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# Provisional Remedies in the Context of International Commercial Arbitration

by  
Douglas D. Reichert†

## INTRODUCTION

American courts, both federal and state, have reached contradictory conclusions concerning the availability of provisional remedies<sup>1</sup> in international commercial disputes governed by agreements to arbitrate. This Article discusses these decisions and their rationales in terms of the issues that the United States Supreme Court should consider if and when it dispels the uncertainty prevailing in the lower courts.

Following an introduction to arbitration as a dispute settlement mechanism, Part I of this Article describes the provisional remedies a court might grant in support of an international commercial arbitration, and then analyzes the due process and jurisdictional issues involved in the consideration of a request for judicial support of arbitral proceedings. It then discusses the application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention)<sup>2</sup> and the effect of the sovereign immunity defense on the availability of provisional remedies. Part II describes the principal cases in the state and federal courts that have considered the availability of attachment as a provisional remedy in international commercial arbitration cases coming under the New York Convention. Part III considers the policies and rationales that a court should consider when faced with a motion for provisional relief. It includes a discussion of the advantages and disadvantages of seeking interim protection directly from an arbitral panel rather than from a court of law.

*Arbitration versus Litigation.* Early in common law history, medieval English merchants recognized the utility of resolving their disputes outside

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1. Provisional remedies include, *inter alia*, injunctive relief, attachment, notice of pendency, posting of security, and receivership.

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (*entered into force* for the United States Dec. 29, 1970) [hereinafter cited as the New York Convention].

the strictly adversarial system of court trial and accordingly developed a private system of dispute settlement.<sup>3</sup> Similarly, neither party in a modern international transaction wants to subject itself to the foreign, and possibly hostile, legal system of its trading partner.

Several features of arbitration distinguish it from litigation. First, arbitration usually does not entail jurisdictional issues since both parties consent to the jurisdiction of an arbitral tribunal. In litigation, the difficulty of obtaining personal jurisdiction over a foreign or sovereign defendant may pose an insurmountable obstacle in pursuing remedies in a court of law.<sup>4</sup> Second, arbitration generally enables the parties to select their own judges. The parties can therefore ensure, at least to a greater extent than in litigation, a sympathetic hearing from persons who have expertise in the subject matter or familiarity with the relevant commercial practices of the disputing parties. Third, arbitration protects the parties from unwanted publicity. Arbitral hearings are generally held in private and the results of the proceedings are rarely published. Finally, arbitration is often hailed as speedier and less costly than litigation.<sup>5</sup>

*Types of Arbitration.* There are three types of international arbitration: international arbitration between nations, international commercial arbitration between private parties, and transnational arbitration between public and private entities. On the nation-to-nation level of public international law, international arbitration is one of several institutions that have developed for the pacific settlement of disputes between sovereigns.<sup>6</sup> In the context of private international law, international *commercial* arbitration between private parties has developed separately as a transnational extension of domestic commercial arbitration. Finally, transnational arbitration has developed in response to the increased commercial activities of sovereign nation-States and their sponsorship of transnational investment. The contracts concluded between sovereign and private entities have frequently included an agreement to resolve disputes through transnational arbitration.<sup>7</sup> Each of these strains of the arbitral system bears distinctive features which influence in different ways the development and application of provisional remedies in the arbitral context.

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3. See Jones, *History of Commercial Arbitration in England and the United States: A Summary View*, in INTERNATIONAL TRADE ARBITRATION 127 (M. Domke ed. 1958); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928).

4. See Branson & Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT'L L. 917 (1984).

5. See, e.g., S. REP. NO. 536, 68th Cong., 1st Sess. 2-3 (1924).

6. See generally J.L. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION (1959).

7. See generally Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784 (1981). Such arbitrations share some of the features of public international arbitration, in that they often involve the application of general principles of international law and sometimes involve sovereign immunity issues. They also resemble international commercial arbitration in that they often apply a domestic law of contracts.

*Provisional Remedies versus Interim Measures of Protection.* Important differences distinguish provisional remedies provided in a court of law from interim measures of protection<sup>8</sup> sought from an arbitral tribunal. Provisional remedies are mandatory writs issued by the court to ensure the efficacy of an eventual judgment. Interim measures of protection, while analogous to many provisional remedies, are issued as orders of the arbitral tribunal with the explicit or implicit consent of the parties. While failure to observe arbitral orders may prejudice the arbitrators unfavorably, such orders, unlike their judicial counterparts, are not compulsory. A party seeking enforcement of an arbitral interim measure must petition a court of law. Moreover, arbitral interim measures procedure is based on a blend of procedures from international arbitration<sup>9</sup> and domestic commercial arbitration.<sup>10</sup> As a result, interim measures have come to resemble in some respects the more familiar provisional remedies rendered by domestic courts.

Underlying the issue of propriety of judicial support for international commercial arbitration is the concern over the international ramifications of otherwise domestic judicial acts. Isolationism and centrism have traditionally dominated American legal and political culture. Despite the post-World War II global pre-eminence of American trade, technology, and finance, these attitudes still subsist, both in judicial administration<sup>11</sup> and in the debate over provisional remedies in the arbitral context.<sup>12</sup>

This Article analyzes the availability of provisional remedies in the context of international commercial arbitration in general and under the New York Convention in particular. This analysis reveals that nothing in international or domestic law prohibits judicial assistance in arbitral proceedings with respect to provisional remedies. Nonetheless, such assistance should be exercised with discretion. If appropriately administered, such judicial assistance would bolster the utility of international commercial arbitration, foster international trade, and decrease the workload of the courts.

## I JUDICIAL PROCEDURE

Whether a court of law will grant an application for provisional remedies in the context of international commercial arbitration depends in part on the procedural law of the jurisdiction concerning the provisional remedy sought.

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8. Interim measures of protection can be any measure designed to preserve the *status quo ante* pending resolution of the dispute.

9. Arbitral interim measures were originally intended to prevent the outbreak of war. See, e.g., Locarno Arbitration Convention, Oct. 16, 1925, 54 L.N.T.S. 303; Pacific Settlement of International Disputes, General Act, Sept. 27, 1929, 93 L.N.T.S. 353.

10. Originally such measures served only a conservatory function. See, e.g., Rule 34 of the American Arbitration Association Rules of Procedure, *infra* note 172 and accompanying text.

11. *But see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

12. See Cooper v. Ateliers de la Motobecane, S.A., 57 N.Y.2d 408, 415-16, 442 N.E.2d 1239, 1243, 456 N.Y.S.2d 728, 732 (1982).

Arbitration law and procedure, except to the extent that they may affect the jurisdiction of a court of law, are not dispositive. In considering a specific request, a court will take into account the provisional measures requested, the requirements of due process, and the jurisdictional questions over entertaining a claim brought under a contractual agreement to arbitrate all disputes, an agreement which may or may not fall under the New York Convention. Finally, if one of the parties to the arbitration is a sovereign or a sovereign-controlled entity, the Foreign Sovereign Immunities Act of 1976<sup>13</sup> will bear on the question of the availability of provisional remedies.

### A. Provisional Remedies

Several types of provisional remedies are available in state and federal courts. Provisional remedies involving the seizure of persons or property include arrest, attachment, garnishment, replevin, and sequestration.<sup>14</sup> Provisional remedies directed at restraining the conduct of persons include various types of injunctions.<sup>15</sup> Other types of remedies intended to protect the interests of the parties include stay,<sup>16</sup> establishment of escrow accounts, posting of bonds or security,<sup>17</sup> and the sale of perishable goods.<sup>18</sup>

The rules governing civil seizure of persons or property are provided for in state statutes. The federal courts refer to the relevant state statute pursuant to Rule 64 of the Federal Rules of Civil Procedure. In admiralty cases, the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure govern. For preliminary injunctions, federal courts apply Rule 65 of the Federal Rules of Civil Procedure while state courts apply their relevant state statutes.

One provisional remedy which is particularly useful in the context of international commercial arbitration is attachment. Attachment operates in *personam* and *in rem*, and it serves the dual functions of obtaining jurisdiction and providing security. Use of attachment to obtain quasi-*in-rem* jurisdiction has been severely circumscribed in the United States by the holding in *Shaffer v. Heitner*.<sup>19</sup> Such use persists in admiralty, however, where the two

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13. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), and 1602-1611 (1982)).

14. See FED. R. CIV. P. 64.

15. See FED. R. CIV. P. 65.

16. See generally C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE (1977).

17. *Id.* See also FED. R. CIV. P. SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS E(2), E(5).

18. FED. R. CIV. P. SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS E(9)(b).

19. 433 U.S. 186 (1977) (quasi-*in-rem* jurisdiction based on the attachment of a single share of stock statutorily "present" in the jurisdiction did not satisfy constitutional due process requirements of minimum contacts with the jurisdiction such that maintenance of the suit would not offend traditional notions of fair play and substantial justice).

functions remain wedded in the same procedure.<sup>20</sup> The second function of the attachment procedure, to ensure the preservation of assets with which to satisfy any final judgment or award, remains unimpaired by the holding in *Shaffer* with regard to alien defendants already subject to the jurisdiction of a court.<sup>21</sup>

Another provisional remedy used in the context of international commercial arbitration is the injunction. The injunction operates in personam to restrain a person subject to the jurisdiction of the court from interfering with the outcome of the dispute settlement process. One type of injunction, the temporary restraining order (TRO), is a short-lived exercise of judicial power. It enables a court to govern the affairs in its jurisdiction pending consideration of the request for regular provisional remedies. These provisional remedies were developed in the context of litigation and are geared to serve its objectives. The use of provisional remedies to support the arbitral process, therefore, presents difficult issues and entails special considerations.

*Attachment.*<sup>22</sup> In the arbitral context, attachment serves to preserve assets in the jurisdiction where enforcement of the arbitral award will be sought. The availability of attachment is particularly important where other enforcement mechanisms are unavailing. For example, although the New York Convention provides an improved system for enforcing arbitral awards in the principal commercial jurisdictions, its application is not at present universal.<sup>23</sup> In the case of movable assets or assets that can be transferred out of the jurisdiction electronically, enforcement of an arbitral award may depend on the availability of provisional remedies such as attachment.

Attachment is governed by the various foreign attachment laws in each state. The federal courts are bound by Rule 64 of the Federal Rules of Civil Procedure to apply the attachment statute of the state in which they sit. For instance, in California, attachment is available in actions on a claim for money, subject to certain limitations of amount and certainty of damages.<sup>24</sup> With respect to nonresident defendants, attachment is available in any action for the recovery of money without limitation.<sup>25</sup> The types of property subject to attachment in California are listed in chapter 8, article 2 of the Civil Procedure Code, beginning with section 488.300.<sup>26</sup> The attachment order may be

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20. See 9 U.S.C. § 8 (1982); FED. R. CIV. P. SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS B(1).

21. However, other due process issues may be involved. See *infra* discussion in Part I.B.

22. See *supra* text accompanying note 14 for the names of procedures analogous to attachment.

23. Sixty-eight countries are now party to the Convention. DEP'T OF STATE, TREATIES IN FORCE 202 (1984). However, countries in Latin America, Africa, and the Middle East are only lightly represented among the Contracting States. China and Canada are two major countries not party to the Convention at present.

24. CAL. CIV. PROC. CODE § 483.010 (West 1985).

25. *Id.* at § 492.010.

26. *Id.* at § 492.040.

obtained *ex parte* upon affidavit of irreparable injury.<sup>27</sup> New York's foreign attachment statute is similar.<sup>28</sup> A temporary attachment may be issued *ex parte*, but the procedural requirements for a TRO have been applied to attachment procedure in response to due process concerns.<sup>29</sup>

As mentioned above, the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure govern attachment procedure involving maritime claims.

*Preliminary Injunction.* In contrast to attachment, which preserves assets in money damage claims, the preliminary injunction protects the rights of a party pending resolution of a dispute over non-money damages. It provides compulsory measures directed at one of the parties. For example, the preliminary injunction may be used to direct the production of evidence. It may also be issued to prevent a party from removing the subject matter of the dispute from the jurisdiction, from instituting a proceeding in another jurisdiction, or from committing the very act the suit seeks to restrain. As arbitration panels are traditionally without compulsory authority, the preliminary injunction may be vital to prevent prejudice to the rights of the party bringing a claim. However, the plaintiff will be granted a preliminary injunction only upon showing that a judgment in its favor is highly likely and that there is risk of irreparable injury.<sup>30</sup>

On federal questions, Rule 65 of the Federal Rules of Civil Procedure governs injunction procedure. At the local level, state courts apply their own preliminary injunction statutes.

*Temporary Restraining Order.* The temporary restraining order (TRO) provides a rapid, *ex parte*, but short-lived injunction pending a hearing on the request for a preliminary injunction. A TRO is issued where it appears that immediate and irreparable injury, loss, or damage will result.<sup>31</sup> The TRO hearing must take place before a judge, the allegations must be based on the affiant's own knowledge, and the party making the request must post a bond to cover any damages that may result from an unwarranted TRO.<sup>32</sup> The TRO, followed by a preliminary injunction, has been used to preserve a situation pending the formation of an arbitral panel in order to seek an interim award.<sup>33</sup> As with the preliminary injunction, TRO procedure is governed by Rule 65 of the Federal Rules of Civil Procedure in federal court and state TRO statutes in state courts.

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27. *Id.* at § 485.010.

28. N.Y. CIV. PRAC. LAW §§ 5201, 6201 (McKinney 1984).

29. *See infra* discussion in Part I.B.

30. N.Y. CIV. PRAC. LAW §6301 Practice Commentaries at 209 (McKinney 1984).

31. FED. R. CIV. P. 65.

32. *Id.*

33. *Sperry Int'l Trade, Inc. v. Government of Israel*, 532 F. Supp. 901, 903 (S.D.N.Y. 1982).

### B. Due Process Issues

The line of cases from *Sniadach v. Family Finance Corp.*<sup>34</sup> to *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>35</sup> imposed constitutional due process requirements of notice and an opportunity to be heard on summary seizure of property and required remedial revision of nearly every state statute governing attachment and garnishment procedures.<sup>36</sup> The majority of states adopted the procedural requirements of the TRO as a model for their new attachment statutes.<sup>37</sup> An *ex parte* attachment, like a TRO, may be issued only on a showing of urgent necessity to prevent great or irreparable injury to the rights of the plaintiff.<sup>38</sup> Following an *ex parte* attachment, due process requires that the defendant be given actual notice and an opportunity to be heard in order to resist the provisional remedy.<sup>39</sup> Once the due process requirements of notice and an opportunity to be heard are satisfied, and if the circumstances so warrant, the temporary *ex parte* attachment may be confirmed, or the TRO may be replaced by a preliminary injunction.

### C. Jurisdictional Issues

*Personal Jurisdiction.* In the United States, requests for judicial orders granting or dissolving pre-award attachment<sup>40</sup> in the context of arbitration agreements have often been denied on jurisdictional grounds.<sup>41</sup> Traditionally, foreign attachment statutes in each state enabled a court to obtain quasi-in-rem jurisdiction over a nonresident defendant merely by attaching assets located in the jurisdiction.<sup>42</sup> Today, the exercise of attachment jurisdiction must satisfy the due process requirements of "minimum contacts" between the defendant and the forum so as not to offend traditional notions of fair play and substantial justice<sup>43</sup> or satisfy one of the exceptions enumerated by

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34. 395 U.S. 337 (1969).

35. 419 U.S. 601 (1975).

36. S. RIESENFELD, CREDITOR'S REMEDIES AND DEBTOR'S PROTECTION 257-58 (3d ed. 1979).

37. D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 149 (4th ed. 1979).

38. See, e.g., CAL. CIV. PROC. CODE § 485.010 (West 1985).

39. See, e.g., *id.* at § 485.240.

40. The term "pre-award attachment" is used herein to designate any court-ordered attachment issued before or during the pendency of arbitral proceedings, as opposed to post-award remedies for the enforcement of the award. The general conditions for the grant of pre-award attachment are analogous to those necessary for other provisional remedies.

41. See, e.g., *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974) (valid arbitration clause in contract precludes any pre-arbitration attachments by a federal court); *I.T.A.D. Assoc. Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *Cooper*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728.

42. See, e.g., CAL. CIV. PROC. CODE § 492.010 (West 1984); N.Y. CIV. PRAC. LAW § 6201 (McKinney 1984).

43. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

the Court in *Shaffer*.<sup>44</sup> In actions falling under the New York Convention, an alien's requisite "minimum contacts" with the jurisdiction can be based on an aggregation of contacts with the United States.<sup>45</sup> However, whether jurisdiction can be obtained over the parties and thus over the property sought to be attached is only a preliminary issue in a court's analysis.

*Subject-Matter Jurisdiction.* Subject-matter jurisdiction poses a major obstacle to the grant of provisional remedies in the context of an arbitration agreement. At one time, U.S. courts routinely voided agreements to arbitrate, whether in the form of a separate agreement for particular disputes or in a clause in the underlying contract. The courts reasoned that such agreements were attempts to oust the courts of jurisdiction.<sup>46</sup> This judicial hostility toward arbitration was finally tempered by state and federal legislation.<sup>47</sup>

In the United States, judicial treatment of arbitration agreements is now governed by the Arbitration Act of 1925, as amended (hereinafter the Arbitration Act).<sup>48</sup> The Arbitration Act comprises two chapters, the first containing general provisions concerning domestic arbitration,<sup>49</sup> and the second containing provisions implementing the New York Convention.<sup>50</sup> A proposed third chapter would implement the Inter-American Convention on International Commercial Arbitration if and when the Senate gives its advice and consent to ratification of this treaty by the United States.<sup>51</sup>

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44. See, e.g., *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977), discussed *infra* at text accompanying notes 111-125. In *Uranex*, the court relied on the *Shaffer* exception that "a State in which property is located should have jurisdiction to attach that property . . . as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*." 451 F. Supp. at 1048. See also Riesenfeld, *Shaffer v. Heitner: Holding, Implications, Forebodings*, 30 HASTINGS L.J. 1183, 1185-86, 1196-97 (1979).

45. Section 203 of the Arbitration Act, 9 U.S.C. §§ 1-208 (1982), provides that an action or proceeding falling under the Convention is deemed to arise under the laws and treaties of the United States. 9 U.S.C. § 203. The relevant contacts with the United States may be aggregated for the purposes of determining federal question jurisdiction.

46. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 825 (2d ed. 1976). See also *Bozeman v. Gilbert*, 10 Ala. 90 (1840); *Rowe v. Williams*, 97 Mass. 163 (1867); *Wood v. Humphrey*, 114 Mass. 185 (1873); *Reed v. Washington Fine & Manne Ins. Co.*, 138 Mass. 572 (1885).

47. Note, *Recent Decisions*, 24 N.Y.U. L.Q. REV. 221, 224 (1949).

48. Ch. 213, §§ 1-15, 43 Stat. 883-886 (1925) (current version at 9 U.S.C. §§ 1-14, 201-208 (1982)).

49. 9 U.S.C. §§ 1-14 (1982).

50. 9 U.S.C. §§ 201-208 (1982).

51. Inter-American Convention on International Commercial Arbitration, January 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336. Although the United States has signed the Inter-American Convention, the Senate has not yet granted its advice and consent. The proposed third chapter of the Arbitration Act would preempt the New York Convention in a dispute between parties of two Contracting States to the Inter-American Convention. Like the New York Convention, the Inter-American Convention is silent on the question of provisional remedies, except that article 3 stipulates that, in the absence of an agreement by the parties to the contrary, the procedure to be applied in arbitrations pursuant to agreements under the Inter-American Convention is that of the Inter-American Commercial Arbitration Commission. The Inter-American Rules provide for interim measures by the arbitral panel. As to the question of whether a court

The Arbitration Act provides that any court having valid jurisdiction over a claim may direct the parties to uphold their agreement to arbitrate.<sup>52</sup> In contrast, article II(3) of the New York Convention provides that:

The court of a 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>53</sup>

This difference in wording between the domestic statute and the multilateral treaty has been interpreted by some U.S. courts as requiring the dismissal of any action on an agreement coming under the New York Convention,<sup>54</sup> rather than as allowing a stay of judicial proceedings pending arbitration of the dispute.<sup>55</sup> However, the meaning of the words "shall . . . refer" in article II(3) has been interpreted consistently by commentators to permit a stay rather than to compel dismissal.<sup>56</sup>

#### D. *Application of the New York Convention*

In determining the jurisdictional question of power to order provisional remedies in the context of international commercial arbitration, the first question is whether the New York Convention applies to the arbitration agreement. If the New York Convention is inapplicable, then either some other treaty applies<sup>57</sup> or the terms of chapter 1 of the Arbitration Act govern by default.

In cases where the New York Convention is inapplicable, section 3 of the Arbitration Act mandates a stay of judicial proceedings pending arbitration.<sup>58</sup> Pre-award attachment clearly may be maintained during a stay

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may order pre-award attachment, or provide for other provisional remedies pending the award, article 1 of the Inter-American Convention merely provides that arbitration agreements with respect to commercial transactions are "valid". In light of international practice, this silence should be taken as leaving the question open to domestic judicial procedures.

52. 9 U.S.C. § 206 (1982).

53. New York Convention, *supra* note 2, at art. II(3) (emphasis added).

54. *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974). *But see Rhone Mediterranée Compagnia Francese v. Lauro*, 555 F. Supp. 481 (D.V.I. 1982), *aff'd*, 712 F.2d 50 (3d Cir. 1983). *McCreary* has been followed in *Siderius Inc. v. Compania de Acero del Pacifico*, 453 F. Supp. 22, 25 & n.6 (S.D.N.Y. 1978); *Cordoba Shipping Co., Ltd. v. Maro Shipping Ltd.*, 494 F. Supp. 183, 188 (D. Conn. 1980); *Cooper*, 57 N.Y.2d at 411, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

55. *Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977); *Rhone Mediterranée*, 712 F.2d 50 (3d Cir. 1983).

56. *Lessing, Cooper v. Ateliers de la Motobecane: Pre-Award Attachment Under the New York Convention*, 1 INT'L TAX & BUS. LAW. 230, 238-42 (1983) and authorities cited therein.

57. Post-World War II treaties of friendship, commerce, and navigation and the new bilateral investment protection treaties, as well as other trade agreements of the United States, usually include an article concerning reference of commercial disputes to arbitration. These treaties usually stipulate that the arbitration law of the jurisdiction where the claim is brought shall apply. *See, e.g., Treaty of Friendship, Commerce, and Navigation*, April 2, 1953, United States-Japan, art. IV(2), 4 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143.

58. Section 3 of the Arbitration Act provides:

pending an arbitral award in these cases.<sup>59</sup> Bilateral treaties governing the arbitration of disputes where the New York Convention does not apply, such as in the case of contracts involving China, rarely mention the role of national courts in enforcing arbitration agreements.<sup>60</sup> Rather, national law is relied upon, which in the United States is contained in chapter 1 of the Arbitration Act.

The New York Convention, as implemented in the United States by chapter 2 of the Arbitration Act, governs both arbitration agreements and arbitral awards "arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of [the Arbitration Act]."<sup>61</sup> Section 2 of the Arbitration Act provides for the validity, irrevocability, and enforcement of an agreement to arbitrate in "a contract evidencing a transaction involving commerce."<sup>62</sup> "Commerce" has been given a broad definition in cases arising under the New York Convention.<sup>63</sup> Section 202 of the Arbitration Act applies the New York Convention to practically all arbitration agreements and awards involving commercial relationships touching one or more foreign jurisdictions.<sup>64</sup> Thus, the Convention will apply in almost all instances of commercial contracts containing arbitration agreements or agreements to arbitrate commercial disputes between citizens of any of the Contracting States of the New York Convention.

Although chapter 2 of the Arbitration Act implements the New York Convention in the United States, chapter 1 of the Act still applies to actions and proceedings brought under chapter 2 to the extent that its provisions are

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If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1982).

59. *Murray Oil Products Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944); *Coastal States Trading, Inc. v. Zenith Navigation S.A.*, 446 F. Supp. 330, 341 (S.D.N.Y. 1977).

60. *See, e.g.*, Agreement on Trade Relations, July 7, 1979, United States-People's Republic of China, art. VIII(2), 31 U.S.T. 4651, T.I.A.S. No. 9630. *See also supra* note 23.

61. 9 U.S.C. § 202 (1982).

62. 9 U.S.C. § 2 (1982).

63. *See, e.g.*, *Island Territory of Curaçao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 12-13 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1973); *Siderius*, 453 F. Supp. 22.

64. Section 202 excludes agreements and awards arising out of a commercial relationship "entirely between citizens of the United States . . . unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign States." 9 U.S.C. § 202 (1982). An award in a New York arbitration involving two foreign parties also falls under the Convention. *Bergeson v. Joseph Muller Corp.*, 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983).

“not in conflict” with chapter 2 or with the New York Convention (as ratified by the United States).<sup>65</sup> Chapter 2 and the Convention are silent on the question of stay or dismissal of an action in conjunction with referral of the dispute to arbitration. Therefore, if a court finds that pre-award attachment is not in conflict with the Convention, it may refer to the stay provision of section 3 in chapter 1 rather than dismiss the claim for lack of jurisdiction to grant provisional remedies.

*Self-Executing Nature of Article II(3).* A treaty provision is the supreme law of the land under the United States Constitution if it is self-executing.<sup>66</sup> A self-executing provision may nonetheless be superseded by an implementing statute if the latter is enacted after the treaty enters into force. A treaty provision which is not self-executing must be “executed” via implementing legislation. The terms of the implementing legislation control the effects of the non-self-executing treaty provision within the United States, and it is to these terms that a U.S. court—as opposed to an international tribunal—must refer. In considering the meaning of the New York Convention with respect to provisional remedies, no court has yet analyzed whether the Convention is self-executing under American law.<sup>67</sup>

Chapter 2 of the Arbitration Act implements the New York Convention in the United States. This implementing legislation accompanied the Senate’s consideration of advice and consent to accession to the treaty, but preceded final ratification of the treaty by the United States.<sup>68</sup> Because the date of accession followed the date of the implementing statute, the language of the treaty provision controls, provided that the relevant language is self-executing. Whether article II(3) of the New York Convention is self-executing has not been judicially evaluated, particularly since implementation of the Convention by chapter 2 of the Arbitration Act renders the determination superfluous for most purposes.

Determination of the executory or non-executory nature of a treaty provision hinges on the mandatory nature of the language of the provision in

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65. 9 U.S.C. § 208 (1982). The United States acceded to the New York Convention with several reservations and declarations, one of which invokes a reciprocity requirement as permitted by article I(3). 21 U.S.T. 2517, 2560. Were the arbitration to be held in Brazil, for example, the United States would not be obligated to apply the New York Convention to recognition and enforcement of the agreement or the eventual award, since Brazil is not currently a party to the New York Convention.

66. U.S. CONST. art. III, § 2.

67. See *Scherk*, 417 U.S. at 520–21 n.15 (the self-executing issue was not reached by the Court in determining whether the agreement to arbitrate was enforceable).

68. The Senate advised accession on October 4, 1968, but this was approved by the President only on September 1, 1970. The U.S. accession was deposited with the Secretary-General of the United Nations on September 30, 1970, and entered into force on December 29, 1970. T.I.A.S. No. 6997 at 2517. Chapter 2 of the Arbitration Act was enacted July 31, 1970, becoming effective concurrently with the entry into force of the New York Convention. Pub. L. 91-368, § 4, July 31, 1970.

question. The use of the word "shall" in article II(3) is unambiguous, particularly in light of the list of exceptions expressed in the last clause of the article.<sup>69</sup> The absence of language on this point in the implementing legislation, chapter 2 of the Arbitration Act, reinforces the perception that article II(3) is self-executing in the United States.

Article II(3) is addressed to the judiciary, and not the executive. This fact indicates the self-executing nature of the provision, implying that any party is entitled, upon request, to a refusal by the court to enter into the merits of the dispute.<sup>70</sup> However, the obligation of the courts under article II(3) to refer the parties to arbitration does not necessarily imply that courts must dismiss the claim, rather than stay the proceeding pending arbitration. The import of the command "refer" requires further interpretation of article II(3).

*Interpretation of the Convention.* The principles of international law governing the interpretation of treaties are relevant in determining the meaning of the language "shall . . . refer" in article II(3) of the New York Convention given the absence of a specific provision therein with respect to the availability of provisional remedies. The Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention),<sup>71</sup> to the extent that it provides evidence of customary international law,<sup>72</sup> specifies the method to be used by American courts in interpreting the language of the New York Convention.<sup>73</sup> Article 31(1) of the Vienna Convention provides the general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." It is therefore necessary to interpret each term in light of the object and purpose of article II(3) and the New York Convention as a whole.

The object and purpose of article II(3) is to exempt disputes subject to arbitration agreements from the jurisdiction *ratione materiae* of national

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69. See article II(3) of the New York Convention quoted *supra* in text accompanying note 53. The original case declaring the constitutional doctrine of executory and self-executing treaties also involved interpretation of the word "shall". *Foster and Elam v. Nielson*, 27 U.S. (2 Pet.) 253 (1829). Chief Justice Marshall initially determined that the word "shall" in that context implied future action requiring execution by Congress in order for the particular treaty provision to have effect. *Id.* at 314. Actually, reference to the Spanish version of the treaty revealed that "shall" was used in its mandatory sense of "shall remain" rather than "shall be", and the earlier ruling was overturned and the treaty provision declared self-executing. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833).

70. *Foster and Elam*, 27 U.S. (2 Pet.) at 314.

71. May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679 (1969) (*entered into force*, Jan. 27, 1980) [hereinafter cited as the Vienna Convention].

72. The United States is neither a signatory nor party to the Vienna Convention. Nonetheless, many of its provisions, including those concerning the interpretation of treaties, are codifications of customary international law. Therefore, these provisions are binding on United States courts under the Constitution. See Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L L. 470, 472 (1979).

73. Vienna Convention, *supra* note 71, arts. 31-33.

courts, except in certain specific situations.<sup>74</sup> Applying the principal interpretative rules of the Vienna Convention, the ordinary meaning of “refer the parties to arbitration” in light of the purpose of the provision would forbid a court from entering into the merits of a dispute brought before it in contravention of an agreement to arbitrate, but would not necessarily compel a dismissal rather than a stay of the action. Moreover, the ordinary meaning of “refer” has no technical, legal significance in either Anglo-American or French jurisprudence, the principal drafting languages of the New York Convention.<sup>75</sup> In addition, the Vienna Convention provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.<sup>76</sup>

It is therefore appropriate to examine supplementary means of interpretation.

*Drafting History of the Convention.* The New York Convention was prepared following a proposal by the International Chamber of Commerce (hereinafter the ICC) for a new convention<sup>77</sup> to replace the 1927 Geneva Convention on Arbitral Awards.<sup>78</sup> The Economic and Social Council of the United Nations (hereinafter ECOSOC) received the suggestion and added the item to its agenda.<sup>79</sup> An ad hoc committee was formed to consider the ICC draft, and it submitted its report with a revised draft to ECOSOC in 1955.<sup>80</sup> Following plenary discussion in its 19th session,<sup>81</sup> ECOSOC requested comments on the new draft from governments and interested organizations.<sup>82</sup> A conference was convened in 1958 to prepare the final text of the proposed convention.<sup>83</sup> The question of whether to include a reference to arbitration agreements in a convention on arbitral awards was thoroughly debated

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

75. The term “*renverra*” (refer) in the French text does not mean “*se déclarera incompetent*” (declare itself incompetent, i.e., dismiss the complaint), just as “refer” does not necessarily mean either “stay” or “dismiss” in Anglo-American law. Lessing, *supra* note 56, at 239.

76. Vienna Convention, *supra* note 71, art. 32.

77. U.N. Doc. E/C.2/373, Oct. 28, 1953; E/C.2/373/Add. 1, Feb. 25, 1954. The proposed draft convention did not include a provision on arbitration agreements.

78. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302.

79. U.N. Doc. E/C.2/373/Add. 1, Feb. 25, 1954.

80. 19 U.N. ESCOR Annex 2 (Agenda Item 2) at 1, U.N. Doc. E/2704 and Corr. 1 (1955). The report showed that the committee was divided as to whether a provision on arbitration agreements in the proposed convention should be included. *Id.* at pars. 18–19.

81. 19 (resumed) U.N. ESCOR (852d mtg.) at 83, U.N. Doc. E/SR.852 (1955).

82. ECOSOC Res. 570, 19 (resumed) U.N. ESCOR Supp. (No. 1A) at 3, U.N. Doc. E/2730/Add. 1 (1955).

83. ECOSOC Res. 604, 21 U.N. ESCOR Supp. (No. 1) at 5, U.N. Doc. E/2889 (1956).

throughout the proceedings.<sup>84</sup> The summary records of the Conference indicate that the delegates were more concerned with the threshold question of whether to include such a reference than with the procedural ramifications of the language adopted.<sup>85</sup>

Many proposals concerning a provision referring to arbitration agreements were made at the Conference,<sup>86</sup> practically all of which reiterated the language of article IV of the 1923 Geneva Protocol on Arbitration Clauses.<sup>87</sup> Article II on arbitration agreements was eventually incorporated into the New York Convention.<sup>88</sup> The words "shall . . . refer," the meaning of which appears crucial to resolution of the question of whether provisional remedies are available under article II(3), were borrowed unchanged from article IV of the Geneva Protocol of 1923. It is therefore useful to examine the drafting history of the 1923 Geneva Protocol in order to understand the meaning of this language.

The Geneva Protocol of 1923 was drafted by a Committee of Experts appointed by the Economic and Finance Committee of the Council of the League of Nations. This group acted on the mandate of the Council to prepare a Protocol open to the Members of the League for the recognition of arbitration agreements. Since the prevailing legal structure in many countries undermined the validity of such contractual provisions,<sup>89</sup> it was considered premature to broach in addition the question of recognition of arbitral awards. These circumstances suggest why there were two protocols in the 1920s and why the original proposal in the 1950s concerned only arbitral awards.

The purpose of the 1923 Geneva Protocol was to assure that national courts would refrain from judging the merits of commercial disputes in the face of agreements to arbitrate.<sup>90</sup> The word "refer" was introduced without explanation in the penultimate draft,<sup>91</sup> whereas the word "stay" had been

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84. United Nations Conference on International Commercial Arbitration, Summary Records 7, 9, 21, 23 & 24; U.N. Doc. E/Conf.26/SR.7, 9, 21, 23 & 24 (1958).

85. *Id.*

86. See G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE 21-28 (1958).

87. Protocol on Arbitration Clauses, Sept. 24, 1923, art. IV, 27 L.N.T.S. 157, at 159:

The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators. Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

88. U.N. Conference on International Commercial Arbitration, Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/Conf.26/8/Rev. 1, U.N. Doc. E/Conf. 26/9/Rev. 1 (1958).

89. 3 LEAGUE OF NATIONS O.J. 1404-05 (1922).

90. 4 LEAGUE OF NATIONS O.J. 271-72 (1923).

91. *Id.* at 836.

used continuously from the time of the original proposal.<sup>92</sup> Since the phrase "shall . . . refer" was adopted without discussion in the New York Convention, courts interpreting the meaning of this phrase should be guided by the meaning of the language adopted in the 1923 Geneva Protocol, in which the word "refer" apparently was considered the functional equivalent of the technical word "stay" in the original proposal. Nonetheless, a court should reserve discretion to dismiss a claim, rather than stay the action, when circumstances so warrant.

### E. Sovereign Immunity Issues

When one of the parties to a dispute subject to arbitration is a foreign State, or an agency or instrumentality of a foreign State, the availability of provisional measures is sharply circumscribed by the Foreign Sovereign Immunities Act (hereinafter the FSIA).<sup>93</sup> The FSIA prohibits pre-judgment attachment or arrest of sovereign-owned property except under certain conditions.<sup>94</sup> A pre-judgment attachment of a foreign State's property used for a commercial activity in the United States may be obtained only if the foreign State has explicitly waived its immunity from attachment prior to judgment and only if the purpose of the attachment is not to obtain jurisdiction but rather to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign State.<sup>95</sup>

An explicit waiver of immunity may be found in a treaty or implied by a transaction.<sup>96</sup> The immunity provisions found in existing friendship, commerce, and navigation treaties of the United States and other trade agreements do not generally provide for waiver of immunity from pre-judgment attachment against foreign-State instrumentalities.<sup>97</sup> There is, however, a statutory ban on attachment as a basis for quasi-in-rem jurisdiction which represents a change from the practice adopted by the United States during the Tate-letter period of the restrictive theory of sovereign immunity.<sup>98</sup>

Special rules also apply in the admiralty context. Section 1605(b) of the FSIA provides that U.S. courts shall have jurisdiction over any case in which

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92. "If two parties of different nationalities agree to refer disputes that may arise between them [to arbitration] in a named country, an action brought by either party in any country other than that agreed upon as the place for arbitration ought to be *stayed* by the Court of the country in which it is brought . . . ." Report of the Sub-Committee on Arbitration Clauses, London, July 1922, 3 LEAGUE OF NATIONS O.J. 1413 (1922) (emphasis added).

93. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), and 1602-1611 (1982)).

94. 28 U.S.C. § 1609 (1982).

95. 28 U.S.C. § 1610(d) (1982). Compare *E-Systems, Inc. v. Islamic Republic of Iran*, 491 F. Supp. 1294, 1301-02 (N.D. Tex. 1980) with *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (2d Cir. 1982).

96. *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 415-16 (2d Cir. 1983).

97. *Id.* See also *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47, 49 (2d Cir. 1982).

98. See *Weilemann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, where the maritime lien is based upon a commercial activity of the foreign State. Under section 1605(b), the traditional admiralty jurisdictional basis of maritime arrest is transformed into in personam jurisdiction in the context of a claim against a foreign State. This grant of jurisdiction is broader than that of section 1605(a), which requires one of three kinds of nexus with the United States.<sup>99</sup> Nonetheless, the extent of liability under section 1605(b) is limited to the value of the vessel or cargo at the time notice is served.

Other provisional remedies, such as a temporary injunction, may be available. However, under the restrictive theory of sovereign immunity, they are arguably subject to the same limitations discussed above with respect to pre-judgment attachments.<sup>100</sup>

Leaving aside the special immunities of foreign States, procedural and jurisdictional issues concerning the availability of provisional remedies in international commercial arbitration do not prevent the application of such remedies as a matter of domestic or international law. Where jurisdiction can be maintained, provisional remedies may be applied because the New York Convention and the Arbitration Act do not explicitly or implicitly preclude their application. Several situations in a given commercial dispute may justify, or even require, granting provisional remedies of different types, particularly pre-award attachment. Therefore, only normal judicial discretion governs consideration of granting a motion for provisional remedies.

## II

### THE PRINCIPAL PRE-AWARD ATTACHMENT CASES

Several U.S. courts have addressed the question of provisional remedies in the context of international commercial arbitration under the New York Convention. The state and lower federal courts have issued contradictory guidance on this question, and the United States Supreme Court has considered only the related questions of the enforceability of arbitration agreements in international commercial contracts<sup>101</sup> and the availability of provisional

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99. "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a) (1982).

100. *S & S Machinery*, 706 F.2d at 417.

101. See *Scherk*, 417 U.S. 506. This case involved a sale-of-trademarks contract specifying ICC arbitration in Paris between a German citizen and an American company. Plaintiff Alberto-Culver alleged fraudulent violations of section 10(b) of the 1934 Exchange Act and Rule 10b-5. The Court reversed a stay of arbitration holding that the agreement of the parties in this case to arbitrate any disputes arising out of their international transactions was to be respected and enforced.

remedies in the context of domestic arbitration.<sup>102</sup> In order to resolve the contradictions generated in the lower courts, the Court should address the issue of provisional remedies, most typically manifest as a request for pre-award attachment, in the context of international commercial arbitration, particularly when the arbitration agreement comes under the New York Convention. This Part presents the principal cases concerning pre-award attachment and introduces the rationales adopted by the relative courts. The issues raised will be discussed more fully in Part III of this Article.

The first case to consider provisional remedies in the arbitral context following the United States' accession to the New York Convention was *McCreary Tire & Rubber Co. v. CEAT S.p.A.*<sup>103</sup> In *McCreary*, the defendant sought dissolution of an attachment order garnishing its assets in a Pennsylvania bank in conjunction with a motion to dismiss the underlying action so that arbitration might proceed. The parties' contract specified that disputes would be submitted to ICC arbitration in Brussels. The Third Circuit initially observed that the attachment order was interlocutory and unappealable.<sup>104</sup> However, after finding that the order denying a stay pending arbitration should be reversed, the court nonetheless considered the question of pre-award attachment.<sup>105</sup>

In determining that pre-award attachment was unavailable, the court compared the terms of article II(3) of the New York Convention<sup>106</sup> with those of section 3 of the Arbitration Act.<sup>107</sup> The court determined that the New York Convention requires dismissal of any judicial action because the Convention prohibits bypassing of the agreement to arbitrate if one of the parties objects. Section 3 of the Arbitration Act permits a "stay" of the judicial proceeding, while article II(3) of the New York Convention requires that a domestic court "refer" the parties to arbitration.

The *McCreary* court distinguished Judge Learned Hand's opinion in *Murray Oil Products Co. v. Mitsui & Co.*<sup>108</sup> that arbitration is merely another method of trial to which state provisional remedies should apply with equal force.<sup>109</sup> The court concluded that the purpose of the New York Convention's implementing statute was to "prevent the vagaries of state law from impeding its full implementation."<sup>110</sup> The *McCreary* court's reasoning was forcefully criticized in *Carolina Power & Light Co. v. Uranex.*<sup>111</sup>

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102. See *Boys Mkt., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970). While the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982), generally bans injunctive relief, this case held that it does not ban injunctive relief in labor disputes involving agreements to arbitrate.

103. 501 F.2d 1032 (3d Cir. 1974).

104. *Id.* at 1034.

105. *Id.* at 1037-38.

106. See *supra* text accompanying note 53.

107. See *supra* note 58.

108. 146 F.2d 381, 384 (2d Cir. 1944).

109. *McCreary*, 501 F.2d at 1038.

110. *Id.*

111. 451 F. Supp. 1044 (N.D. Cal. 1977).

In the *Uranex* case, the federal court for the Northern District of California granted plaintiff Carolina Power & Light Company an *ex parte* attachment of an \$85 million debt owed to the defendant Uranex (a French *groupement d'intérêt économique* formed to market uranium fuel internationally) by the Homestake Mining Company in San Francisco. The debt represented the only known American-based assets of Uranex out of which the plaintiff, if successful, might execute an eventual arbitral award concerning the price terms in the parties' long-term supply contract. When Uranex sought renegotiation of its obligation to supply uranium at a certain price following a dramatic rise in the price of uranium on world markets,<sup>112</sup> plaintiff Carolina Power & Light Company filed suit to compel American Arbitration Association (hereinafter AAA) arbitration in New York as specified in the underlying contract. After the filing of suit and the court's subsequent grant of attachment, Uranex began to participate in the arbitration proceedings. Uranex then moved to dismiss the action to compel arbitration and to quash the attachment.

In deciding to maintain the attachment, the *Uranex* court considered the language and policies of the New York Convention and found no indication that resort to pre-award attachment was precluded.<sup>113</sup> The court did not find the reasoning in *McCreary* convincing and, in particular, criticized the "refer" versus "stay" distinction as being too literal.<sup>114</sup> The court reasoned that the literal interpretation adopted by the *McCreary* court was unrealistic, given the complex demands of drafting an international treaty capable of application in a variety of jurisdictions.<sup>115</sup>

In addition, the *Uranex* court rejected the *McCreary* contention that the purpose of the Arbitration Act's removal jurisdiction provision<sup>116</sup> was to protect full implementation of the New York Convention from the "vagaries of state law." The *Uranex* court reasoned that under Rule 64 of the Federal Rules of Civil Procedure federal district courts apply the remedies and procedures of the states in which they sit, and that therefore removal of the action to federal court would not prevent the application of state law governing provisional remedies.<sup>117</sup> Finally, the *Uranex* court observed that "the Supreme Court has concluded that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate."<sup>118</sup>

*Uranex* lacked sufficient contacts with either California or the United States to permit in personam jurisdiction.<sup>119</sup> The attachment was nonetheless

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112. See, e.g., *In re Westinghouse Elec. Corp. Uranium Contract Litig.*, 405 F. Supp. 316 (J.P.M.D.L. 1975).

113. 451 F. Supp. at 1052.

114. *Id.* at 1051-52.

115. *Id.*

116. 9 U.S.C. § 205 (1982).

117. 451 F. Supp. at 1052.

118. *Id.* (citing *Boys Mkt.*, 398 U.S. 235).

119. *Id.* at 1046.

granted on the basis of quasi-in-rem jurisdiction, predicated on the condition that the plaintiff file, within thirty days, an action directed to the underlying merits in a jurisdiction that could exercise in personam jurisdiction over the defendant.<sup>120</sup> The *Uranex* attachment was not in fact vacated after thirty days, but continued in existence for more than eight months, after which time it was ordered reduced from \$85.2 million to \$1.278 million.<sup>121</sup> Carolina Power & Light Company appealed this reduction, but the parties eventually reached a settlement before any final ruling was made.<sup>122</sup> Uranex apparently never appealed the legitimacy of an attachment by a court lacking personal jurisdiction. Therefore, the question of the maintenance of an attachment predicated on quasi-in-rem jurisdiction was never resolved, although the *Shaffer v. Heitner* exception on which it was based appears to permit the procedure.<sup>123</sup> The *Uranex* decision was later endorsed by a New York appellate court in *Cooper v. Ateliers de la Motobecane, S.A.*,<sup>124</sup> only to be reversed by the New York Court of Appeals.<sup>125</sup>

In *Cooper*, a sharply divided Court of Appeals of New York reversed (4-3) a grant of pre-award attachment by a New York appellate court (4-1). Plaintiff Cooper sought to avoid arbitration in Zurich of a price dispute concerning a stock repurchase agreement with Motobecane S.A., which had requested that the dispute be resolved by arbitration as provided under the contract.<sup>126</sup> Cooper initially requested a permanent stay of arbitration on the grounds that the arbitration demand by Motobecane S.A. was untimely. This action was denied.<sup>127</sup> Cooper also filed a money judgment claim accompanied by an action to attach a debt owed Motobecane S.A. by its American subsidiary, Motobecane America.

In reversing the lower appellate court's grant of pre-award attachment, the New York Court of Appeals asserted that the drafters of the New York Convention considered the problem and saw no need to provide for pre-arbitration security in the Convention. The court further noted that since enforcement of arbitral awards under the Convention was possible "almost anywhere in the world," contracting parties were already provided with some degree of security. In addition, the Court of Appeals found the *McCreary* analysis sounder than that of the *Uranex* court and concluded that the purpose and policy of the New York Convention would best be served by restricting pre-award judicial action.<sup>128</sup>

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120. *Id.* at 1049.

121. *Id.* at 1054.

122. *Id.* at 1056 n.6.

123. "[A] state in which property is located should have jurisdiction to attach that property . . . as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*." *Shaffer*, 433 U.S. at 210.

124. 86 A.D.2d 568, 446 N.Y.S.2d 297 (N.Y. App. Div.), *rev'd*, 57 N.Y.2d 408 (1982).

125. *Cooper*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728.

126. *Id.* at 410-11, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

127. 49 N.Y.2d 819, 404 N.E.2d 741, 427 N.Y.S.2d 619 (1980).

128. *Cooper*, 57 N.Y.2d at 414-16, 442 N.E.2d at 1242-43, 456 N.Y.S.2d at 731-32.

The *Cooper* majority distinguished pre-award attachment in admiralty cases, permitted by section 8 of the Arbitration Act, from non-admiralty cases, as to which the Arbitration Act is silent.<sup>129</sup> The *Cooper* court considered the *Uranex* decision as the only other pre-award attachment case which did not involve a maritime contract and dismissed its reasoning as “not compelling”.<sup>130</sup> The *Cooper* court’s rationale rested on the *McCreary* argument that the New York Convention strips the courts of jurisdiction, because the purposes of the Convention are to minimize the uncertainty of enforcing arbitration agreements and awards and to avoid the vagaries of foreign law for international traders.<sup>131</sup>

Within four months, the *Cooper* decision was muted by a federal court in the Southern District of New York in *Construction Exporting Enterprises v. Nikki Maritime, Ltd.*<sup>132</sup> *Nikki Maritime* concerned an action for maritime attachment, based, however, on section 6201 of the New York Civil Practice Law. The attachment was originally denied in an oral decision relying on *Cooper*, which had been rendered just six days before.<sup>133</sup> On appeal, the question of the availability of a traditional admiralty attachment—based on Supplemental Rule B(1) and section 8 of the Arbitration Act, rather than on section 6201 and notwithstanding the New York Convention—was remanded to the district court. The district court repudiated its earlier decision, based on section 6201, and considered the question on the basis of Supplemental Rule B(1). It endorsed the reasoning of the dissenting opinion in *Cooper* that the New York Convention either permits both maritime attachment and non-maritime attachment or it prohibits both.<sup>134</sup> Since the *Cooper* majority did not deny the validity of maritime attachment in cases under the New York Convention, the federal court concluded that the *Cooper* majority was wrong in disallowing a non-maritime attachment.<sup>135</sup> The *Nikki Maritime* rationale was that courts should not limit their jurisdictional authority through interpretation of an international treaty that does not address the question at issue.<sup>136</sup>

Another recent case, *Rogers, Burgun, Shahine & Deschler, Inc. v. Dong-san Construction Co.*,<sup>137</sup> acknowledged the uncertainty surrounding the availability of pre-award attachment under the New York Convention.<sup>138</sup> However, the court sidestepped the quagmire by distinguishing between an

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

130. *Id.* at 415, 442 N.E.2d at 1242–43, 456 N.Y.S.2d at 732.

131. *Id.* at 410, 442 N.E.2d at 1240, 456 N.E.2d at 729.

132. 558 F. Supp. 1372 (S.D.N.Y. 1983).

133. *Id.* at 1373.

134. *Id.* at 1375.

135. *Id.* at 1374.

136. *Id.*

137. 598 F. Supp. 754 (S.D.N.Y. 1984).

138. *Id.* at 759 n.10.

attachment of assets and the subject matter of the case—a preliminary injunction enjoining the calling of a letter of guarantee for payment.<sup>139</sup> The court flatly asserted that arbitration “does not deprive the Court of its authority to provide provisional remedies.”<sup>140</sup> In accordance with the New York Convention, the court granted a stay of proceedings pending arbitration and a preliminary injunction preventing calling of the letter of guarantee.<sup>141</sup>

This progression of case law has not followed a consistent line of reasoning. The cases might be reconciled on the basis of which party was resisting arbitration, the purpose of the attachment sought, and the level of the court that decided each case. But insofar as each case sharply criticizes the reasoning of an earlier case or avoids an issue due to uncertainty, the conflict deserves resolution by the Supreme Court.

Until the Supreme Court settles the conflict, the availability of pre-award attachment in non-maritime cases in the United States will remain uncertain. As a consequence, American businessmen may refuse to conclude arbitration agreements in international commerce,<sup>142</sup> a result that would undermine the express policy of Congress and contravene the favorable stance of the Supreme Court toward arbitration.<sup>143</sup>

### III THE POLICY OF PROVISIONAL REMEDIES IN THE ARBITRATION CONTEXT

The tension between the judiciary’s interest in permitting litigation and its obligation to recognize and enforce agreements to arbitrate affects the question of provisional remedies. Clearly, if a court decides to void an arbitration agreement or if neither of the parties invokes their agreement, provisional remedies will be available in the normal course of litigation. On the other hand, a decision by a court to give the parties “the benefit of their bargain” might entail an almost spiteful refusal to entertain requests for provisional remedies. The following discussion critiques the grounds proffered by courts in refusing to grant provisional remedies in the context of arbitration under the New York Convention; it then considers alternative methods of obtaining such relief.

#### A. *The Purpose and Policy Rationale*

Insofar as the law governing provisional remedies in the context of international commercial arbitration is unsettled, the approach adopted by American courts must be carefully considered in developing the proper policy. This

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139. *Id.* The contract provided for ICC arbitration of disputes in Paris. *Id.*

140. *Id.* at 758.

141. *Id.* at 759.

142. van den Berg, *Commentary*, IX Y.B. COM. ARB. 329, 366 (1984).

143. *See Scherk*, 417 U.S. at 519–20.

policy should be formulated to best effectuate the object and purpose of the New York Convention.

The *Cooper* court argued that the New York Convention “was drafted to minimize the uncertainty of enforcing arbitration agreements and to avoid the vagaries of foreign law for international traders.”<sup>144</sup> The court asserted that “[t]his policy would be defeated by allowing a party . . . to obtain an order of attachment before arbitration.”<sup>145</sup> Furthermore, the court concluded that “[t]he purpose and policy of the . . . Convention will be best carried out by restricting prearbitration judicial action to determining whether arbitration should be compelled.”<sup>146</sup> The *Cooper* majority felt that allowing pre-award attachments or other judicial proceedings in the context of arbitration would inject uncertainty and subject the foreign business entity to foreign laws—the antithesis of what the court understood to be the Convention’s purpose.<sup>147</sup>

A Department of State memorandum accompanying the transmittal of the New York Convention to the Senate states that the purpose of article II is to provide a treaty obligation for the recognition and enforcement of agreements to arbitrate.<sup>148</sup> The purpose of the obligation in article II, as it was in the 1923 Geneva Protocol, is not therefore to preclude courts from participating in the arbitral process, but rather to prevent them from declaring arbitration agreements void and thus claiming jurisdiction over a dispute. The role of courts in appointing arbitrators and in enforcing arbitral awards clearly establishes the necessity of a relationship between courts and the arbitral process. The availability of provisional remedies is a necessary adjunct to the arbitral process whenever the arbitral tribunal is not empowered to provide the same protection as courts may provide, which is most often the case. In light of the varying determinations by the lower courts on the question of the availability of provisional remedies, the purpose enunciated by the Court in *Scherk* that implementation of the New York Convention is intended to “unify the standards by which agreements to arbitrate are observed” is not being fulfilled.<sup>149</sup>

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

145. *Id.*

146. *Id.* at 416, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

147. *Id.* at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

148. S. EXEC. DOC. NO. E, 90th Cong., 2d Sess. 18 (1968). See also *Scherk*, 417 U.S. at 520 n.15 (“the principal purpose underlying American adoption and implementation of [the Convention], was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . .”).

149. *Scherk*, 417 U.S. at 520.

### B. *The Maritime Distinction*

Several courts have granted or upheld pre-award attachment in maritime contract cases,<sup>150</sup> but not in cases concerning general commercial contracts.<sup>151</sup> This distinction is based on a statutory exception. Section 8 of the Arbitration Act expressly permits quasi-in-rem jurisdiction based on libel in admiralty and seizure of a vessel or property, even in the face of an agreement to arbitrate.<sup>152</sup> However, section 8 is silent on the question of attachment or other provisional remedies in the maritime context. All courts relying on the "maritime distinction" have failed to distinguish between libel as a jurisdiction-obtaining device and maritime attachment as a provisional remedy to secure enforcement of an eventual judgment. For claims subject to contract law and not to admiralty, the silence of the Arbitration Act on provisional remedies in general, and attachment as a basis for quasi-in-rem jurisdiction in non-admiralty cases in particular, does not compel the negative inference that provisional remedies are impermissible in the context of arbitration. Indeed, courts have deemed the silence of the Arbitration Act on the permissibility of provisional remedies in non-admiralty actions as being irrelevant.<sup>153</sup>

### C. *The Arbitral Situs Distinction*

Whether the arbitration is to take place in a foreign forum or within the United States may be a determinative factor for U.S. courts considering the availability of provisional relief in arbitral proceedings. While the *Uranex* attachment was granted pending establishment of valid jurisdiction in another court, presumably in New York (the arbitral forum), the *Cooper* court faced the prospect of an arbitral proceeding in Paris and determined that it was unreasonable to subject the parties to judicial orders in the United States. These two decisions highlight the disinclination of American courts to impose non-forum judicial orders on parties to international commercial arbitration.

The *Cooper* court's opinion displays a remarkable level of naiveté concerning international commercial arbitration and the proper interpretation of international treaties. The court's basic argument was that if the New York Convention were interpreted to permit pre-award attachment, American-

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150. See *Paramount Carriers Corp. v. Cook Indus. Inc.*, 465 F. Supp. 599 (S.D.N.Y. 1979); *Atlas Chartering Serv. v. World Trade Group*, 453 F. Supp. 861 (S.D.N.Y. 1978); *Construction Exporting Enters. v. Nikki Maritime, Ltd.*, 558 F. Supp. 1372 (S.D.N.Y. 1983).

151. See *supra* note 41.

152. Section 8 of the Arbitration Act provides:

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, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 8 (1982).

153. See, e.g., *Murray Oil Products Co.*, 146 F.2d at 384.

owned assets located abroad would be subject to attachment.<sup>154</sup> The majority failed to recognize that courts of the United Kingdom<sup>155</sup> and Italy<sup>156</sup> had already considered this issue and determined that judicial pre-award attachment is both desirable and permissible under their domestic laws, notwithstanding the New York Convention. Also, the unilateral decision of the New York Court of Appeals will have no impact on the law of attachments in other countries. In Switzerland, for example, property within the jurisdiction is subject to attachment regardless of the situs or the nature of the dispute settlement.<sup>157</sup>

The *Cooper* court also desired to spare parties agreeing to arbitration from unfamiliar foreign law.<sup>158</sup> However, the court overlooked the fact that persons will probably be subject to attachment wherever they have assets, and that they will be presumed to be familiar with local law. Moreover, since the parties may have difficulty predicting what law, if any, the arbitrators will apply to the merits of their dispute, notwithstanding a choice of law by the parties, arbitration is not a reliable means of avoiding the application of unfamiliar foreign law. Therefore, the relevant criterion is not the situs of the arbitration, which in international commercial arbitration is often unrelated either to the parties or to the transaction, but rather a combination of the likely situs of the eventual enforcement of the award and the propriety of affording provisional remedies under the circumstances.

#### D. The State/Federal Distinction

Whether a U.S. court should apply state or federal procedural law to the question of the availability of provisional remedies has caused some analytical difficulty. Federal court jurisdiction in cases involving arbitration agreements coming under the New York Convention is "deemed to arise under the laws and treaties of the United States."<sup>159</sup> The district courts, therefore, have original jurisdiction regardless of the amount in controversy.<sup>160</sup> Cases brought in the state courts may be removed by the defendant to the federal district court.<sup>161</sup>

The relevant district court cases evidence the problems that arise when determining whether to apply state or federal law. The *McCreary* court determined that the purpose of the removal-jurisdiction provision was to provide a federal remedy in order to prevent the vagaries of state law from

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

155. *The Rena K*, [1979] 1 All E.R., Q.B. 397, 417.

156. *SEV Scherk Enters. A.G. v. Société des Grandes Marques*, Judgment of Sept. 15, 1977, Corte cass., Italy, Foro It. I; 2 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, Part V. 156 (G. Gaja ed. 1978).

157. See *Symposium on Interim Measures in International Commercial Arbitration*, 12 INT'L BUS. LAW. 101 (1984).

158. *Cooper*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728.

159. 9 U.S.C. § 203 (1982). See U.S. CONST. art. III, § 2.

160. 9 U.S.C. § 203 (1982).

161. 9 U.S.C. § 205 (1982).

impeding implementation of the Convention.<sup>162</sup> The *Uranex* court, on the other hand, observed that under Rule 64 of the Federal Rules of Civil Procedure, federal courts apply the procedures and remedies of the states in which they sit.<sup>163</sup> In *Nikki Maritime*, however, the basis for reversing the denial of the grant of pre-award attachment was that the amended request for attachment was based on Supplemental Rule B(1) of the federal admiralty rules of procedure rather than on section 6201 of the New York Civil Practice Law, the state attachment statute.<sup>164</sup>

In principle, claims involving agreements coming under the New York Convention are federal law claims, while claims not under the Convention are state law claims. The choice of procedural law varies accordingly. In attachment cases, the effect of Rule 64 makes this difference trivial. For injunctions, however, the difference can be significant. As demonstrated by *Nikki Maritime*, admiralty claims entail an exclusive federal remedy.

Title 28, section 1651 of the United States Code provides an alternative device for making provisional remedies such as attachment available in federal appellate courts as a matter of federal procedure. Federal courts are entitled to issue "all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>165</sup> Although writs of attachment and mandamus come under this provision, district courts have applied the Federal Rules of Civil Procedure.

#### *E. Arbitral Interim Measures of Protection*

An alternative to seeking provisional remedies from a court of law is to apply for interim measures of protection from the arbitral tribunal itself. The power of arbitrators to order such measures is based on their applicable rules of procedure. There are two kinds of commercial arbitration rules currently in use—those developed by national arbitration institutions for international and national commercial arbitration, and those developed by international arbitration institutions or organizations. The latter tend to reflect general international practice since they are the product of negotiation among representatives of several different legal traditions. The parties might also decide to modify for their purposes a set of existing rules. The international rules will be considered first.

Article 26 of the United Nations Commission on International Trade Law Arbitration Rules (hereinafter the UNCITRAL Rules) provides:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject

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162. *McCreary*, 501 F.2d at 1038.

163. *Uranex*, 451 F. Supp. at 1052.

164. *Nikki Maritime*, 558 F. Supp. at 1373.

165. 28 U.S.C. § 1651 (1982).

matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. 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>166</sup>

The UNCITRAL Rules may be specified for use by any arbitral institution.<sup>167</sup> It is interesting to note that article 26 provides for interim measures both from the tribunal and from a court.

In contrast, arbitration under the ICC Arbitration Rules (hereinafter the ICC Rules) permits recourse to courts for interim protection, including attachment, prior to the arbitral proceedings, but not an arbitral order of interim measures. Article 8(5) of the ICC Rules provides that:

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.<sup>168</sup>

Other international rules concerning interim measures are the Rules of the International Centre for the Settlement of Investment Disputes (hereinafter ICSID),<sup>169</sup> the Inter-American Commercial Arbitration Commission

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166. Adopted April 26, 1976 by UNCITRAL, *reprinted* in II Y.B. COM. ARB. 161 (1977).

167. *E.g.*, International Commercial Arbitration Rules, London Court of Arbitration, Rule 13.

168. ICC Brochure No. 291 (1975). The meaning of the words "the relevant powers reserved to the arbitrator" is not clear. One interpretation finds that this language presumably incorporates the inherent power to indicate interim measures of protection. McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 COLUM. J. TRANS-NAT'L L. 273 (1984); Branson & Tupman, *supra* note 4. The decided trend in international commercial arbitration supports this interpretation, but it counters the traditional civil law practice that provisional remedies are held exclusively by the judicial system.

169. *Rule 39*.

1. At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

2. The Tribunal shall give priority to the consideration of a request made pursuant to paragraph 1.

3. The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

4. The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

ICSID Doc. 14-A, *reprinted* in I INTERNATIONAL COMMERCIAL ARBITRATION Doc. I.8 (C. Schmitthoff ed. 1979).

Rules of Procedure,<sup>170</sup> and the Permanent Court of Arbitration Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State.<sup>171</sup>

National arbitration institutions sometimes provide in their rules for interim measures. For instance, the AAA Commercial Arbitration Rules provide for conservatory measures in Rule 34.<sup>172</sup> Similarly, the Rules of the London Court of International Arbitration (hereinafter the London Arbitration Rules) empower the arbitrator(s), unless all of the parties at any time agree otherwise, to "order the preservation, storage, sale or other disposal of any property or thing under the control of any party."<sup>173</sup> The Chinese arbitral institution is also empowered to indicate interim measures.<sup>174</sup> These interim measures ordered by an arbitrator are analogous to provisional remedies and may include attachment in jurisdictions where such authority is not held exclusively by public authorities.<sup>175</sup>

Despite the apparent usefulness of these interim measures, there are problems with relying on an arbitral tribunal for interim protection. One

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170. *Article 26.*

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. 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.

*Reprinted in III Y.B. COM. ARB. 231 (1978).*

171. *Article 24.*

The Tribunal or, in urgent cases, its President shall have the power to prescribe provisional or conservatory measures, if they consider that the circumstances so demand.

If one of the Parties cannot agree to the measures prescribed by the President, it may ask for a decision by the Tribunal. Pending such decision, the interim measures shall remain in force.

*Reprinted in I INTERNATIONAL COMMERCIAL ARBITRATION DOC. I.13 (C. Schmitthoff ed. 1979).*

172. *Conservation of Property.* The arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute. *Reprinted in VII Y.B. COM. ARB. 191 (1982).*

173. Rules of the London Court of International Arbitration, effective Jan. 1, 1985.

174. *Article 15.*

Upon the request of one of the parties, the chairman of the Arbitration Commission may, for the purpose of safeguarding the interests of the disputing parties, prescribe provisional measures concerning the materials, property rights, and/or other matters appertaining to the parties.

*Arbitration Rules of the Foreign and Economic Trade Arbitration Commission, reprinted in III Y.B. COM. ARB. 244 (1978).*

175. See McDonell, *supra* note 168, at 273.

problem involves the delay that occurs in establishing the tribunal itself. Another difficulty is the limited number of jurisdictions where arbitration could result in a compulsory attachment enforceable against third parties, such as a bank. The principal difficulty with such orders is that they are not mandatory. As with an arbitral award, compliance by the parties is voluntary. One solution to this difficulty is for the tribunal to issue the protective order in the form of an interim award, as provided in UNCITRAL Rule 26(2). An interim award is enforceable in the United States under the Arbitration Act.<sup>176</sup>

### F. Contracting for Interim Protection

In light of judicial uncertainty in the United States concerning the availability of pre-award attachment in the context of arbitration agreements coming under the New York Convention, another alternative is for parties to international commercial agreements containing arbitration clauses to contract for interim protection. Parties who favor interim measures might specify arbitral rules containing such a power or provide that they recognize the power of courts to grant provisional remedies.<sup>177</sup> They might also contract for the creation of escrow accounts or other forms of security for assets pending resolution of the dispute.<sup>178</sup> By contracting for their own provisional measures, the parties might be able to overcome the reluctance of courts to grant provisional remedies in this context.

One way for parties to ensure recourse to interim protection is to specify procedural rules which permit such measures. As mentioned above, arbitration rules that specify the power of the arbitrators to order interim measures include those of the AAA, UNCITRAL, ICSID, and the London Court of International Arbitration. The opposite effect can also be obtained by contract. The London Arbitration Rules, for example, allow the parties to obviate this procedural power of the arbitrators by mutual agreement.<sup>179</sup> Procedural rules which do not explicitly permit arbitrators to grant interim measures may also be selected.<sup>180</sup> However, since the parties are not compelled to respect an interim protection order imposed by the arbitrators, any order may be meaningless without coercive judicial assistance.

Alternatively, the parties might specify that they recognize the authority of courts to order provisional remedies in support of arbitration, notwithstanding the arbitration agreement. This approach would be mandatory in the context of an ICSID arbitration clause, where interim protection is the

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176. *Sperry Int'l Trade v. Government of Israel*, 689 F.2d 301 (2d Cir. 1982).

177. See Holtzmann, *National Report—U.S.A.*, IX Y.B. COM. ARB. 60, 61 (1984).

178. *Cooper*, 57 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

179. See *supra* text accompanying note 173.

180. Several national arbitration rules do not address the question, particularly since in many legal systems authority over provisional remedies is held exclusively by the judicial system. See McDonell, *supra* note 168, at 277-78. The ICC Rules do not explicitly permit the arbitrators to indicate interim measures.

exclusive domain of the ICSID Tribunal, unless the parties expressly agree to the contrary.<sup>181</sup> Such a contractual provision might specify that recourse to courts for provisional remedies is not inconsistent with the agreement to arbitrate. Another option would be for the provision to specifically empower courts to grant an attachment or other provisional remedy pending an eventual arbitral award. Conversely, the parties might agree that resort to provisional remedies is inconsistent with the agreement to arbitrate.<sup>182</sup>

The contractual approach to provisional remedies in the arbitral context, however, is little-tested and runs the risk of offending the judicial notion of exclusivity in exercising discretionary powers. Until the Supreme Court resolves the inconsistency in decisions of state and federal courts, there is no practical way of assuring the availability of provisional remedies in the arbitral context when the only attachable assets are in the United States.

### G. *The Emerging Law of International Commercial Arbitration*

In settling American policy with respect to provisional remedies in the context of international commercial arbitration, it is important to consider the positions adopted by other countries and the unification efforts of UNCITRAL in forming a Model Arbitration Law. Both sources contradict the position adopted in the *McCreary* and *Cooper* cases that pre-award judicial action should be restricted to preclude the granting of provisional remedies.

The arbitration statutes of most countries leave the question of provisional remedies to the judicial system.<sup>183</sup> Courts in Italy and the United Kingdom have addressed the question and have decided that the New York Convention leaves the question of provisional remedies to domestic procedures.<sup>184</sup> Similarly, the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law) explicitly provides that provisional remedies in support of arbitration shall be available in domestic courts having valid jurisdiction in accordance with their domestic procedures,<sup>185</sup> and that the arbitral tribunal may issue orders for interim protection.<sup>186</sup>

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181. Delaume, *ICSID Arbitration: Practical Aspects*, 5 PACE L. REV. 563, 582-83 (1985).

182. For an argument to that effect, see *Uranex*, 451 F. Supp. at 1049 n.2.

183. See generally HANDBOOK OF COMMERCIAL ARBITRATION (P. Sanders ed. 1984).

184. See *supra* notes 155-156.

185. "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." UNCITRAL Model Law on International Commercial Arbitration, art. 9, U.N. Doc. A/40/17 (1985) [hereinafter cited as the Model Law].

186. Article 17 provides:

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security for the costs of such measure.

*Id.* at art. 17.

Following the solicitation of comments by States, the Model Law was adopted by UNCITRAL at its June 1985 session in Vienna.<sup>187</sup> The drafting history of the Model Law emphasized several features of the question of provisional remedies in the context of international commercial arbitration. First, the Model Law repeats the “shall . . . refer” language of article II(3) of the New York Convention.<sup>188</sup> The Working Group, established to produce a draft text, considered whether this language implied that the court should stay or dismiss the action, but determined that this question should be left to national procedural law.<sup>189</sup> Nevertheless, the drafters included a provision similar to UNCITRAL Rule 26(3) specifying that recourse to courts for provisional remedies, including attachment, is not inconsistent with an agreement to arbitrate.<sup>190</sup>

In another article, the Model Law empowers the arbitral tribunal to indicate interim measures of protection upon request of one of the parties, unless both parties agree otherwise.<sup>191</sup> Such interim measures include conservatory measures, but the common terminology of “interim measures” was preferred.<sup>192</sup> This provision also states that recourse to courts for the enforcement of an arbitrator’s interim measures order is compatible with arbitral procedure, but national procedural law governs whether enforcement will be granted.<sup>193</sup> The deliberations of the UNCITRAL Working Group represent the most in-depth consideration on the international level of the question of interim measures in the context of international commercial arbitration. The conclusions reached by UNCITRAL and endorsed by the United Nations General Assembly should be considered by American courts in defining the law in the United States.

#### CONCLUSION

The cases in the United States demonstrate that many courts are confused on the issue of provisional remedies in the context of international commercial arbitration. The treaty law is ambiguous and the statutory law unclear. In the absence of clear legislative direction, the Supreme Court should provide international traders with greater certainty concerning this

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187. U.N. Doc. A/CN.9/SR. 306–28.

188. Article 8 provides:

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Model Law, *supra* note 185, at art. 8.

189. U.N. Doc. A/CN.9/216 at 9, para. 36.

190. *Id.* at 10, para. 39.

191. Model Law, *supra* note 185, at art. 17.

192. U.N. Doc. A/CN.9/216 at 8, para. 25.

193. *Id.* at 8, para. 26.

aspect of international commercial arbitration. The policy adopted by American courts should advance the use of arbitration and should be consistent with the position of other countries. To this end, U.S. courts should not interpret the New York Convention to prohibit the granting of provisional remedies. Instead, federal judicial policy should continue to support international commercial arbitration by providing for provisional remedies in that context. Furthermore, guidelines should be adopted to prevent abuse of provisional remedies in the arbitral context. Finally, judicial discretion must be exercised in order to ensure that provisional remedies will be available only when necessary.