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## Attachment Prior to the Enforcement of International Arbitral Awards Under the New York Convention

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# Attachment Prior to the Enforcement of International Arbitral Awards Under the New York Convention

Peter J. Fitzpatrick

## **Abstract**

This Note will analyze the court of appeals decision in *Cooper v. Ateliers de la Motobecane, S.A.*, and examine the usefulness and suitability of permitting attachments pending arbitration proceedings.

# ATTACHMENT PRIOR TO THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

## INTRODUCTION

The New York Court of Appeals has held<sup>1</sup> that attachment is impermissible pending arbitral procedures in commercial disputes under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>2</sup> (New York Convention). It is the first state appellate court to address the issue of whether attachment should be permitted prior to the completion of arbitration.<sup>3</sup> The court of appeals' conclusion is contrary to the approach taken by legislative<sup>4</sup> and judicial bodies<sup>5</sup> of other signatory countries to the New York Convention<sup>6</sup> and contrary to the approach taken by the major arbitration rule-setting bodies.<sup>7</sup> This Note will analyze the court of appeals decision in *Cooper v. Ateliers de la Motobecane, S.A.*,<sup>8</sup> and examine the usefulness and suitability of permitting attachments pending arbitration proceedings.<sup>9</sup>

## I. THE NEW YORK CONVENTION AND ATTACHMENT

### A. The Convention

Businessmen often prefer to settle disputes through arbitration rather than judicial proceedings. The reasons cited are speed of

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1. *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982) (four-to-three decision).

2. *Opened for signature* June 1, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, reprinted in 4 Y.B. COMM. ARB. 226 (1979) [hereinafter cited as New York Convention].

Attachment or in rem arrest has traditionally been permitted pending maritime arbitrations. See *infra* notes 43-44 and accompanying text. The decision does not affect this traditional practice. See *Cooper*, 57 N.Y.2d at 415, 442 N.E.2d at 1242, 45 N.Y.S.2d at 731.

3. See *infra* notes 24-44 for attempts by federal courts to address the topic of attachment pending New York Convention-governed arbitrations.

4. See *infra* note 92 and accompanying text.

5. See *infra* notes 93-111 and accompanying text.

6. See *infra* note 14 for a list of signatory countries to the New York Convention.

7. See *infra* notes 112-27 and accompanying text.

8. 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728.

9. The issue is particularly relevant within New York's jurisdiction because of the number of businesses in New York that conduct transactions with overseas parties and that have the option of inserting arbitration agreements into their contracts. See Bennett, *New York: The World Financial Market*, N.Y. Times, Mar. 22, 1983, at B1, col. 1 (discussion of New York as the world center for finance and trade).

determination, informality, monetary savings, expertise of the arbitrators as compared to judges, and protection of confidential business transactions.<sup>10</sup> Perhaps more important, arbitration allows dispute settlement to occur in a neutral forum.<sup>11</sup>

One historical problem with international arbitration has been to ensure that one country will recognize and enforce an arbitral award granted in another country.<sup>12</sup> The New York Convention<sup>13</sup> has provided more certainty in this area.<sup>14</sup> The Convention's two most important provisions are article II(3), which reads,

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One court has already questioned the majority's decision in *Cooper*. See *Construction Exporting Enters. v. Nikki Maritime Ltd.*, 558 F. Supp. 1372, 1375 (S.D.N.Y. 1983).

10. A. VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958*, at 1 (1981); Asken, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, in *NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 37, 39 (1971); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 *YALE L.J.* 1049, 1049 (1961).

11. McLaughlin, *Arbitration and Developing Countries*, 13 *INT'L LAW* 211, 212 (1979); Quigley, *supra* note 10, at 1049, 1051.

12. Quigley, *supra* note 10, at 1051. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974). The Court, in making reference to centuries of judicial hostility toward arbitration, noted that English courts had traditionally refused to recognize arbitrations, believing that arbitration agreements were premised on "ousting" the courts of their jurisdiction. *Id.* This same attitude toward arbitration prevailed in the United States. See Comment, *International Arbitration*, 47 *WASH. L. REV.* 441, 443-45 (1972).

13. New York Convention, *supra* note 2.

14. See De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42, 56-57 (1982).

There are currently 65 signatories to the New York Convention: Argentina, Australia, Austria, Belgium, Benin, Botswana, Bulgaria, Byelorussian SSR, Central African Republic, Chile, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic Kampuchea, Denmark, Ecuador, Egypt, El Salvador, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Luxembourg, Madagascar, Mexico, Monaco, Morocco, Netherlands, Niger, Nigeria, Norway, Pakistan, Philippines, Poland, Republic of Korea, Romania, San Marino, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, and the United States of America. UNITED NATIONS, *MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS OF 31 DECEMBER (1982)*.

The Convention, sponsored by the Economic and Social Council of the United Nations, was signed in 1958 by 25 out of 45 participants. See *Contracting States and Reservations*, 2 *INT'L COMM. ARB.: NEW YORK CONVENTION (Oceana)* pt. VI.2-VI.3 (Sept. 1980). It has 16 articles and its application can be limited to commercial disputes. See New York Convention, *supra* note 2.

The court of the Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, *refer the parties to arbitration*, unless it finds that the said agreement is null and void, inoperative or incapable of being performed,<sup>15</sup>

and article III, which states in part, “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is

The United States originally declined to sign but subsequently acceded to the Convention effective February 1, 1971. See *Contracting States and Reservations*, 2 INT’L COMM. ARB.: NEW YORK CONVENTION (Oceana) pt. VI.3 (Sept. 1980). The Convention was codified under title 9 of the *United States Code*. 9 U.S.C. §§ 201-208 (1976).

Prior to signing the Convention, the United States primarily relied upon the doctrine of comity and upon bilateral treaties of friendship, commerce, and navigation to recognize and enforce arbitration agreements. Asken, *supra* note 10, at 37. This led to an inconsistent result. Before codifying the Convention, the common law in approximately 22 states did not necessarily allow enforcement of arbitration agreements. *Id.* at 38 n.5. Enforcement of arbitral agreements was often left to the discretion of individual state legislatures, and many states retained the common law doctrine of the revocability of arbitration clauses. Quigley, *supra* note 10, at 1056. The bilateral treaties failed to establish a uniform approach to transnational arbitration. *Id.* at 1054.

Preceding the New York Convention, there had been other attempts to create multilateral agreements to achieve uniformity. See *id.* The most significant of these efforts were the Geneva Treaties: the 1923 Protocol on Arbitration Clauses, 27 L.N.T.S. 158 (1924), and the 1927 Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 302 (1929). Quigley, *supra* note 10, at 1054. By allowing the burden of proof to be placed on the successful party, these treaties made it easy for an unsuccessful defendant to default and for a tribunal to thwart enforcement of an award. *Id.* at 1054-55. See Contini, *International Commercial Arbitration—The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 289-90 (1959), for a discussion of the Geneva Treaties. A primary benefit of the New York Convention is that it shifts the burden of proof to the party seeking to vacate an award. Domke, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT’L L. 414, 416 (1959).

Efforts to foster arbitration had also been exerted by professional organizations and associations. Contini, *supra*, at 284; Quigley, *supra* note 10, at 1051. Traditionally, arbitration did not receive overwhelming support in the legislatures and judicial bodies of nations. *Id.* at 1049, 1051; see *supra* note 12. Thus, private organizations and regional centers were substantially responsible for bringing credibility to the arbitral process. See Contini, *supra*, at 284; De Vries, *supra*, at 44. Two important bodies in this respect, particularly in the United States, are the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA). See Contini, *supra*, at 284; De Vries, *supra*, at 45.

Other well known bodies in addition to the ICC and AAA were the Inter-American Commercial Arbitration Commission, the London Court of Arbitration, the Netherlands Arbitration Institute, the Zurich Chamber of Commerce, and the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce. Asken, *supra* note 10, at 39; Contini, *supra*, at 284.

15. New York Convention, *supra* note 2, art. II(3).

relied upon, under the conditions laid down in the following articles.”<sup>16</sup>

Article II(3) provides for the recognition of arbitral agreements. It prevents courts from adjudicating disputes that the parties have agreed to arbitrate when one party asserts a valid arbitration agreement.<sup>17</sup> Article III provides that signatories will enforce legitimate arbitral awards.<sup>18</sup>

The New York Convention brought to the arbitral process a greater degree of uniformity and credibility than previous treaties<sup>19</sup> and private efforts<sup>20</sup> had achieved. One area of contention is the issue presented in *Cooper*: whether attachments should be allowed pending arbitral proceedings under the purview of the Convention.<sup>21</sup>

### B. *United States Law Prior to Cooper*

Federal law governs the permissibility of attachment pending arbitration under the New York Convention.<sup>22</sup> Although federal law controls the application of the New York Convention, attachment is a local matter and must always satisfy the prerequisites of state law.<sup>23</sup>

16. *Id.* art. III.

17. When a party seeks adjudication of an issue specified in an arbitration agreement, article II(3), by its terms, demands that the court “refer” the parties to arbitration after the other party asserts the existence of the arbitration agreement. *See id.* art. II(3).

18. When an arbitral panel reaches its conclusion, article III mandates that the final award be enforced in the signatory country where it is sought to be enforced without readjudication of the matter. *See id.* art. III. The only involvement of a court should be to enforce the award. *See id.*

19. Quigley, *supra* note 10, at 1054.

20. Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, in *NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 25, 25 (1971).

21. 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

22. 9 U.S.C. §§ 201-208 (1976).

23. U.S. CONST. amend. X.

Attachment is rationally related to a vital state interest in that a state must ensure that the rights of creditors are protected against debtors, who might thwart attempts to enforce legal obligations. *Stoller Fisheries, Inc. v. American Title Ins. Co.*, 258 N.W.2d 336, 346 (Iowa 1977).

In New York, the relevant attachment provisions are found at § 6201 and § 6211 of the *New York Civil Practice Law & Rules*. N.Y. CIV. PRAC. LAW §§ 6201, 6211 (McKinney 1980). Section 6201 sets out when attachment can be imposed. Subsection (3) states that attachment will be available when a money judgment is at stake and includes a provision that attachment will be allowed when a defendant is attempting to abscond with funds that might satisfy a potential award. Section 6211(a) states that attachment is allowed without notice,

Two cases highlight the issue of attachment under the New York Convention. In *McCreary Tire & Rubber Co. v. CEAT, S.p.A.*,<sup>24</sup> a Pennsylvania corporation, McCreary Tire and Rubber, sued CEAT, an Italian corporation. Despite a prior agreement between the two companies to submit commercial disputes to arbitration,<sup>25</sup> McCreary brought a judicial action, claiming that CEAT had violated an agreement not to supply other companies in the United States with tires it produced in Italy and India.<sup>26</sup> McCreary obtained an attachment over the defendant's assets in Pennsylvania.<sup>27</sup> The Court of Appeals for the Third Circuit reversed the decision and held that no judicial action could be brought against CEAT prior to the agreed upon arbitration.<sup>28</sup> The court cited the New York Convention, specifically article II(3), noting: "There is nothing discretionary about article II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration."<sup>29</sup>

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but in accordance with § 6211(b) must be confirmed within five days after an attachment is levied.

Sections 7502 and 7503 provide the relevant arbitration provisions in New York. N.Y. CIV. PRAC. LAW §§ 7502-7503 (McKinney 1980). Section 7502(b) sets out the necessary time requirements for asserting an arbitration agreement. Section 7503(a) mandates that where there is a valid arbitration agreement, parties will be referred to arbitration if judicial proceedings are sought. It specifies, however, that only those matters that are the subject of the arbitration will be referred away. The court retains jurisdiction over that which is non-referable. Arbitral boards cannot legally impose attachments. It can be presumed, therefore, that this type of provisional remedy is non-referable, thereby allowing the involvement of the courts. See Burrows & Newman, *Attachment in Aid of Arbitration*, N.Y.L.J., Dec. 30, 1982, at 2, col. 2.

New York law does not preclude a party, acting pursuant to an arbitration proceeding, from obtaining a warrant of attachment. See *American Reserve Ins. Co. v. China Ins. Co.*, 297 N.Y. 322, 327, 79 N.E.2d 425, 427 (1948); *Lease Plan Fleet Corp. v. Johnson Transp., Inc.*, 67 Misc. 2d 822, 823, 324 N.Y.S.2d 928, 929 (Sup. Ct. 1971); *Auerbach v. Grand Nat'l Pictures, Ltd.*, 176 Misc. 1031, 1033, 29 N.Y.S.2d 747, 750 (Sup. Ct.), *aff'd*, 263 A.D. 712, 31 N.Y.S.2d 670 (1941).

24. 501 F.2d 1032 (3d Cir. 1974).

25. *Id.* at 1035.

26. McCreary alleged that CEAT was selling its tires to a Massachusetts corporation under a different brand name, but with the same tread, in violation of its agreement. *Id.* It was also alleged that CEAT's Indian subsidiary was selling CEAT tires to corporations in California and Arizona, in violation of an agreement to use good faith efforts to prevent the subsidiary from selling to companies other than the plaintiffs in the United States. *Id.* at 1035-36.

27. *Id.* at 1033.

28. *Id.* at 1038. The decision overturned the opinion of the District Court of Western Pennsylvania, which had denied CEAT's motion to dissolve the foreign attachment, dismiss the complaint, transfer the venue, and stay the action pending arbitration. *Id.* at 1033.

29. *Id.* at 1037.

The court recognized that attachment might be used to enforce an arbitral award but held that it could not be imposed prior to the rendering of an award.<sup>30</sup> According to the court, state provisional remedies accompanying trials, including attachment, are not free from the article II(3) mandate "to refer" parties to the arbitral procedure.<sup>31</sup>

In *Carolina Power & Light Co. v. URANEX*,<sup>32</sup> the Northern District Court of California reached a contrary conclusion. A public utility had contracted with a French company (URANEX) for the delivery of uranium concentrates.<sup>33</sup> When URANEX defaulted, Carolina Power and Light filed an action and proceeded to attach an U.S.\$85 million debt owed to URANEX by a California corporation.<sup>34</sup> The contract had called for arbitration in New York in the event of commercial disputes.<sup>35</sup> URANEX sought dissolution of the attachment on the grounds that it was contrary to the New York Convention.<sup>36</sup> The district court found no basis for the decision in *McCreary*, stating that the Convention was silent on the issue of attachment and therefore did not necessarily preclude it.<sup>37</sup> The court noted: "[I]t would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law."<sup>38</sup> Judge Peckham also cited<sup>39</sup> the United States Supreme Court decision in *Boys Market, Inc. v. Retail Clerks Union*,<sup>40</sup> which concluded that provisional remedies encourage rather than obstruct the use of arbitration agreements.<sup>41</sup>

*Carolina Power* is the only reported case that clearly permits attachment pending an arbitration proceeding in a non-maritime

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30. *Id.* at 1038.

31. *Id.*

32. 451 F. Supp. 1044 (N.D. Cal. 1977).

33. *Id.* at 1045. During the period of performance, the price of uranium increased dramatically, causing the French company to renege on its agreement. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1046, 1049.

37. *Id.* at 1051.

38. *Id.* (quoting *Anaconda v. American Sugar Ref. Co.*, 322 U.S. 42, 44-45 (1944)).

39. 451 F. Supp. at 1052.

40. 398 U.S. 235 (1970).

41. The case involved a labor dispute. Members of the Retail Clerks Union had walked off their jobs when supervisors had rearranged food on the shelves of the plaintiff's supermarket. *Id.* at 239. The parties had an arbitration provision in their collective bargaining agreement which established a procedure for resolving disputes. *Id.* at 238-39. Strikes were prohibited. *Id.* In upholding the plaintiff's right to seek an injunction, the Court reasoned that provisional remedies could aid arbitration. *Id.* at 249.



matter.<sup>42</sup> The cases that permit attachment all involve maritime disputes.<sup>43</sup> They have a specific statutory basis upon which to rely.<sup>44</sup>

## II. THE COOPER CASE

### A. Facts

In November 1974, the parties, Robert R. Cooper and Ateliers de la Motobecane, S.A., entered into a shareholder's agreement.<sup>45</sup> The agreement governed their rights and obligations concerning their joint ownership of Motobecane America, Ltd. (the Corporation), a newly formed American subsidiary of Ateliers de la Motobecane, S.A.<sup>46</sup> Included in the shareholder's agreement was a provi-

42. 451 F. Supp. at 1044. The only other non-maritime federal case addressing the attachment issue is *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981), which adopts the *McCreary* approach. *Id.* at 77. Podar was an Indian-based foreign partnership. *Id.* at 76. It had contracted with I.T.A.D. Associates, a New York company, to deliver textiles. *Id.* Podar alleged that government imposed quotas prevented it from conforming to the contract. *Id.* Consequently, I.T.A.D. was unable to fulfill contracts it had entered into with its customers. *Id.* I.T.A.D. alleged breach of contract and attached a Podar shipment of textiles to another customer. *Id.* The contract had mandated that disputes be submitted to arbitration. *Id.* The court held attachment was precluded by the Convention requirement that the parties be referred to arbitration. *Id.* at 77 (citing *McCreary* and article II(3) of the New York Convention, *supra* note 2). The court stated that an attachment or other judicial proceedings would be permissible only if a judge found the agreement to arbitrate "null and void, inoperative or incapable of being performed." *Id.* (quoting article II(3) of the New York Convention, *supra* note 2).

43. *Drys Shipping Corp. v. Freights, Sub-Freights, Charter Hire*, 558 F.2d 1050, 1051 (2d Cir. 1977); *Paramount Carriers Corp. v. Cook Indus.*, 465 F. Supp. 599, 601 (S.D.N.Y. 1979); *Compania de Navegacion y Fin. Bosnia v. National Unity Marine Salvage Corp.*, 457 F. Supp. 1013, 1014 (S.D.N.Y. 1978); *Atlas Chartering Servs. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978); *Andros Compania Maritima v. Andre & Cie.*, 430 F. Supp. 88, 91 (S.D.N.Y. 1977).

44. The Federal Arbitration Act states in pertinent part:

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings . . . .

9 U.S.C. § 8 (1976).

It should be noted that this section gives authority to seize vessels in order to establish in rem jurisdiction and begin judicial proceedings. This judicial action is distinguishable from attachment to provide security for a final arbitral award. Both, however, require judicial involvement pending arbitrations.

45. Brief for Defendant-Appellant at 1, *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 442 N.E.2d 1239, 457 N.Y.S.2d 728 (1982) [hereinafter cited as Defendant-Appellant's Brief].

46. *Id.* Robert R. Cooper, one of the American investors, and Motobecane, a French corporation headquartered in Pantin, France, had formed the venture to import and distrib-

sion that Cooper and others could tender their shares to Motobecane or the Corporation.<sup>47</sup> Both were jointly and severally obligated to buy them according to a price-setting formula.<sup>48</sup> The agreement referred the parties to arbitration in Switzerland if either seller or purchaser believed the formula did not properly weigh "known adverse or favorable factors" that "substantially and materially" affected the corporation's future profits.<sup>49</sup> In April 1978, Cooper tendered his shares requesting repurchase.<sup>50</sup> Unsuccessful negotiations to set a value followed.<sup>51</sup> Motobecane eventually demanded arbitration.<sup>52</sup>

### B. *The Judicial Proceeding*

Cooper asserted that Motobecane failed to demand arbitration within the time period established in their agreement.<sup>53</sup> He sought money damages in a court action for the value of the shares and successfully attached a debt owed by the American subsidiary to its parent.<sup>54</sup> The attachment, which was intended to preserve any subsequent judgment, was upheld by the appellate division.<sup>55</sup> The

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ute mopeds. Shareholder's Agreement Dated Nov. 20, 1974, § 5(v) at 7, Record on Appeal at 42, *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 442 N.E.2d 1239, 457 N.Y.S.2d 728 (1982) [hereinafter cited as Record on Appeal].

47. Record on Appeal, *supra* note 46, at 58, exhibit F.

48. *Id.* The formula set the purchase of the shares at eight times the net profit after tax for the last two fiscal years preceding the notice to repurchase. *Id.*

49. *Id.*

50. *Cooper v. Ateliers de la Motobecane, S.A.*, 68 A.D.2d 819, 819, 414 N.Y.S.2d 147, 149 (1979).

51. *Id.* at 820, 414 N.Y.S.2d at 149.

52. *Id.*

53. The agreement called for the party to assert its right to arbitration within 10 days after it received notice that the other party wished to purchase the shares at the agreed upon formula. Record on Appeal, *supra* note 46, at 58, exhibit F. Cooper gave notice of his intention to buy on April 13, 1978, but Motobecane did not unequivocally demand arbitration until September 1, 1978, considerably after the 10-day limit. 68 A.D.2d at 819-20, 414 N.Y.S.2d at 149.

54. *Cooper v. Ateliers de la Motobecane, S.A.*, 86 A.D.2d at 568-69, 446 N.Y.S.2d at 298.

55. *Id.* at 570, 446 N.Y.S.2d at 299-300. The case history was complicated. In September 1978, Cooper brought a special proceeding to stay arbitration in the supreme court. *Id.* at 568, 446 N.Y.S.2d at 298. The special term denied the request. The appellate division reversed and issued the stay. 68 A.D.2d at 819, 414 N.Y.S.2d at 148. However, the court of appeals overturned it. *Cooper v. Ateliers de la Motobecane, S.A.*, 49 N.Y.2d 819-20, 404 N.E.2d 741, 427 N.Y.S.2d 619 (1980).

While the initial appeal was pending in this prior action, Cooper commenced and won an ex parte money judgment action in the supreme court for the value of the shares owed to

court of appeals reversed the appellate division,<sup>56</sup> holding that the New York Convention does not allow attachment pending arbitration proceedings.<sup>57</sup> The court applied the *McCreary* interpretation of article II(3) of the Convention, rejecting the *Carolina Power* approach as “not compelling.”<sup>58</sup> The decision stated that the language “refer the parties to arbitration”<sup>59</sup> prevents courts from adjudicating “in any capacity except to order arbitration.”<sup>60</sup>

The court also posited that attachment is unnecessary because the Convention’s list of signatory countries assures a contracting party that it will be able to “enforce an arbitral award anywhere in the world,”<sup>61</sup> presumably without resorting to attachment. It expressed concern that attachment would inject “uncertainty” into arbitral proceedings, “the antithesis of the UN Convention’s purpose.”<sup>62</sup> The court concluded that permitting attachment against foreigners in the United States would lead to retaliatory attachment of American assets located in other signatory countries.<sup>63</sup>

him according to the price-setting formula in the shareholder’s agreement. 86 A.D.2d at 568-69, 446 N.Y.S.2d at 298. When Cooper moved to confirm the attachment he was opposed by Motobecane. *Id.* at 569, 446 N.Y.S.2d at 298. The supreme court, after the appellate division had stayed the arbitration, confirmed the attachment. *Id.* Upon Motobecane’s request, it reversed its decision in special term, dismissing the complaint and vacating the attachment, after the court of appeals had allowed arbitration to continue. *Id.*

In a four-to-one decision, the appellate division reversed the special term, ruling that pre-arbitration attachment was permissible. *Id.* at 570, 446 N.Y.S.2d at 300.

56. 57 N.Y.2d at 416, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

57. *Id.* at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

58. *Id.* at 415, 442 N.E.2d at 1242-43, 456 N.Y.S.2d at 731-32.

The appellate division had adopted the approach utilized in *Carolina Power*. See 86 A.D.2d at 570, 446 N.Y.S.2d at 299-300.

The court of appeals apparently felt *Cooper* had met the prerequisites of New York state law governing attachment, thus creating the further need to address the federal law on the issue. See *supra* note 23 and accompanying text. The court interpreted American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 79 N.E.2d 425 (1948), to allow attachments pursuant to arbitration agreements if notice is given or if the attachment is confirmed prior to the other party moving to stay the action pending arbitration. 57 N.Y.2d at 413, 442 N.E.2d at 1241-42, 456 N.Y.S.2d at 730-31. The *Cooper* case met this limited test. Because arbitration had been stayed, 68 A.D.2d at 819, 414 N.Y.S.2d at 148, the attachment was confirmed before the defendant was able to assert that his right to arbitrate existed, 86 A.D.2d at 568-69, 446 N.Y.S.2d at 298. See Burrows & Newman, *supra* note 23, at 2, col. 3. In satisfaction of N.Y. CIV. PRAC. LAW § 6201 (McKinney 1980), money damages were at stake in the dispute. See 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

59. New York Convention, *supra* note 2, art. II(3).

60. 57 N.Y.2d. at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

61. *Id.*

62. *Id.*

63. 57 N.Y.2d at 415-16, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

### III. CRITICISM OF THE McCREARY VIEW AND ITS ADOPTION IN COOPER

#### A. Analysis of the Cooper Decision

The narrow four-to-three margin in the *Cooper* decision suggests that the majority's interpretation of the New York Convention is not definitive. The *McCreary* court's broad interpretation of the phrase "refer the parties to arbitration,"<sup>64</sup> cited by the *Cooper* majority,<sup>65</sup> automatically precludes the possibility of attachment.<sup>66</sup> This conclusion is unwarranted in view of the Convention's silence on the topic of attachment.<sup>67</sup>

The majority admits that foreign arbitration awards, by the terms of the Convention, are to be enforced in the same manner and on the same terms as domestic awards.<sup>68</sup> Article III of the Convention states: "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."<sup>69</sup> The Convention's silence on attachment, therefore, should not be construed necessarily to mean that it would alter a traditional approach which permitted attachment pending domestic arbitral disputes.<sup>70</sup>

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64. New York Convention, *supra* note 2, art. II(3).

65. 57 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

66. A narrower interpretation of these words would be less drastic and would allow United States practice to conform with the approach of other signatory countries, which allows for attachment pending arbitration. See *infra* note 92 and accompanying text. A more reasonable approach would refer parties to arbitration when either party sought judicial action concerning the actual dispute issues mentioned in the agreement, and would not automatically turn away tangential efforts to protect ultimate awards, such as the seeking of an attachment by a concerned party. The *McCreary* and *Cooper* courts seem to put excessive emphasis on "refer to" within article II(3), particularly since the actual drafting of article II(3) was hastily completed. See Sanders, *Commentary-Court Decisions on the New York Convention 1958*, 2 Y.B. COMM. ARB. 231, 237 (1979).

67. See *Carolina Power*, 451 F. Supp. at 1051-52. There is one exception to the silence. The Convention specifically allows for provisional remedies when a party attempts to thwart the enforcement of an award. New York Convention, *supra* note 2, art. VI.

68. 57 N.Y.2d at 413, 442 N.Y.S.2d at 1241, 456 N.Y.S.2d at 730.

69. New York Convention, *supra* note 2, art. III.

70. Arbitration and attachment have long coexisted in the United States. *Atlas Chartering Servs.*, 453 F. Supp. at 863. New York permits attachment pending domestic arbitral disputes as long as certain criteria, see *supra* notes 23, 58, are met. See Plaintiff-Respondent's Brief at 25-27, *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982) [hereinafter cited as Plaintiff-Respondent's Brief].

Dr. Albert Jan Van den Berg states:

The majority distinguishes *Cooper* from the maritime cases upholding attachments.<sup>71</sup> Those cases relied on the Federal Arbitration Act.<sup>72</sup> However, this distinction is illusory. The implementing legislation for the Convention mandates that the Convention override the previously existing Federal Arbitration Law.<sup>73</sup> Thus, if the Convention is interpreted as prohibiting attachment pending arbitration, the Federal Arbitration Act can no longer allow for libel and seizure of vessels in maritime cases, because the Convention makes no distinction between maritime and non-maritime disputes.<sup>74</sup> It is contradictory to infer that the Convention would permit judicial action in one instance and proscribe it in another.<sup>75</sup>

Among the strongest arguments favoring the *Cooper* position is the Convention's policy of encouraging dispute resolution without delay and expense.<sup>76</sup> Attachment, according to the *Cooper* majority, may cause the defendant inconvenience and unnecessary expense, including legal fees, sheriff's fees, and bond premiums.<sup>77</sup> It does not necessarily follow, however, that an attachment will cause delays. Attachment is a procedural device not related to the material dispute.<sup>78</sup> The arbitration proceeding may commence or continue, regardless of a party's decision to seek an attachment of its opponent's assets.<sup>79</sup> The attachment is ancillary to the dispute and only provides that, in the event of an award, a party will have the

[T]he view that pre-award attachment is incompatible with the Convention, is not warranted by the Convention. The Convention does not provide for a self-contained overall regulation of international arbitration. Its purpose is merely to facilitate on an international level the enforcement of the arbitration agreement and award. As far as the judicial involvement is concerned, the Convention only precludes that a court will interfere with the merits of a dispute which is, or is to be, referred to arbitration.

Van den Berg, *Commentary-Court Decisions on the New York Convention 1958*, 7 *Y.B. COMM. ARB.* 290, 299 (1982).

71. 57 *N.Y.2d* at 415, 442 *N.E.2d* at 1242, 456 *N.Y.S.2d* at 731.

72. See *supra* notes 43-44 and accompanying text for a discussion of the statutory basis which allows for attachment in maritime matters.

73. 9 *U.S.C.* § 208 (1976).

74. See *New York Convention*, *supra* note 2.

75. This point is argued in the *Cooper* dissent. 57 *N.Y.2d* at 416-17, 442 *N.E.2d* at 1243, 456 *N.Y.S.2d* at 732 (Meyer, J., dissenting).

76. Defendant-Appellant's Brief, *supra* note 45, at 10.

77. *Id.*

78. Arbitral disputes concern the subject matter of the arbitration agreement, not the tangential issue of a party's effort to secure a possible award in its favor.

79. In *Cooper*, the attachment did not affect the timing of the arbitral proceeding. See Plaintiff-Respondent's Brief, *supra* note 70, at 18.

ability to receive its just compensation.<sup>80</sup> Moreover, the security that attachment affords a concerned party outweighs the legal expenses and premiums that may be involved.<sup>81</sup>

The majority in *Cooper* suggests that parties can entirely avoid the court's prohibition of attachment pending arbitration by providing for such provisional relief in their agreement.<sup>82</sup> However, the complexity of contractual undertakings makes it unrealistic to assume that parties will seriously consider every detail of a future dispute including the need for provisional remedies if and when an arbitration occurs.<sup>83</sup> For example, the financial position of the parties may change over time or the level of trust between the parties may erode, necessitating recourse to provisional remedies.

## B. *Justification for Attachment*

### 1. Policy Considerations

In most cases, the party seeking attachment fears that an arbitral award will be unenforceable and rendered meaningless should the other party transfer or hide its assets.<sup>84</sup> Attachment prevents a party from removing assets from a jurisdiction, thus ensuring that the assets will be available to satisfy the arbitration.

As trade with Third World countries continues to develop, attachment can take on even greater significance. Some of these countries may have limited enforcement procedures in the event an award goes against a company within their jurisdiction.<sup>85</sup> The majority failed to recognize this problem when it stated that the list of signatory countries to the Convention guarantees that awards will be enforced in other areas of the world.<sup>86</sup> While these countries may

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80. Attachment does not relate to the original purpose of arbitration agreements, which in most cases is to provide for non-judicial settlements of *specified* disputes in the future.

81. Without the possibility of attachment a party might attempt to avoid the arbitral process altogether.

82. 57 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.2d at 731.

83. When parties enter into a contract, most of their attention is directed to the business matter of the agreement. The minute details of providing for a provisional remedy in the event of an arbitration is too easily glossed over at this stage. Optimistic parties might presuppose that disputes will never arise and, therefore, not adequately prepare for them.

84. Left unrestricted, a party which fears an award will be rendered against it has the option of removing its assets to a location where the award will not be enforced.

85. Burrows G. Newman, *supra* note 23, at 2, col. 4; Krishnamurthi, *Thoughts on a New Convention*, in *THE ART OF ARBITRATION* 208, 210 (1982).

86. 57 N.Y.2d at 414, 442 N.E.2d at 1241, 456 N.Y.S.2d at 731.

recognize the Convention, in reality their legal systems sometimes make awards difficult to enforce.<sup>87</sup> By permitting attachment in a country that has fair and sound procedures security could be sought. This would add greater credibility and reliability to the arbitral process in international transactions.

In contrast to *Cooper's* assertion that attachment hinders arbitration,<sup>88</sup> attachment encourages parties to enter into and adhere to arbitration agreements. Parties are more likely to enter into arbitral proceedings if they know that an ultimate award will be enforced.

## 2. Comparative Law Analysis

Available information concerning other signatories indicates that provisional remedies<sup>89</sup> are allowed in aid of arbitration.<sup>90</sup> This is particularly interesting in view of the court's reasoning in *Cooper*. The court of appeals expressed fear that if attachments were sustained, American businessmen would find their assets subject to attachments in foreign jurisdictions.<sup>91</sup> This concern is, however, superfluous: at least twenty-three countries, all signatories to the Convention, already permit attachments when parties have agreed to arbitrate.<sup>92</sup>

87. Parlin, *Negotiating the International Arbitration Agreement*, in *DOING BUSINESS IN HIGH RISK COUNTRIES* 83, 93 (1979).

88. 57 N.Y.2d at 414, 442 N.E.2d at 1241, 456 N.Y.S.2d at 731.

89. Provisional or interim measures other than attachment include court orders to provide testimony, produce documents, or grant injunctive relief. *See De Vries, supra* note 14, at 62.

90. *See infra* note 92.

91. 57 N.Y.2d at 415-16, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

92. Available information does not allow an examination of all current 65 signatories to the Convention. *See supra* note 14 (list of signatories). The countries that allow for attachments are: Algeria, 4 Y.B. COMM. ARB. 13 (1979); Austria, *id.* at 33, INTERNATIONAL CHAMBER OF COMMERCE, *Arbitration Law in Europe* 21 (1981) [hereinafter cited as *Arb. Law*]; Belgium, 5 Y.B. COMM. ARB. 14 (1980); Denmark, *id.* at 34; Egypt, 4 Y.B. COMM. ARB. 51 (1979); England and Wales, *Arb. Law, supra*, at 168; Finland, 5 Y.B. COMM. ARB. 47 (1980), *Arb. Law, supra*, at 135; France, 6 Y.B. COMM. ARB. 14-15 (1981), *Arb. Law, supra*, at 151; Germany, *Arb. Law, supra*, at 89; Greece, 5 Y.B. COMM. ARB. 70 (1980), *Arb. Law, supra*, at 210; Indonesia, 5 Y.B. COMM. ARB. 90 (1980); Iraq, 4 Y.B. COMM. ARB. 109 (1979); Italy, 6 Y.B. COMM. ARB. 43 (1981); Japan, 4 Y.B. COMM. ARB. 129 (1979); Kuwait, *id.* at 143; Libya, *id.* at 153; Netherlands, 6 Y.B. COMM. ARB. 71 (1981), *Arb. Law, supra*, at 287; Norway, 5 Y.B. COMM. ARB. 105 (1980); Pakistan, *id.* at 127; Sweden, 7 Y.B. COMM. ARB. 69 (1982); Switzerland, *Arb. Law, supra*, at 61; Syria, 7 Y.B. COMM. ARB. 43 (1982).

As an example of the statutory support in other countries, the Israeli Knesset passed an arbitration law on July 30, 1968. It states that courts have the same powers in arbitration matters as in other court actions when it concerns "the attachment of property, the prevention of departure from Israel, security for the production of property, the appointment of a receiver, a mandatory injunction and a prohibitive injunction." Act of July 30, 1968, § 16(a),

Two cases in foreign courts have considered the New York Convention and have provided for attachment in aid of arbitration. One case, *Scherk Enterprises Aktiengesellschaft v. Société des Grandes Marques*,<sup>93</sup> was decided by the Italian Supreme Court. In *Scherk*, the plaintiff had leased trademarks to the Italian defendant (SGM) in exchange for royalty payments.<sup>94</sup> A two-year contract had been renewed several times and the original version contained an arbitration clause.<sup>95</sup> Eventually Scherk alleged that SGM was using its trademarks without paying royalties.<sup>96</sup> It sought arbitration at the designated location, Zurich, and obtained attachment of SGM's assets in Italy from the Court of First Instance of Rome.<sup>97</sup> When Scherk requested invalidation of the attachment award and a declaration that the Italian court lacked jurisdiction with respect to the merits of the dispute, it was opposed by SGM.<sup>98</sup> The Italian Supreme Court held that the Italian court had jurisdiction to validate the attachment.<sup>99</sup> The Court, however, denied jurisdiction running to the merits of the dispute because of Italy's participation in the New York Convention.<sup>100</sup> The Italian Supreme Court, therefore, upheld the right of Italian courts to impose attachment pending an arbitral proceeding after it gave full consideration to the New York Convention.

The *Scherk* decision is notable because the Court permitted the attachment even though it had strong justification for vacating it.

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22 Laws of the State of Israel 210, 213, reprinted in 2 INT'L COMM. ARB. (Oceana) pt. VII, at 14 (June 1979). Israel was one of the original signatories to the Convention. See *Contracting States and Reservations*, 2 INT'L COMM. ARB.: NEW YORK CONVENTION (Oceana) pt. VI.3 (Sept. 1980).

Japan's *Code of Civil Procedure* includes a provision permitting judicial involvement during arbitral proceedings. Minji soshō hō (Code of Civil Procedure), Law No. 29 of 1890, art. 796 (Japan), reprinted in 3 INT'L COMM. ARB. (Oceana) pt. III, at 156 (Dec. 1980). Japan was an early signatory to the Convention. See *Contracting States and Reservations*, 2 INT'L COMM. ARB.: NEW YORK CONVENTION (Oceana) pt. VI.3 (Sept. 1980). Upon the motion of a party, legal acts affecting the award "may be carried out by the court[s]" where arbitrators lack the power and where a "real necessity" is apparent. *Id.*

See generally A. VAN DEN BERG, *supra* note 10, at 43; Burrows & Newman, *supra* note 23, at 2, col. 5 (proposition that other signatories allow attachment in aid of arbitration).

93. Judgment of May 12, 1977, Corte cass., Italy, 4 Y.B. COMM. ARB. 286 (1982).

94. *Id.* at 287.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 288.



The attachment favored a foreigner, the arbitral clause had not been written into the renewed agreement,<sup>101</sup> and the original arbitral clause had been written prior to Italy's becoming a signatory to the New York Convention.<sup>102</sup> Thus, the Court had motive to strictly interpret the New York Convention but still concluded that an attachment was not inconsistent with Convention-governed arbitrations.

The second case arose in England. In *The "Rena K,"*<sup>103</sup> the defendant shipper negligently damaged goods.<sup>104</sup> The plaintiff applied for and obtained an attachment of the defendant's ship in London.<sup>105</sup> The shipowner asked for the unconditional release of his ship pending arbitration, but the Queen's Bench Division (Admiralty Court) held that the attachment was permissible.<sup>106</sup> Justice Brandon noted:

I see no good reason in principle why it should not be available to provide a plaintiff, whose action is being stayed on the application of a defendant in order that the claim may be decided by arbitration in accordance with an arbitration agreement between them, with security for the payment of any award which the plaintiff may obtain in the arbitration. I have further been informed by counsel that the Commercial Court has granted injunctions on this extended basis in a number of unreported cases.<sup>107</sup>

The New York Convention was fully considered by the court. The court wrote: "There is nothing in s.1(1) of the 1975 Act which obliges the Court, whenever it grants a stay of an action in rem in which security has been obtained, to make an order for the uncon-

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101. *Id.* at 287.

102. *Id.* at 288.

103. [1978] 1 Lloyd's L.R. 545. The plaintiff was the Mauritius Sugar Syndicate (Mauritius Island) and the defendant was the Tate & Lyle Refineries Ltd. (U.K.). *Id.*

104. *Id.* at 547. The defendant shipping company had agreed to deliver 11,150 tons of sugar for plaintiff, shipping it from Port Louis to Liverpool. The sugar was damaged by sea water during the voyage. *Id.*

105. *Id.* at 548.

106. *Id.* at 560-61. The Queen's Bench Division (Admiralty Court) decided that the lower court was entitled to maintain a letter of undertaking submitted by the shipping company's insurance agent for release of the ship, while referring the main dispute to arbitration. *Id.* at 563.

107. *Id.* at 561. Attachment in this case referred to a *Mareva* injunction. A *Mareva* injunction can be applied against a foreign defendant when he has money or chattel within the court's jurisdiction which might be removed prior to the enforcement of a judgment. Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 5, ch. 49, § 45.

ditional release of such security.”<sup>108</sup> The passage refers to the Arbitration Act of 1975<sup>109</sup> which codified the Convention. The court explicitly stated that while it would refer the parties to arbitration it would continue to retain authority to attach assets as security.<sup>110</sup> The general language of *The “Rena K”* opinion implies that attachment pending arbitration is not limited to maritime cases, but may be permitted in any commercial matter.<sup>111</sup>

### 3. Treatment of the Issue by Rule Setting Bodies

International regulatory groups and arbitral associations, whose rules determine the mechanics of international arbitration proceedings, allow for attachment.<sup>112</sup> The United Nations Commission of International Trade Law (UNCITRAL) arbitration rules<sup>113</sup> specifically provide for provisional remedies in aid of arbitration.<sup>114</sup> The rules state: “A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”<sup>115</sup>

The UNCITRAL rules were intended “to be compatible with all legal, social and economic systems throughout the world.”<sup>116</sup> They were recommended without a dissenting vote by the United Nations General Assembly.<sup>117</sup> Prior to their adoption, signatories to

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108. [1978] 1 Lloyd's L.R. at 559.

109. Arbitration Act, 1975, ch. 3.

110. [1978] 1 Lloyd's L.R. at 561.

111. *Id.* at 559, 561.

Justice Kerr describes several instances in which disputes submitted to arbitration under English law may still involve judicial proceedings. Attachment as security is one mentioned. Kerr, *The English Courts and Arbitration*, 3 INT'L COMM. ARB. (Oceana) pt. III, at 34 (Dec. 1980). Although the account was written prior to England's adoption of the New York Convention, it indicates the traditional acceptance of attachment in aid of arbitration, which is still applied.

112. See *infra* notes 113-27 and accompanying text.

113. Arbitration Rules of the United Nations Commission on International Trade Law, 31 U.N. GAOR Supp. (No. 17), U.N. Doc. A/31/17 (1976), reprinted in 2 Y.B. COMM. ARB 161 (1977) [hereinafter cited as UNCITRAL rules].

114. *Id.* art. 26(3).

115. *Id.*

116. Holtzmann, *Introduction-recent contributions of Pieter Sanders to the art of international commercial arbitration*, in THE ART OF ARBITRATION at xi-xii (1982). The UNCITRAL rules play a significant role in international dispute settlement. See De Vries, *supra* note 14, at 53.

117. 31 U.N. GAOR (99th plen. mtg.) para. 49, U.N. Doc. A/C.6/L.17/Rev.1 (1976).

the New York Convention generally abided by regionally based rules.<sup>118</sup>

Professor Sanders, who helped draft the rules,<sup>119</sup> stated with reference to article 26(3):

The taking of interim measures is without prejudice to the outcome of the case. They are well known in court proceedings, which are not excluded in this instance. A party may even prefer to approach the court instead of addressing himself to the arbitral tribunal. *Paragraph 3* safeguards this approach by stating that it is not incompatible with the arbitral agreement to approach a judicial authority . . . .<sup>120</sup>

He also pointed out that the New York Convention was "taken into account" when the rules were approved.<sup>121</sup>

The first draft of the rules was circulated to the regional economic commissions of the United Nations and to approximately seventy-five centers of international commercial arbitration.<sup>122</sup> The rules have been adopted by the Asian-African Legal Consultative Committee and the Inter-American Commercial Arbitration Commission.<sup>123</sup> They played a vital role in resolving the hostage crisis between the United States and the Islamic Republic of Iran.<sup>124</sup>

The International Chamber of Commerce arbitration rules, under which Cooper and Motobecane agreed to carry out their arbitrations,<sup>125</sup> also provide for interim or conservatory measures.<sup>126</sup>

118. Holtzmann, *supra* note 116, at xii.

119. *Id.*

120. Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COMM. ARB. 172, 196-97 (1977).

121. *Id.* at 173. Professor Sanders is a firm advocate of interim measures such as attachment in aid of New York Convention governed arbitration. He played an instrumental role in the drafting of the Convention, thus his opinion on interim measures has some weight in interpreting the New York Convention on this issue. See Van den Berg, *Should an International Arbitrator Apply the New York Convention of 1958?*, in *THE ART OF ARBITRATION* 39, 39 (1982).

122. Sanders, *supra* note 120, at 172.

123. Holtzmann, *supra* note 116, at xii.

124. *Id.* The United States and Iran agreed on the use of UNCITRAL rules in settling the claims of not only commercial transactions, but disputes of public law as well. *Id.*

125. Record on Appeal, *supra* note 46, at 56, § 14.

126. Article 8(5) provides in pertinent part:

Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

In addition, the American Arbitration Association (AAA) rules indicate that judicial proceedings do not represent the waiver of a party's right to arbitrate.<sup>127</sup>

#### IV. SUGGESTED REFORM

A Supreme Court decision allowing for provisional remedies pending arbitral proceedings would bring the United States practice into line with that of other countries and the UNCITRAL rules.<sup>128</sup> Until the Supreme Court acts, it is suggested that state and federal courts, when considering this matter, undertake a comparative law analysis similar to the one set forth in this Note.<sup>129</sup>

Legislative action may alternatively provide needed reform. The Committee on Arbitration of the Association of the Bar of the City of New York and the Subcommittee on Advisability and Validity of Provisional Remedies in the Arbitration Process together have suggested reform of section 7502 of the *New York Civil Practice Laws & Rules (CPLR)* and of section 8 of the Federal Arbitration Act.<sup>130</sup> The proposed changes would permit attachments pending arbitral proceedings.<sup>131</sup>

Rules of Conciliation and Arbitration of the International Chamber of Commerce art. 8(5) (1975), reprinted in 1 Y.B. COMM. ARB. 157 (1976). While the rules call for exceptional circumstances, the organization at least conceptually allows for interim or conservatory measures during arbitrations. *Id.* This is significant because the organization played a key role in the creation of the New York Convention. In 1953, it requested the Economic and Social Committee of the United Nations to call an international convention on the topic of the New York Convention. See Asken, *supra* note 10, at 39-40; Domke, *supra* note 14, at 414; Van den Berg, *supra* note 121, at 39.

127. Rule 47 of the Commercial Arbitration Rules of the AAA states in pertinent part:

- (a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any Arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration.

Commercial Arbitration Rules of the American Arbitration Association 47(a)-(b) (1982), reprinted in 7 Y.B. COMM. ARB. 191 (1982). The AAA is the world's largest arbitration association. See De Vries, *supra* note 14, at 45, for an indication of the organization's influence on arbitration.

128. Cooper unsuccessfully sought *certiorari* from the United States Supreme Court on the issue of whether attachments are permitted pending arbitrations under the New York Convention. Burrows & Newman, *supra* note 23, at 3, col. 1.

129. See *supra* notes 89-111 and accompanying text.

130. The committees suggest adding a subdivision (c) to § 7502, which would read:

Notwithstanding the existence of a valid agreement to arbitrate, and unless the parties have expressly agreed by signed instrument to the contrary, the provisional remedies enumerated in Articles 62 and 63 shall be available in arbitration proceed-

In 1982, New York's Advisory Committee on Civil Practice also drafted a subdivision to be added to section 7502 of the *CPLR*, permitting courts to grant an attachment or injunction in connection with an arbitral proceeding.<sup>132</sup> The New York legislature did not act on it, but it will be resubmitted with slight revisions in 1983.<sup>133</sup>

ings, and for purposes of such provisional remedies, a Notice of Intention to Arbitrate and Demand for Arbitration shall be deemed the equivalent of a summons and complaint. Any application for such relief must be made prior to or within twenty days after service by a party of a Notice of Intention to Arbitrate or Demand for Arbitration.

Report of the Committee on Arbitration of the Association of the Bar of the City of New York and the Subcommittee on Advisability and Validity of Provisional Remedies in the Arbitration Process 10-11 (1982) [hereinafter cited as New York City Bar Committee Report] (copy on file at the *Fordham International Law Journal*). See *supra* note 23 for background on N.Y. CIV. PRAC. LAW § 7502 (McKinney 1980).

The Committee also suggests that § 8(b) of the Federal Arbitration Act be amended to read:

*Application of Interim Relief in Aid of Arbitration:* A party to an agreement in writing for arbitration enforceable under Section 2 hereunder may begin his proceeding hereunder by attachment of property of another party in accordance with the law applicable to attachment proceedings or by obtaining a preliminary injunction against another party in accordance with the law applicable to obtaining such relief, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration, to amend, supplement, vacate or otherwise alter any orders made under this section and to enter its decree upon the award.

New York City Bar Committee Report, *supra*, at 11. See *supra* note 44 and accompanying text for background on § 8 of the Federal Arbitration Act.

131. See *supra* note 130.

132. The provision would read as follows:

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this act shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

1983 Report of the Advisory Committee on Civil Practice to the Chief Administrator of the Courts of the State of New York 90-91 (1983) [hereinafter cited as Advisory Committee Report] (copy on file at the *Fordham International Law Journal*). This proposal includes a necessity test, distinguishing it from the New York City Bar Committee Report which does not. The implicit danger of a necessity test is that it might impose additional time burdens on the court and parties. Time would presumably have to be spent analyzing evidence concerning the financial conditions of the parties. Inserting a necessity test, therefore, remains a debated issue.

133. *Id.* at 12.

Reforming New York law on this issue is not enough absent a Supreme Court decision in favor of attachment. The *Cooper* decision cites a federal convention as preventing attachment; therefore federal legislation, as suggested in the New York City Bar Committee Report,<sup>134</sup> is needed to correct the court's misguided interpretation of the Convention as codified.<sup>135</sup>

### CONCLUSION

Attachment in aid of arbitration is acceptable to many countries that have signed the New York Convention.<sup>136</sup> Thus, the *McCreary* court's broad interpretation of article II(3) of the Convention<sup>137</sup> and the *Cooper* court's reliance on *McCreary*<sup>138</sup> are unwarranted.

The treatment of this issue by United States courts is questionable in view of the Convention's silence on the issue,<sup>139</sup> the overwhelming support of foreign countries for attachment,<sup>140</sup> and the

The New York City Bar Committee and Advisory Committee reports relax the requirements for attachment pending arbitration under New York law in comparison to the standard established by the *Cooper* decision in its interpretation of *American Reserve Ins. Co.*, 297 N.Y. 322, 79 N.E.2d 425. See *supra* note 58.

This is a beneficial result if one accepts the proposition that attachment does not hinder the arbitral process, but in fact grants security to parties concerned that awards in their favor will never be enforceable. See *supra* notes 84-88 and accompanying text.

134. See *supra* note 130.

135. Clarifying the New York Convention's treatment of attachment as codified in the *United States Code* would help eliminate the confusion experienced by all courts on this issue. See *supra* notes 24-44 and accompanying text. Clarifying the *Code* would be particularly helpful to New York's jurisdiction. See *supra* note 9.

It has been suggested that the United Nations could resolve the ambiguity by issuing an interpretive ruling. Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785, 801-02 n.85 (1981). However, the drafters of the Convention specifically rejected a proposal to institute uniform procedural rules for enforcement of arbitral agreements. *Id.* Promulgation of such rules was considered premature in view of the differing national approaches to arbitration. *Id.* Therefore, no real mechanism is in place to generate such United Nations interpretive rulings. See *id.*

Since the interpretation of an international convention is at issue, it would seem that the next best approach would be to examine how the other signatories interpret the Convention on the issue of pre-award attachment and then clarify the *United States Code* accordingly. See *supra* note 92 and accompanying text.

136. See *supra* note 92 and accompanying text.

137. See *supra* notes 29-31 and accompanying text.

138. See *supra* note 58 and accompanying text.

139. See *supra* notes 67, 70 and accompanying text.

140. See *supra* notes 89-111 and accompanying text.

uniform support for attachment by the associations and regulatory bodies that have shaped and created the arbitral procedures that exist today.<sup>141</sup>

The decision in *Carolina Power*,<sup>142</sup> which allows for attachments pending arbitration, is more consistent with the views of judiciaries and legislatures of other signatory countries and serves to promote rather than disrupt the arbitral process. Parties to a contract will be more likely to enter into and adhere to arbitration agreements when they know that an award in their favor will be enforceable. Attachment can help provide this desired security.<sup>143</sup>

*Peter J. Fitzpatrick*

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141. See *supra* notes 112-27 and accompanying text.

142. 451 F. Supp. 1044 (N.D. Cal. 1977). See *supra* notes 32-41 and accompanying text for discussion of the opinion.

143. See *supra* notes 84-88 and accompanying text.