

1983

Cooper v. Ateliers de la Motobecane S.A.: Pre-Award Attachment under the New York Convention

Adam Lessing

Recommended Citation

Adam Lessing, *Cooper v. Ateliers de la Motobecane S.A.: Pre-Award Attachment under the New York Convention*, 1 INT'L TAX & BUS. LAW. 230 (1983).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol1/iss1/9>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Cooper v. Ateliers de la Motobecane S.A.: Pre-Award Attachment Under the New York Convention

by
Adam Lessing*

*Robert R. Cooper v. Ateliers de la Motobecane S.A.*¹ is the latest decision regarding a recurring issue which has split the American courts: the availability of pre-award attachment² under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³ In *Cooper*, the New York Court of Appeals followed the recently emerging trend against pre-award attachment pending international arbitration⁴ by holding that the Convention prohibits pre-award attachment.

* Dr. Jur., 1981, University of Vienna; L.L.M., 1983, University of California, Berkeley.

1. 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982), [hereinafter cited as *Cooper*].

2. The term pre-award attachment is used here to designate any order of attachment issued by a court before or during the pendency of arbitral proceedings, as contrasted to a post-award remedy. For general literature on the subject of pre-award attachment under the Convention see Hoellering, *Pre-arbitral Attachment*, 187 N.Y.L.J., June 10, 1982 at 1, col.1; Note, *Pre-Arbitration Attachment: Is It Available in International Disputes?*, 1 REV. LIT. 211 (1981); Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L. L. 785 (1981) [hereinafter cited as Note, *Pre-Award Attachment*]; Note, *Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 36 WASH. & LEE L. REV. 1135 (1979) [hereinafter cited as Note, *Attachment*]. The inquiry of this Article is limited to the question of attachment, although other judicial action prior to entering judgment on an arbitral award (e.g., court orders for discovery, compelling attendance of witnesses, other provisional measures, etc.) raises analogous problems.

3. 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 [hereinafter cited as "the Convention"]. For general literature on the Convention, see A. J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981); and G. GAJA, *INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK CONVENTION (1978-1980)*. The Convention was adopted at a conference conducted under the auspices of the United Nations Economic and Social Council (ECOSOC) and was aimed at providing a more effective framework for international arbitration than the 1923 Geneva Protocol (*see infra* note 125) and the 1927 Geneva Convention (*see infra* note 102). The United States ratified the Convention in 1970, effective Dec. 29, 1970. To implement the Convention, a second chapter was added to the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1976). For a general discussion see Aksent, *American Arbitration Accession Arrives in the Age of Aquarius, United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U.L. REV. 1 (1971).

4. Note, *Enforcement of Arbitration in International Commercial Disputes: I.T.A.D. Assoc. Inc. v. Podar Brothers*, 7 N.C.J. INT'L L. & COM. REG. 105, 117 (1982). In 1979, one commentator could still discern the opposite trend. *See* Note, *Attachment*, *supra* note 2, at 1136 n. 7, 1142.

This Article examines the availability of pre-award attachment under the Convention in light of the *Cooper* decision. Part I establishes that the so-called problem of pre-award attachment actually consists of two separate issues. The first issue concerns the disposition of an action brought in contravention of an arbitration agreement falling under the Convention, while the second issue involves the compatibility of pre-award attachment with the Convention's general design and purpose. Part II discusses in detail the first issue and demonstrates that a suit brought in contravention of an arbitration agreement falling under the Convention must be stayed rather than dismissed. Part III shows that the provisions of the Convention, as seen in the light of internationally accepted principles of interpretation, do not require vacatur of a writ of attachment obtained before arbitration. The Article concludes that pre-award attachment is available under the Convention as provided for by the law of the forum in which attachment is sought.

I

THE *COOPER* LITIGATION

A. *The Facts*

The *Cooper* litigation arose out of an agreement to establish a New York subsidiary of Ateliers de la Motobecane S.A., a French corporation. The agreement provided that the shareholders of the New York subsidiary, Motobecane America, could tender their shares for repurchase by Motobecane S.A. and/or Motobecane America upon written notice.⁵ In the event of a dispute over the purchase price, either party could, within 10 days of notification of the intention to sell, demand arbitration in Zürich, Switzerland. Cooper and other shareholders gave notice of their intention to sell on April 13, 1978. After negotiations between the parties, Motobecane S.A. unequivocally demanded arbitration⁶ on September 1, 1978.

Cooper sought to avoid arbitration of the dispute through two separate actions, a motion for a permanent stay of arbitration and an action for money judgment against Motobecane S.A. The motion for a permanent stay of arbitration was brought on the theory that the demand for arbitration had not been timely. After several conflicting lower court decisions, the Court of Appeals denied the motion.⁷ After

5. *Cooper*, 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. Additional facts are taken from the opinion of the appellate division in *Cooper v. Ateliers de la Motobecane S.A.*, 68 A.D.2d 819, 819-20, 414 N.Y.S.2d 147, 149 (1979).

6. 68 A.D.2d at 820, 414 N.Y.S.2d at 149.

7. *Cooper v. Ateliers de la Motobecane S.A.*, 49 N.Y.2d 819, 427 N.Y.S.2d 619, 404 N.E.2d 741 (1980); *reversing* 68 A.D.2d 819, 414 N.Y.S.2d 147 (App. Div. 1979).

the Supreme Court had denied the stay of arbitration in the first action and appeal had been taken, Cooper began the second action for money judgment against Motobecane S.A. and obtained an ex parte order of attachment of a debt owed to Motobecane S.A. by Motobecane America.⁸ A motion to dismiss by Motobecane S.A. was first denied and the order of attachment confirmed by the Supreme Court.⁹ After the Court of Appeals finally denied the stay of arbitration in Action I, Motobecane S.A. renewed its motion to dismiss and vacate which was granted by Special Term. On appeal the Appellate Division reversed in a 4 to 1 decision.¹⁰ Lastly, the Court of Appeals, in a 4 to 3 decision, reversed again and reinstated the Supreme Court order dismissing the action and vacating the attachment.¹¹ This comment will examine only this final Court of Appeals decision.

The *Cooper* majority advanced a variety of reasons for its decision to dismiss and vacate. The court noted that the Convention's purpose "would be defeated by allowing a party, contrary to contract, to bring multiple suits and to obtain an order of attachment before arbitration."¹² It also felt that the Convention stripped the courts of jurisdiction to entertain an attachment action¹³ and that voluntary compliance with awards and the world-wide enforcement system of the New York Convention might make attachment unnecessary in the context of international arbitration.¹⁴ Finally, the court suspected that the instant

8. *See generally*, *Cooper v. Ateliers de la Motobecane S.A.* 86 A.D.2d 569, 569-70 (N.Y. App. Div. 1982).

9. This decision was issued after the Appellate Division had granted a stay in Action I.

10. *Cooper v. Ateliers de la Motobecane S.A.*, 86 A.D.2d 569, (N.Y. App. Div. 1982)

11. *Cooper*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728. As concerns the interplay of the present decision with the first action, for a stay of arbitration, the *Cooper* court noted that "the chronology of events indicates that the order of attachment should never have issued at all, as the underlying dispute is subject to arbitration." *Id* at 415, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732. It is unclear to which chronology the court refers. The reference might be to the fact that the ex parte order of attachment was issued although the Supreme Court had at that time already denied a stay of arbitration. If so, the court is merely restating its conclusion that confirmation of the attachment was erroneous. It is also possible, however, that the court was referring to an earlier passage in its opinion. The court, citing *American Reserve Insurance Co. v. China Insurance Co. Ltd.*, 297 N.Y. 322, 79 N.E.2d 425 (1948), stated that "an order of attachment will remain valid if it was obtained with notice or has been confirmed in a contract action before a defendant obtains a stay of proceedings because the underlying dispute is subject to arbitration." *Cooper*, 57 N.Y.2d at 413, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. If the "chronology" reference concerns this statement it would seemingly imply that if the attachment action had been brought first the attachment would have been upheld, a result contradicting all other arguments made in the opinion.

12. *Cooper*, 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. For a discussion of the Convention's purpose, see *infra* Part III.

13. *Cooper*, 57 N.Y.2d at 411, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. For a discussion of the jurisdiction issue, see *infra* Part II.

14. *Cooper*, 57 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. This argument is inconsistent with both previous arguments. Since it goes to the ability of plaintiff to collect on a debt, it involves substantive New York law on attachment. (The ability to collect on a judgment is

case was only an attempt by Cooper to circumvent the ruling in Action I denying the stay of arbitration,¹⁵ and that permitting such an attachment to stand would expose American business to the risk of pre-award attachment abroad.¹⁶

B. The Problem of Pre-Award Attachment

The problem of pre-award attachment under the Convention turns on two issues.¹⁷ The first issue, which can be called the "referral problem," concerns the appropriate judicial response to an action falling under the Convention¹⁸ where the parties have previously agreed to

a factor which the court can consider in exercising its discretion whether to grant an attachment under N.Y. Civ. Prac. R. 6201 (McKinney 1980). See McLaughlin, *Practice Commentaries*, McKinney's Consolidated Laws of New York, Book 7B, CPLR 6201 at 15.) The former arguments, however, imply that the Convention supersedes substantive New York attachment law. See *infra*, note 135.

15. *Cooper*, 57 N.Y.2d at 415, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732. Although this may be true regarding the stay of arbitration, it is without relevance to the central issue here, whether the attachment had to be vacated, and does not explain why the main action was dismissed rather than stayed.

16. *Cooper*, 57 N.Y.2d at 416, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732. This argument is ill-founded. The reciprocity provisions of the Convention (Article I(3), first reservation, and Article XIV) do not contemplate such action. It seems extremely doubtful that, even if *Cooper's* interpretation of the Convention were correct, another state would retaliate against the United States by discriminating in the application of its attachment laws against American parties.

17. There are several other problems unrelated to the Convention which arise in connection with pre-award attachment, the treatment of which is beyond the scope of this article. Most notable among these is whether an attachment can constitutionally be maintained pending arbitration, especially in light of *Shaffer v. Heitner*, 433 U.S. 186 (1977). See *Carolina Power & Light Company v. Uranex*, 451 F. Supp. 1044, 1046-49 (N.D.Cal. 1977) [hereinafter cited as "*Uranex*"]; Note, *Jurisdiction to Attach a Defendant's Property Pending Adjudication in a Foreign Forum*, *Carolina Power & Light Company v. Uranex*, 58 B.U.L. REV. 841 (1978); Riesenfeld, *Shaffer v. Heitner: Holding, Implications, Forebodings*, 30 HAST. L. J. 1183 (1979); McNamara, *The Constitutionality of Maritime Attachment*, 12 J. MAR. L. & COM. 97 (1980).

18. The courts have struggled with Article II's field of application, thereby disproving Aksen's optimistic prediction that courts will have no difficulty in limiting the broad language of Article II. See Aksen, *Accession*, *supra* note 3, at 8. Article II does not specify its field of application, an oversight probably occasioned by the considerable time pressure under which it was drafted. See A.J. VAN DEN BERG, *supra* note 3, at 56. The authors are split on whether Article II is to be interpreted by analogy to Article I, see *id.* at 56-71, or as applying to arbitration agreements which may lead to an arbitral award to which the Convention is applicable, see G. GAJA, *supra* note 3, at I.A.2. In the United States the problem is further complicated by the need to reconcile Article II with the two reservations under Article I(3) and Section 202 of the Federal Arbitration Act, 9 U.S.C. § 202 (1976). See A.J. VAN DEN BERG, *supra* note 3, at 17, for the proposition that Section 202 is inconsistent with the Convention.

The *Cooper* court does not mention its reason for finding Article II of the Convention applicable. While *Andros Compania Maritima v. Andre et Cie S.A.*, 430 F. Supp. 88, 90 (S.D.N.Y. 1977) [hereinafter cited as "*Andros*"] is a notable exception, most courts seem to overlook the problem of applicability. The court in *I.T.A.D. Associates Inc. v. Podar Brothers*, 636 F.2d 75 (4th Cir. 1981) for example, found the Convention applicable although there was no indication, at the time of decision, whether the arbitration would be held within the United States. *Id.* at 76-77. It was later ordered that the arbitration be held in New York. Note, *supra* note 4, at 115 n.90. See also *Uranex*, 451 F. Supp. at 1049 (In an arbitration between an American and a foreign party to

submit the subject matter to arbitration. While some courts have held a stay of the action to be appropriate pending arbitration,¹⁹ others have found dismissal to be required.²⁰ If the Convention requires dismissal, there can be no attachment for lack of jurisdiction.²¹ The second problem, the "compatibility problem," addresses the compatibility of pre-award attachment with the Convention's own provisions, most notably Article II(3).²² Some courts have argued that the Convention's silence regarding pre-award attachment does not bar such attachment,²³ while other courts have found to the contrary.²⁴

be held in New York "there is little question that the Convention would apply to the contract at issue"; *but see* *Sperry International Trade Inc. v. Government of Israel*, 670 F.2d 8 (2d Cir. 1982) (faced with the same situation, the Court did not even discuss its failure to apply the Convention.)

The question of whether the Convention should have been applied in the various cases dealing with pre-award attachment is beyond the scope of this Article.

19. *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*; 555 F. Supp. 481, 486 (V.I. 1982); *Andros*, 430 F. Supp. at 92; *Becker Autoradio U.S.A. Inc. v. Becker Autoradiowerke GmbH*, 585 F.2d 39, 47 (3d Cir. 1978); *Star-Kist Foods v. Diakan Hope S.A.* 423 F. Supp. 1220, 1221 (C.D.Cal. 1976).

20. *Ledee v. Ceramiche Ragno*, 528 F. Supp. 243, 245 (D.C.D.P.R.), *aff'd* 684 F.2d 184 (1st Cir. 1982); *Siderius Inc. v. Compania de Acero del Pacifico S.A.* 453 F. Supp. 22, 25 (S.D.N.Y. 1978); *Cordoba Shipping Co. Ltd. v. Maro Shipping Ltd.*, 494 F. Supp. 183, 188 (D.Conn. 1980) (*dictum*).

21. For New York law, see *infra*, note 27. See generally AM. JUR. 2D *Attachment and Garnishment* § 410; C.J.S. *Attachment* § 216, 1980. Pre-award attachment under Chapter 1 of the F.A.A. is possible because Section 3 directs the courts to stay the action, the court thereby retaining jurisdiction. 9 U.S.C. § 3 (1976). See *infra* note 31.

22. Convention, *supra* note 3, Art. II(3). See *infra* text accompanying note 33.

23. *Filia Compania Naviera S.A. v. Petroship S.A.*, No. 81 Civ. 7515 (S.D.N.Y. Oct 1, 1982) (available May 24, 1983, on LEXIS, Gen Fed Library Cases File); *Paramount Carriers Corp. v. Cook Industries Inc.*, 465 F. Supp. 599, 602 (S.D.N.Y. 1979); *Atlas Chartering Services Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978); *Uranex*, 451 F. Supp. at 1048-52; *Andros*, 430 F. Supp. at 92-93.

24. *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) [hereinafter cited as *McCreary*]; *I.T.A.D. Associates Inc. v. Podar Brothers*, 636 F.2d 75, 77 (4th Cir. 1981); *Metropolitan World Tanker Corp. v. P.N. Pertamina*, 427 F. Supp. 2, 5 (S.D.N.Y. 1975).

The *Cooper* court summarily dismissed many of the cases cited *supra* note 23 as being inapplicable, since they were maritime cases, while *Cooper* was a non-maritime case. *Cooper*, 57 N.Y.2d at 415, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. This is a false distinction which reveals the *Cooper* majority's confusion between the referral and compatibility issues. The difference between maritime and non-maritime cases lies in the jurisdictional basis for attachment. In maritime cases, Section 8 of the Federal Arbitration Act provides for the availability of attachment notwithstanding the arbitration agreement. 9 U.S.C. § 8 (1976). In non-maritime cases, the jurisdictional basis for attachment depends on applicable state law which usually limits the availability of attachment to a certain category of actions. See generally S. MORGANSTERN, *LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT* 70-89 (1971). The compatibility question, since it addresses only the interpretation of the provisions of the Convention, is the same in both cases. Contrary to the *Cooper* majority's contention, maritime cases dealing with the compatibility issue can therefore be relied upon as precedent in non-maritime cases. See *Cooper v. Ateliers de la*

The *Cooper* court faced these two issues in determining whether Cooper's action for money damages should be stayed or dismissed²⁵ (referral problem) and whether an order of attachment would be compatible with the Convention (compatibility problem). The two issues are interdependent. New York law allows attachment only in actions seeking, at least in part, money damages.²⁶ If the referral problem is solved in favor of dismissal of a monetary damages action, New York law requires vacatur without any inquiry into the compatibility of pre-award attachment with the Convention.²⁷

The *Cooper* decision dismissed the action and extensively commented on the incompatibility of pre-award attachment with the Convention. The scope of the *Cooper* holding is thus unclear. While it provides authority for a dismissal rather than a stay of an action falling under the Convention, the court's discussion of incompatibility is of questionable precedential value since its decision on this point is compelled by New York state law.²⁸ Nevertheless, as the *Cooper* holding strongly favors incompatibility, it is an appropriate vehicle for discussing the state of the law in this area.²⁹

II

THE REFERRAL ISSUE

The appropriate judicial response to an action in which the parties have previously entered into an arbitration agreement falling under the Convention is a subject of great dispute. Under Chapter 1 of the Federal Arbitration Act the law is well settled since Section 3 directs the

Motobacane S.A., 86 A.D.2d 568, 570 (N.Y. App. Div. 1982); *Cooper*, 57 N.Y.2d at 416-17, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732, (Meyer, J., dissenting).

A further distinction between maritime and non-maritime cases, the appropriate law determining whether attachment is warranted in the individual case, arises only once the compatibility question is correctly resolved in favor of the availability of pre-award attachment under the Convention. See *infra*, note 131 and text accompanying note 133.

25. Since *Cooper's* motion for a stay of arbitration had been previously denied, see *supra* text accompanying note 7, it was clear that the action for money damages should not proceed in the courts.

26. N.Y. CIV. PRAC. LAW § 6201 (McKinney 1980).

27. See N.Y. CIV. PRAC. LAW. §§ 6223, 6224. *Atlantic Raw Materials Inc. v. Almarex Products Inc.*, 154 N.Y.S. 2d 993, 996, 91 Misc. 2d 610 (S.Ct., Special Term, 1956). However, if the action is merely stayed, the attachment will be upheld, provided it has been obtained with notice or confirmed prior to the stay. See *supra* note 11; *Compania Panamena San Gerassimo S.A. v. International Union Lines Ltd.*, 17 Misc. 2d 969, 970, 188 N.Y.S.2d 708, 709 (S.Ct., Special Term, 1959).

28. The dissent sheds no further light on this question since it seems only to argue in favor of compatibility of pre-award attachment with the Convention without discussing the referral issue. See *Cooper* 57 N.Y.2d at 416, 442 N.E.2d at 1243, 456 N.Y.S.2d 732 (Meyer, J., dissenting).

29. This Article will only address the referral and compatibility issues in connection with the *Cooper* decision to vacate and dismiss since these are the two issues arising under the Convention. The other arguments advanced by the *Cooper* court are addressed *supra*, notes 14-16, and *infra*, notes 80 and 135.

court to stay the action.³⁰ The court thereby retains jurisdiction, requiring the plaintiff to submit to arbitration to enforce his or her rights.³¹ The Convention,³² however, does not use the term "stay". Article II(3) provides:

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.³³

To date, the courts have split in their interpretations of the term "refer," some finding a dismissal of the action to be appropriate, others ruling in favor of a stay.³⁴

A. The "Stripping of Jurisdiction" Argument

The decision generally relied upon by the courts in favor of dismissal is *McCreary Tire & Rubber Co. v. CEAT S.p.A.*,³⁵ a situation similar to that in *Cooper*. Plaintiff, a Pennsylvania corporation, commenced an action against CEAT, an Italian corporation, by foreign attachment of a debt owed to CEAT alleging breach of a distributorship contract. CEAT moved to dissolve the attachment, dismiss the complaint, transfer to another venue and stay the case pending arbitration. The District Court denied each motion. On appeal, the Third Circuit found that the dispute was encompassed by an arbitration clause in the distributorship contract, providing for arbitration in Brussels, Belgium under the ICC arbitration rules.³⁶ The Court of Appeals deemed the Convention to be applicable³⁷ and, therefore, faced both the referral and compatibility problems. Regarding the lower court's refusal to dismiss the action, the court held that it was a matter of settled law that

30. 9 U.S.C. § 3 (1976).

31. 9 U.S.C. § 3 "does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate". *Barge Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44 (1944).

32. Where the Convention applies it supersedes Chapter 1 of the Arbitration Act. Insofar as the Convention and Chapter 2 are not in conflict with Chapter 1, Chapter 1 applies to actions falling under the Convention as well. 9 U.S.C. § 208 (1976). See *infra* text accompanying note 75.

33. Convention, *supra* note 3, at Art. II(3) (emphasis added).

34. To date the courts have only interpreted "refer" to mean either "stay" or "dismiss" so that no other meaning needs to be taken into account. Also, it is settled that the possibility of actually directing the parties to arbitration under § 206 of the Federal Arbitration Act, 9 U.S.C. § 206 (1976), goes beyond the obligations imposed by the Convention. A.J. VAN DEN BERG, *supra* note 3, at 131; Aksén, *Application of the New York Convention by United States Courts*, 4 YEAR-BOOK OF COMMERCIAL ARBITRATION 341, 350 (1979) [hereinafter cited as "Y.C.A."]; McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 753 n. 83 (1971).

35. 501 F.2d 1032 (3d Cir. 1974).

36. *Id.* at 1035, 1038.

37. However, the court did so without providing its reasoning. *Id.* at 1037. See generally *supra*, note 18.

denial of a motion to dismiss is unappealable.³⁸ Nevertheless, the court found the lower court's order denying the stay pending arbitration to be appealable. It reversed and directed the district court to refer the disputed claim to arbitration,³⁹ reasoning that:

There is nothing discretionary about Article II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration.⁴⁰

While unstated, the court of appeals interpreted the term "refer" to require a stay of the action, because "it was error [for the lower court] to deny the motion for a stay in disregard of the convention."⁴¹ *McCreary* therefore resolved the referral issue in favor of a stay of the action.⁴² Later in the opinion, however, the court stated that:

Unlike Sec. 3 of the federal Act, article II(3) of the Convention provides that the court of a contracting state shall "refer the parties to arbitration" rather than "stay the trial of the action." The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate.⁴³

It is this language that is relied upon in later cases as authority for the proposition that the Convention requires dismissal of any action brought in contravention of an agreement to arbitrate. The statement, however, was made in the context of the court's discussion of the compatibility issue, and was not intended to relate to the referral issue.⁴⁴ Moreover, insofar as the statement is read as implying that the Convention requires dismissal,⁴⁵ it directly conflicts with the court's holding to stay the action in its earlier treatment of the referral issue. Such use of dictum as precedent is misguided. Accordingly, *McCreary* provides no

38. 501 F.2d at 1034. See *Catlin v. United States*, 324 U.S. 229, 236 (1945); *Brannon v. Warn Bros. Inc.* 508 F.2d 115, 118 (9th Cir. 1974); *Fleming v. Berardi* 441 F.2d 732 (3d Cir. 1971); *Spuill v. Cage* 262 F.2d 355, 356 (6th Cir. 1958); WRIGHT, *LAW OF FEDERAL COURTS* § 101, at 453 (2d ed. 1970).

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

40. *Id.* at 1037 (emphasis in original).

41. *Id.*

42. *Accord* *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 555 F. Supp. 481, 486 (V.I. 1982).

43. *Id.* at 1038. Although the court referred to the motion for attachment as a violation of *McCreary's* agreement to arbitrate, it did not take this agreement into account. The (old) ICC arbitration rules, on the application of which the parties had agreed (see *supra* text accompanying note 36) provide in Article 13(5) for interim measures to be taken by the courts. See INTERNATIONAL CHAMBER OF COMMERCE, *RULES OF CONCILIATION AND ARBITRATION*, in force June 1st 1955, 13 (4th ed. 1964). These provisions had been interpreted as barring the arbitrators from taking interim measures. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL*, 121, No. 215 (1965). On the issue of the enforceability of agreements empowering arbitrators to take interim measures, see *infra* notes 80 and 134.

44. See *Becker Autoradio U.S.A. Inc. v. Becker Autoradiowerke GmbH*, 585 F.2d 39, 47 (3d Cir. 1978) (holding for a stay without mentioning the seemingly inconsistent *McCreary* decision.)

45. Given the ambiguity of the language in the quoted passage, this result does not ineluctably follow.

authority for a dismissal under the referral issue.⁴⁶

One of the cases mistakenly relying on *McCreary* as authority for dismissal is *Siderius Inc. v. Compania de Acero del Pacifico S.A.*⁴⁷ *Siderius* involved an action for breach of contract brought despite the fact that a contractually mandated arbitration had already begun. In denying the motion, the court contrasted the "referral" language of Article II(3) with the "stay" language of the Federal Arbitration Act and, citing the *McCreary* dictum, stated that:

The finality of the referral procedure, and the absence of any provision for the retention of jurisdiction after referral by the court indicates that dismissal of the complaint for lack of subject matter jurisdiction is the appropriate remedy under the Convention.⁴⁸

Why the referral procedure should have any inherent finality is unclear. Moreover, the argument addressing the lack of provisions for the retention of jurisdiction is circular because the existence of such provisions is exactly what is in issue. Finally, the cite to *McCreary* provides only specious support, for as previously discussed, the cited passage is mere dictum arguably rendered ineffective by that court's own action.

Cooper is the most recent decision in this line of cases. Unfortunately, the reasoning behind the decision to dismiss *Cooper's* complaint is obscured by the rationale for the court's further holding to vacate the attachment. From the majority's citations of *McCreary* and *Siderius*, and its approval of the lower court *Cooper* opinion which relied on "Federal cases that interpret the U.N. Convention as stripping a court of jurisdiction to entertain an attachment action,"⁴⁹ it appears that the *Cooper* majority followed the questionable *McCreary* dictum on Article II(3).

B. Interpreting Art. II(3) and its Implementing Act

Identifying the weakness in the courts' handling of the referral problem does not end the inquiry, for the appropriate judicial action required by Article II(3) in providing that a court "refer the parties to arbitration" must still be determined. The interpretation of international treaties is governed by the Vienna Convention on the Law of

46. *Accord Rhone Mediteranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 555 F. Supp. 481, 486 (V.I. 1982).

47. *Siderius Inc. v. Compania de Acero del Pacifico S.A.*, 453 F. Supp. 22 (S.D.N.Y., 1978). *Siderius* is cited as support by *Cooper*. *Cooper*, 57 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

48. *Siderius*, 453 F. Supp. at 25 & n.6. See also *Cordoba Shipping Co. Ltd. v. Maro Shipping Ltd.* 495 F. Supp. 183, 188 (D.Conn. 1980) ("Prejudgment attachment [under the Convention] is inappropriate since arbitration under the Convention . . . divests the court of jurisdiction.")

49. *Cooper*, 57 N.Y.2d at 411, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

Treaties.⁵⁰ Although the United States is not a party to the Vienna Convention, the principles of interpretation in Articles 31-33 embody rules of customary international law,⁵¹ as can be inferred from the decisions of the International Court of Justice.⁵² Article 31(1) of the Vienna Convention provides 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 the light of its object and purpose." Paragraph 3(b) adds that there "shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."⁵³

The ordinary meaning of "refer"⁵⁴ indicates that a decision on the merits should belong to the arbitrators, thereby setting some limits on interpretation.⁵⁵ It provides no support, however, in favor of either a

50. Vienna Convention on the Law of Treaties, concluded on May 23, 1969, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 (1969), 63 AM. J. INT'L. L. 875 (1969); *entered into force*, Jan. 27, 1980, 17 U.N. CHRONICLE 91 (1980).

51. H.F. KÖCK, VERTRAGSINTERPRETATION UND VERTRAGSRECHT SKONVENTION, 79 n.4 (1976); G. RESS & C. SCHREUER, RELATIONSHIP BETWEEN INTERNATIONAL PUBLIC LAW AND CONSTITUTIONAL LAW IN THE INTERPRETATION OF INTERNATIONAL TREATIES 10-12 (23 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 1982); *see also* Briggs, *U.S. Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L. L. 470, 472 (1979). Any inquiry into the difficult problems raised by the question of treaty interpretation in international law is beyond the scope of this article. The problems raised on a domestic level by "subsequent practice" (*see infra* text accompanying note 53) are extensively treated by G. RESS & C. SCHREUER, *supra*. Gaja's proposal to refer to the local laws of Contracting States for the interpretation of doubtful expressions of the Convention (GAJA, *supra* note 3, at I.A.3 & n.11) is not endorsed insofar as this goes beyond the "subsequent practice" or "preparatory materials" within Articles 31-33 of the Vienna Convention. It also seems doubtful that subsequent international conventions can be relied on to interpret the Convention. *See, e.g.*, Art. VI(4) of the European Convention on International Commercial Arbitration, Geneva 1961, 484 U.N.T.S. 364, which enables the courts to take interim measures. Such an interpretation of the Convention, although not in relation to Article II, has been suggested by Lebedev. *See* Schlosser, *Miszellen: VII Internationaler Arbitrage Kongress Hamburg 1982*, 46 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 727, 733 (1982).

52. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (Advisory Opinion of June 21, 1971); Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972, I.C.J. 46, 67 (Judgment of Aug. 18, 1972); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 14, 18 (Jurisdiction of the Court, Judgment of Feb. 2, 1973).

53. 63 AM. J. INT'L. L. 875, 885 (1969).

54. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1193 (2d Collegiate ed. 1970) defines "refer" as: ". . . 2. to submit [a question] etc. for determination or settlement". Most definitions in legal dictionaries allude only to the American institution of the referee. *See, e.g.*, BLACK'S LAW DICTIONARY 1151 (Rev. 5th ed. 1979). The French text is to the same effect. "Renverra" (Convention, *supra* note 3, at Art. II(3), French text) is not a technical expression and is not equivalent to "se déclarera incompétente". *See infra* note 63.

55. The supplementary means of interpretation provided in Article 32 of the Vienna Convention can only be used to confirm the meaning obtained under Article 31, or to clarify this meaning insofar as the interpretation under Article 31 leaves the result ambiguous or obscure or leads to a manifestly absurd result. *See* Article 32 Vienna Convention on the Law of Treaties,

stay or dismissal of the action pending arbitration. Similarly, viewing the term in context provides little clue as to its intended effect.⁵⁶ The purpose of the Convention is also not determinative⁵⁷ since, regardless of whether the court stays or dismisses the action, a party seeking enforcement of its rights must proceed to arbitration.⁵⁸

The subsequent practice of the parties in implementing and applying Article II(3), as embodied in the various implementing acts⁵⁹ and court decisions, reveals that "refer" encompasses dismissal as well as stay. For example, the implementing acts of the United Kingdom⁶⁰ and India⁶¹ rephrase Article II(3)'s direction to "refer the parties to arbitration" as "to stay the court proceedings."⁶² In contrast, certain civil law jurisdictions implement Article II(3) by providing for dismissal, as does the new French law on Arbitration.⁶³ This practice is also followed in the court decisions of, for example, the Federal Republic of Germany, Austria and other countries.⁶⁴ Thus, using subsequent practice as a guide, the term "refer" in Article II(3) was not intended to mean "stay" or "dismiss" but to encompass either of the two procedures. As one U.S. court stated:⁶⁵

supra note 50, at art. 32, 8 I.L.M. 679, (1969), 62 AM. J. INT'L. L. 875, 885 (1969). Since a stay or dismissal is manifestly absurd, the interpretation in this case must be limited by the ordinary meaning of "refer". See generally, KÖCK, *supra* note 51, at 92-97.

56. See Vienna Convention on the Law of Treaties, Article 31(1), *supra* text accompanying note 53.

57. *Accord* G. GAJA, *supra* note 3, at I.B.1.

58. See *Barge Anaconda v. American Sugar Refining Co.* 322 U.S. 42, 45 (1944).

59. Implementing acts constitute "subsequent practice" within the meaning of Article 31 of the Vienna Convention on the Law of Treaties. Furet, *L'interprétation des traités par législateur*, 81 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 6-8 (1977); Coste-Floret, Note on Judgment of June 30, 1976 (Cass. crim.), 1977 Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 1, 3-4.

60. Arbitration Act 1975, § 1(1).

61. Foreign Awards (Recognition and Enforcement) Act 1961 § 3, as amended by Foreign Awards (Recognition and Enforcement) Amendment Act 1973. See generally Shroff, *Enforcement in India of Foreign Commercial Awards*, 21 JOURNAL OF THE INDIAN LAW INSTITUTE 31, 41 n.56 (1979).

62. Similar language can be found in the implementing acts of Ghana (Article 40, *reprinted in* Gaja, *supra* note 3, at IV. 5.1.3) and Israel (Article 5, *reprinted in id.* at IV. 17.1, 2).

63. Article 1458 Nouveau Code de Procédure Civile, 1981 D.S.L. 221, 238. For a discussion of the arbitration provisions of the decree, see Derains, *National Report France* 6 Y.C.A. 1 (1981), 7 Y.C.A. 3 (1982); Mezger, *Überblick über das französische Recht der Schiedsgerichtsbarkeit nach dem Reformdekret vom 14.5.1980*, 94 ZEITSCHRIFT FÜR ZIVILPROZESS 117 (1981).

64. See BAUMBACH-SCHWAB, *SCHIEDSGERICHTSBARKEIT* 78 (2d Ed. 1960); Glossner, *National Report—Federal Republic of Germany*, 4 Y.C.A. 60, 66 (1979); HANS FASCHING, *SCHIEDSGERICHT UND SCHIEDSVERFAHREN IM ÖSTERREICHISCHEN UND IM INTERNATIONALEN RECHT*, 34-5 (1972) (Austria); Doi, *National Report—Japan*, 4 Y.C.A. 115, 123 (1979); Trolle, *National Report—Denmark*, 5 Y.C.A. 28, 30 (1980).

65. In *Uranex*, 451 F. Supp. 1044, plaintiff, a Carolina utility, sought to attach a debt owed to defendant, a French "groupement d'intérêt économique". After bringing the action plaintiff voluntarily agreed to submit to arbitration. *Id.* at 1045. The only issue, therefore, was whether the attachment could be upheld pending arbitration in New York. The court found the Conven-

The use of the general term "refer" . . . reflect[s] little more than the fact that the Convention must be applied in many very different legal systems, and possibly in circumstances where the use of the technical term "stay" would not be a meaningful directive.⁶⁶

As used in the Convention, then, the term "refer" has no specific technical meaning beyond the proscription of court action on the merits. The Convention's mandate is therefore fulfilled by whatever procedure a Contracting State may use to prevent a court from adjudicating the merits of the dispute.⁶⁷ Since the ordinary meaning and context of "refer" and the purpose of the Convention are broad enough to encompass this interpretation, it is consistent with the Vienna Convention.

To determine the appropriate judicial action required by the language of Article II(3), the provisions enacted by Congress to implement the Convention are of key importance.⁶⁸ Chapter 2, Section 206 of the Federal Arbitration Act, the implementing provision corresponding to Article II(3) of the Convention, enables a court with jurisdiction to direct arbitration to be held at any place provided for in the agreement.⁶⁹ This language does not favor either interpretation.⁷⁰ Moreover, Section 206 was enacted solely to clarify the pre-convention issue⁷¹ whether a court may order arbitration to be held at the place provided in the arbitration agreement, even if outside the United States.⁷² Section 206, therefore, is confined to the question of the arbitration's location⁷³ and cannot be relied upon to determine whether dismissal or stay is appropriate under Chapter 2.⁷⁴

tion to be applicable, and proceeded to interpret Article II(3). It rejected *McCreary's* reasoning (see *infra* note 85) and concluded that "there is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be precluded". *Uranex*, 451 F. Supp. at 1052. Consequently the attachment was upheld.

66. *Uranex*, 451 F. Supp. at 1051-2.

67. *Accord* van den Berg, *Commentary Vol. VII*, 7 Y.C.A. 290, 299 (1982); G. GAJA, *supra* note 3, at I.B.1; 1 P. SCHLOSSER, *DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT*, 382, No. 388 (1975).

68. 9 U.S.C. §§ 201-208 (1976).

69. 9 U.S.C. § 206 (1976).

70. Even if the court enters an order directing the parties to proceed to arbitration, it must dispose of the pending action. This can take either the form of a stay (as under 9 U.S.C. § 3) or a dismissal.

71. See M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 18.03, at 169-70 (1968).

72. *Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Hearing on S.3274 before the Senate Committee on Foreign Relations*, 91st Cong., 2d Sess., S. REP. NO. 702, App. 5, 8 (1970) (statement by Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law).

73. *I.T.A.D. Associates Inc. v. Podar Brothers*, 636 F.2d 75, 77 (4th Cir. 1981).

74. But see Note, *Pre-Arbitration Attachment: Is It Available in International Disputes?*, 1 REV. LIT. 211, 221-22 (relying on § 206 for the resolution of the "referral" question).

Where the Convention and applicable implementing provisions of Chapter 2 do not determine whether dismissal or stay is appropriate, Section 208 of the Federal Arbitration Act provides for the residual application of Chapter 1 of the Federal Arbitration Act "to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."⁷⁵ Where an action is brought in contravention of an arbitration agreement, Chapter 1 Section 3 directs the court to "stay the trial of the action."⁷⁶ Since both the Convention and Chapter 2 would allow a stay as well as a dismissal, the "stay" provision of Chapter 1 Section 3 is "not in conflict" and applies by virtue of Section 208.

The *Cooper* majority erred in feeling compelled by the Convention to dismiss the action. The Convention does not "strip the courts of jurisdiction," but is satisfied by any procedure which prevents adjudication by the courts on the merits. Since the stay authorized under Section 3 is such a procedure it is applicable to the *Cooper* situation by virtue of Section 208. The appropriate course in *Cooper* would have been a stay of the proceedings pending arbitration.

III THE COMPATIBILITY PROBLEM

Since the Convention does not divest the courts of jurisdiction over an action violating an agreement to arbitrate falling under the Convention, there is no jurisdictional bar to the granting of pre-award attachment under the Convention. It is often argued, however, that because the Convention does not provide for attachment at this stage and pre-award attachment is incompatible with the purposes of the Convention, it cannot be granted. This is the "compatibility problem," the next subject of analysis.

A. The Language and Purpose of Art. II(3)

Article II(3) itself is silent on the question of pre-award attachment. Silence in other articles of the Convention has been interpreted as proscribing court action.⁷⁷ To determine whether this treatment also pertains to pre-award attachment under Article II(3), the scope of the exclusion of court action under Article II(3) must be examined. The question thus becomes whether a request for pre-award attachment is

75. 9 U.S.C. § 208 (1976).

76. 9 U.S.C. § 3 (1976).

77. For example, it is uniformly held that since Article V of the Convention does not refer to the correct application of the law by the arbitrator, court review of this question is prohibited. Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 299 (1959); A.J. VAN DEN BERG, *supra* note 3, at 269-74 (with extensive further references):

“an action in a matter in respect of which the parties have made an [arbitration] agreement.”⁷⁸ If it is, the court is not allowed to take action, but must refer the parties to arbitration.⁷⁹

This question is, again, one of interpretation of the Convention subject to the Vienna Convention.⁸⁰ Neither ordinary meaning⁸¹ nor context provide clear guidance as to the meaning of “action” in Article II(3).⁸² It is therefore necessary to look to the “object and purpose” of the Convention to determine the meaning to give to “action”. While the *Cooper* majority, like other courts,⁸³ relies on this interpretative

78. Convention, *supra* note 3, at Art. II(3); see *supra* text accompanying note 33.

79. It is settled that “there is nothing discretionary” about the referral mandated by Article II(3). VAN DEN BERG, *supra* note 3, at 135; see *I.T.A.D. Associates Inc. v. Podar Brothers*, 636 F.2d 75, 77 (4th Cir. 1981); *Ledee v. Ceramiche Ragno*, 528 F. Supp. 243, 245 (D. P.R.), *aff’d* 684 F.2d 184 (1st Cir. 1982); see generally, *supra* note 4, at 114-5. Therefore, the only issue is whether pre-award attachment is within the scope of Article II(3). The suggestion of a “balancing test” (Note, *Attachment*, *supra* note 2, at 1144) is thus incompatible with that author’s contention that pre-award attachment falls under Article II(3).

80. See *supra* text accompanying note 50. Some courts try to avoid this issue and bolster their argument against pre-award attachment by noting that resort to such attachment is a “violation of [the] agreement to submit the underlying disputes to arbitration”, *McCreary*, 501 F.2d at 1038, a “bypass [of] the agreed upon method of settling disputes”, *id.*, or “contrary to contract”, *Cooper*, 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. These statements beg the question. A preliminary question is whether the agreement to arbitrate indeed empowers the arbitrators to take, while barring the courts from ordering, interim measures. This depends on the procedural rules governing the arbitration. See, e.g., *supra* note 43 (arbitration under the old I.C.C. Rules). The *Cooper* majority does not mention whether the parties had agreed on any specific procedural rules. Even if the parties have agreed to empower only the arbitrators to take provisional measures, there still remains the question whether the Convention mandates enforcement of such an agreement. The existence of such an agreement alone does not resolve the question. See *infra* note 134.

81. As one court aptly stated: “The term ‘action’, in its usual sense . . . means a suit brought in court, a formal complaint within the jurisdiction of a court of law”. *Pathman Construction Co. v. Knox County Hospital Ass’n.*, 164 Ind. App. 121, 136, 326 N.E.2d 844, 853 (1975).

82. The argument that “in virtually all countries, attachment . . . cannot be ordered by the arbitrator, but has to be applied for at the court”, A.J. VAN DEN BERG, *supra* note 3, at 140, does not settle the question. The argument probably concerns “ordinary meaning” and “context” as used in the Vienna Convention on the Law of Treaties, in which case it implies that since virtually all countries do not permit such “actions” to be referred to the arbitrators, the meaning of “actions” in this context cannot include pre-award attachment. This argument fails because there are countries, including the United States, where arbitrators can order provisional remedies. See e.g., *Sperry International Trade Inc. v. Government of Israel*, 689 F.2d 301, 306-7 (2d Cir. 1982); *Compania de Navegacion Y Financiera Bosnia S.A. v. National Unity Marine Corporation*, 457 F. Supp. 1013, 1015 (S.D.N.Y. 1978) (United States); R. HUYS & H. KEUTGEN, *L’ARBITRAGE EN DROIT BELGE ET INTERNATIONAL*, 262-65 (1982) (Belgium); J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL*, 178-9 (1976) (France under the old law); Mezger, *Überblick über das französische Recht der Schiedsgerichtsbarkeit nach dem Reformdekret vom 14.5.1980*, 94 ZEITSCHRIFT FÜR ZIVILPROZESS, 117, 144-45 (1981) (France under the new law). There is thus by far no uniform rule on this point, so that the ordinary meaning and context cannot be relied upon for guidance.

83. See *Uranex*, 451 F. Supp. at 1052 (pre-award attachment compatible with purpose of the Convention); *Andros*, 430 F. Supp. at 92-3; *Paramount Carriers Corp. v. Cook Industries Inc.*, 465 F. Supp. 599, 602 (S.D.N.Y. 1979). But see *Metropolitan World Tanker Corp. v. P.N. Pertamina*, 427 F. Supp. 2, 4 (S.D.N.Y. 1975) (pre-award attachment incompatible with the Convention).

method, it misconstrues the Convention's purpose. Thus, the *Cooper* majority maintained that the Convention was drafted "to minimize the uncertainty of enforcing arbitration agreements and to avoid the vagaries of foreign law for international traders",⁸⁴ and felt that "this policy would be defeated by allowing a party. . . to obtain an order of attachment before arbitration."⁸⁵ It followed that the purpose of the Convention "will be best carried out by restricting pre-arbitration judicial action to determining whether arbitration should be compelled."⁸⁶ Implicit in this reasoning is the assumption that the purpose of the Convention is to "avoid the vagaries of foreign law" by restricting the application of forum law to situations where the Convention specifically mandates its application.

This assumption is erroneous. The Convention was specifically designed to include significant intervention of forum law in the enforcement process. Statutory history shows that "the Convention does not provide for a self-contained overall regulation of international arbitration,"⁸⁷ the result that would follow were the Convention to exclude all application of forum law. At the U.N. Conference on International Arbitration,⁸⁸ where the Convention was adopted, proposals to include procedural rules for the enforcement of arbitral awards in the Convention were dropped because they would have proved too cumbersome.⁸⁹ Moreover, at an early stage of the Convention's history, a draft by the

Certain authors also rely on this method. See, e.g., G. GAJA, *supra* note 3, at I.B.1 (purpose of the Convention better served if Article II is not interpreted as barring interim measures by courts).

84. *Cooper*, 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. The term "vagaries of foreign law" originates in the *McCreary* decision where the court actually employed the term "vagaries of state law" to describe the purpose of the removal provision of the implementing statute, 9 U.S.C. § 205 (1976). It did not use the term in interpreting the Convention itself. *McCreary*, 501 F.2d at 1038. Like other dicta in the *McCreary* decision, (see *supra* text accompanying notes 43-46, it has a history of misuse in later opinions. See, e.g., *Metropolitan World Tanker Corp. v. P.N. Pertamina* 427 F. Supp. 2, 4 (S.D.N.Y. 1975). The original *McCreary* argument, that the purpose of the removal provision is to prevent the "vagaries of state law" from impeding the implementation of the Convention and that therefore the use of state law attachment was proscribed, has been soundly refuted. See *Uranex*, 451 F. Supp. at 1052 (noting that state law is applied in attachment procedures despite the removal, by virtue of Rule 64 of the Federal Rules of Civil Procedure). Accord A.J. VAN DEN BERG, *supra* note 3, at 142; G. DELAUME, *TRANSNATIONAL CONTRACTS* § 13.14 at 99 (1982).

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

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

87. van den Berg, *Commentary Vol. VII*, 7 Y.C.A. 290, 299 (1982).

88. Conference on International Arbitration, held in New York from May 20, 1958 to June 10, 1958 [hereinafter cited as the "Conference"]. The preparatory materials are collected in U.N. Docs. E/Conf. 26 (1958).

89. See U.N. Doc. E/Conf. 26/2 at 4 (1958). The contention that "one of the primary purposes of the Convention [was] the promotion of uniformity of procedure surrounding enforcement of international arbitral awards" is therefore erroneous. But see Note, *Pre-award Attachment*, *supra* note 2, at 803.

ICC⁹⁰ proved unacceptable to the majority of states⁹¹ because it contemplated an arbitration which would be independent of individual national laws.⁹²

Although the Conference recognized that uniformity of national laws on arbitration would be a highly desirable result, it did not attempt to achieve this goal with the Convention itself. The ECOSOC resolution setting up the Conference provided that, in addition to concluding a Convention, the Conference should consider *other possible measures* for increasing the effectiveness of arbitration in the settlement of private law disputes and make such recommendations as it may deem desirable.⁹³ This item on the agenda⁹⁴ led to a resolution in the Final Act of the Conference⁹⁵ which embraced this view and stated that the Conference:

considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, . . . and suggests that appropriate attention be given to defining suitable subject matter for model arbitration statutes⁹⁶

Since uniformity of national laws on arbitration was viewed as a goal to be pursued outside the Convention, it is inaccurate to perceive the Convention's purpose as embracing that goal.

The statutory history shows that, while the purpose of the Convention was "to facilitate on an international level the enforcement of the arbitration agreement and award,"⁹⁷ the Convention did not seek to achieve this purpose by completely removing the enforcement of arbitration agreements and awards from the reach and "vagaries" of local law, as *Cooper* and prior cases seem to suggest. While certain matters under Article II(3) are to be governed exclusively by the Convention, others are to remain under the control of local law.

90. The initiative for a revision of the Geneva Agreements of 1923 and 1927 came from the I.C.C. which in 1953 issued a draft Convention. See INTERNATIONAL CHAMBER OF COMMERCE, ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS REPORT AND PRELIMINARY DRAFT CONVENTION, (I.C.C. Brochure No. 174, 1953 reproduced in U.N. Doc. E/C.2/373 (1953).

91. A.J. VAN DEN BERG, *supra* note 3, at 7. See also U.N. Doc. E/Conf. 26/S.R.2 at 7 (1958) (statements by delegates at the Conference, Italy).

92. See Statement of the Basic Differences Between the 1927 Geneva Convention and the ICC Proposal for the Enforcement of International Arbitral Awards, U.N. Doc. E/C.2/373/Add. 1 at 2 (1954). ECOSOC thereupon produced a new draft convention in 1955. U.N. Doc. E/2704 reprinted in G. GAJA, *supra* note 3, at III.A.1.1.

93. Resolution 604 (XXI), Recognition and Enforcement of Foreign Arbitral Awards, reprinted in G. GAJA, *supra* note 3, at III. A.1.9.

94. The item was referred to a committee. See U.N. Doc. E/Conf. 26/SR.5 at 3 (1955). After elaborate discussions, see U.N. Doc. E/Conf. 26/C.2/SR.1-5 (1958), U.N. Doc. E/Conf. 26/C.2/L.1-4 (1958), the committee produced a draft resolution. U.N. Doc. E/Conf. 26/C.2/L.4 (1958).

95. U.N. Doc. E/Conf. 26/9/Rev. 1 (1958).

96. *Id.* at 5-6.

97. van den Berg, *Commentary Vol. VII*, 7 Y.C.A. 290, 299 (1982).

B. The Dividing Line

Article II sheds no light on the dividing line between matters which are left to local law and those regulated exclusively by the Convention. However, in the area of enforcement of arbitral awards,⁹⁸ Article III draws the line explicitly: while the *conditions* for enforcement are governed by the Convention, the *procedure* for enforcement is left to the law of the enforcing forum.⁹⁹ Although any distinction between substance and procedure is inherently problematic, attachment in the area of enforcement of arbitral awards has been found to be "procedural" for the purposes of Article III.¹⁰⁰ Thus, this form of attachment is made available subject to the conditions of forum law, notwithstanding the Convention's silence on this point.

If this distinction were applicable by analogy to Article II, attachment in the area of enforcement of arbitration agreements would be classed as "procedural" and, consequently, would be available as allowed by local law. Both the history and purpose of this distinction in Article III warrant this analogy to Article II.¹⁰¹

The Article III distinction originated in Article I of the Geneva Convention of 1927,¹⁰² where it was argued that incorporation of procedural provisions for the enforcement of awards into the 1927 Convention was impossible because the procedural laws of the contracting states were too diverse.¹⁰³ From there, the distinction was carried over

98. This is a distinct, though related, area of the enforcement of arbitration agreements.

99. The first sentence of Article III of the Convention provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the *rules of procedure of the territory* where the award is relied upon, under the conditions laid down in the following articles." Convention, *supra* note 3, at Article III (emphasis added). The only limit which the Convention places on the application of the procedural law of the forum is embodied in the second sentence of Article III which states: "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." *Id.* See also *infra*, note 94.

100. A.J. VAN DEN BERG, *supra* note 3, at 240. The fact that those courts mentioning attachment for the enforcement of arbitral awards do not refer to a possible incompatibility of attachment with the Convention, together with the fact that there is no published U.S. case directly on point, indicates that the courts have, as settled practice, correctly applied only forum law to the question. See, e.g., *Imperial Ethiopian Government v. Baruch-Foster Corp.* 535 F.2d 334, 336 (5th Cir. 1976). See also *McCreary*, 501 F.2d at 1038 ("Quite probably foreign attachment may be available for the enforcement of an arbitration award").

101. Accord A.J. VAN DEN BERG, *supra* note 3, at 143.

102. Convention for the Execution of Foreign Arbitral Awards, done Sept. 26, 1927, 92 L.N.T.S. 302. Article 1 states that "... an arbitral award ... shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon."

103. *Draft Protocol on the Execution of Foreign Arbitral Awards, Report of the Committee of Legal Experts and Text of its Draft*, 8 LEAGUE OF NATIONS O. J. 890, 894 (1927); O. GREMINGER, DIE GENFER ABKOMMEN VON 1923 UND 1927 ÜBER DIE PRIVATE INTERNATIONALE SCHIEDSGERICHTSBARKEIT, 47 (1957).

into the ICC-draft¹⁰⁴ and the ECOSOC-draft.¹⁰⁵ While certain governments urged the incorporation of uniform rules of procedure into the New York Convention, this suggestion was not adopted for the same reason that it was not taken up in the Geneva Convention.¹⁰⁶ As far as the summary records show, this matter ceased to be an issue at the Conference itself.¹⁰⁷ Therefore, the distinction between "conditions for enforcement" (governed by the Convention) and "procedures for enforcement" (governed by forum law) is maintained by Article III for the sole reason that the great diversity of the procedural laws of the contracting states make uniform regulation by a convention impracticable.

This rationale applies with equal force to the area covered by Article II. The procedural laws for the enforcement of arbitration agreements are as diverse as those regulating the enforcement of awards, making a uniform procedure no less cumbersome under Article II than under Article III. Since the distinction between procedural and substantive matters serves the same purpose when applied to Article II as it does in Article III, it should therefore be extended by analogy to Article II of the Convention.

The task, then, is one of separating those matters which are "conditions for enforcement" from those embodying "procedures for enforcement" and determining whether pre-award attachment falls under the latter. The "conditions for enforcement" of an arbitration agreement are established by the Convention in Article II. These conditions require that there be a dispute concerning a defined legal relationship, the subject matter of which is capable of settlement by arbitration. In addition, the agreement to arbitrate must be in writing,¹⁰⁸ and one party must request referral.¹⁰⁹ Finally, the agreement must not be "null and void, inoperative or incapable of being performed."¹¹⁰ If these conditions are satisfied, the court must refer the parties to arbitration and further court inquiry into any condition not enumerated by

104. See *supra* note 90.

105. See *supra* note 92.

106. See *supra* note 89.

107. See U.N. Docs. E/Conf. 26/SR. 10, 11, 13, 26 (1958) where Article III (Article II of the ECOSOC Draft) was discussed. However, the matter was touched upon by the second sentence of Article III, see *supra* note 99. The discussion of this provision created a "Babel-like confusion" at the Conference due to the diversity of the procedural backgrounds of the delegates. A.J. VAN DEN BERG, *supra* note 3, at 235. The minimum compromise reached in this area shows that the diversity of procedural laws had not diminished since 1927.

108. Convention, *supra* note 3, at Art. II(1).

109. *Id.*, at Art. II(3).

110. *Id.*

the Convention is barred.¹¹¹

Matters which are not "conditions for enforcement" are "procedural"¹¹² and are left to forum law. The courts already have drawn and applied the distinction in certain procedural matters. In addressing the question of which court is competent for the enforcement of arbitral agreements, courts have applied forum law which, in the United States, includes Section 205 of the Federal Arbitration Act¹¹³ providing for removal to federal court. A strict *Cooper* rationale would argue that, since a motion to remove delays arbitration, it is one of the "vagaries" of American law which the Convention is "designed to avoid." However, no court has ever thought removal incompatible with the Convention,¹¹⁴ apparently because the Convention does not indicate which court is competent to enforce the arbitral agreement and, being a procedural matter, the question of removal is regulated by forum law.

This application of forum law to procedural matters should be applied to pre-award attachment under Article II by analogy to both Article III and current court practice. Attachment is no more a "condition for enforcement" of an arbitration *agreement* under Article II than it is a "condition for enforcement" of an arbitration *award* under Article III. As such, pre-award attachment should be treated as a procedural matter and administered accordingly under local law.

111. For example, a court may not inquire into the timeliness of a demand for arbitration unless the delay renders the arbitration agreement "null and void, inoperative or incapable of being performed" under the applicable law. Implicitly, this classification also bars any court action which would affect the merits of the dispute, unless the court first finds that the conditions for enforcement of the arbitration agreement are not met, since such inquiry into the merits would violate the mandate to "refer" to arbitration. A.J. VAN DEN BERG, *supra* note 3, at 168.

It need not be decided here whether the proposed analogy would also make the second sentence of Article III applicable to Article II, since the grant or denial of attachment does not subject the enforcement of the arbitration agreement to "substantially more onerous conditions" or "higher fees or charges" than it does for domestic awards. See *supra* note 99.

112. It is a question of semantics whether these questions are called "procedural in the sense of Article III" or "incidental to the enforcement unregulated by the Convention". See A.J. VAN DEN BERG, *supra* note 3, at 240 (endorsing the latter terminology).

113. 9 U.S.C. § 205 (1976).

114. See *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-6 (1st Cir. 1982); *I.T.A.D. Associates Inc. v. Podar Brothers*, 636 F.2d 75, 76 (4th Cir. 1981); *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 971 (2d Cir. 1974); *Fuller Company v. Compagnie des Bauxites de Guinee*, 421 F. Supp. 938, 939 (W.D.Pa. 1976).

Another example of this practice is discovery which was expressly allowed after a stay and referral to arbitration in London under the Convention. See *Star-Kist Foods Inc. v. Diakan Hope S.A.*, 423 F. Supp. 1220 (C.D.Cal., 1976). The court order read: "To prepare for such arbitration the parties shall have the opportunity for such discovery as they would be entitled to *under the rules and jurisdiction of this Court*, and this Court may exercise its continuing jurisdiction to entertain motions of the parties regarding discovery" *Id.* at 1221 (emphasis added).

C. The History of Art. II(3)

The availability of pre-award attachment is further compelled by the history and preparatory materials of Article II(3). The Convention was not intended, at the outset, to deal with the enforcement of arbitration agreements.¹¹⁵ However, concern voiced by several states that this omission might permit avoidance of the obligation to arbitrate under the arbitration agreement led to the creation of a working party which drafted an additional protocol.¹¹⁶ Article III of this protocol dealt with the subject matter now covered by Article II(3) of the Convention.¹¹⁷

The Netherlands later proposed to incorporate this additional protocol into the Convention and presented a draft article for this purpose.¹¹⁸ Paragraph 3 of the draft article dealt with the subject matter of Article III of the additional protocol, but in much broader terms.¹¹⁹ Though the Conference adopted the subject matter of the additional protocol into the Convention,¹²⁰ it replaced Paragraph 3 of the Netherlands draft article with Article III of the draft protocol.¹²¹ The reasons for this textual change help to illuminate the meaning attached by the Conference to the current Article II(3). The draft protocol's formulation was preferred because under Paragraph 3 of the Netherlands draft "matters might be referred to arbitration which were wholly within the purview of domestic courts."¹²² A comparison of the two texts shows that these matters "wholly within the purview of domestic courts" can only be *procedural* and related matters, since they are the only issues "referrable" under the rejected language which are not referrable to the arbitrators "for decision."¹²³ Thus, the discussions at the Conference

115. The Ad Hoc Committee of ECOSOC was divided on this point. See U.N. Doc. E/2704, para. F, reprinted in G. GAJA, *supra* note 3, at III.A.1.203.

116. U.N. Doc. E/Conf. 26/L.52 (1958).

117. Article III of the protocol stated:

1. The courts of the Contracting States Parties to this Protocol, if seized of an action relating to a contract which includes an arbitration agreement valid under article I and capable of execution shall, at the request of one of the parties, refer the parties concerned to arbitrators *for decision*.

2. Such action shall not prejudice the competence of the courts if, for any reason, the arbitration agreement, arbitral clause or arbitration has become null and void or inoperative. *Id.*

118. U.N. Doc. E/Conf. 26/L.54 (1958).

119. Paragraph 3 stated: "In case one of the parties invokes the existence of an agreement in writing before the courts these (sic) will refer the parties to arbitrators, without prejudice however to the competence of the courts." *Id.*

120. U.N. Doc. E/Conf. 26/SR.21 at 17 (1958).

121. *Id.* at 22.

122. U.N. Doc. E/Conf. 26/SR.21 at 19 (1958) (Statement of the Israeli delegate).

123. Any other interpretation eliminates any difference between the two texts and therefore cannot be deemed to reflect the intention of the Conference. The text thus adopted at the plenary meeting, U.N. Doc. E/Conf. 26/L. 59 (1958), was referred to the drafting committee which produced a version corresponding to the present Article II(3), differing only in that the words "of its own motion or" were included after "shall". U.N. Doc. E/Conf. 26/L.61 (1958). There are no

indicate a distinction between the handling of procedural and substantive issues under Article II(3), suggesting that procedural matters be governed by local law. This inference is further supported by statements of Conference delegates in the debate over Article II itself, and leads to the conclusion that Article II(3) was intended to preclude court action only in substantive matters.¹²⁴

Other aspects of Convention history corroborate the inclusion of pre-award attachments as "procedural matters." Article III of the additional protocol, the basis for Article II(3) of the Convention, is based on Article 5 of the 1923 Geneva Protocol.¹²⁵ During the lengthy debate over Article II the matter of attachment was never directly mentioned.¹²⁶ Since the Geneva Protocol was at this time uniformly interpreted as allowing pre-award attachment,¹²⁷ it is highly unlikely that the Conference intended the new article to change accepted practice by excluding pre-award attachment without once mentioning the change.

records of the discussions in the drafting committee available. The fact that the Conference adopted this version without mention of a possible difference to the draft L.59 indicates that no change of meaning between those two drafts was intended. *See* U.N. Doc. E/Conf. 26/SR.23 at 14 (1958). Finally, at the last session of the Conference, the words "of its own motion or" were reconsidered and deleted. U.N. Doc. E/Conf. 26/SR.24 at 9 (1958).

124. Statement of the delegate of the U.S.S.R.: "*Mr. Bakhtov* did not understand why it was proving so difficult to arrive at a text that would plainly say that courts should not *adjudicate* where there had been an agreement to arbitrate but should *facilitate the arbitration* originally agreed upon". U.N. Doc. E/Conf. 26/SR.21 at 22 (1958) (emphasis added).

125. Protocol on Arbitration Clauses, *done* Sept. 24, 1923, 27 L.N.T.S. 158. Article 4 states:

(4) 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 . . . 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.

126. *See* U.N. Doc. E/Conf. 26/SR.21 at 17-23 (1958); L. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE MAY/JUNE 1958, 21-8 (1958). It has been suggested that the entire problem of pre-award attachment under the Convention arises from the fact that the United States delegation to the Conference took no part in the work of the drafting committees. Note, *Attachment*, *supra* note 2, at 1141 n.45. *See generally* Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: the First Four Years*, 5 GA. J. INT'L. & COMP. L. 471, 472 (1975). However, the delegate from the United Kingdom took an active part in the discussion of Article II, *see, e.g.*, U.N. Doc. E/Conf. 26/SR.21 at 18-23 (1958), providing insight from a delegate of a country whose legal system provides for prejudgment attachment.

127. Nussbaum, *Treaties on Commercial Arbitration — A Test of International Private-Law Legislation*, 56 HARV. L. REV. 219, 225 n. 39 (1942), an expanded version of which appeared at Nussbaum, *Staatsverträge im Bereich des Schiedsgerichtswesens als Prüfstein internationaler Privatrechtsregelung*, 4 ARCHIV DES VÖLKERRECHTS 385 (1953/54), at 391 n.40. *See also* O. GREMINGER, DIE GENFER ABKOMMEN VON 1923 UND 1927 ÜBER DIE PRIVATE INTERNATIONALE SCHIEDSGERICHTSBARKEIT, 30 (1957); Judgment of Jan. 17, 1933, Oberster Gerichtshof (Supreme Court, Austria) 4 INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESEN 126 (1934).

The preparatory materials to the Convention therefore confirm that the "actions" encompassed by Article II and required to be referred to arbitration do not include all conceivable measures which a party might request from a court. As to the exact delimitation, an analogy from Article III shows that procedural matters, which include attachment, are excluded from the scope of Article II, and left to local law for regulation. The silence of Article II on pre-award attachment does not bar the courts of a Contracting State from ordering it. Whether pre-award attachment may be granted must be determined by reference to the "law of procedure of the territory where the agreement is relied upon."

D. The United States Implementing Act

The United States "local law" includes Chapter 2 of the Federal Arbitration Act.¹²⁸ As was seen above, the limited reach of Section 206, implementing Article II(3), makes it inapplicable to questions other than the place where arbitration may be ordered.¹²⁹ Since no other provision of Chapter 2 applies to pre-award attachment, Section 208 again renders the provisions of Chapter 1 applicable.¹³⁰

Chapter 1 distinguishes between maritime and non-maritime cases. In maritime cases, Section 8 provides that pre-award attachment is available under the standards applicable in admiralty cases.¹³¹ In non-maritime cases such as *Cooper*, Chapter 1 is silent as to the availability of pre-award attachment. The courts have nonetheless determined that Chapter 1 does not bar the granting of pre-award attachment.¹³² As to

128. 9 U.S.C. §§ 201-208 (1976).

129. See *supra* text accompanying notes 71-74.

130. See *supra* text accompanying note 75.

131. The exact reach of Section 8 is unsettled. Since it could be read as providing only for actions seeking attachment for jurisdictional purposes, it is unclear whether Section 8 can be used to obtain attachment solely for security purposes. Compare *Metropolitan World Tanker Corp. v. P.N. Pertambangan* 427 F. Supp. 2, 4 (S.D.N.Y. 1975) with *Paramount Carriers Corp. v. Cook Industries Inc.*, 465 F. Supp. 599, 602 (S.D.N.Y. 1979). A related problem is until which stage of the arbitration attachment may be ordered. Compare *Instituto Cubano de Establizacion v. T/V Firbranch*, 130 F. Supp. 170, 172 (S.D.N.Y. 1954); *Reefer Express Lines Pty. Ltd. v. Petmovar S.A.*, 420 F. Supp. 16, 17-18 (S.D.N.Y. 1976); *Andros*, 430 F. Supp. at 93, with *Sommer, Maritime Arbitration—Some of the Legal Aspects*, 49 TUL. L. REV. 1035, 1040-1 (1975). See generally *Smith, Security for an Arbitration Award, A United States View*, 78 IL DIRITTO MARITIMO 133, 135-8 (1976).

If Section 8 applies, the conditions under which attachment is available are set forth the Supplemental Rules for Certain Admiralty and Maritime Claims, FED. R. CIV. P. SUPP. R. (A), (B).

132. *Murray Oil Products Co. Inc. v. Mitsui & Co. Ltd.*, 146 F.2d 381 (2d Cir. 1944); *Uranex*, 451 F. Supp. at 1051; *Barge Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44-45; 64 S.Ct. 863, 865, 88 L.Ed. 1117, 1120 (1944) (dictum). The continuing vitality of *Murray Oil Products* has been the subject of a controversy between the *Uranex* court and the court in *McCreary*. Compare *McCreary*, 501 F.2d at 1038 (the contention of *Murray Oil Products*, that arbitration is

the conditions under which attachment may be granted, Federal Rule of Civil Procedure 64 directs the federal courts to apply state law.¹³³ The availability of pre-award attachment in non-maritime cases is therefore governed by state law.¹³⁴ The *Cooper* court should therefore have examined the availability of pre-award attachment under New York law, rather than dismissing the action as not consonant with the Convention's purpose.¹³⁵

IV CONCLUSION

The *Cooper* decision erred in its handling of both the "referral" and "compatibility" problems. It is telling that its rationale in dismissing *Cooper's* cause of action is ambiguous, for it would have been difficult, if not impossible, to explicitly reconcile the court's citations of the misapplied *McCreary* dicta with a proper interpretation of Article II(3) and its implementing legislation. Indeed, Article II(3) as implemented by Title 9, Chapters 1 and 2 appears to resolve the referral issue in favor of requiring a court to grant a stay, rather than a dismissal.

merely another method of trial to which state provisional remedies should apply, was rejected in *Bernhardt v. Polygraphic Co. of America*) with *Uranex*, 451 F. Supp. at 1051 n. 3 (none of the questions decided in *Murray Oil Products* were involved in *Bernhardt*). See also *Andros*, 430 F. Supp. at 92-3; Healy, *Obtaining Security in Aid of Arbitration*, (1976) LLOYD'S MAR. & COM. L.Q. 267. But see *Compania de Navegacion v. Financiera Bosna S.A. v. National Unity Marine Salvage Corp.*, 457 F. Supp. 1013 (S.D.N.Y. 1978) where the court relies on the "policy of the Federal Arbitration Act" to deny granting a further attachment and directs the moving party to apply to the arbitrators for relief. *Id.* at 1015. The lack of citation to any statutory provision makes it impossible to say with certainty whether the court sought to limit via dictum the *Murray Oil Products* holding, as its language suggests, or whether the court's rationale pertains to the controversy over the stage of the arbitration after which attachment under Section 8 can no longer be granted. See *supra* note 131.

133. Rule 64 of the Federal Rules of Civil Procedure provides in pertinent part that all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held The remedies thus available include . . . attachment.

134. This conclusion applies also to an eventual explicit agreement to leave provisional measures solely to the arbitrators. See *supra* note 80. Thus, while such agreements are unenforceable in maritime cases under *Barge Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 46, (1944) (Application of § 8 of the Federal Arbitration Act may not be contractually excluded), their enforceability in non-maritime cases depends upon the applicable state law.

135. Taking into account the conclusion in Part II that a stay of the action for money damages was the appropriate measure, the case seems to be governed by *American Reserve Insurance Co. v. China Insurance Co. Ltd.*, 297 N.Y. 322, 79 N.E.2d 425 (1948), as stated in *Cooper* majority opinion. See *supra* note 11. Thus, the attachment should have been confirmed unless the court chose, in its discretion, to vacate it. It is in this connection, as an issue bearing on the discretion afforded the court under New York state law, that the court should have considered the argument that it "is open to dispute whether attachment is even necessary in the arbitration context" given the high rate of voluntary compliance with awards and the assurance provided to the winning party that it will be able to enforce the award almost anywhere in the world. See *Cooper*, 957 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

While *Cooper's* reasoning regarding the compatibility problem is delineated, this proves to be a mixed blessing, as other courts may use it as authority for finding pre-award attachment incompatible with the purposes of the Convention. This result is unfortunate, as the history and preparatory materials of the Convention as well as the language of the Convention and its implementing act demonstrate an intention to apply forum law to procedural issues in suits under the Convention. As pre-award attachment is such a procedural matter, courts are obliged to provide for pre-award attachment as available under local law.