An Argument for Pre-Award Attachment in International Arbitration under the New York Convention

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NOTE

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INTRODUCTION

Commerce has evolved from neighborhood trading into complex international transactions. Along with profits from expanding foreign markets has come the complexity of international litigation when commercial agreements break down. The fear that applying the law of one party's forum may result in prejudice to the opposing foreign party and the threat of leaving a victorious plaintiff with an unenforceable judgment make litigation an undesirable means of resolving international commercial disputes.

Arbitration is an alternative that avoids the delay and expense of international commercial litigation. Arbitration also allows parties to determine, before a controversy arises, who will resolve their dispute and what the basis of its resolution will be. Because of these

1. See Sanders, Trends In the Field of International Commercial Arbitration, II RECUEIL DES COURS 205, 216 (1975). Lack of judicial familiarity with foreign procedural and substantive law further complicates the litigation of controversies arising from international transactions. See Burnstein, Arbitration of International Commercial Disputes, 6 B.C. INDUS. & COM. L. REV. 569, 569-72 (1965). Because arbitrators are often experts in the commercial field underlying the arbitration, they are often more perceptive in examining the facts of a dispute than a judge would be. Further, arbitral procedure is generally more flexible than court procedure.

2. A plaintiff's success in one jurisdiction does not ensure that a foreign court will enforce his judgment. It may be mere chance that the defendant's assets are located in the same foreign arbitral forum that the parties chose for its neutrality, experience, or other qualities important at the time of signing the contract. See Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 633 (9th Cir. 1982) (maritime attachment permitted to ensure availability of security to satisfy arbitral award).


4. It is widely recognized that the law chosen by the parties will govern the proceedings of an arbitral tribunal. . . . Even if the parties have made no express choice of law, they have chosen to resolve their disputes by arbitration and, hence, authorized the arbitrators to determine the legal principles applicable to specific issues before the tribunal.

advantages, arbitration is less likely to destroy ongoing commercial relations than litigation, explaining the marked preference for arbitration as a means to resolve international commercial disputes.\(^5\)

Arbitration is effective only if the parties abide by their agreement to arbitrate and honor the arbitral decision. When a party refuses to arbitrate or seems unlikely to honor the outcome, judicial remedies, such as pre-award attachment and garnishment, may be useful to coerce cooperation. It is uncertain whether an arbitral clause in an international commercial agreement should preclude a court from granting a motion for pre-award attachment before the commencement or resolution of an arbitral proceeding. United States courts\(^6\) and commentators\(^7\) are split in their positions on whether pre-award attachment is inimical to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).\(^8\)


7. See infra notes 38-43 and accompanying text.

This Note argues that pre-award attachment should be allowed to supplement the procedures of the New York Convention. First, the Note shows that, rather than contravening the Convention’s goal of uniformity, pre-award attachment actually promotes the Convention’s underlying objectives of providing international standards for the recognition and enforcement of foreign arbitral awards. Second, the Note presents U.S. cases involving maritime attachment under the Convention as evidence of a strong U.S. policy in favor of attachment and argues that this policy should be extended to all international arbitral proceedings governed by the Convention. The Note concludes with a model that suggests that courts consider the law to be applied and the location of the arbitral forum in determining whether to grant a motion for pre-award attachment.

I. PRE-AWARD ATTACHMENT UNDER THE NEW YORK CONVENTION

A. ENFORCEMENT OF ARBITRAL AGREEMENTS BEFORE THE NEW YORK CONVENTION

Before the enactment of the United States Arbitration Act of 1925 (the Arbitration Act), U.S. courts generally refused to enforce contractual provisions for arbitral resolution of commercial disputes. Passage of the Arbitration Act ended judicial hostility by validating enforcement of arbitral agreements in all commercial areas under federal jurisdiction. Nevertheless, passage of the Arbitration Act generated questions concerning the necessity or fairness of a court’s granting motions for provisional remedies to protect parties’ interests during arbitration. This Note focuses exclusively on the remedy of

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9. See infra notes 73-86 and accompanying text.
10. See infra notes 146-48 and accompanying text.
11. See infra notes 149-51 and accompanying text.
13. For a discussion of judicial reluctance to enforce agreements to arbitrate, see Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924). See also United States v. Columbus Marine Corp. (The Schoon), 8 F.2d 315 (S.D.N.Y. 1925). This judicial hostility was based on the belief that arbitral agreements are intended to rob courts of their jurisdiction. See Comment, International Commercial Arbitration, supra note 5, at 443-45.
14. The history of judicial attitudes toward arbitration was summarized in Kulukundis Shipping Co., S/A v. Amtorg Trading Corp. (The Mount Helmos), 126 F.2d 978 (2d Cir. 1942) (the Arbitration Act should not be construed narrowly) (per Frank, J.). Even in 1938, one federal court refused to bind a party attempting to escape from an arbitration provision, stating, “Arbitration sometimes involves perils that even surpass the perils of the sea.” In re Canadian Gulf Line (The Soloy), 98 F.2d 711, 714 (2d Cir. 1938).
16. For two cases in which the courts found that pre-award attachment was consistent with the provisions of the Arbitration Act, see infra notes 18-20.
pre-award attachment, which is used to achieve jurisdiction over a defendant in order to compel arbitration or to preserve assets pending completion of the arbitral process.  

Two cases that upheld pre-award attachment illustrate U.S. courts’ position that pre-award attachment was proper in cases involving arbitration agreements that were enforceable under the Arbitration Act. In one case, the plaintiff procured attachment before attempting to enforce the contractual provision to arbitrate. In the other case, the plaintiff procured attachment when the selection of an arbitral panel was nearly finished and arbitration was about to begin. Thus, the courts’ obligation under the Arbitration Act to enforce arbitral agreements, which precluded judicial resolution on the merits, did not bar pre-award attachment to preserve a defendant’s assets. Instead, the courts recognized that provisional remedies such as attachment promote the arbitral process by ensuring the enforceability of arbitral awards.

17. See generally 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 2931-2934 (1973) (discussing the mechanics of attachment). Attachment in federal court is accomplished through use of Fed. R. Civ. P. 64. This rule authorizes use of provisional remedies at the beginning and throughout the course of legal action in the manner provided by the law of the state in which the federal court sits. If a request for attachment is successful, the court will retain custody of the property until the controversy has been resolved. The grounds for attachment vary considerably between states; most require a showing of fraud or some proof of an attempt to conceal or remove assets from the jurisdiction.

State attachment procedures are subject to the statutes and Constitution of the United States. For a discussion of the constitutionality of pre-arbitral attachment in light of recent Supreme Court decisions upholding certain state sequestration procedures, see Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 637-40 (9th Cir. 1982).


19. In American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 79 N.E.2d 425, 79 N.Y.S.2d 322 (1948), two insurance companies entered into a reinsurance agreement containing an arbitration clause. When the Chinese company avoided an obligation to pay premiums to its American counterpart, the American company brought suit and procured ex parte attachment of the defendant’s assets in New York. The court denied the defendant’s motion to vacate the attachment, stating, “[I]t is not even proper for the defendant in such an action to plead the arbitration agreement as a defense or counterclaim.” 297 N.Y. at 326-27, 79 N.E.2d at 427, 79 N.Y.S.2d at 326-27.


21. The most common reason for arbitration is to substitute the speedy decision of specialists in the field for that of juries and judges; and that is entirely consistent with a desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do.

Murray Oil Prod. Co. v. Mitsui & Co., 146 F.2d 381, 384 (2d Cir. 1944) (per Learned Hand, J.). But see Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975) (denying attachment, because it would have placed the defendant under undue pressure to settle in order to release his attached assets). See generally Kheel, New York’s Amended Attachment Statute: A Prejudgment
Domestic cases granting attachment under the Arbitration Act evince the pro-attachment posture of U.S. courts. Nonetheless, movement to an international arena complicates the question of whether courts should grant motions for pre-award attachment. Although attachment would ensure recovery of an arbitral award against a foreign party, this advantage must be considered against the backdrop of international agreements governing the arbitral process.

B. THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (THE NEW YORK CONVENTION)

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) was drafted to encourage the recognition and enforcement of international commercial arbitration agreements and to promote international uniformity in the standards underlying enforcement of arbitral awards. The United States did not become a signatory until 1970.

Remedy in Need of Further Revision, 44 Brooklyn L. Rev. 199 (1978). Methods exist, however, for controlling abuse. Due process requires the plaintiff to post bond before attachment is granted and to give notice and the opportunity for a hearing prior to depriving a person of "any significant property interest." Fuentes v. Shevin, 407 U.S. 67, 82 (1972). But see Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982) (due process does not require notice because notice can defeat purposes of attachment—obtaining jurisdiction and security).

22. New York Convention, supra note 8.


24. For the reasons behind the United States' delay in ratifying the New York Convention, see Aksen, 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, 4 (1971). The author sets forth four reasons: the delegation believed (1) that adopting the Convention in a manner that avoids conflict with state law would remove any advantages that the United States could gain from ratification; (2) that an acceptance that assures any advantages to the United States would necessarily invalidate most states' arbitration laws; (3) that the United States did not have a sufficient legal basis for accepting an international agreement in the area of arbitration; and (4) that the Convention contained principles of arbitral law that were undesirable for U.S. endorsement. These reasons are also advanced in Quigley, supra note 23, at 1074 n.108. Sixty-one nations had become members by January 1, 1983. See U.S. Dep't of State, Office of the Legal Advisor, Treaties in Force: A List of Treaties and Other Interna-
In enacting legislation to implement the New York Convention, Congress maintained the old Arbitration Act, designating it as Chapter I, and added the implementing legislation for the New York Convention as Chapter II. In order to resolve potential conflicts between the old Arbitration Act and the New York Convention, Congress specified that Chapter I would govern only when it does not conflict with Chapter II.

Cases that fall within the terms of the Convention may be removed to federal court. When federal courts cannot apply the New York Convention to a particular international commercial controversy, other mechanisms are often available for the recognition
and enforcement of the underlying arbitral agreement.\textsuperscript{30}

The provision of the New York Convention that has generated controversy among U.S. courts over the availability of pre-award attachment is Article II, section 3:

\begin{quote}

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.\textsuperscript{31}

\end{quote}

This controversy over the availability of pre-award attachment arises because neither the language of the New York Convention nor its implementing legislation\textsuperscript{32} indicates whether the Convention was intended to prevent a court from granting a motion for pre-award attachment.\textsuperscript{33} Similarly, the legislative history of the Convention's articles\textsuperscript{34} and its introductory materials\textsuperscript{35} provide little from which to refuse to enforce an arbitral award if it would be contrary to public policy. It is generally recognized that the public policy defense should be construed narrowly. See Note, The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards, 7 CAL. W. INT'L L.J. 228 (1977). For a detailed discussion of the Convention's provisions for defenses to enforcement and a comparison of how the courts of the various member nations have interpreted them, see A. VAN DEN BERG, supra note 23, at 275-357. The Supreme Court suggested that the arbitrators' manifest disregard of the law would warrant refusal to enforce an award under Chapter I of the Arbitration Act. Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (dicta).

\textsuperscript{30} See generally Note, Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention, 23 VA. J. INT'L L. 75 (1982) (other statutory means for enforcement include the 1925 Arbitration Act; the Treaty of Friendship, Commerce, and Navigation; State law; and conversion of the foreign arbitral award to a foreign judgment in order to bring that judgment to the United States for enforcement through reciprocity under the doctrine of Hilton v. Guyot, 159 U.S. 113 (1895)).

\textsuperscript{31} New York Convention, supra note 8, at art. II, § 3 (emphasis added); 9 U.S.C. § 201 (1982). The first two sections of Article II provide,

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract of an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

New York Convention, supra note 8; 9 U.S.C. § 201.

\textsuperscript{32} See generally Asken, supra note 24, at 14-23 (summarizing the implementing legislation).


\textsuperscript{34} The legislative history of the New York Convention's articles is summarized in G.W. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS (1958). The preparatory materials of the U.N. Conference on International Arbitration, in which the Convention was adopted, are collected in U.N. Doc. E/Conf.26 (1958).

\textsuperscript{35} The introductory materials to the New York Convention are reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, supra note 23, at pt. III.
surmise the drafters’ intent.\(^\text{36}\)

C. McCREARY AND ITS ADVOCATES: ARGUMENTS AGAINST PRE-AWARD ATTACHMENT UNDER THE NEW YORK CONVENTION

United States courts have found the attachment of assets as a means to secure potential arbitral awards to be consistent with the Arbitration Act.\(^\text{37}\) In order to determine the appropriate division of judicial and arbitral roles under the New York Convention, an examination of the impact of U.S. implementation of the Convention upon the pro-attachment posture of American courts is necessary.

Two commentators have argued that courts should not allow pre-award attachment to supplement arbitral agreements that are governed by the Convention and that attachment is warranted only in extraordinary circumstances.\(^\text{38}\) They advance four contentions: (1) pre-award attachment is unnecessary because the Convention ensures international recognition of arbitral decisions and allows for post-award attachment to satisfy arbitral awards;\(^\text{39}\) (2) pre-award attachment contradicts the Convention’s objective of international uniformity, because federal courts apply state attachment procedures;\(^\text{40}\) (3) pre-award attachment contradicts international uniformity, because attachment procedures are not available in all of the signatory nations;\(^\text{41}\) and (4) the Convention’s provision that a court “shall . . . refer the parties to arbitration”\(^\text{42}\) precludes judicial intervention in the arbitral process, such as granting a motion for pre-award attachment.\(^\text{43}\)

\(^{36}\) The paucity of information led one commentator to conclude accurately, “[T]he conference appears never to have addressed the issue of pre-award remedial procedures.” Note, Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 VA. J. INT’L L. 788, 791 (1981). Although the New York Convention “gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security,” this is only in the context of post-award enforcement. Sanders, Court Decisions on the New York Convention of 1958, IV Y.B. COM. ARB. 223, 237 (1979).

\(^{37}\) See supra notes 18-20 and accompanying text.


\(^{39}\) Note, Pre-Award Attachment Under the U.N. Convention, supra note 36, at 802.

\(^{40}\) Id.

\(^{41}\) Note, Attachment Under the United Nations Convention, supra note 38, at 1141-42.

\(^{42}\) New York Convention, supra note 8, at art. II, § 3. See supra text accompanying note 31 for the entire provision.

\(^{43}\) One commentator has suggested that the possibility of including provisions for pre-award attachment in the New York Convention never occurred because none of the participants in the actual drafting of the New York Convention were from countries that had similar procedures, such as the United States. Mirabito, The United Nations Convention on the
Two of these arguments were embraced in *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, the first case in which a federal court was forced to decide the compatibility of pre-award attachment with an arbitral agreement governed by the Convention. In *McCreary*, the plaintiff, a Pennsylvania corporation, sued CEAT, an Italian corporation, for breach of contract. Although the contract provided for arbitration of disputes in Brussels under Italian law, the plaintiff brought suit in Pennsylvania state court and attached CEAT's assets pursuant to state law. CEAT removed the action to federal district court and moved to dissolve the attachment. The motion was denied.

The United States Court of Appeals for the Third Circuit reversed the district court's order and vacated the attachment order. In order to justify its holding, the Third Circuit had to distinguish pre-Convention cases that had held that the Arbitration Act's requirement to "stay the trial of the action" did not preclude a court from requiring parties to submit to arbitration or from enforcing provisional remedies such as attachment. The Third Circuit held that the Convention's provision that courts "shall . . . refer the parties to arbitration" compels courts to send the entire controversy to the arbitral body designated by the parties and to refrain from ordering pre-award attachment. In addition, the court remanded the case to the district court with instructions to refer the disputed claims to arbitration pursuant to the parties' arbitration agreement.

To support its interpretation of the Convention, the *McCreary* court turned to the statutes implementing the Convention in the United States. The court found that the provision for removal to federal court without regard to diversity or amount in controversy demonstrated the "firm commitment of the Congress to the elimina-

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44. 501 F.2d 1032 (3d Cir. 1974).
45. The parties' contract called for arbitration under the rules of the ICC, making the New York Convention applicable to the arbitral agreement. Id. at 1036.
46. Id. at 1035.
47. In Balter v. Bato Co., 385 F. Supp. 420, 423 (W.D. Pa. 1974), the court explained the purposes of the Pennsylvania foreign attachment statute. "In addition to the goal of obtaining jurisdiction of an out-of-state defendant, the statute also ensures, until the entrance of suitable bond, a fund or res from which the plaintiff is insured satisfaction at least to some extent of any judgment he may obtain."
48. 501 F.2d at 1033.
49. 9 U.S.C. § 3 (1982). For the full text of the provision, see infra note 65.
50. 501 F.2d at 1038.
51. New York Convention, supra note 8, at art. III, § 3. For the full text of this provision, see supra text accompanying note 31.
52. 501 F.2d at 1036-38.
53. 501 F.2d at 1038.
tion of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context."\(^5\) The court also gleaned from the removal provision a congressional intent to prevent the "vagaries of state [attachment] law"\(^5\) from interfering with the workings of the New York Convention.

The *McCreary* court's interpretation of the Convention was conclusory. The court failed to explain how attachment would contradict the Convention’s goals of promoting uniformity and the recognition of arbitral awards. It did not consider whether CEAT's assets would be subject to attachment under Italian law.\(^5\) Moreover, the court did not consider whether the plaintiff could enforce an arbitral award without the help of an attachment order.

**D. THE CAROLINA POWER RESPONSE TO McCREARY**

In *Carolina Power & Light Co. v. Uranex*,\(^5\) the United States District Court for the Northern District of California took the position that attachment is compatible with the Convention. Following an unprecedented rise in the price of uranium, Uranex refused to deliver at the contract price and requested contract renegotiation. After instituting arbitral proceedings, Carolina Power and Light\(^5\) attached a debt owed to Uranex by a third party in order to ensure that an award from the arbitration would be enforceable. Uranex moved to quash the writ of attachment, citing the *McCreary* holding.\(^6\)

The court denied Uranex's motion to quash and held that although it could not adjudicate the merits of the dispute, it could maintain a limited form of jurisdiction sufficient to order attachment.\(^6\) Thus, the court held that the parties' agreement to arbitrate,

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\(^{55}\) 501 F.2d at 1037. The court cited with approval *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (U.S. adoption of New York Convention is strongly persuasive evidence that the Convention is binding on the courts), suggesting that a contrary ruling would provide courts with a means for interjecting their own views on the conformity of attachment with the arbitration process at the expense of achieving international uniformity.

\(^{56}\) 501 F.2d at 1038.

\(^{57}\) Italian courts have granted motions for attachment pending an arbitral decision. See infra note 74.

\(^{58}\) 451 F. Supp. 1044 (N.D. Cal. 1977).

\(^{59}\) The plaintiff was a public utility that had entered into a contract for the delivery of uranium concentrate from the defendant. 451 F. Supp. at 1054 n.6. The court apparently granted attachment of the entire $85 million debt owed jointly to the defendant and non-party coventurer because it could not determine what portion of the debt was owed specifically to the defendant. See id. at 1053-54.

\(^{60}\) Id. at 1049-50.

\(^{61}\) The court decided that under *Shaffer v. Heitner*, 433 U.S. 186 (1977), a special type of "attachment pending" jurisdiction was allowable despite the defendant's lack of minimum contacts with the forum under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). 451 F. Supp. at 1046-49. "[A] fair reading of the Supreme Court's opinion in *Shaffer v. Heitner*, requires that the application of notions of 'fair play and substantial
although governed by the New York Convention, did not bar attachment pending the arbitral decision.\(^6\)

Finding nothing in either the text or the legislative history of the Convention concerning the availability of attachment pending arbitration,\(^6\) the court looked to the Arbitration Act for guidance. The court found that the Arbitration Act, "which operates much like the Convention for domestic agreements involving maritime or interstate commerce, does not prohibit maintenance of a prejudgment attachment during a stay pending arbitration."\(^6\) The court based this conclusion on the Supreme Court's interpretation of the provision in section 3 of the Arbitration Act that a court shall "stay the trial of the action"\(^6\) until arbitration.

The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law.\(^6\)

The Carolina Power court concluded that the reasoning of the Arbitration Act cases—that attachment is consistent with judicial enforcement of arbitral agreements—remains valid despite adoption of the Convention.\(^6\)

The Carolina Power court rejected the McCreary court's departure from the Arbitration Act cases. The court based its rejection of McCreary on the following arguments: (1) the textual differences between the Arbitration Act and the Convention do not affect the justice' include consideration of both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought . . . ." \(^\text{Id. at 1048.}\) For a discussion of the jurisdictional aspects of Carolina Power, see Note, Jurisdiction To Attach a Defendant's Property Pending Adjudication in a Foreign Forum, 58 B.U.L. Rev. 841 (1978). Despite the absence of the traditionally required minimum contacts with the forum, the author concludes that the exercise of jurisdiction pending arbitration is consistent with modern notions of fairness. \(^\text{Id. at 852.}\)

On the constitutionality of pre-arbitral attachment in light of recent Supreme Court decisions upholding certain state sequestration procedures, see Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 637-40 (9th Cir. 1982).

63. \(\text{Id. at 1050-51.}\)
64. \(\text{Id. at 1051.}\)
65. 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 that applicant for the stay is not in default in proceeding with such arbitration.

67. \(\text{Id. at 1032.}\)
availability of pre-award attachment;\textsuperscript{68} (2) section 4 of the Arbitration Act, which also grants district courts power to order parties to arbitration, has never been interpreted to deprive courts of their continuing jurisdiction over the action;\textsuperscript{69} (3) although cases governed by the Convention are removable to federal court, the Arbitration Act contains a similar provision that has been held compatible with pre-award attachment;\textsuperscript{70} and (4) “removal to federal court could have little impact on the ‘vagaries’ of state provisional remedies, for pursuant to Rule 64 of the Federal Rules of Civil Procedure the district courts employ the procedures and remedies of the states where they sit.”\textsuperscript{71}

Finally, the Carolina Power court found support for its position in the Supreme Court’s conclusions that the availability of provisional remedies such as attachment encourages use of nonjudicial methods of dispute resolution.\textsuperscript{72}

E. BEYOND CAROLINA POWER: THE NEW YORK CONVENTION SHOULD NOT PRECLUDE PRE-AWARD ATTACHMENT

The absence of pre-award attachment would severely limit the Convention’s promotion of enforcement of foreign arbitral awards. Approximately 100 countries are not Convention signatories. This list includes several countries involved in major commercial trading with the United States, such as Brazil, Canada, and Saudi Arabia.\textsuperscript{73} If a party transfers assets to a nonmember country, the Convention cannot be used to enforce an arbitral award rendered in a signatory nation. Similarly, a party can liquidate or seclude assets within a signatory

\textsuperscript{68} The McCreary court makes two rather elliptical comments to distinguish the United States Arbitration Act from the Convention. First, the court notes that the Arbitration Act only directs courts to “stay the trial of the action,” while the Convention requires a court to “refer the parties to arbitration.” 501 F.2d at 1038.

\textsuperscript{69} Id. at 1051-52 (footnote omitted).

\textsuperscript{70} Id. at 1052.

\textsuperscript{71} 451 F. Supp. at 1052. See supra note 17.

\textsuperscript{72} Id. at 1052. In Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235, 253 (1970), the Court concluded that the purpose of including a provision for removal to federal court was “to prevent the vagaries of state law from impeding its [the Convention’s] full implementation.” 501 F.2d at 1038. Yet, any case falling within section 4 of the Arbitration Act can also be removed to federal court under 28 U.S.C. § 1441 (1982). This suggests that removal jurisdiction had nothing to do with the Convention’s international scope.

\textsuperscript{73} See 9 Multilateral Treaties Deposited with the Secretary General 611, U.N. Doc. ST/LEG/SER.E/1 (1981); VII Y.B. COM. ARB. 288-89 (1982).
country to complicate or even to prevent the enforcement of an arbitral award. Pre-award attachment is a workable solution to these problems.

Pre-award attachment is also needed to supplement the limited powers of arbitral bodies. "In virtually all countries, attachment, like other provisional remedies involving coercion, cannot be ordered by the arbitrator, but has to be applied for at the court." Because arbitral bodies generally lack power to grant attachment motions, "[i]f the Convention did not allow the courts to grant any provisional remedy in the presence of an arbitration agreement covered by the Convention, the arbitral award might be prevented from reaching any practical effect." Some commentators contend that attachment contravenes the Convention's purpose of promoting a uniform system for the international recognition and enforcement of arbitral agreements.74

74. A. VANDEN BERG, supra note 23, at 140. "As the National Reports on the law of arbitration in the Yearbook of Commercial Arbitration demonstrate, there is almost no law which does not permit that a court be requested to order attachment as a provisional remedy in aid of arbitration." Id. at 143. See, e.g., V Y.B. COM. ARB., pt. IV (1980) (in most countries a court may be requested to order attachment as a provisional remedy to aid arbitration). Part IV of each National Report in the Yearbook sets forth recent amendments to arbitration statutes in each country.

In Scherk Enter. Aktiengesellschaft v. Societe des Grandes Marques, IV Y.B. COM. ARB. 286 (1979) (Corte. cass., Italy 1977), and in The Rena K, [1978] 3 W.L.R. 431 (Q.B.), both cited in the Report of the Secretary-General, U.N. Doc. A/CN.9/168 (1979), attachment pending arbitral decision was found consistent with the New York Convention. In The Rena K, the court held that pre-arbitral attachment is proper when the stay of litigation required under Article II(3) of the New York Convention is temporary. [1978] 3 W.L.R. at 452. In considering the stay's effect on the attachment, the court noted that the Convention does not require the release of security obtained through attachment when such a stay is granted. Id. Thus, the court concluded that the decision whether to maintain the pre-arbitral attachment is governed not by the New York Convention, but rather by the court's discretion in light of the facts of the case before it. Id. Because the defendants appeared unable to satisfy an arbitral award rendered against them, the court held that maintaining the attachment would be appropriate. Id. at 454. The position taken in Scherk and The Rena K is consistent with the rules of the International Chamber of Commerce. G. DULAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES § 13.14 (1980). The 1975 ICC Rules, art. 8(5), provide,

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.

Id. at 97.

75. INTERNATIONAL COMMERCIAL ARBITRATION, supra note 23, at pt. I.B.1. See supra note 34.

76. See Note, Attachment Under the United Nations Convention, supra note 38, at 1141-42. The author argues that the remedy of attachment, which U.S. law inherited from English common law, may be unavailable in other signatory nations with different legal traditions. The author also suggests that a U.S. court's decision to grant a motion for pre-award attachment might undermine the Convention, because such a decision would imply that the Convention could not effect foreign enforcement of an arbitral award. See also Note, Pre-Award Attachment Under the U.N. Convention, supra note 36, at 802-03.
Although the drafters of the Convention acknowledged the desirability of unifying national laws on arbitration, they did not attempt to achieve this goal through the Convention itself. Rather, they recommended pursuit of this goal in a separate framework.77 Thus, even if pre-award attachment does affect uniformity, attachment cannot be said to contravene the goals of the New York Convention.

The Convention's silence on the availability of pre-award attachment may represent a decision to leave the issue for determination by the domestic law of each member nation until a uniform agreement can be reached. For example, Article II, which requires member countries to honor arbitral agreements "concerning a subject matter capable of settlement by arbitration,"78 does not indicate how to determine whether an arbitral agreement concerns this subject matter. This omission has led one commentator to conclude, "The silence of Article II would permit one to argue that the matter is to be determined by the law selected by the parties . . . ."79

Article V(1)(e) provides that enforcement of an award may be refused upon a showing that the arbitral award was set aside by a court in "the country in which, or under the law of which, the award was made."80 One commentator has concluded that the New York

First, the proponents of pre-award attachment have failed to demonstrate that interim remedies under the Convention are necessary. Since post-award attachment is available, an award may be enforced in any Contracting State in which the respondent maintains assets.

Second, any benefits of pre-award attachment which may accrue to individual firms are far outweighed by the dangers that attachment poses to the overall scheme of international cooperation envisioned by the New York Convention. In the United States, attachment procedures vary from state to state and each federal district court is bound, at least in non-maritime cases, by the procedure of the state in which it sits. Given these variations, other Contracting States may very well view attachment in U.S. courts as unpredictable and idiosyncratic. As a result, those States which have exercised the Convention's reciprocity reservation may choose to view U.S. practice as an invitation to adopt rules of procedure which serve parochial interests at variance with the objectives of the New York Convention. Moreover, other Contracting States may be discouraged from entering into agreements to arbitrate with U.S. firms. Thus, there seems to be little reason to favor pre-award attachment for reasons of efficiency when attachment subverts one of the primary purposes of the New York Convention; viz., promotion of uniformity of procedure surrounding enforcement of international arbitral awards.

77. The U.N. Conference on International Arbitration, which adopted the New York Convention, rejected proposals to include procedural rules for enforcing arbitral awards in the Convention. See U.N. Doc. E/Conf./26/2, at 4 (1958). This rejection led to a resolution 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 statutes . . . ." Id. at 5-6.

78. New York Convention, supra note 8, at art. II, § 1. See supra note 31 for the full text of this provision.


Convention was built upon the presumption that "the award is governed by a national arbitration law since the setting aside of an award belongs to the exclusive jurisdiction of the court under whose arbitral law the award is made."^81

Article III of the New York Convention requires that signatories recognize and enforce foreign arbitral awards using the procedural law of the country where the arbitral award is to be relied on. In addition, Article III prohibits imposition of "substantially more onerous conditions or higher fees or charges"^83 for awards governed by the Convention than are imposed on domestic arbitral awards. These provisions suggest that the Convention was not intended to supplant domestic law.

One commentator has interpreted the Convention's procedural provisions as strong evidence of an intention to defer to domestic law. There is no center or secretariat, there are no rules promulgated for conducting arbitrations, there are no tribunals established for enforcing awards and there are no minimum procedural standards created for the enforcement of awards. The convention, while devoted to arbitration, is very much involved in national judicial proceedings. The convention is directed to the competent authority, presumably the courts, of each contracting state, and leaves much of its effectiveness to the procedures of those courts and to the particular agreement between the parties.^84

Thus, courts should recognize that the drafters of the Convention intended only to facilitate international enforcement of arbitral agreements and their potential awards. They should determine the availability of pre-award attachment under the Convention solely on the basis of the law of the arbitral forum.^86

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81. See A. Van Den Berg, supra note 23, at 37.
82. Article III of the New York 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. 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. New York Convention, supra note 8, at art. III; 9 U.S.C. § 201 (1982).
84. Quigley, supra note 79, at 822.
85. See supra note 77 and accompanying text.
86. Van den Berg has recognized that although the Convention makes a court incompetent to adjudicate the merits of a controversy, once the parties' arbitral agreement is invoked, a court can still decide matters related to the arbitration. Examples of this continuing competence include the appointment or replacement of arbitrators when the parties have not provided for these possibilities in their agreement, the setting aside of an arbitral award, and "the ordering of provisional remedies, especially attachment for securing the sum or goods in dispute, irrespective of whether the arbitration is to take, or is taking, place within its own district, or in a foreign country." A. Van Den Berg, supra note 23, at 131. This argument is strengthened by the fact that the Convention does not contain mechanisms for the resolution of commercial controversies that differ from arbitration under the arbitral law of the forum. Id. at 143. Rather, the Convention's limited purpose of facilitat-
II. PRE-AWARD ATTACHMENT IN MARITIME LAW

Admiralty courts have consistently upheld pre-award attachment in cases that have addressed the compatibility of pre-award attachment with the New York Convention. An examination of relevant aspects of admiralty law leads to the conclusion that these holdings should be extended to all commercial cases.

A. ADMIRALTY JURISDICTION AND PROCEDURE IN U.S. COURTS

Several cases in which motions for pre-award attachment arose despite the applicability of the New York Convention are governed by the law of admiralty. This introduction presents a brief overview of the aspects of admiralty that are relevant to the discussion that follows.

The Constitution provides that the judicial power of the United States shall extend to "all Cases of admiralty and maritime Jurisdiction." These cases include actions connected in all manners with maritime transportation, as well as transactions occurring on all bodies of water navigable in interstate and foreign commerce. Until 1966, federal district courts had separate dockets and rules of procedure for admiralty cases. "In 1966 the separate 'sides' were merged, the admiralty 'suit' became a regular 'civil action', and the Federal Rules of Civil Procedure were made generally applicable. . . . Despite this 'unification', the admiralty power remains a separate and independent ground of jurisdiction, both constitutional and statutory." The Federal Rules of Civil Procedure did not create any of the four special maritime remedies for seizure of property, such as maritime actions quasi in rem, which involve maritime attachment.

87. See infra notes 122-45 and accompanying text.
88. See infra notes 146-48.
89. U.S. Const. art. III, § 2.
90. On contracts for chartering ships (charter parties) and contracts for the carriage of goods, see G. Gilmore & C. Black, The Law of Admiralty (2d ed. 1975).
91. Id. at 31-33.
92. Id. at 2 (emphasis in original).
93. The other maritime remedies for seizure of property are "maritime actions in rem (with arrest or the property subject to lien); maritime actions for possession, partition, or
or garnishment. Rather, the use of maritime attachment to vest a court with personal jurisdiction over a nonresident defendant grew out of a body of distinct substantive law that predated the U.S. Constitution. 94

Because the rules governing these special remedies relate only to maritime actions, the four remedies were preserved in a set of Supplemental Rules to the Federal Rules of Civil Procedure. 95 Supplemental rule B's attachment procedure 96 is the descendant of the writ of foreign attachment. 97 One purpose of foreign attachment was to provide the court with personal jurisdiction over a recalcitrant defendant. By attaching the defendant's assets, the court expected the defendant to appear within its jurisdiction in order to secure the assets' release; this appearance gave the court an opportunity to acquire personal jurisdiction. 98

Attachment or garnishment is available for any admiralty claim in personam. 99 Rule B provides that a motion for attachment and garnishment will be granted if "the defendant shall not be found within the district" 100 where the plaintiff files his claim. The provision trying title (involving similar arrest of the property claimed); and maritime actions for exoneration or limitation of liability (involving the declaration of rights with distribution of a fund deposited in court.)" 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3201 (1973).


95. See Bradley, Admiralty Aspects of the Civil Rules, 41 F.R.D. 257, 261 (1966). Actions involving the remedies listed in supplemental rule A are governed by the main body of the rules only to the extent that they are consistent with the supplemental rules. FED. R. CIV. P. SUPP. R. A.

96. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked. FED. R. CIV. P. SUPP. R. B(1).


99. See WRIGHT & MILLER, supra note 93, at § 3211.

100. For the full text of Fed. R. CIV. P. Supp. R. B(1), see supra note 96.
emphasizes the rule's jurisdictional rather than security aspect. Garnishment was necessary for achieving personal jurisdiction, because the pre-1966 Admiralty Rules limited service to the court's district.¹⁰¹

The unification of civil and admiralty procedure has increased the ability of federal courts sitting in admiralty to use supplemental rule B as a security device when jurisdiction in personam already exists.¹⁰² Merger has expanded service of process, so that a court sitting in admiralty may now serve a summons on a defendant “anywhere within the territorial limits of the state in which the district court is held.”¹⁰³ Rule B, however, still states that maritime attachment will be granted if “the defendant shall not be found within the district.”¹⁰⁴ Thus, although a defendant would be subject to personal jurisdiction on the basis of in-state service,¹⁰⁵ a party can forego service, electing instead to attach pursuant to rule B;¹⁰⁶ this transforms attachment into a device for security.¹⁰⁷ The following discussion shows that courts have accepted the security function of attachment in admiralty cases subject to arbitration.


Instead of filing a libel in the United States District Court within which the respondent maintains its principal office, to the knowledge of libelant, the libelant crosses the East River, files the libel in this court and prays for the issuance of process in personam with writ of foreign attachment.

228 F. Supp. at 385.

¹⁰². See Note, Maritime Attachment Under Rule B, supra note 97, at 405-07.

¹⁰³. FED. CIV. P. 4(f).


¹⁰⁵. See WRIGHT & MILLER, supra note 93, at § 3211.


¹⁰⁷. There is further evidence that rule B serves a security function that exceeds any jurisdictional function; when a motion for attachment is granted based on the respondent's absence from the district, it is not dissolved by the respondent's subsequent appearance. Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 693 (1950). See PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE, supra note 101, at 66-67 ("The Advisory Committee considered whether the rule on attachment and garnishment [supplemental rule B] should . . . permit those remedies only when the defendant cannot be found within the state and concluded that the remedy should not be so limited.").
B. ATTACHMENT IN ADMIRALTY CASES UNDER THE ARBITRATION ACT

Section 8 of the Arbitration Act allows the use of the traditional admiralty procedure of libel and seizure\(^{108}\) to promote compliance with arbitration provisions and enforcement of potential arbitral awards. Section 8 provides that if a cause of action is within the admiralty power, a party may invoke "libel and seizure of the vessel or other property" and "the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree on the award."\(^{109}\)

In *The Anaconda v. American Sugar Refining Co.*,\(^ {110}\) the United States Supreme Court recognized a congressional intent to maintain a plaintiff's right to acquire personal jurisdiction through libel and seizure without sacrificing the right to enforce an arbitral agreement.\(^ {111}\) Although attachment gives a court jurisdiction to compel a party to honor an agreement to arbitrate,\(^ {112}\) the *Anaconda* Court suggested that section 8's mandate to maintain attachment after compelling arbitration also ensures the enforceability of arbitral awards.\(^ {113}\)

A subsequent case demonstrated that the two purposes of attachment under section 8, to acquire jurisdiction and to provide security, were not interdependent. In *Texas San Juan Oil Corp. v. An-Son Off-

\(^{108}\) 9 U.S.C. § 8 (1982). Because the Federal Rules of Civil Procedure and the Supplemental Rules now govern admiralty actions, courts rarely use nomenclature from the early system. In the pre-merger cases the complaint was called the "libel," the plaintiff was the "libelant," and defendant was the "respondent."

\(^{109}\) Id. Before enactment of the United States Arbitration Act of 1925, admiralty courts lacked power to grant equitable relief and generally refused to aid the enforcement of contractual provisions calling for arbitration. With the passage of the Act, the courts' hostility toward their arbitral counterparts ended. See 2 BENEDET ON ADMIRALTY, ch. VIII, § 103 (7th ed. 1958).

\(^{110}\) 322 U.S. 42 (1944).

\(^{111}\) [Section 8] plainly contemplates that one who has agreed to arbitrate may, nevertheless, prosecute his cause of action in admiralty, and protects his opponent's right to arbitration by court order. Far from ousting or permitting the parties to the agreement to oust the court of jurisdiction of the cause of action that statute recognizes the jurisdiction and saves the right of the aggrieved party to invoke it.

\[
\ldots \ldots \text{[W]hatever its reasons, Congress plainly and emphatically declared that although the parties had agreed to arbitrate, the traditional admiralty procedure with its concomitant security should be available to the aggrieved party without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court.}
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*Id.* at 45-46.


CORNELL INTERNATIONAL LAW JOURNAL

shore Drilling Co.,\(^{114}\) the libelant filed a libel for attachment pursuant to the arbitral provision of a charter party\(^{115}\) and section 8 of the Arbitration Act following a contract dispute. The United States District Court for the Southern District of New York issued a writ of foreign attachment on a bank account within its jurisdiction.\(^{116}\) The respondent challenged the libel, contending that there was no allegation that the libelant had demanded arbitration or that the respondent had failed to arbitrate.\(^{117}\) The court denied the motion to dismiss the attachment. Embracing the Anaconda Court's reading of the purposes behind section 8, the court refused to "force a party to choose between arbitration, on the one hand, and his ancient admiralty right of jurisdiction in rem or by foreign attachment, on the other . . . ."\(^{118}\)

Other cases go beyond allowing libel and seizure under the Arbitration Act to instances in which there has been no allegation that the defendant failed to comply with an arbitral provision. In one case,\(^{119}\) the United States District Court for the Southern District of New York sitting in admiralty allowed attachment pursuant to section 8 even though arbitration had already commenced.\(^{120}\) The court based its conclusion on the Anaconda holding that attachment also serves a security function under section 8.\(^{121}\)

C. ADMIRALTY CASES UNDER THE NEW YORK CONVENTION

Admiralty courts, unlike their civil counterparts,\(^{122}\) have uniformly maintained the same pro-attachment posture following congressional implementation of the New York Convention. \textit{Andros Compania Maritima, S.A. v. Andre & Cie., S.A.}\(^{123}\) was the first admiralty case in which a federal court recognized that pre-award attachment does not undermine the goals of the New York Convention, but instead encourages the use of arbitral provisions and supplements the enforcement of arbitral awards in international commercial agreements. In \textit{Andros}, the plaintiff brought suit for demurrage\(^{124}\) due

115. See supra note 90.
117. Id. at 398.
118. Id.
120. Id. at 172.
121. Id. See supra note 111.
122. See supra text accompanying notes 37-72.
124. Demurrage is the sum that is fixed in a contract or allowed to the owner of a ship as remuneration for the detention of his vessel beyond the number of days allowed by the charter party for loading and unloading or for sailing. See Hellenic Lines, Ltd. v. Director Gen. of India Supply Mission, 319 F. Supp. 821, 823 (S.D.N.Y. 1970).
under a charter party. Although the contract called for arbitration in London, the plaintiff commenced suit in the United States District Court for the Southern District of New York under the attachment provisions of supplemental rule B. The defendant moved to vacate the attachment on the ground that the required arbitration was already in progress.

The court denied the motion to vacate attachment. First, the court held that the plaintiff had validly invoked rule B to acquire jurisdiction over the defendant, because no one was authorized to receive service of process within the district on the defendant's behalf. Furthermore, the court held that because the plaintiff had met this requirement for attachment under rule B, the plaintiff could invoke section 8 of the Arbitration Act. "Section 8 is no more inimical to the Convention's design—i.e., to encourage submissions of international commercial disputes to arbitral proceedings . . . than it has been to the long-standing federal policy . . . favoring resort to arbitration of disputes, whether or not entirely domestic . . . ." The court found that commencement of an action pursuant to section 8 is not an attempt to bypass an arbitration provision and that retention of jurisdiction under section 8 pending arbitration is consistent with the Convention, because "Article II(3), thus framed, surely may accommodate the stays of litigation impliedly contemplated by Section 8, and expressly directed by Section 3." The court's final conclusion was based on pre-Convention cases that had reasoned that pre-award attachment promotes the arbitral process by facilitating recovery on arbitral awards.

125. 430 F. Supp. at 89-90.
126. Id. at 90. The defendant's argument was based on the McCready analysis. See supra notes 51-56 and accompanying text.
127. 430 F. Supp. at 95.
128. Id. In Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975), section 8 of the Arbitration Act was given a narrower reading. The court denied the plaintiff's attempt to invoke the traditional admiralty attachment procedure of libel and seizure under section 8 because personal jurisdiction could be achieved by service at an office the defendants maintained within the court's jurisdiction. Id. at 4. The World Tanker court also determined that if plaintiffs subsequently prevailed at arbitration, the rules of the New York Convention would be available to assure enforcement of their arbitral award. Relying on the McCready analysis, the court concluded that attachment prior to arbitration would create an "unnecessary and counterproductive pressure on a situation which could otherwise be settled expeditiously and knowledgeably in an arbitration context." Id. In Andros, even the defendant's willingness to accept service of process did not stop the court from granting plaintiff's motion for attachment pursuant to supplemental rule B. See 430 F. Supp. at 95.
129. 430 F. Supp. at 91.
130. Id. at 92.
131. Id. For the text of Article II(3) of the New York Convention, see supra text accompanying note 31.
132. See supra note 21. Pre-award attachment promotes efficient arbitration by "preserving the subject matter or assets intact within the jurisdiction, thus making the (later)
A trend following the *Andros* analysis in the admiralty courts is apparent. In *Atlas Chartering Services, Inc. v. World Tanker Group, Inc.*, two foreign corporations entered into a charter party providing for London arbitration of all disputes. The plaintiff brought an action in the United States District Court for the Southern District of New York to compel arbitration and sought attachment of the defendant’s assets within the court’s jurisdiction pursuant to supplemental rule B.

In granting the motion for attachment, the *Atlas* court addressed whether pre-award attachment conflicts with the dictates of the New York Convention. The court concluded that “a London arbitration can proceed in an orderly fashion even though the defendant’s assets have been attached in New York as security for any award rendered by the London panel.” The court based this conclusion on its view that attachment is compatible with the Arbitration Act. Certainly, the policy in favor of arbitration is at least as strong under the [Arbitration] Act as under the Convention. Moreover, the prospect of pre-arbitration attachment has yielded neither interference with, nor reluctance to enter into, domestic arbitration. Thus, we doubt that a decision permitting attachment would discourage or hamper arbitration under the Convention.

The court’s conclusion that pre-award attachment under section 8 of the Arbitration Act and supplemental rule B is available to compel arbitration under the New York Convention was limited to maritime cases.

The argument that admiralty courts have transformed supplemental rule B into a security device extending beyond any jurisdictional purpose receives strong support from the United States District Court’s holding in *Paramount Carriers Corp. v. Cook Industries, Inc.* After arbitration had begun in London, the plaintiff commenced an action in district court by obtaining a writ of attachment pursuant to supplemental rule B. The defendant argued that attachment could not be used solely to obtain security and that the security obtained through attachment is only incidental to the primary goal of obtaining jurisdiction. Thus, the defendant contended, the

award meaningful. Otherwise it might have been a pure formality, if assets had been taken outside of the court’s jurisdiction or wasted.” M. Domke, The Law and Practice of Commercial Arbitration § 26.02 (1968).

131. *Id.* at 861 (S.D.N.Y. 1978).
132. *Id.* at 862.
133. *Id.* at 863.
134. *Id.* at 864.
135. *Id.* at 865.
136. *Id.* at 866.
137. *Id.*
138. *See supra* notes 102-07 and accompanying text.
140. *Id.* at 600.
141. *Id.* at 601.
plaintiff's commencement of the action solely to secure the claim in the pending arbitration "was an abuse of the process of the Court." 142 Although the court acknowledged that the plaintiff had filed suit primarily to obtain security through rule B attachment,143 it did not vacate the attachment. Rather, the court found attachment for security to be entirely consistent with the New York Convention.144 The court based this ruling on Anaconda's view that a party's right to the security function of traditional admiralty procedure is independent of its jurisdictional function.145

The admiralty courts' endorsement of attachment under supplemental rule B as compatible with the New York Convention bears on the issue of the use of pre-award attachment in non-maritime cases. The security function of attachment exists in non-maritime cases as well; this suggests that pre-award attachment should be available in all cases governed by the New York Convention. Whether courts allow attachment to promote arbitration, to make arbitral awards meaningful, or simply because they believe that attachment does not interfere with the arbitral process, there is no reason to limit pre-award attachment to admiralty cases.146 Commercial assets such as bank accounts are now more readily transferable than the ships whose mobility prompted the use of attachment in maritime law.147

The New York Convention's silence regarding pre-award attachment suggests that if pre-award attachment is allowed in admiralty cases, it should be allowed in all cases. The purpose of the Convention

142. Id.
143. Id.
144. Id. at 602.
145. Id. at 601. See supra notes 110-11 and accompanying text.
146. In Cooper v. Ateliers de la Motobecane, S.A., 446 N.Y.S.2d 297, 86 A.D.2d 568, rev'd, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (N.Y. 1982), the Appellate Division of the Supreme Court of New York noted that any distinction between maritime cases and non-maritime cases is artificial. "The purpose and language of the Convention and its implementing legislation remain the same with reference to either admiralty or commercial law." 446 N.Y.S.2d at 299, 86 A.D.2d at 570. Although the New York Court of Appeals subsequently reversed, the United States District Court for the Southern District of New York agreed with the dissenting opinion of Court of Appeals Judge Meyer.

147. The need to attach now and notify later is as great now as it ever was, if not greater. A ship can quietly slip its moorings and depart the jurisdiction. It can easily take with it such tangible property as may be within the jurisdiction. And credits can be quickly transferred elsewhere.

Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 637 (9th Cir. 1982).
and its language are the same for all cases, whether in admiralty or civil courts. It follows that the New York Convention must either permit or prohibit pre-award attachment in both courts. In light of the Convention's deference to local law, pre-award attachment should be permitted in both maritime and civil cases in U.S. courts.

III. A PROPOSAL FOR RESOLVING MOTIONS FOR PRE-AWARD ATTACHMENT IN U.S. COURTS

Assuming the New York Convention's inapplicability to the issue of pre-award attachment, it is relevant to ask what a U.S. court should consider in deciding motions for attachment. This section assumes that the merits of the plaintiff's case would justify granting a motion for pre-award attachment. A plaintiff would bring a motion for pre-award attachment in a U.S. court for one or both of the following reasons. First, the parties have specified that the availability of pre-award attachment would be decided under U.S. law. Second, the assets that the plaintiff hopes to attach are in the United States. A scenario like that in Carolina Power would present the strongest case for justifying attachment, because the parties' contract calls for arbitration in the United States and the defendant's assets are located in the United States.

Nonetheless, there are also cases in which only one of the reasons justifying attachment would be present. If the contract provides that U.S. law will control the availability of attachment, but the assets to be attached are located within another country, the court should grant attachment. This will ensure that the plaintiff can enforce the judgment in the forum where the defendant's assets are located.

The situation in which the plaintiff seeks attachment solely because the defendant's assets are in the United States should be broken into two subcases. In the first subcase, the parties' contract designates a non-U.S. arbitral forum but says nothing about judicial remedies like attachment. In this instance, a U.S. court could grant the motion for pre-award attachment. This result would follow from the conclusion that if the parties had intended to limit all proceedings to the arbitral forum, they easily could have worded their agreement accordingly.

This analysis may be criticized, however, for requiring

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149. See supra notes 58-72 and accompanying text.
150. For example, the arbitral agreement in McCreary, 501 F.2d at 1035, specified that Italian law would apply, that the arbitration would be conducted under the rules of the ICC, that the arbitrators would meet in Brussels, and that the proceeding would be in English. See supra notes 44-57 and accompanying text. The arbitral agreement in Andros, 430 F. Supp. at 90, was much less elaborate, providing merely for final arbitration by two
an unrealistic level of foresight at the contracting stage.

Another solution is to look to the applicable law, designated explicitly by the parties or implicitly from the location of the arbitral forum, for guidance. If the foreign law would allow pre-award attachment, the motion should be granted unless a prior motion to the foreign court for the attachment of assets located within its jurisdiction has already been denied. Absent a strong showing of hardship, the subsequent motion before a U.S. court should be denied out of deference to the foreign court. This will further the Convention's goal of promoting international recognition and enforcement of arbitral agreements.

In the second subcase, the contract specifies that the law of the foreign arbitral forum should also be applied. Again, a U.S. court would have two options. The first would be to decide the motion for attachment by applying the law of the arbitral forum, and the second would be to simply refer the motion to a court within the country of the arbitral forum designated by the parties, and to give recognition to the judgment of the foreign court. The second approach, too, would further the Convention's objectives.

CONCLUSION

The split in U.S. courts over the compatibility of pre-award attachment with the purposes and policies of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards should be resolved in favor of pre-award attachment. The fact that the New York Convention does not proscribe the national law of its member forums nor provide an alternative system of arbitral rules supports this conclusion. Because the New York Convention provides only for the international enforcement of arbitral decisions rendered in its participating states, attachment remains a question of national law distinct from the concerns and policies underlying the Convention.

arbitrators carrying on business in London. See supra notes 123-32 and accompanying text.

151. Although some arbitral agreements specify only the forum of the arbitration, other agreements specify what law will be applied. If the agreement lacks a choice-of-law clause, authority suggests that the forum clause creates a presumption that the court should apply the law of the arbitral forum. See Lummers Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915 (1st Cir.), cert. denied, 364 U.S. 911 (1960) (provision calling for New York arbitration "indicates a choice of law"); Campagne d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A., [1970] 3 W.L.R. 389 (H.L.) (rebuttable presumption that forum-choosing clause is intended to also choose forum law). See generally Smedresman, Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments, 7 Cal. W. Int'l L.J. 263 (1977) (discussing the choice-of-law implications of arbitral clauses). Under this analysis, the two types of arbitral agreements need not be distinguished.
Two lines of analysis suggest that pre-award attachment is compatible with arbitration under the New York Convention. First, the long-standing U.S. policy of allowing attachment to further domestic arbitration is equally applicable to international arbitration under the New York Convention. Second, U.S. courts’ allowance of maritime attachment in admiralty cases arising under the New York Convention cannot be distinguished from similar civil controversies. On the contrary, maritime attachment is the result of a strong U.S. policy in favor of ensuring the enforceability of arbitral awards. This same policy applies with equal if not greater force to the use of attachment in international commercial arbitration.

Kevin Jeffrey Brody*

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