contract to arbitrate all disputes arising out of it in accordance with rules seemingly calling for arbitration in New York and stating "provisions of this contract relating to arbitration shall be construed according to the laws of the State of New York." Ohio had not then passed the Draft State Act. The Ohioan, when arbitration was demanded, failed to go through with the proceeding. Undaunted, the distributor held an *ex parte* arbitration in New York, and then attempted to enforce the award in Ohio. He was denied this right in the latter state, on the ground that arbitration being procedural, the exhibitors revocation was valid in Ohio, and the *ex parte* arbitration of no avail. Grounds may be found to distinguish the two decisions perhaps, but a homely and simple explanation of them seems logical. In states normally holding arbitration agreements irrevocable, the award of such *ex parte* arbitration held against the wishes of another party will be enforced; in states clinging to the old common law rules of revocability it will not be respected.

Many earnest advocates of arbitration hail the enforcement of *ex parte* arbitrations with great delight, especially in these interstate cases.<sup>120</sup> But they overlook certain vital facts; unless all parties in an

<sup>118</sup>255 N. Y. 348, 358, 174 N. E. 706, 709 (1931).

<sup>119</sup>36 Ohio App. 31, 172 N. E. 689 (1930). The case is commented on in (1930) 30 COL. L. REV. 1198, which admits decision can be logically sustained, but feels it is not consistent with modern arbitration theory; (1929) 29 MICH. L. REV. 623 thinks Ohio might have found arbitration substantive, but its courts were not able to administer the provisions of the NEW YORK ARBITRATION ACT; (1930) 6 NOTRE DAME LAW. 126, supports decision on the New York remedial cases; (1930) 9 TEX. L. REV. 436, feels *lex contractus* should govern and case wrong; (1930) 40 YALE L. J. 302, thinks court could get opposite result by showing defendant did not actually revoke arbitration agreement, but questions calling arbitration statutes remedial.

<sup>120</sup>Note the many appearances *amiciae curiae* in *Gilbert v. Burnstine* for example. Cf. (1930) 30 COL. L. REV. 1198; (1931) 31 COL. L. REV. 679.

arbitration are agreed on holding the proceeding, it is not a satisfactory one; and *ex parte* arbitrations have certain obvious defects.<sup>121</sup> But of more importance is the fact that arbitration clauses are inserted in order forms, standardized contracts and "take it or leave it" documents, and if the maker of the contract can provide for *ex parte* arbitration in his jurisdiction, as he undoubtedly will, a tremendous amount of unfairness can result and unethical practises ensue. This is not a theoretical argument, but one of the utmost practicality.<sup>122</sup>

#### ENFORCEMENT OF FOREIGN AND LOCAL AWARDS

In passing, the method of enforcement of foreign awards should be noted. Since early times statutes have been passed making the speedy enforcement of the awards of arbitrators possible. At common law, the only method of enforcing an award was by suit. In order to gain the advantage of statutory procedure, certain mystic words or formulae were necessary in the arbitration agreement. But these statutes were only available for awards rendered within the state and under the particular statute. An award obtained under the statute of another state could only be enforced by the common law methods, slow and cumbersome as they were. Despite all the praise and publicity given *Gilbert v. Burnstine*, no one publicly noticed that the plaintiff was forced to use the slow common law suit to enforce the award obtained abroad.<sup>123</sup> A recent Georgia decision seems to take

<sup>121</sup>"It is true, that, generally speaking, the obstacles in the way of the arbitrator, if one of the parties refuses to attend, are so great that it is difficult and sometimes impossible, for the arbitrator to go on with the arbitration." *Doleman & Sons v. Ossett Corporation*, (1912) 3 K. B. 257, 264, per Vaughn Williams, L. J.

<sup>122</sup>We have previously set forth the unfairness of certain types of arbitration, *op. cit. supra* note 7, p. 1274 ff. The difficulties and hardships are magnified in an interstate *ex parte* arbitration. A in New York inserts a proper clause in his "take it or leave it" order forms. A small merchant in Kansas is thus forced to come to New York to attend the arbitration, or attempt an almost impossible effort to obtain injunction against it; if he does not come he is certain to lose for the evidence will be all one-sided; if he does choose to come in, it may involve tremendous expense, and unfairness. The decision in *Shaffer v. Metro-Goldwyn-Mayer Co.*, *supra* note 119, is his only protection, and we favor the decision, not because of the logic of the court, but because, unless more adequate safeguards are built up for *ex parte* arbitrations than exist at present, they are likely to be a weapon of oppression, and the courts therefore should not aid in their enforcement.

<sup>123</sup>See *e. g.*: "Another obstacle has been the difficulty of securing the enforcement of a foreign award in the United States. This obstacle has been greatly lessened by . . . *Gilbert v. Burnstine*." REPORT OF THE AMERICAN ARBITRATION ASSOCIATION 1926-1931 (1932). The statement is more adequate as propaganda than accurate as law. Cf. *Matter of United Artists Corporation*, 135 Misc. 92, 236 N. Y. Supp. 623 (1929); this defect does not seem to exist under the British Act,

away even the common law method of enforcing a foreign award. In *Wright, Graham & Co. v. Hammond*<sup>124</sup> the plaintiff was denied the right to enforce by common law methods an award obtained in England in accordance with the British Arbitration Act. The court concluded it was not a common law award, *ex hypothesi*, therefore (?) the remedies of the common law were unavailable; it was not a Georgia statutory award, therefore speedy statutory remedies were not available; the only remedy the plaintiff had was to plead the English statute and have the Georgia court enforce it by the methods outlined there. The arbitration acts should be amended to extend the speedy enforcement methods for awards to awards obtained in a foreign jurisdiction in such a manner as to be in substantial accord with the arbitration law of the forum. Note, however, that under the Ohio Arbitration Act,<sup>125</sup> an agreement to arbitrate in a particular county in that state, gives the courts of that county irrevocable jurisdiction to confirm and enter judgment on any award therein rendered. And under many acts, an award can be confirmed by the courts and judgment entered thereon without personal service within the state, provided the arbitration was held in accordance with the terms of the statute and within the state.<sup>126</sup> This might lead to great

see REPORT OF COMMITTEE ON THE LAW OF ARBITRATION (1927) §31. Cf. also *Benjamin Co. v. Royal Manufacturing Co.*, 172 La. 965, 136 So. 19 (1931).

<sup>124</sup>41 Ga. App. 738, 154 S. W. 649 (1930).

<sup>125</sup>OHIO GEN. CODE (Page, 1932) §12149-8.

<sup>126</sup>ARIZ. CODE (Struckmeyer, 1928) §4297; ARK. DIG. STAT. (Crawford & Moses, 1921) §425; COL. CODE OF CIV. PROC. (1921) §318; CONN. GEN. STAT. (1930) §5849 DEL. REV. CODE (1915) §4501; FLA. COMP. LAWS (1927) §4556; GA. CODE ANN. (Michie, 1926) §5047; ILL. REV. STAT. (Cahill, 1933) c. 10, §9; IOWA CODE (1927) §12705; KAN. REV. STAT. ANN. (1923) c. 6, §112; KY. CODES ANN. (Carroll, 1927) Civil Prac. §451-7; MD. ANN. CODE (Bagby, 1924) §55; MASS. GEN. LAWS (1931) c. 251, §9; MICH. COMP. LAWS (1929) §15401; MINN. STAT. (Mason, 1927) §9515; NEB. COMP. STAT. (1929) §9182; N. H. PUB. LAWS (1926) as amended by LAWS 1929, c. 147; N. M. STAT. ANN. (Courtright, 1929) §5-108; N. D. COMP. LAWS ANN. (1913) §8332; ORE. CODE ANN. (1930) §21-106; S. C. CIV. CODE (1932) §7041; TENN. ANN. CODE (Michie, 1932) §9365; TEX. REV. CIV. CODE (Vernon, 1928) art. 231; VT. GEN. LAWS (1917) §2077; VA. CODE ANN. (Michie, 1930) §6161; W. VA. CODE ANN. (1932) §5501. On the entire subject see *West v. Duncan*, 72 Colo. 253, 210 Pac. 699 (1922); *Sturges & Burn Manufacturing Co. v. Unit Construction Co.*, 207 Ill. App. 74 (1917); *Mitsubishi Goshi Kaisha v. Carstens Packing Company*, 116 Wash. 630, 200 Pac. 237 (1921). The cases advance the doctrine that holding a statutory arbitration under the laws of a state is consent to the statutes method of enforcing an award. Many of these statutes apply only to submissions of existing disputes which have previously been entered as a rule of court, and where so applied are perfectly fair and equitable. Where, however, the submission need not be made a rule of court, or where it applies to contracts to arbitrate a future dispute and to a resident of another state, the operation of such provisions may be vicious to say the least.

unfairness at times, especially if the arbitration could have been held *ex parte* in the first place. Under the laws not mentioned in note 126, however, after an award is obtained it can be reduced to judgment only where personal service can be had on the other party.<sup>127</sup>

In spite of the well settled law that the enforcement of an arbitration agreement is a matter of remedy, the enforcement of an award has generally been treated as the enforcement of a contract or judgment, and the validity of the award is determined according to the law of the place where rendered, it will be enforced,<sup>128</sup> or if invalid according to the place where rendered, it will be denied enforcement<sup>129</sup> regardless of the law of the forum.<sup>130</sup> But if state A, in a mistaken view of the law of state B holds an award, made in and actually invalid according to the law of state B, to be valid, a judgment thereon rendered in state A is entitled to full faith and credit even in state B.<sup>131</sup>

But note, that when an arbitration has been held *ex parte*, in violation of the laws of the enforcing state, there may be some difficulty, and *lex fori* may be applied to the arbitration agreement, and not *lex contractus* to the award!<sup>132</sup>

#### CHECKS AND AIDS TO HARSH ENFORCEMENT

It is possible if an arbitration is proceeding *ex parte* for the recalcitrant party to obtain an injunction against it, if it violates any of his fundamental rights; for example if he never agreed to arbitrate.<sup>133</sup> But he cannot place a burden on the party who is proceeding with the arbitration to make a motion to compel arbitration; he can merely

<sup>127</sup>*Cf.*, for instance, *Matter of United Artists Corporation*, 135 Misc. 92, 236 N. Y. Supp. 623 (1929).

<sup>128</sup>Thus an award rendered in Oregon, under an arbitration agreement made there, is enforceable in Washington if valid in Oregon, even though it affects Washington land and would have been invalid if rendered in Washington. *Taylor v. Basye*, 119 Wash. 263, 205 Pac. 16 (1922), "A contract good in the state where it is made can be enforced in another state, even though it is not executed with the formalities required in the latter state." *Id.* at p. 265, and 16. The doctrine of the text is supported in *Green v. East Tennessee and Georgia Railroad*, 37 Ga. 456 (1867); *Thatcher Implement and Mercantile Co. v. Brubaker*, 193 Mo. App. 627, 187 S. W. 117 (1916) (A Missouri contract for an Indiana arbitration, award rendered in Indiana, enforceable in Missouri if good according to Indiana law); *Woodrow v. O'Conner*, 28 Vt. 776 (1856).

<sup>129</sup>*Fisher Flouring Mills Co. v. U. S.*, 17 F. (2d) 232 (C. C. A. 9th, 1927).

<sup>130</sup>But the foreign law must be pleaded, or it will be assumed to be similar to the *lex fori*. *Woodrow v. O'Conner*, *supra* note 128.

<sup>131</sup>*Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641 (1908).

<sup>132</sup>See *supra*.

<sup>133</sup>See *Finsilver, Still and Moss v. Goldberg, Maas & Co.*, 253 N. Y. 382, 172 N. E. 579 (1939); *In re Ritt*, N. Y. L. J., April 18, 1931.

enjoin the arbitration until the court determines whether or not he is in default in refusing to proceed. The New York law was clearly stated in the denial of a petitioner's motion for an injunction against an arbitration being held until the other party made a successful motion to compel arbitration:

"The plaintiff may not, however, impose upon the other party to the arbitration the burden of making such an application, in view of the fact that Section 4a expressly imposes that burden upon the party contesting the validity of the arbitration . . . The language of the Court of Appeals in *Finsilver, Still & Moss v. Goldberg Maas and Company* (1930) 253 N. Y. 382, 171 N. E. 579, 'the proceedings will often be kept open by a stay' does not mean a stay until the defendant moves to compel. . . A proper complaint (is) for an order staying the arbitration proceeding until the hearing and decision of an application made by the plaintiff to determine whether the plaintiff was in default in failing to submit to arbitration."<sup>134</sup>

But a non-resident defendant would be unlikely to come into New York to obtain an injunction against an *ex parte* arbitration. Of course, if he did not actually make the arbitration agreement, he might then appear to enjoin the arbitration, but assuming that he made the agreement, but merely objected to coming to New York for the arbitration, he would have no chance of avoiding the New York arbitration; in fact if he consented to the jurisdiction of the New York courts in order to obtain the injunction, the proceeding would probably end with an order by the New York courts compelling him to proceed.

On the other hand, if an award is rendered against a non-resident defendant in one of the New York *ex parte* proceedings, the award cannot be enforced against him by statutory procedure in New York, unless personal service can be obtained within the jurisdiction.<sup>135</sup> Even if personal service is obtained, the defendant may nevertheless urge on a motion to confirm the award any defense which he could have on a

<sup>134</sup>*Kanter v. Edward Bloom*, 144 Misc. 603, 259 N. Y. Supp. 46 (1932); see the modulations of this case in *Interstate Silk Corp. v. M. Salzberg and Sons Inc.*, N. Y. L. J. April 14, 1933 and *matter of Flintkote Corporation* May 5, 1933. In the latter case the court found "nothing in the law which allows a party who refuses to arbitrate to obtain on a special proceeding a declaratory judgment that there is no agreement to arbitrate. The theory of the law is that the refusing party may defend in a special proceeding. If he wants positive relief declaring his rights he must bring an action." Cf. *Direct United States Cable Company v. Dominion Telephone Company*, 84 N. Y. 153 (1881).

<sup>135</sup>But cf. *supra* notes 126 and 127. On a motion to compel arbitration an appearance to deny the making of an arbitration agreement confers jurisdiction to order arbitration. *Berizzi Bros. v. Krawitz*, N. Y. L. J. May 13, 1933.

motion to compel; in fact, if an arbitration proceeds without a court order, and one party participates protesting that the arbitration is held without right, he may still urge his defenses on a motion to confirm the award.<sup>136</sup>

There is one saving grace in these interstate contracts providing for arbitration of future disputes. It is rare that arbitrators are named in the agreement.<sup>137</sup> In which case, an *ex parte* arbitration cannot be held, because there are no arbitrators, and unless one comes into the jurisdiction of the recalcitrant party, and that state has a modern arbitration act, arbitrators will not be appointed by the court, because personal service must be made in order for the courts to grant this relief.<sup>138</sup>

The American Arbitration Association, however, along with many other trade associations, has offered a standard arbitration clause which cures this defect.<sup>139</sup> The arbitration clause provides for arbitration in accordance with certain set rules. The rules provide that the administering trade association, in the event the parties cannot agree and have not already provided therefor in the contract, determines the locality of the arbitration.<sup>140</sup> Furthermore, if the parties cannot agree on the arbitrators, it appoints them!<sup>141</sup> Thus, no need exists to

<sup>136</sup>Finsilver, Still and Moss v. Goldberg, Maas & Co., *supra* note 133; *In re Lang*, N. Y. L. J., Sept. 8, 1932.

<sup>137</sup>"Although the parties may exercise their right to name the arbitrators in the clause at the time the contract is made, it is not desirable. Under the Arbitration Rules it is not encouraged, for the following reasons: (1) The names of the arbitrators, when fixed in the clause, make them part of the contract, and they cannot be removed or the vacancy filled without the written consent of all the parties to the contract. (2) Persons named in the clause may die or be absent or be otherwise unavailable at the time a controversy emerges and the difficulty of choosing a successor in the heart of the controversy is thereby increased. (3) The status of the arbitrators may have changed, rendering them incompetent or, by reason of their changed relation to a party, open to the suspicion of partiality. (4) The arbitration may be held in a place remote from the residence of the named arbitrators, adding greatly to the expense and inconvenience of their service. (5) The parties may have selected persons qualified to deal with one class of controversies, as, for example, questions of quality whereas the controversy that arises may concern a wholly different question wherein the arbitrators named are not experts." CODE OF ARBITRATION: PRACTISE AND PROCEDURE (1931) p. 50-51.

<sup>138</sup>The DRAFT STATE ACT and the statutes of the states adopting it so provide.

<sup>139</sup>"Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction." See CODE OF ARBITRATION: PRACTISE AND PROCEDURE (1931) pp. 46, 205.

<sup>140</sup>For example RULES OF THE AMERICAN ARBITRATION ASSOCIATION No. I.

<sup>141</sup>For example RULES OF THE AMERICAN ARBITRATION ASSOCIATION No. IV.

apply to the court to name arbitrators; and a party who agrees in Delaware to arbitrate all disputes thereafter arising out of a contract according to the rules of the American Arbitration Association, may have arbitrators named for him in New York by the Association, and an *ex parte* arbitration conducted there. Whether such is wise and just we leave as an open question; on the one hand, here are lay arbitration tribunals with wider powers than are possessed by our courts—on the other hand, why should business be handicapped by ancient jurisdictional rules, assuming that the arbitration tribunal is honestly, wisely and fairly conducted. It is possible, however, though the point has never been raised, that arbitration clauses providing for the arbitration to be conducted according to rules may not be absolutely enforceable. As far as the rules furnishing a procedural guide for the conduct of the arbitration, there can be no question.<sup>142</sup> But, whether agreeing to arbitrate according to rules confers irrevocable powers on the administering body to appoint arbitrators is something else again. The law provides that arbitration agreements are irrevocable; it provides a definite method of appointing arbitrators in the event the parties fail to do so, or the means selected fails. It does not provide that the authority of an agent selected to appoint arbitrators is irrevocable. Is it possible therefore that an extra-territorial arbitration which was unfair could be defeated by the party outside of New York, for example, revoking, not his arbitration agreement—which would be ineffective in New York—but by revoking the power of the trade association to appoint an arbitrator.<sup>143</sup> Even this could be prevented by a properly drawn arbitration clause, however. For example, the clause would provide that all matters in dispute under the contract would be submitted to the X Association, as arbitrator, in accordance with named arbitration rules. The problem of the corporate arbitra-

<sup>142</sup>See, for instance, *Blakey Oil and Fertilizer Co. v. Proctor & Gamble Co.*, 134 Ga. 139, 67 S. E. 389 (1909); *Thatcher Implement and Mercantile Co. v. Brubaker*, *supra* note 128; *McDonald v. Real Estate Board of Baltimore*, 155 Md. 377, 142 Atl. 261 (1928); *Campbell v. Michigan Mutual Hail Insurance Co.*, 240 Mich. 167, 215 N. W. 401 (1927).

<sup>143</sup>See *Interstate Silk Corporation v. Kattersman and Mitchell*, N. Y. L. J., April 28, 1933. And *cf.* *Czarinkow & Co. v. Roth, Schmidt & Co.* (1922) 2 K. B. 478; *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 8 (C. C. A. 8th, 1906); *Kohlsaas v. Main Island Creek Coal Co.*, 90 W. Va. 656, 112 S. E. 213 (1922); *Dickson Manufacturing Co. v. American Locomotive Co.*, 119 Fed. 488 (C. C. Pa. 1902). But *cf.* *Matter of E. A. Tutien*, 249 N. Y. 84, 162 N. E. 592 (1928); *Finsilver, Still and Moss v. Goldberg, Maas & Co.*, *supra* note 133; *Matter of Marguiles*, N. Y. L. J., March 26, 1932.

tor, however, is too far outside the scope of this paper to be discussed further herein.<sup>144</sup>

An escape frequently used in New York at present is a contract with a resident agent of a foreign principal. Of course, an agent must have authority, either express<sup>145</sup> or implied<sup>146</sup> to bind his principal in the first place to arbitration, and the implied authority cases are troublesome. But the mere fact that an agent may bind the principal to arbitrate does not mean that the agent himself will be thus bound<sup>147</sup> or may represent the principal in an arbitration.<sup>148</sup> There must be a specific arbitration agreement with the agent to obtain this result.<sup>149</sup> Frequently the business men attempt to obtain an arbitration compelled through a local agent of a foreign principal; their efforts are generally unsuccessful since they cannot obtain service on the foreign principal, and service on the agent is worthless, in that he has not authority to accept it on behalf of his principal and a motion to compel the agent to arbitrate will not be granted because he has not agreed to do so. It is customary for factors and agents to guarantee any award which might be rendered against the foreign principal, but this may not assist the debtor in obtaining an order to compel arbitration against the agent.<sup>150</sup> Other similar agreements used by New

<sup>144</sup>*Cf. e.g.,* Davis v. Rochester Can Co., 124 Misc. 123, 207 N. Y. Supp. 33 (1924).

<sup>145</sup>*Cf.* Campbell v. Upton, 113 Mass. 67 (1873); Morris v. Grier, 76 N. C. 410 (1877); King v. King, 104 La. 420, 29 So. 205 (1900).

<sup>146</sup>Matter of Caulkins, N. Y. L. J., Feb. 9, 1927. A selling or buying agent would, under normal circumstances, have authority to bind the principal only if arbitration were customary in the trade, or in the usual dealings between the parties. Brosterman v. China Foreign Corporation, N. Y. L. J., July 2, 1929. "Authority given an agent to buy beans does not give him authority to make a contract to submit to arbitration. Of course, it might be shown that there were previous dealings between the parties and that these dealings were in accordance with known usages of the trade." California Lima Bean Growers Association v. Mankowitz, 9 N. J. Misc. 362, 154 Atl. 532 (1931). *Cf.* Matter of I. M. Friedman & Co., N. Y. L. J., Jan. 2, 1934 for authority of a broker to bind his principal to an arbitration agreement.

<sup>147</sup>Littlejohn v. Demarest, 245 N. Y. 605 (1927) (memo.).

<sup>148</sup>*Cf.* Wright, Graham & Co. v. Hammond, 41 Ga. App. 738, 154 S. W. 649 (1930).

<sup>149</sup>And the provision binding the agent to arbitrate must be expressed in very clear terms. Zucker v. Zongkey, N. Y. L. J., May 15, 1931.

<sup>150</sup>*In re* Berg Fur Company, Inc., N. Y. L. J., April 9, 1932. "The parties to the contract calling for arbitration were the petitioner and Lasher, the respondent's principal. The guarantee executed by the respondent was apparently intended to secure payment of any award against Lasher." *Contra:* Lehman v. Ostrovsky, N. Y. L. J., Jan. 3, 1934, "to construe the agreement as the agent urges would make it binding only on the buyer, for the seller cannot be brought into the jurisdiction without his consent. Taking into consideration all the circumstances, the contract must be construed to mean that the agent would arbitrate and pay the

York business houses have likewise failed.<sup>151</sup> The arbitration clause must contain a clear statement authorizing the agent to represent the principal throughout the arbitration proceedings and to accept service of a motion to compel; or a separate arrangement entered into with the agent at the time of the making of the contract which will clearly bind the agent to arbitrate.

#### CONCLUSION AND RECOMMENDATIONS

To review: *A* and *B* have a dispute, and *thereafter* agree to arbitrate it. Little difficulty arises in enforcing the agreement. *A* and *B* make a contract, and agree therein to arbitrate any dispute thereafter arising. A dispute arises, and they voluntarily arbitrate. The proceeding will be successful generally and well worth while. But if the arbitration is compelled or a suit brought be stayed by the mandatory enforcement statute, unbelievable difficulties ensue. But these are small compared to the difficulties occurring should *A*, for example, be a citizen of New York and *B* of Delaware; and the dispute does not fall within the terms of the United States Arbitration Act with the narrow meaning of commerce as defined by our courts. *A* can sue *B* in Delaware and *B* cannot stop this; *B* can sue *A* in the state courts of New York but the action can be stayed; *B* can compel *A* to arbitrate in New York, and *A* cannot compel *B* to thus act; *B* can sue *A* in the Federal Courts of New York and the action cannot be stayed; *A* can sue *B* in the Federal Courts of Delaware; *A* possibly can hold an *ex parte* arbitration in New York, and *B* cannot enjoin this, but *B* cannot hold an *ex parte* arbitration in Delaware. And if either of the parties can find the other in the remaining forty-six states of the Union, parts of this little game can be repeated, depending on the law of the particular state; and providing in the contract that the arbitration shall be held in Delaware leads to another round of difficulties.

Obviously such a situation is too ridiculous to require additional comment. While it has been caused by the passage of acts without proper forethought, that is water over the dam, it certainly is not aided by the courts' adoption of the "remedial" argument. It is necessary for clarification.

---

award." The reasoning of the latter case seems spurious. Contracts are not generally worked out by implication simply to make for equalized legal process. See also *Biddle Purchasing Corporation v. Yung Hsing Trading Corp.*, 238 App. Div. 264, 264 N. Y. Supp. 157 (1st Dept. 1933).

<sup>151</sup>See *e. g.* *Silk Service Corporation v. Scism-Beaumont Co. Inc.*, N. Y. L. J., Sept. 11, 1930. Note, however, that if the agent is a managing agent, and the contract provides for arbitration in New York, service on the agent may be effective as against a foreign principal. *Cf.* *Biddle Purchasing Co. v. Yung Hsing Corporation*, 238 App. Div. 264, 264 N. Y. Supp. 157 (1st Dept. 1933).

The insertion of an arbitration clause in contracts where the parties are residents of different states leads to such confusion that its use is not recommended. But the courts can and must remedy the situation. A single rule, avoiding the *renvoi*, for the construction of arbitration agreements must be made. It is suggested for clarification, that the Draft State Acts be amended to provide only for the specific enforcement of contracts which provide for enforcement under the particular law involved; and that they affirmatively state that the law is substantive and not remedial; or for courts all over to adopt the law of place of performance of the arbitration agreement governs, and if not stated specifically in the contract, the place of performance of the contract governs; if there is a conflict in the latter, the place of making the contract, which conceivably might be a good rule to adopt for all cases. Any rule which would lead to uniformity is desirable, and there is no fundamental objection to the courts breaking away from "remedial law—*lex fori*."

State boundaries have caused much difficulty to business men, and our law with regard to them is obviously in need of change. But arbitration law is not the place to inaugurate the reform, and the simply drawn arbitration statutes are not going to change law as complicated as the one under discussion. The Draft State Act has simply added another difficulty. A properly drawn Federal Act could help simplify the arbitration problem. But enthusiastic as we are about the arbitration process, we cannot but feel that arbitration is primarily a question of business ethics and psychology. We have had too much experience in the last decade with attempts to legislate ethics and psychology by the "thou shalt" method. It leads to adroit evasion and disregard of law. That is exactly what is happening to the present mandatory, compulsory arbitration law.<sup>152</sup> Let us encourage arbitration in its proper place; let us teach the business men the advantages of it and build up a satisfactory procedure so that they will *want* to arbitrate; but let us not be blinded by zeal and fanaticism for the process into adopting the "thou shalt" philosophy which will lead only to failure and condemnation.

---

<sup>152</sup>"It has been thought by some people that once an arbitration statute is passed, all technicalities would be done away with, and every controversy would be promptly decided on its merits. Unfortunately this is not the case. Disputes which would be bitterly contested in court, will in all probability be contested in arbitration proceedings. If a party believes that he can obtain an advantage by a technicality he will avail himself of it irrespective of the tribunal. This is shown by the records of the courts which contain many instances of litigation under arbitration agreements having little or nothing to do with the merits." Poor, *op. cit. supra* note 4, p. 667. See Isaacs, Book Review (1930) 40 YALE L. J. 149; Skeen, Book Review (1929) 17 CALIF. L. REV. 191.