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# What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention

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## NOTE

# What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention<sup>1</sup>

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### INTRODUCTION

“Parties who submit their disputes to arbitration expect the proceedings to be private, expeditious, and final.”<sup>2</sup> The common wisdom takes this to mean that parties choose arbitration for its temporal and financial economies.<sup>3</sup> Those who engage in transnational commercial activities, however, find in arbitration something even more valuable: party autonomy.<sup>4</sup> The ability to specify the

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1. In *The Hunting of Snark*, the Bellman informs his crew “[w]hat I tell you three times is true.” Lewis Carroll, *The Hunting of the Snark, in Rhyme? And Reason?* 134 (1887). United States courts have followed a similar approach in establishing the New York Convention’s article II(3), accomplishing their task more through the cumulative effect of pronouncements than by investigation of objective indicia, such as the New York Convention’s drafting history.

2. D. W. Shenton, *Attachments and Other Interim Court Remedies in Support of Arbitration: The English Courts*, 14 *Int’l Bus. Law.* 101, 101 (1984).

3. Michael Burrows & Lawrence W. Newman, *Attachment in Aid of Arbitration*, N.Y.L.J., Dec. 30, 1982, at 1; Douglas D. Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 *Int’l Tax & Bus. Law.* 363, 369 (1986); David L. Zicherman, Note, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 *U. Pitt. L. Rev.* 667, 667 (1989) (citing Reichert, *supra*).

4. Colleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 *Tul. L. Rev.* 1519, 1520 (1991).

forum, procedure and substantive rules that will apply to future disputes provides a welcome measure of security for business people who set out for uncharted waters.<sup>5</sup> With the stroke of a pen, they can immunize themselves against the misfortune of settling subsequent differences in hostile fora and in accordance with unfamiliar rules.

Autonomy in arbitration, however, is not synonymous with arbitral exclusivity.<sup>6</sup> Although parties desire to sequester the merits of their disputes from the reach of courts, parties nonetheless depend on judges to secure the integrity of their agreements to arbitrate.<sup>7</sup> From start to finish, courts stand ready to take action in support of arbitration. When necessary, courts may order arbitration,<sup>8</sup> appoint arbitrators,<sup>9</sup> compel the appearance of witnesses<sup>10</sup> and enforce awards.<sup>11</sup> Indeed, one doubts whether anyone would turn to arbitration in the absence of this complementary relationship.

This Note examines one portion of the confluence between litigation and arbitration—the competence of courts to order pre-award attachments under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention (or Convention).<sup>12</sup> Because of the strategic importance of pre-award attachments,<sup>13</sup>

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5. Christine & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 *Bus. Law.* 577, 622-23 (1990).

6. Higgins, *supra* note 4, at 1522.

7. *Id.* at 1522, 1546; William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 *Tul. L. Rev.* 647, 656-57 (1989); Shenton, *supra* note 2, at 101.

8. The Federal Arbitration Act (FAA), 9 U.S.C. § 4 (1988) (chapter 1 of the FAA); The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 206 (1988) (chapter 2 of the FAA); The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II(3), 21 *U.S.T.* 2517, 330 *U.N.T.S.* 3 [hereinafter *Convention*].

9. 9 U.S.C. §§ 5, 206.

10. 9 U.S.C. § 7.

11. 9 U.S.C. §§ 9, 207; *Convention*, *supra* note 8, art. III.

12. *Convention*, *supra* note 8.

13. By preventing dissipation or transfer of assets, pre-award attachments preserve the *status quo ante*. This, in turn, guarantees the ultimate satisfaction of an award. Depriving arbitration of this form of judicial assistance means stripping it of the certainty that makes it an attractive alternative to litigation. See *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944); Charles N. Brower & W. Michael Tupman, *Court-Ordered Provisional Measures under the New York Convention*, 80 *Am. J. Int'l L.* 24, 28-29 (1986); Higgins, *supra* note 4, at 1520-22, 1525; Michael F. Hoellering, *Interim Relief in Aid of International Commercial Arbitration*, 1984 *Wis. Int'l L.J.* 1, 1; William P. Mills, III, Note, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the*

courts and commentators have visited these waters frequently over the past two decades. During their expeditions, jurists and scholars have posed and responded to a single question: in light of the Convention's silence regarding pre-award interim measures, what meaning *should* we ascribe to its vague provision on arbitral clauses? Some conclude that the Convention should permit courts to order pre-award attachments.<sup>14</sup> Others argue that courts should not possess the authority to grant such measures because it would contradict the Convention's spirit and obscure language.<sup>15</sup> Unfortunately, in their haste to explain what the law ought to be, both sides of the debate virtually ignore the issue that should be the point of departure: what *is* the law?

The purposes of this Note are twofold. First, by exposing inconsistencies in the United States' case law on the competence of courts to grant pre-award attachments under the Convention, it emphasizes the pressing need in U.S. jurisprudence for resolution of this issue. This Note argues that by spinning a web of conflicting precedent and inexplicable exceptions, U.S. courts have increased the cost of private dispute resolution in international transactions.

In most transactions, the additional costs take the form of "risk premiums" exacted for uncertainty regarding the availability of provisional measures in future arbitrations. Once an arbitration has commenced, however, uncertainty costs translate into attorney fees as the parties—now adversaries—battle over the Convention's meaning, the applicability of recognized exceptions and the existence of proposed exceptions. Until courts adopt a uniform, principled approach in answering "what is the law?" businesses

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Availability of Interim Relief, 13 *Fordham Int'l L.J.* 604, 623-24 (1989-1990); Zicherman, *supra* note 3, at 668.

14. *Carolina Power & Light v. Uranex*, 451 F. Supp. 1044, 1049-52 (N.D. Cal. 1977); Joseph D. Becker, *Attachments in Aid of International Arbitration—The American Position*, 1 *Arb. Int'l* 40, 42 (1985); Brower & Tupman, *supra* note 13, at 25; Hoellering, *supra* note 13, at 8-12; Reichert, *supra* note 3, at 388-89; Kevin Brody, Note, 18 *Cornell J. Int'l L.* 99, 101 (1985); Mills, *supra* note 13, at 630-35; Zicherman, *supra* note 3, at 692-99; Burrows & Newman, *supra* note 3, at 2.

15. *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75, 75-77 (4th Cir. 1981); *McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032, 1032-33, 1037-38 (3d Cir. 1974); *Cooper v. Ateliers de la Motobecane*, 442 N.E.2d 1239, 1242-43 (N.Y. 1982); Neil E. McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 *Colum. J. Transnat'l L.* 273, 289 (1984) (preferring *McCreary* generally, but suggesting a case-by-case approach); Andrew S. Holmes, Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 *Va. J. Int'l L.* 785, 801-03 (1981); John B. Yelliot, Note, *Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 36 *Wash. & Lee L. Rev.* 1135, 1143-44 (1979).

cannot take full advantage of the Convention's potential to reduce uncertainty costs.

Second, this Note demonstrates that the Convention's lineage and *travaux préparatoires*, heretofore ignored by U.S. judges and scholars, prove that the Convention should be interpreted so as to allow courts the jurisdiction sufficient to order pre-award attachments.

Part I briefly describes U.S. law pertaining to the availability of pre-award attachments under chapter 1 of the Federal Arbitration Act (FAA),<sup>16</sup> which governed most commercial arbitration agreements prior to ratification of the Convention and still controls arbitral clauses not subject to the Convention. This part also introduces the reader to the Convention's text and summarizes the three seminal U.S. cases on the power of courts to order pre-award attachments under the Convention. Because twenty years' worth of debate has generated substantial analysis of these three cases, Part I discusses them only to provide a basic background regarding their facts and holdings.

Part II provides a comprehensive review of current U.S. law regarding judicial competence to order pre-award attachments under the Convention, as implemented in the United States by chapter 2 of the FAA. Part II(A) sets forth a circuit-by-circuit examination of the conclusions reached by courts in the wake of the decisions discussed in Part I. This section has two aims. First, it calls attention to the failure of U.S. courts to consult the Convention's drafting history. Second, Part II(A) illustrates how this failure to develop a coherent and uniform rule has led to an unfortunate split of authority—both between and within the circuits.

In similar fashion, Part II(B) presents an analysis of the recognized and suggested exceptions to the line of cases holding that the Convention divests courts of jurisdiction to order pre-award attachments. These exceptions add another dimension of uncertainty to U.S. doctrine and, unintentionally, considerably damage the Convention's integrity. Part II concludes that the chaotic state of U.S. law calls for a definitive resolution of the debate concerning the availability of pre-award attachments under the Convention.

To this end, Part III first explores the English interpretation of the Convention's position on this issue, then probes the Conven-

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16. 9 U.S.C. §§ 1-16.

tion's *travaux préparatoires* in an attempt to provide the definitive answer called for in Part II. Part III(A) explains that English courts have never doubted that the Convention permits them to order interim measures prior to the issuance of awards. It concludes by considering what has enabled English courts to avoid controversy in this matter and what U.S. courts can learn from their experience.

Part III(B) recounts how England became a party to the Geneva Protocol on Arbitration Clauses of 1923<sup>17</sup> (Geneva Protocol or Protocol) and participated actively in drafting the New York Convention.<sup>18</sup> Because the United States did neither,<sup>19</sup> its judges and scholars have remained uninformed about the Convention's antecedents and *travaux*. This ignorance, in turn, explains the enduring controversy regarding the *jurisdiction* of courts to order pre-award attachments under the Convention.<sup>20</sup>

The contrasting readiness of English courts to grant pre-award attachments in appropriate circumstances stems from their country's intimate understanding of the Convention's *travaux* and the Geneva Protocol. Unlike the United States' institutional memory, England's recalls that article II(3) of the Convention reenacted article IV of the Geneva Protocol. It also understands that this latter provision left courts in possession of jurisdiction sufficient for the purpose of ordering pre-award interim measures. Part III concludes that if U.S. judges and commentators had undertaken a serious inquiry into the Convention's *travaux*, they could have spared arbitrating parties from the increased risks and costs associated with the uncertainty of securing provisional measures in aid of arbitration.

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17. Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157 [hereinafter Geneva Protocol]; see English Arbitration Clauses (Protocol) Act, 1924, § 1(1) and Schedule (text of the Protocol on Arbitration Clauses), reprinted in 1 Halsbury's Statutes 470-71 (1929).

18. See G. Winthrop Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21-26 (1958); Paolo Contini, International Commercial Arbitration, 8 Am. J. Comp. L. 283, 290 n.33 (1959); Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1063 (1961).

19. See *infra* text accompanying notes 226, 298-99.

20. I do *not* suggest that once informed of the Convention's drafting history, courts would (or should) make generous use of their *power* to order pre-award interim measures. I merely argue that the drafting history settles their *authority* to make such orders in appropriate cases.

I. INTERIM MEASURES UNDER CHAPTER ONE OF THE FEDERAL ARBITRATION ACT AND SEMINAL CASES INTERPRETING ARTICLE II(3) OF THE NEW YORK CONVENTION

A. *Chapter One of the FAA*

Congress passed the Federal Arbitration Act (FAA) in 1925<sup>21</sup> as a vehicle to reverse the common law view of arbitration as ousting the jurisdiction of courts.<sup>22</sup> Although the framers of the FAA sought to "assure those who desired arbitration . . . that their expectations would not be undermined by federal judges,"<sup>23</sup> the FAA did not banish courts from hearing actions in aid of arbitration. Thus, section 4 grants courts the power to compel arbitration.<sup>24</sup> Section 5 confers on courts the authority to appoint arbitrators.<sup>25</sup> Section 7 instructs courts to issue summonses to witnesses whose presence is required in an arbitration.<sup>26</sup> Section 10 grants to courts marginal powers to review the validity of awards.<sup>27</sup> Finally, section 9 authorizes courts to issue orders confirming awards.<sup>28</sup>

The text of the FAA presents no authoritative response to the question of whether or not Congress intended to include interim measures in the judicial framework supporting private arbitration. Section 8 of the Act specifically authorizes courts to grant attachments pending arbitration of suits that would otherwise be heard in admiralty.<sup>29</sup> Courts might have interpreted this provision as providing an exclusion of interim measures in other circumstances. Only one jurisdiction, however, the United States Court of Appeals for the Eighth Circuit, has both adopted and stood by this decision in its reported cases.<sup>30</sup> The clear weight of authority holds that pre-award attachment is an important right of arbitrating parties.

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21. Federal Arbitration Act, ch. 213, §§ 1-15, 43 Stat. 883, 883-85 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1988)).

22. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

23. *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1983) (quoting *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir. 1961)).

24. 9 U.S.C. § 4.

25. 9 U.S.C. § 5.

26. 9 U.S.C. § 7.

27. 9 U.S.C. § 10.

28. 9 U.S.C. § 9.

29. 9 U.S.C. § 8.

30. See *infra* text accompanying notes 44-45 (discussing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1291 (8th Cir. 1984)).

Speaking for the United States Court of Appeals for the Second Circuit, Judge Learned Hand became the first to make this determination in the context of international arbitration. The case, *Murray Oil Prods. Co. v. Mitsui & Co.*, involved a breach of contract action brought by a U.S. company against a Japanese supplier of oil.<sup>31</sup> Because the contract contained an arbitration clause, the Japanese supplier moved to stay the court action and liquidate an attachment granted by a state court.<sup>32</sup> The federal district court stayed the litigation but refused to liquidate the attachment.<sup>33</sup>

On appeal, Judge Hand agreed that "an arbitration clause does not deprive a promisee of the usual provisional remedies."<sup>34</sup> He cited two reasons for this conclusion. First, he considered arbitration to be but another form of trial, which should not displace the standard mechanisms used for preserving the *status quo*.<sup>35</sup> Second, he acknowledged that many parties choose arbitration for its ability to provide parties with an expeditious expert decision.<sup>36</sup> Although these statements may not seem wholly consistent with one another, they nonetheless led Judge Hand to find that interim measures are compatible with an agreement to arbitrate. Judge Hand reasoned that if parties seek the speedy decision of a specialist, they must also desire effective recovery upon the issuance of an award.<sup>37</sup> Because interim measures serve this function, a court may grant them despite an agreement to arbitrate.<sup>38</sup>

State courts also used statutes identical to chapter 1 of the FAA to justify attachments, despite the presence of arbitration clauses in international contracts.<sup>39</sup> In *American Reserve Ins. Co. v. China Ins. Co.*, the New York Court of Appeals upheld an attachment obtained by a U.S. reinsurer against a Chinese insurer who had defaulted on a premium.<sup>40</sup> Surprised by the defendant's suggestion that the arbitration clause barred attachment proceedings, the

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31. *Murray Oil Prods. Co. v. Mitsui Co.*, 146 F.2d 381, 382 (2d Cir. 1944).

32. *Id.*

33. *Id.*

34. *Id.* at 384.

35. *Id.* at 383.

36. *Id.* at 384.

37. *Id.*

38. *Id.*

39. The language in § 5 of New York's Arbitration Law of 1920, later enacted as § 1451 of the Civil Practice Act, was essentially identical to that in § 3 of the FAA. See 9 U.S.C. § 3.

40. *American Reserve Ins. Co. v. China Ins. Co.*, 79 N.E.2d 435, 426 (N.Y. 1948).



court wrote that "it is not even proper . . . in such an action to plead the arbitration agreement as a defense."<sup>41</sup>

Three U.S. courts have found a situation in which it is *per se* improper to grant interim relief. In *Greenwich Marine v. S.S. Alexandra*, the Second Circuit held that although section 4 of the FAA permits a court to order arbitration, it does not authorize the court to order a defendant to post security.<sup>42</sup> Speaking for the court, Judge Marshall reasoned that although section 8 specifically permits courts to order provisional measures in admiralty cases, section 4 offers no authority for extending this to a broader range of cases.<sup>43</sup> A convenient silence on *Murray Oil* also facilitated Judge Marshall's reasoning.

Dormant for nearly two decades, this line of reasoning resurfaced in the United States Courts of Appeals for the Eighth and Tenth Circuits a decade ago.<sup>44</sup> In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, the Eighth Circuit found interim relief inappropriate because the "judicial inquiry requisite to determine the propriety of . . . relief . . . would inject the court into the merits of issues more appropriately left to the arbitrator."<sup>45</sup>

Although the Second Circuit first articulated this interpretation of section 4 of the FAA, it has since reversed itself. In *Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co. of New York*, the Second Circuit held that a court may grant interim relief in order to maintain the *status quo* between arbitrating parties.<sup>46</sup> The United States Courts of Appeals for the First, Third, Fourth, Seventh and Ninth Circuits have long shared the Second Circuit's revised understanding of section 4.<sup>47</sup> The United States Court of Appeals for the Fifth Circuit has declined to choose between the

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41. *Id.* at 427.

42. *Greenwich Marine v. S.S. Alexandra*, 339 F.2d 901, 903-04 (2d Cir. 1965) (citing 9 U.S.C. § 4).

43. *Id.* at 904 n.1 (citing 9 U.S.C. §§ 4, 8).

44. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1291 (8th Cir. 1984) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, No. 83-1480 (10th Cir. May 12, 1983) (summary order to stay injunction during pending arbitration)).

45. *Id.* at 1292.

46. *Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co. of New York*, 749 F.2d 124, 125 (2d Cir. 1984).

47. *Ortho Pharmaceuticals Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989); *PMS Distrib. Co., Inc. v. Huber & Shuner, A.G.*, 863 F.2d 639, 642 (9th Cir. 1988); *Teradyne v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984).

*Hovey* and *Roso-Lino* schools of thought.<sup>48</sup> Instead, it upheld the district court's decision to grant interim relief on the ground that the parties' arbitration agreement expressly provided for the maintenance of the *status quo* pending an award.<sup>49</sup> The court recognized, however, that this remedy dovetails with the FAA's policy of expediting arbitration.<sup>50</sup> This suggests that the Fifth Circuit also would adhere to the Second Circuit's revised stance on the availability of pre-award interim measures in chapter 1 cases.

Thus, there is a minor split between the circuits regarding the availability of interim measures under chapter 1 of the FAA. Some precedent supports the view that courts ordering arbitration under section 4 must completely divest themselves of jurisdiction over the matter. According to this view, interim measures are not available to arbitrating parties. Most authority, however, endorses the position that because Congress desired the FAA to enforce arbitration agreements, it implicitly condoned the maintenance of the *status quo* as a means of preserving the meaningfulness of the arbitral process.<sup>51</sup>

In summary, Congress promulgated the FAA in order to prevent courts from interfering with valid arbitration agreements. Nonetheless, it authorized courts to intervene in arbitrations for the purpose of securing their integrity. Despite Congress' general silence on the issue of interim measures, most U.S. courts of appeals have interpreted chapter 1 of the FAA as sanctioning the use of such remedies for the purpose of supporting domestic and international arbitrations.

#### B. *Seminal Cases on the Effect of Article II(3) of the New York Convention*

Few use the New York Convention's official title: The United Nations Convention on the Enforcement and Recognition of Foreign Arbitral Awards.<sup>52</sup> True to its full name, the Convention provides comprehensive standards for the enforcement of arbitral awards.<sup>53</sup> The treaty, however, sheds only dim light on arbitral

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48. *RGI, Inc. v. Tucker & Associates, Inc.*, 858 F.2d 227, 230 (5th Cir. 1988).

49. *Id.*

50. *Id.* at 229.

51. See, e.g., *Teradyne*, 797 F.2d at 51.

52. See Convention, *supra* note 8.

53. See *id.* arts. III, IV, V, VI.

agreements. Only article II, inserted on the last working day of the drafting conference,<sup>54</sup> mentions arbitral agreements:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate shall,] at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>55</sup>

Even this provision offers no meaningful guidance to courts presented with a petition for interim measures in a dispute subject to an arbitration clause. Thus, in the absence of a working knowledge of the article's drafting history, judges are left to ponder its vague instruction.

The Convention's drafters may have successfully provided a uniform standard for the enforcement of arbitral awards. On the other hand, their elliptical instructions as to the enforcement of arbitral agreements have left U.S. jurisdictions in discord. Whether an arbitrating party can petition a court for interim measures varies with jurisdictional borders. Thus, in some U.S. courts, parties have access to provisional measures, whereas in others, they do not. Some jurisdictions present litigants with even more disquieting uncertainty, namely intra-circuit splits of authority. The U.S. experience with this aspect of the Convention has not been one of tremendous success.

In 1974, the Third Circuit became the first appellate court to rule on whether the availability of interim measures established in *Murray Oil* had survived U.S. ratification of the New York Convention. In *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, a U.S. company secured an attachment and brought a breach of contract action against an Italian corporation in Pennsylvania state court.<sup>56</sup> The Italian corporation removed the action to federal court, and citing the contract's arbitration clause, it then requested the district court to stay the litigation and to liquidate the attachment.<sup>57</sup> The district court denied both motions.<sup>58</sup>

On appeal, the Third Circuit granted the stay and liquidated the attachment. In a brief portion of the opinion, the court gave three

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54. McDonell, *supra* note 15, at 288; Holmes, *supra* note 15, at 790-91.

55. Convention, *supra* note 8, art. II(3).

56. *McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032, 1033 (3d Cir. 1974).

57. *Id.*

58. *Id.*

reasons for vacating the attachment. It did not, however, discuss whether or not the Convention's drafting history would support these arguments. First, the court found that the Convention's instruction to "refer the parties to arbitration" prevented it from granting interim relief.<sup>59</sup> The court agreed that section 3 of the FAA allows such interim measures because it commands only a stay of litigation, after which a court retains sufficient jurisdiction to maintain an attachment.<sup>60</sup> The court asserted, however, that the phrase "refer" prevents a court in a chapter 2 proceeding from preserving any residual jurisdiction over the matter.<sup>61</sup> In other words, because chapter 1 of the FAA applies to international arbitrations only to the extent that it does not conflict with the Convention,<sup>62</sup> the Third Circuit considered itself unable to uphold the attachment. Second, it reasoned that an attachment represents an attempt to bypass the agreed method of dispute resolution.<sup>63</sup> Curiously, the court did not attempt to explain why it had concluded that the same does not hold true for cases falling under chapter 1 of the FAA.<sup>64</sup> Finally, the court announced that the application of attachment procedures, which vary from state to state, would impede the Convention's full implementation.<sup>65</sup>

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59. *Id.*

60. *Id.* at 1038.

61. *Id.* But see *Carolina Power & Light v. Uranex*, 451 F. Supp. 1044, 1051 (N.D. Cal. 1977) (criticizing *McCreary's* logic); *Cooper v. Ateliers de la Motobecane*, 442 N.E.2d 1239, 1242 (N.Y. 1982).

62. 9 U.S.C. § 208.

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

64. *Id.* ("Unlike § 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 . . . action.'") (emphasis added); see also *Ortho Pharmaceuticals Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) (holding that pre-award attachments are available in chapter 1 cases).

65. *McCreary*, 501 F.2d at 1038. The court's hostility towards the idea of subjecting chapter 2 actions to local procedural rules is puzzling. The drafters of the Convention actually rejected a proposal to insert uniform procedural rules into its text. United Nations, Economic and Social Council, United Nations Conference on International and Commercial Arbitration, Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Note by the Secretary-General at 4, U.N. Doc. E/CONF.26/2 (1958). Instead, they suggested that this concern could best be addressed through the promulgation of model laws. *Id.* at 5-6. As a result, seven provisions of the Convention contemplate the injection of local substantive and procedural rules. In some cases, it is not clear which municipal law a court must apply. It is apparent, however, that the court is to employ some local, perhaps eccentric, standard.

For example, article II(1) requires courts to recognize an agreement to arbitrate a "subject matter capable of settlement by arbitration." Convention, *supra* note 8.

Article II(3) directs courts to refer the parties to arbitration "unless it finds that the . . . agreement is null and void, inoperative or incapable of being performed." *Id.*

Thus, the first U.S. court to consider the issue held that judges applying the New York Convention lack the authority to grant pre-award interim measures. One might discount *McCreary* as the opinion of a court unfamiliar with international trade; however, the Fourth Circuit's concurrence<sup>66</sup> is hard to explain on these grounds. It becomes even more difficult to maintain this position when considering the New York Court of Appeals' decision to follow the Third Circuit in *Cooper v. Ateliers de la Motobecane*.<sup>67</sup>

In *Cooper*, a U.S. company and a French company had created a third corporation to distribute the French company's products in the United States.<sup>68</sup> The contract, which contained an arbitration clause, provided that the French company would repurchase on request the U.S. company's shares in the third corporation.<sup>69</sup> When the French company refused to honor the agreement, the U.S. company brought a contract action and secured an attachment against the French company.<sup>70</sup> Relying on the arbitration clause, the French company moved to dismiss the action and liquidate the attachment.<sup>71</sup> After the Court of Appeals ordered arbitration, the trial court liquidated the attachment.<sup>72</sup> The Appellate Division reversed this decision.<sup>73</sup> Marshalling nine reasons for its decision,

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Article III instructs contracting states to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." *Id.*

Article V(1)(a) allows courts to set aside an award if the parties "were, under the law applicable to them, under some incapacity, or the . . . agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." *Id.*

Article V(1)(d) authorizes courts to refuse to recognize an award if the arbitral procedure has not been conducted in accordance with the agreement of the parties, "or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." *Id.*

Article V(2)(a) permits courts not to enforce an award if they find that the subject matter of the dispute is not arbitrable under local law. *Id.*

Article V(2)(b) provides that courts may refuse to recognize an award that is contrary to public policy. *Id.*

The foregoing should sufficiently demonstrate that the Convention's drafters had no intention of isolating it from the vagaries of municipal laws.

66. See *infra* text accompanying notes 107-12 (discussing *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75, 76-77 (4th Cir. 1981)).

67. *Cooper v. Ateliers de la Motobecane*, 442 N.E.2d 1239 (N.Y. 1982).

68. *Id.* at 1240.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

none of which it based on the Convention's *travaux*, the Court of Appeals reinstated the order of the trial court.

First, the Court of Appeals agreed with the Third Circuit that the plain language of article II(3) prevented it from retaining any jurisdiction over an action subsequent to referring the parties to arbitration.<sup>74</sup> Second, the court followed the Third Circuit's decision that the Convention was designed to allow parties to avoid the vagaries of state law.<sup>75</sup> The Court of Appeals added a third and original legal argument, reasoning that because the Convention expressly provides for attachment only in an action to enforce an award, the framers must have intended courts to abstain from such interference until after an arbitrator had decided the merits of the dispute.<sup>76</sup>

In addition, the Court of Appeals advanced six policy arguments for its decision. First, it explained that the essence of arbitration is the resolution of disputes without judicial interference.<sup>77</sup> Second, it reasoned that because arbitration is based on voluntary arrangements and is usually followed by voluntary compliance with awards, attachment is not normally necessary.<sup>78</sup> Third, because an award may be executed in any country party to the Convention, there is no need for pre-award attachment even in the absence of voluntary compliance.<sup>79</sup> Fourth, to the extent that parties do need

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74. *Id.* at 1242.

75. *Id.* at 1240.

76. *Id.* at 1242. This argument, however, makes little sense in light of *Murray Oil* and its progeny. See *supra* part I.A. (interpreting chapter 1 of the FAA to allow recourse to pre-award interim measures despite the fact that § 8 of the Act provides explicitly for them only in admiralty cases).

77. *Cooper*, 442 N.E.2d at 1243. On this point, the court simply misconstrued the nature of arbitration. Brower & Tupman, *supra* note 13, at 33-34; Higgins, *supra* note 4, at 1522, 1546; Park, *supra* note 7, at 656-57; Reichert, *supra* note 3, at 389; Shenton, *supra* note 2, at 101 (noting that English common law and the Arbitration Acts of 1950 and 1979 give English courts the power to issue orders securing the amount in dispute). From start to finish, courts exercise their powers to give force to arbitration clauses. See *supra* text accompanying notes 8-11.

78. *Cooper*, 442 N.E.2d at 1242 (citing Contini, *supra* note 18, at 309 n.84, for the proposition that parties voluntarily comply with awards 85% of the time). Experts have doubted the validity of this figure. Brower & Tupman, *supra* note 13, at 32 n.67. Even assuming that the court correctly stated the figure, it does not explain why interim measures should not be available in the 15% of cases in which they are manifestly necessary.

79. *Cooper*, 442 N.E.2d at 1242. Even if this were true, many states that are party to the Convention have more restricted discovery and greater protection of proprietary information than does the United States. Paul Stephan, et al., *International Business and Economics* 209-11 (1993). In fact states such as Australia, Bermuda, Canada, the Cayman Islands, France, Germany, Liechtenstein, Norway, Panama, Singapore, Switzerland and the

security, they can contract for performance bonds.<sup>80</sup> Fifth, it would be contrary to the Convention's purpose to subject a foreign entity to local procedures with which it may not be familiar.<sup>81</sup> Finally, the court suggested that if U.S. courts subject foreign entities to unfamiliar procedures, U.S. companies operating overseas will face reciprocal treatment.<sup>82</sup>

Despite the volume of arguments that have been offered to demonstrate the Convention's prohibition of pre-award attachments, not all U.S. courts have been swayed by their content. Like *McCreary* and *Cooper*, however, courts that have upheld the use of pre-award attachments have relied upon the Convention's text and policy arguments rather than upon the Convention's *travaux*.

In *Carolina Power & Light Co. v. Uranex*, the United States District Court for the Northern District of California became the first court to reject explicitly the Third Circuit's decision in *McCreary*.<sup>83</sup> A North Carolina utility had entered into a ten-year contract with a French uranium supplier.<sup>84</sup> After a dramatic rise in the market

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United Kingdom all have "blocking statutes," which are designed to frustrate the disclosure of business information in U.S. litigation. *Id.* Even the European Union's Commission is considering such a measure. *Id.* In anticipation of an adverse award, a defendant might spread its assets among related entities so as to hinder discovery of their location. At a minimum, the freedom to do this increases defendants' settlement leverage.

80. *Cooper*, 442 N.E.2d at 1242. Yet, this directly confounds parties which have chosen arbitration as a means of reducing transaction costs. In keeping with the parties' desire to reduce these, it makes sense to have them post security only when necessary, which is the purpose of interim measures.

81. *Id.* It is surprising that a court might argue that ignorance is a basis for immunizing defendants from the laws of the jurisdictions where they keep their assets, especially because many foreigners choose to hold their assets in the United States so that they may benefit from our political stability. Richard L. Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 *Geo. L.J.* 1091, 1123 (1983).

In any event, it seems more equitable to subject foreigners' locally held assets to domestic law than it does to require U.S. parties to execute awards in fora with whose laws they may be unfamiliar.

82. *Cooper*, 442 N.E.2d at 1243. Unfortunately, the court failed to understand that U.S. companies already face this danger. See Joseph D. Becker, *Attachments in Aid of International Arbitration—The American Position*, 1 *Arb. Int'l* 42, 48 (1985) (noting a recent series of studies documenting the use of injunctions in Europe); Brower & Tupman, *supra* note 13, at 32; Burrows & Newman, *supra* note 3, at 2; Reichert, *supra* note 3, at 390-91. Indeed, only the United States has produced a judicial opinion holding that article II(3) prohibits courts from dispensing pre-award interim measures. 2 G. Delaume, *Transnational Contract* 76-77 (1990); Albert Jan van den Berg, *The New York Arbitration Convention of 1958*, at 143 (1981); Curtis E. Pew & Robert M. Jarvis, *Pre-Award Attachment in International Arbitration: The Law in New York*, 7 *J. Int'l Arb.* 31, 31 (1990).

83. *Carolina Power & Light v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977).

84. *Id.* at 1045.

price of uranium, the French supplier refused to perform under the terms of the contract and, in accordance with their contract, the parties commenced arbitration in New York.<sup>85</sup> Despite the French company's cooperation, the U.S. utility feared that it would be unable to execute the award in the United States.<sup>86</sup> Therefore, it brought an attachment action against the French company's single U.S. asset, an \$85 million debt in California.<sup>87</sup> Citing *McCreary* as precedent, the French company argued that the maintenance of an attachment would violate the Convention.<sup>88</sup>

The district court rejected *McCreary* on several grounds. First, it argued that the language of article II(3) is not materially different from that of section 3 of the FAA.<sup>89</sup> In doing so, the court speculated that any difference between the words "stay" and "refer" could be explained by the fact that the Convention was intended to apply to a multitude of legal systems.<sup>90</sup> The court reasoned that in some circumstances a judicial authority might not understand the term "stay", which is a term of art peculiar to Anglo-American common law.<sup>91</sup> Second, even if "refer" means something stronger than "stay," the availability of interim measures should not be prohibited. Indeed, the court argued, section 4 of the FAA (which allows courts to order parties to proceed to arbitration) has never been understood to prevent a court from exercising "continuing jurisdiction."<sup>92</sup> Third, it noted that none of the Convention's provisions expressly prohibit pre-award attachments.<sup>93</sup> Fourth, it found no basis for the argument that the Convention's provision for removal to federal court reflects a bias against subjecting arbitrating parties to the vagaries of state law.<sup>94</sup> Finally, the court recalled that the Supreme Court had reversed its former hostility to the availability of interim measures in the context of labor arbitrations.<sup>95</sup>

Although the *Carolina Power & Light* court manifested a greater sensitivity to the need to construe the language of article II(3) in

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85. *Id.*

86. *Id.* at 1045-46.

87. *Id.*

88. *Id.* at 1050.

89. *Id.* at 1051.

90. *Id.* at 1051-52.

91. *Id.*

92. *Id.* at 1052 (citing 9 U.S.C. § 4).

93. *Id.* at 1051.

94. *Id.* at 1052.

95. *Id.* (citing *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970)).



light of the circumstances in which it was drafted, the court's construction still did not rely upon legislative history.

## II. DOCTRINAL SHATTER ZONES

### A. *A Murky Split of Authority*

Twenty-two years have passed since the Third Circuit decided *McCreary* and nineteen have expired since the Northern District of California declined to follow the Third Circuit's wisdom. Time, however, has neither resolved the differences between the two lines of cases nor provided a clear split of authority. Because the availability of pre-award attachments has an enormous effect on the meaningfulness of the arbitral process, this section reviews the post-*McCreary* precedent existing in each circuit. In so doing, it uncovers an uncertain three-way split of authority. First, with varying degrees of clarity, the First, Third, Fourth, Eighth and Tenth Circuits appear to have aligned themselves with *McCreary*. Second, precedent from the United States Courts of Appeals for the Fifth, Sixth and Ninth Circuits indicates greater sympathy for *Carolina Power & Light*. Third, the Second and Seventh Circuits have produced conflicting authority on the jurisdiction of courts to grant interim measures under the Convention. To date, the United States Courts of Appeals for the Eleventh and District of Columbia Circuits have never addressed the issue and therefore offer no guidance in this matter. This lack of clarity leaves parties in the uncomfortable position of not knowing *ex ante* whether the local district court will order an attachment in aid of future arbitrations. Thus, a significant portion of "the bottom line" will become certain only after a dispute arises, at which time each party will have to investigate the other's amenability to suit in various jurisdictions, the current location of the other party's assets and the likely outcome of the simultaneous litigation in jurisdictions adhering to different views of the Convention.<sup>96</sup>

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96. Although this subpart discusses federal courts' divergent views with regard to article II(3), the issue's complexity grows if state courts are considered. Because state courts need not defer to federal courts' interpretations of treaties, New York courts could adhere to *Cooper* even if the Second Circuit repudiated *McCreary*. Restatement (Third) of the Foreign Relations Law of the United States § 112 cmt. a (1987) [hereinafter Restatement]; see also *Smith v. Wisconsin Dep't of Agric., Trade & Consumer Protection*, 23 F.3d 1134, 1139 n.10 (7th Cir. 1994) (noting that Seventh Circuit interpretations of federal law do not bind state courts); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (holding that though Supreme Court precedent binds state courts on questions of federal law, the decisions of inferior federal courts have no binding effect on state courts

### 1. *McCreary Jurisdictions*

In *Ledee v. Ceramiche Ragno*, the First Circuit followed the Third Circuit's decision in *McCreary*.<sup>97</sup> This case arose out of a dispute over the termination of a distributorship contract between a Puerto Rican company and its Italian supplier.<sup>98</sup> When the Italian supplier failed to renew the distributorship contract, the Puerto Rican company brought an action in the Superior Court of Puerto Rico.<sup>99</sup> The supplier successfully removed the action to federal court on the basis of diversity jurisdiction<sup>100</sup> and filed a motion to dismiss the suit for lack of subject matter jurisdiction.<sup>101</sup> Relying on the contract's arbitration clause and the Third Circuit's holding in *McCreary*, the district court found that article II(3) of the Convention mandates referral to arbitration and makes no provision for a court to retain any degree of jurisdiction over the dispute.<sup>102</sup> Therefore, the court dismissed the action for lack of subject matter jurisdiction.<sup>103</sup> On appeal, the First Circuit upheld the decision of the district court; in doing so, it cited *McCreary* as well as the Fourth Circuit's holding in *I.T.A.D. Assoc. v. Podar Bros.*<sup>104</sup>

The *Ledee* decisions bring the First Circuit into close alliance with the Third Circuit's *McCreary* view. The district court specifically relied on *McCreary* for the proposition that after referring a dispute to arbitration, a court may not retain jurisdiction over the matter.<sup>105</sup> The First Circuit upheld this decision and supported its own opinion with additional references to *McCreary* and its prog-

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that lie outside their appellate jurisdiction), cert. denied, 402 U.S. 983 (1971); Note, Authority in State Courts of Lower Federal Court Decisions on National Law, 48 Colum. L. Rev. 943, 946-47 (1948)(same). One might be tempted to speculate that, in such a case, diversity jurisdiction would, in the context of international arbitration, ensure the effective predominance of the Second Circuit's view. The clever joinder of parties, however, often serves to destroy diversity jurisdiction or to bar removal. See *Bi v. Union Carbide*, 984 F.2d 582, 584 n.2 (2d Cir. 1993) (providing a litany of methods by which a party can destroy diversity and prevent removal of an action to federal court). Removal on the basis of federal question jurisdiction would, thus, present a more promising way to maintain the predominance of federal courts. However, because the federal question must appear on the face of the plaintiff's complaint, this avenue may also be subject to manipulation.

97. *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982).

98. *Ledee v. Ceramiche Ragno*, 528 F. Supp. 243, 244 (D.P.R. 1981).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 245-46.

103. *Id.* at 246.

104. *Ledee*, 684 F.2d at 187 (citing *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981)).

105. *Ledee*, 528 F. Supp. at 245-46.

eny.<sup>106</sup> Although *Ledee* did not specifically involve a request for a pre-award attachment, it is difficult to see how a pre-award attachment could be granted without violating the court's reasoning. If a court retains no jurisdiction after sending the parties to arbitration, it lacks the authority to order an attachment. Thus, although the First Circuit has never held that pre-award attachments are unavailable under the New York Convention, it would have to overrule its decision in *Ledee* in order to reach a different result.

Fifteen years ago, the Fourth Circuit became the first federal appellate court to announce its unqualified support for *McCreary*. *I.T.A.D. Assoc. v. Podar Bros.* involved a dispute between an Indian seller and a U.S. buyer.<sup>107</sup> After the Indian government prevented the seller from fulfilling its obligations, the U.S. buyer brought a suit for breach of contract and obtained an attachment in a South Carolina state court.<sup>108</sup> The Indian seller removed the case to federal court where it moved to compel arbitration.<sup>109</sup> The district court denied the request.<sup>110</sup> On appeal, the Fourth Circuit reversed the district court and ordered the attachment liquidated.<sup>111</sup> Citing only *McCreary* as authority, the court held tersely that the attachment was obtained "contrary to the parties' agreement to arbitrate and the Convention."<sup>112</sup>

The Eighth Circuit itself has only once had occasion to cite *McCreary*. In that case, the court cited *McCreary* to support its position on the appealability of transfer orders.<sup>113</sup> It yields no insight germane to the present inquiry. However, *McDonnell Douglas Corp. v. Kingdom of Denmark*, a 1985 decision of the United States District Court for the Eastern District of Missouri, sheds more light on the availability of interim measures under the

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106. *Ledee*, 684 F.2d at 187.

107. *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75, 76 (4th Cir. 1981).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 77.

112. *Id.* The Fourth Circuit has not deviated from its decision in *I.T.A.D. Assoc.* In 1992, the United States District Court for the District of Maryland cited *Carolina Power & Light* as precedent. *Cameco Indus., Inc. v. Maytrac, S.A.*, 789 F. Supp. 200, 204 (D. Md. 1992). The court, however, cited *Carolina Power & Light* for the general proposition that a *quasi in rem* attachment may in part be justified by the liquidity of the asset. *Id.* Because the Maryland case dealt with the grounds for a *pre-judgment* attachment, *id.*, it does not lead one to believe that the Fourth Circuit's lower courts have launched an assault on *I.T.A.D. Assoc.*

113. *United States Fire Ins. Co. v. American Family Life Assurance Co.*, 787 F.2d 438, 439 (8th Cir. 1986).

New York Convention.<sup>114</sup> In that case, McDonnell Douglas brought a declaratory action for the purpose of absolving itself from any liability in the unintentional firing of a missile it had sold to the Danish Navy.<sup>115</sup> Citing the sales contract's arbitration clause and the Convention, the Danish Navy moved to dismiss the complaint for lack of subject matter jurisdiction.<sup>116</sup>

The district court granted the Danish request. In a two-sentence discussion of this crucial issue, the court noted that under section 3 of the FAA, it would usually stay litigation of any disputes subject to an arbitration clause.<sup>117</sup> With regard to the Convention, the court found persuasive the argument that it had no choice but to dismiss for lack of subject matter jurisdiction any claims falling within the scope of a valid arbitration clause.<sup>118</sup> In support of its conclusion, the court cited both *McCreary* and *Ledee*.<sup>119</sup>

Thus, the existing precedent indicates that interim measures may not be available in the Eighth Circuit. If the district court found itself unable to retain sufficient jurisdiction merely to stay the litigation, it certainly had no power to grant provisional measures. This conclusion is confirmed by the previous discussion of the availability of interim measures under chapter 1 of the FAA.<sup>120</sup> The Eighth Circuit considers it impossible simultaneously to order arbitration and to weigh the parties' claims to provisional measures.<sup>121</sup> Given this approach and the similarity between "ordering"<sup>122</sup> and "referring"<sup>123</sup> parties to arbitration, it is only logical that the courts of the Eighth Circuit would refuse to grant pre-award attachments in cases subject to the Convention.

Like the Eighth Circuit, the Tenth Circuit reports only one case that mentions *McCreary*.<sup>124</sup> The court followed the Third Circuit's view on the appealability of transfer orders.<sup>125</sup> Thus, it is difficult

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114. *McDonnell Douglas Corp. v. Kingdom of Denmark*, 607 F. Supp. 1016 (E.D. Mo. 1985).

115. *Id.* at 1017.

116. *Id.* at 1020.

117. *Id.* (citing to 9 U.S.C. § 3).

118. *Id.*

119. *Id.*

120. See *supra* part I.A.

121. See *supra* text accompanying notes 44-45 (discussing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1291-92 (8th Cir. 1984)).

122. Section 4 of the FAA requires courts to "order" parties to arbitration. 9 U.S.C. § 4.

123. Article II(3) of the Convention, *supra* note 8, requires courts to "refer" parties to arbitration.

124. *Jesko v. United States*, 713 F.2d 565, 568 (10th Cir. 1983).

125. *Id.*

to predict how the Tenth Circuit might rule on a request for interim relief under the Convention. Yet, given its past hostility to interim measures under section 4 orders to arbitrate,<sup>126</sup> it would be prudent to expect a similar reaction under an article II(3) reference to arbitration.<sup>127</sup>

## 2. Carolina Power & Light Jurisdictions

The Fifth Circuit has hinted that it might be persuaded to reject *McCreary*. In *E.A.S.T., Inc. of Stamford, Conn. v. M/V ALAIA*, a U.S. company had agreed to charter a foreign vessel.<sup>128</sup> The charter party called for arbitration of any disputes in London under English law.<sup>129</sup> When the U.S. company received the vessel in unseaworthy condition, it petitioned a district court to compel arbitration and arrest the vessel under section 8 of the FAA.<sup>130</sup> The owners of the vessel argued, *inter alia*, that the court had no power to arrest the vessel and compel arbitration on the basis of *in rem* jurisdiction.<sup>131</sup> The district court rejected this argument, compelled arbitration, arrested the vessel as security and retained jurisdiction over the matter.<sup>132</sup>

On appeal, the owners of the vessel claimed that the vessel had been arrested in violation of the New York Convention.<sup>133</sup> The Fifth Circuit upheld the district court, basing its opinion in part upon an exception to the *McCreary* doctrine created in the Second Circuit: that the Convention does allow pre-award attachments in admiralty cases.<sup>134</sup> At the same time, the court noted that the reasoning of *McCreary*—if valid to begin with—should apply to arbitrations involving questions of admiralty as well as to those involving typical commercial disputes.<sup>135</sup> It also observed that a number of courts and commentators had criticized *McCreary*.<sup>136</sup> Therefore, although holding only that maritime attachments do not

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126. See *supra* note 44.

127. This occurred in the Ninth Circuit. *PMS Distrib. Co., Inc. v. Huber & Shuner*, A.G., 863 F.2d 639, 642 (9th Cir. 1988); see *infra* text accompanying notes 145-46.

128. *E.A.S.T., Inc. of Stamford, Conn. v. M/V ALAIA*, 876 F.2d 1168, 1169 (5th Cir. 1989).

129. *Id.*

130. *Id.* at 1170.

131. *Id.*

132. *Id.*

133. *Id.* at 1171 (claiming that “pre-arbitration attachment is inconsistent with the [New York Convention]”).

134. *Id.* at 1173.

135. *Id.* at 1173 n.3.

136. *Id.* at 1173.

violate the Convention, the Fifth Circuit's dicta may solicit arbitrating parties to challenge *McCreary*.

One of the Sixth Circuit's district courts has concluded somewhat tentatively that interim measures are available under the Convention. In *Tennessee Imports, Inc. v. Filippi*, a U.S. distributor brought a breach of contract suit against an Italian supplier and sought a preliminary injunction.<sup>137</sup> In response, the Italian supplier argued that the distributorship contract required arbitration of all disputes in Italy.<sup>138</sup> The court noted that this forum selection clause, in turn, triggered article II(3) of the Convention, which required the court to refer the parties to arbitration and perhaps divest itself of subject matter jurisdiction.<sup>139</sup> As authority for this line of reasoning, the court cited *McCreary*.<sup>140</sup>

The court agreed that there is merit in the *McCreary* approach and decided that, in general, courts ordering parties to arbitrate pursuant to article II(3) should subsequently dismiss any litigation for lack of subject matter jurisdiction.<sup>141</sup> The court, however, also found persuasive the line of cases holding that a court may merely stay litigation under article II(3) when necessary to order interim measures in aid of arbitration; in fact, the court acknowledged that interim measures are sometimes necessary to ensure that arbitration remains a meaningful process of dispute resolution.<sup>142</sup> Ultimately, the court decided that the plaintiff had failed to make a compelling case for a preliminary injunction.<sup>143</sup> Therefore, the court declined to rule on whether or not interim measures are available under the Convention.<sup>144</sup> Nonetheless, its dicta can hardly encourage proponents of *McCreary*.

The Ninth Circuit has never had occasion to adopt the full holding of the district court's opinion in *Carolina Power & Light*. In *PMS Distrib. Co. v. Huber & Shuner, A.G.*, it cited *Carolina Power & Light* as authority for the proposition that, after ordering arbitration pursuant to section 4 of the FAA, a court may retain jurisdiction sufficient to maintain an attachment.<sup>145</sup> Because *PMS*

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137. *Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1317-18 (M.D. Tenn. 1990).

138. *Id.* at 1318.

139. *Id.* at 1322-23, 1323 n.4.

140. *Id.* at 1323.

141. *Id.* at 1324.

142. *Id.* at 1325.

143. *Id.* at 1329-30.

144. *Id.* at 1329.

145. *PMS Distrib. Co., Inc. v. Huber & Shuner, A.G.*, 863 F.2d 639, 642 (9th Cir. 1988).

*Distrib.* cites *Carolina Power & Light* as authority only for the availability of pre-award attachments under chapter 1 of the FAA, it does not directly confirm the full holding of *Carolina Power & Light*. Yet, inasmuch as the power to grant provisional measures after ordering arbitration pursuant to section 4 of the FAA was a key argument in favor of reaching the same result when “referring” parties to arbitration under the Convention,<sup>146</sup> it seems that the Ninth Circuit looks favorably upon the holding of *Carolina Power & Light*.

### 3. *Mixed-Precedent Jurisdictions*

Prior to 1990, courts within the Second Circuit typically held that once arbitration is ordered pursuant to the Convention, courts are stripped of subject matter jurisdiction over the matter.<sup>147</sup> In *Borden, Inc. v. Meiji Milk Prods. Co.*, however, the Second Circuit broke with precedent and upheld a district court’s decision to grant a preliminary injunction in aid of arbitration.<sup>148</sup> The Second Circuit could have relied on an earlier district court case which had held that although there is some question regarding a court’s authority to order a pre-award attachment under the Convention, it may issue an injunction.<sup>149</sup> Instead, the Second Circuit seemed to distinguish *Borden* from *McCreary*, finding that the injunction, in contrast to a pre-award attachment, is an aid to arbitration rather than an effort to evade arbitration.<sup>150</sup>

The *Borden* decision, although purporting only to distinguish *McCreary*, effectively repudiates it in two ways. First, although an *in personam* order may differ from an *in rem* order in the abstract, their practical effects are identical—the owner of the assets loses the power to move them at will.<sup>151</sup> Second, and of more importance, lying at the core of *McCreary* is the premise that article II(3) divests courts of subject matter jurisdiction to do *anything* beyond

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146. *Carolina Power & Light*, 451 F. Supp. at 1052.

147. See, e.g., *Astor Chocolate Corp. v. Mikroverk*, 704 F. Supp. 30, 35 (E.D.N.Y. 1989).

148. *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 825-26 (2d Cir. 1990).

149. *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co.*, 598 F. Supp. 754, 758, 759 n.10 (S.D.N.Y. 1984); see also *infra* text accompanying notes 195-98 (discussing *Dongsan*).

150. *Borden*, 919 F.2d at 825-26 (holding that the Convention does not strip courts of their jurisdiction to issue a preliminary injunction, but noting the Third Circuit’s holding in *McCreary* that the Convention forbids courts from granting pre-award attachments).

151. See Shenton, *supra* note 2, at 103-04 (treating *in personam* Mareva injunctions, see *infra* text accompanying notes 231-37, as the English equivalent of pre-award attachments).

referring the parties to arbitration.<sup>152</sup> Thus, even if one believes that injunctions differ fundamentally from attachments, the fact remains that under *McCreary* a court lacks subject matter jurisdiction and, thus, the authority to issue either *in personam* or *in rem* orders for interim relief. Because the *Borden* decision found article II(3) to present no bar to pre-award injunctions, it amounted to a rejection of the line of lower court cases following *McCreary*. In 1991, however, another panel of the same court placed *Borden* into question by acknowledging, yet failing to confront, the key jurisdictional issue.

In *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, the Second Circuit held that there remained some controversy concerning the authority to retain any jurisdiction over a dispute after referring it to arbitration under the Convention.<sup>153</sup> The court noted the existence of *Borden* as well as several district court decisions that had followed *McCreary*.<sup>154</sup> In light of the continuing debate, the court refused to discuss the question until it had been developed more clearly on remand.<sup>155</sup>

Thus, the Second Circuit's stance on the availability of interim measures under the Convention is, for now, uncertain. Until 1990, parties understood that courts would not grant provisional measures. After *Borden*, parties would have been justified in expecting courts to grant certain measures, such as injunctions, where appropriate. Unfortunately, the more recent dicta of the *Threlkeld* panel leave parties to ponder the state of the law and their own exposure. Does this confusion reflect an unintended hiccup or a bitter controversy among the judges of the Second Circuit? If the latter is

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152. *McCreary*, 501 F.2d at 1038:

Unlike § 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. Thus, the contention that arbitration is merely another method of trial, to which provisional state remedies should equally apply, is unavailable.

See also *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 253 n.2 (2d Cir. 1991) (construing *McCreary* as holding that "once arbitration is ordered pursuant to the Convention, the court is stripped of subject matter jurisdiction"); *Carolina Power & Light*, 451 F. Supp. at 1051 (interpreting *McCreary* as holding that the Convention "completely ousts the court of jurisdiction"); *Cooper*, 442 N.E.2d at 1242 (understanding *McCreary* as holding that article II(3) "precludes the courts from acting in any capacity except to order arbitration").

153. *Threlkeld*, 923 F.2d at 253 n.2.

154. *Id.*

155. *Id.*



true, does *Borden* apply only to injunctions? Does it apply at all? Given the amount of assets subject to its jurisdiction, the Second Circuit would serve businesses well by clarifying these points.

Like the Second Circuit, the Seventh Circuit's precedent leaves ample room for parties to argue both for and against the availability of interim measures under the Convention. Those favoring interim measures might look to the court's decision in *Sauer-Getriebe KG v. White Hydraulics, Inc.*<sup>156</sup> The case arose as the result of a dispute over an agreement in which a U.S. producer of motors had granted a distributorship to a German firm.<sup>157</sup> When the German firm learned that the owner of the U.S. company planned to sell its assets, it brought suit to enjoin the U.S. owner from transferring the assets until after the parties had terminated arbitration.<sup>158</sup> In what appears to have been a confused and simply wrongly decided opinion, the district court denied the injunction, enjoined the German firm from proceeding with the arbitration it had already commenced and made findings which it declared to be binding in any future arbitrations.<sup>159</sup> On appeal, the Seventh Circuit reversed the district court on each of these points.<sup>160</sup>

The outcome in *Sauer-Getriebe KG* would seem to lead to the conclusion that attachments may be granted in aid of arbitration. This conclusion, however, depends on two premises. First, it assumes that if the Convention allows a court to order injunctions, the same must be true of attachments. This is a reasonable assumption, but it has been rejected by at least one district court in the Second Circuit.<sup>161</sup> Thus, although the Seventh Circuit's decision to grant an injunction logically leads to the same result for attachments, some persuasive precedent points in the opposite direction.

Second, and of greater importance, it assumes that the Seventh Circuit decided *Sauer-Getriebe KG* under the Convention. Because the situs of the arbitration was in the United Kingdom—a signatory to the Convention—and the parties represented two dif-

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156. *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984).

157. *Id.* at 349.

158. *Id.*

159. *Id.*

160. *Id.* at 350.

161. See *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co.*, 598 F. Supp. 754, 759 n.10 (S.D.N.Y. 1984) (deciding that a court may be unable to grant an attachment under the Convention, but can order an injunction); see *infra* notes 195-99.

ferent countries, the assumption is logical.<sup>162</sup> In *International Shipping Co. v. Hydra Offshore, Inc.*, however, the Second Circuit noted that a party cannot invoke the Convention unless it seeks either to compel arbitration or to enforce an award.<sup>163</sup> Because the plaintiff in *Sauer-Getriebe KG* attempted to do neither, his case may not have arisen under the Convention.<sup>164</sup> Indeed, the Third Circuit,<sup>165</sup> the Fifth Circuit<sup>166</sup> and the Ninth Circuit,<sup>167</sup> as well as Supreme Court Justices White and Blackmun,<sup>168</sup> have all interpreted *Sauer-Getriebe KG* as arising under the domestic portion of the FAA. The *Sauer-Getriebe KG* court's failure to mention the Convention or any case interpreting it tends to confirm this theory.

Furthermore, an opinion that the United States District Court for the Northern District of Illinois handed down a year after *Sauer-Getriebe KG* supports the position that *Sauer-Getriebe KG* was not decided under the Convention. In *Matrenord, S.A. v. Zokor Int'l Ltd.*, the French plaintiff had filed for an attachment against two U.S. companies that had defaulted on a loan.<sup>169</sup> The defendants moved to dismiss, claiming that the court lacked competence to deal with the matter.<sup>170</sup> After reciting the conclusions reached by a number of other jurisdictions, the district court declared the matter to be a question of first impression in the Seventh Circuit.<sup>171</sup> This confirms the previous analysis of *Sauer-Getriebe KG* as a case arising under chapter 1 of the FAA. Therefore, contrary to the opinions of some commentators,<sup>172</sup> *Sauer-Getriebe KG* sheds only questionable light on the Seventh Circuit's interpretation of article II(3).

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162. 9 U.S.C. § 202 (noting that arbitration falls under the Convention if agreement is not entirely between U.S. citizens).

163. *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 n.5 (2d Cir.), cert. denied, 493 U.S. 1003 (1989).

164. In its lawsuit, the German company sought only an injunction until the parties' rights had been determined by arbitration; it did not seek to compel arbitration. *Sauer-Getriebe KG*, 715 F.2d at 348-49.

165. *Ortho Pharmaceuticals Corp. v. Amgen, Inc.*, 882 F.2d 806, 811 (3d Cir. 1989).

166. *RGI, Inc. v. Tucker & Assoc.*, 858 F.2d 227, 229 (5th Cir. 1988).

167. *PMS Distrib. Co. v. Huber & Shuner, A.G.*, 863 F.2d 639, 641-42 (9th Cir. 1988).

168. *Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. McCollum*, 469 U.S. 1127, 1130 (1985) (White, J., dissenting from denial of certiorari).

169. *Matrenord, S.A. v. Zokor Int'l, Ltd.*, No. 84 Civ. 1639 (N.D. Ill. Dec. 19, 1984) (LEXIS, Genfed library, Dist file).

170. *Id.*

171. *Id.*

172. See, e.g., Zicherman, *supra* note 3, at 689 n.139.

Because it went on to reject *McCreary*, *Matrenord* might provide greater illumination on the Seventh Circuit's position. Three facts, however, limit the decision's utility as precedent. First, it is a twelve-year-old unpublished case which no other court has cited as authority. Second, *Matrenord* seriously misinterprets *McCreary* and, consequently, fails to address its central argument. For example, in *McCreary*, the Third Circuit held that the words "refer the parties to arbitration" strip courts of jurisdiction to order pre-award attachments.<sup>173</sup> Although reaching different conclusions about article II(3), the courts in both *Cooper* and *Carolina Power & Light* agreed that this was the central holding in *McCreary*.<sup>174</sup> In contrast, the court in *Matrenord* explained that the Third Circuit considered the Convention to prohibit pre-award attachments because such measures allow parties to bypass their agreement to settle disputes through arbitration.<sup>175</sup> Because the Illinois court disagreed with this statement as a matter of principle, it rejected *McCreary* entirely.<sup>176</sup> Although the district court held that pre-award attachments are available under the Convention, its misinterpretation of precedent and failure to address the key jurisdictional question leave its decision open to challenge.

Finally, *Matrenord* stands at odds with a more recent, published opinion of the Northern District of Illinois. In *Marchetto v. DeKalb Genetics Corp.*, an Italian company and a U.S. corporation had created a joint venture, DeKalb Italiana.<sup>177</sup> Pursuant to the joint venture agreement, neither party could sell its stock without first offering it to the other partner.<sup>178</sup> The parties also agreed to submit all differences to arbitration in Italy.<sup>179</sup> When the U.S. company sold its shares to a third entity, the Italian company brought a suit for breach of contract.<sup>180</sup> The U.S. corporation moved to dismiss the action because the arbitration clause provided for dispute resolution in Italy.<sup>181</sup> Because the court recognized the substantial

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173. *McCreary*, 501 F.2d at 1038 ("Unlike § 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 . . . action.'" (emphasis added).

174. See *Carolina Power & Light*, 451 F. Supp. at 1051; *Cooper*, 442 N.E.2d at 1242.

175. *Matrenord, S.A. v. Zokor Int'l, Ltd.*, No. 84 Civ. 1639 (N.D. Ill. Dec. 19, 1984) (LEXIS, Genfed library, Dist file).

176. *Id.*

177. *Marchetto v. DeKalb Genetics Corp.*, 711 F. Supp. 936, 937 (N.D. Ill. 1989).

178. *Id.*

179. *Id.*

180. *Id.* at 938.

181. *Id.*

presumption towards enforcing arbitration clauses under the Convention, it effectively agreed that it was dispossessed of jurisdiction over any suit subject to a valid arbitration clause.<sup>182</sup> The court cited *Ledee, McCreary* and *McDonnell Douglas Corp. v. Kingdom of Denmark*<sup>183</sup> in support of its decision to dismiss the Italian company's claims.<sup>184</sup>

This opinion could be read as holding that, where interim measures are not an issue, a court must simply relieve itself of jurisdiction upon finding that the dispute is subject to a valid arbitration clause. Yet the *DeKalb* court's invocation of *McCreary*, *Ledee* and *McDonnell Douglas* makes this argument difficult to maintain because each of these cases interpreted article II(3) to deprive courts of jurisdiction to do more than order parties to arbitration. Therefore, one might argue that, were the issue directly before it, the *DeKalb* court would have held itself incompetent to order interim measures. Regardless of which theory the reader finds more compelling, the point is that neither interpretation is beyond question. Today, parties arbitrating under the Convention cannot be sure whether the courts of the Seventh Circuit will offer them recourse to pre-award attachments.

#### 4. Summary

In sum, the circuits divide into an ambiguous three-way split: 1) the First, Third, Fourth, Eighth and Tenth Circuits are either in or leaning towards *McCreary*; 2) the Fifth, Sixth and Ninth Circuits either adhere or are sympathetic to *Carolina Power & Light*; and 3) the Second and Seventh Circuits have, arguably, articulated conflicting understandings of the law. The Eleventh and D.C. Circuits present clean slates, not having considered the issue. Like the Tenth Circuit, the Eleventh has followed *McCreary*, but only with regards to the appealability of transfer orders.<sup>185</sup> The existing three-way split only increases unpredictability—and costs—to parties who have turned to arbitration because of its certainty.

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182. *Id.* at 938-39.

183. See *supra* text accompanying notes 114-19 (discussing *McDonnell Douglas*).

184. *DeKalb*, 711 F. Supp. at 940-41.

185. *Alimenta (USA), Inc. v. Lyng*, 872 F.2d 382, 385 (11th Cir. 1989); *Middlebrooks v. Smith*, 735 F.2d 431, 432 (11th Cir. 1984).

## B. *Making Exceptions*

The courts that hold themselves incompetent under the New York Convention to order pre-award interim measures have offered well-reasoned opinions in favor of their conclusion. So have the courts rejecting this position. One means of assessing the strength of each position is to examine the degree to which each side of the debate has recognized exceptions to the general rule. Other than advising courts to exercise caution in granting interim relief,<sup>186</sup> no court following the outcome of *Carolina Power & Light* has recognized an exception to the general rule that provisional measures theoretically are available under the Convention. On the other hand, courts following the decision in *McCreary* have recognized a number of exceptions to the general rule that provisional measures are not available under the New York Convention. As with the arguments advanced in *McCreary*, courts have neglected to ground these exceptions in the Convention's *travaux*. Indeed, their holdings often lack the virtue of logical consistency. Consequently, they have done considerable harm both to doctrinal stability and to the Convention's integrity. It is to these exceptions that this Note now turns.

In 1977, the United States District Court for the Southern District of New York promulgated the "admiralty exception." In *Andros Compania Maratima, S.A. v. Andre & Cie., S.A.*, the court granted the attachment of a vessel in aid of an arbitration that had already commenced in London.<sup>187</sup> As authority for its decision, the court relied on section 8 of the FAA, which expressly provides for pre-award attachment in arbitrations involving questions of admiralty.<sup>188</sup> The court noted that chapter 1 of the FAA applies insofar as it does not conflict with the Convention.<sup>189</sup> Reasoning that pre-award attachment in maritime cases does not undermine the Convention's main goal—the production of enforceable awards—the court found the express terms of section 8 to control.<sup>190</sup> In so

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186. See *Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1324 (M.D. Tenn. 1990) (holding that absent "compelling" reasons, dismissal for lack of subject matter jurisdiction is appropriate).

187. *Andros Compania Maratima, S.A. v. Andre & Cie, S.A.*, 430 F. Supp. 88, 89-90 (S.D.N.Y. 1977).

188. *Id.* at 91.

189. *Id.*

190. *Id.* at 92-93.

doing, it created an exception to *McCreary* that courts have consistently applied when sitting in admiralty.<sup>191</sup>

The *Andros* decision and its progeny may enjoy popularity with those who would like to limit *McCreary* to the greatest extent possible. From a logical standpoint, however, the maritime exception is indefensible. It is true that section 8 of the FAA expressly allows pre-award attachment; however, chapter 1 of the FAA applies to cases involving international arbitration only when consistent with the Convention.<sup>192</sup> Therefore, to grant interim measures based on section 8, a court must first determine that the Convention presents no obstacle to such an order. Because the Convention provides no distinction between commercial and maritime arbitrations, it follows that the Convention either condones or prohibits both.<sup>193</sup> Inasmuch as the *Andros* court agreed that *McCreary* governs commercial arbitration clauses that fall under the Convention,<sup>194</sup> it should have explained why the Convention provides for a different result in cases involving questions of admiralty. Understandably, it chose not to undertake this seemingly impossible task.

Courts may have created the admiralty exception to cabin the reach of ill-considered doctrine, but they would have served the public better by rejecting *McCreary* as incompatible with the Convention's *travaux* rather than by creating law out of whole cloth. The point is not only that courts upset the separation of powers when they assume the legislature's role, but also that, political theory aside, lawyers give advice based on their understanding of statutes and treaties. When courts begin to interpret written laws in an unprincipled fashion, they reduce the utility of reasoned legal advice and, thus, increase the cost of business transactions.

The Southern District of New York has also created an injunction exception.<sup>195</sup> In *Rogers, Burgun, Shahine & Deschler, Inc. v.*

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191. For sources listing cases, see Brower & Tupman, *supra* note 13, at 28-29; McDonell, *supra* note 15, at 286-87; Pew & Jarvis, *supra* note 82, at 33; Reichert, *supra* note 3, at 390; Brody, *supra* note 14, at 114, 118-20.

192. 9 U.S.C. § 208.

193. Brower & Tupman, *supra* note 13, at 28-29; McDonell, *supra* note 15, at 286-87; Pew & Jarvis, *supra* note 82, at 33; Reichert, *supra* note 3, at 390; Brody, *supra* note 14, at 114, 118-20.

194. *Andros*, 430 F. Supp. at 91 (noting that "this Court might easily enough extend the instructions of *McCreary* . . . to support the conclusion that the 'libel-cum-seizure' provisions of Section 8 are 'in conflict with' . . . the Convention," but declining to do so).

195. Catherine Meier, *Provisional Judicial Remedies in Arbitration: The United States Position, in Interim Court Remedies in Support of Arbitration: A Country-by-Country Analysis* 31, 46 (David W. Shenton & Wolfgang Kuhn eds., 1987).

*Dongsan Constr. Co.*, the Southern District enjoined a Korean contractor from drawing on a performance bond pending the outcome of an International Chamber of Commerce (ICC) arbitration in Paris.<sup>196</sup> In a footnote to its decision, the court acknowledged that there is some question regarding the availability of pre-award attachments under the Convention.<sup>197</sup> It argued, however, that the *McCreary* doctrine did not control because the case at bar dealt with an injunction.<sup>198</sup>

The distinction between attachments and injunctions is no more justifiable than the line courts have drawn between admiralty and non-admiralty cases. There simply is no operational difference between the two. Only a lawyer could understand the distinction between not being able to dispose of assets because of an order against the assets as opposed to an order against their owner or custodian. For business people, the effect of one is indistinguishable from the other. Indeed, even English legal commentators treat such injunctions as equivalent to attachments, at least for assets actually within the court's jurisdiction.<sup>199</sup>

Despite the fact that the *Dongsan* exception can hardly be defended from a legal point of view, it is not without merit. Were it followed widely, the exception at least would swallow the rule. Instead of applying for attachments, parties would simply request injunctions. This would dispense with the need for further inexplicable deviations from *McCreary* and incursions upon the Convention's logical integrity. Yet, *Dongsan* has not enjoyed wide acceptance; therefore, courts continue to craft new exceptions.

In two recent decisions, New York state courts have produced yet another exception to *McCreary*. In both *Goldenwave Marine Ltd. v. H. Dantes Comercia, Navagacao e Industrias Ltd.*<sup>200</sup> and *Intermar Overseas, Inc. v. Argocean S.A.*,<sup>201</sup> New York courts held

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196. *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co.*, 598 F. Supp. 754, 758-59 (S.D.N.Y. 1984).

197. *Id.* at 759 n.10.

198. *Id.* at 758, 759 & n.10.

199. D. W. Shenton, *Attachments and Other Interim Court Remedies in Support of Arbitration: The English Courts, in Interim Court Remedies in Support of Arbitration: A Country-by-Country Analysis*, supra note 195, at 53, 61; Shenton, supra note 2, at 103; Zicherman, supra note 3, at 674.

200. *Goldenwave Marine Ltd. v. H. Dantes Comercia, Navagacao e Industrias Ltd.*, Index No. 18488/89 (N.Y. Sup. Ct. IAS Part 15, Jan. 23 1990), reprinted in *Pew & Jarvis*, supra note 82, at 40.

201. *Intermar Overseas, Inc. v. Argocean S.A.*, 117 A.D.2d 492, 497 (N.Y. App. Div. 1986).

that citizens of states not party to the Convention cannot invoke it for the purpose of liquidating attachments, even when the place of arbitration is in a state that has ratified the Convention. These decisions blatantly contradict the Convention. It is true that the United States has a reciprocity reservation to the Convention; however, this applies only to the enforcement of *awards rendered in a state not a party to the Convention*.<sup>202</sup> Because both suits dealt with *agreements to arbitrate in a country that has ratified the Convention*, their holdings are simply wrong.<sup>203</sup> Indeed, it contradicts the Convention's one innovation regarding arbitral agreements. The Geneva Protocol—the Convention's precursor with regard to arbitration clauses—mandated enforcement only of agreements between parties of different signatories.<sup>204</sup> Writing shortly after the Convention's drafting, several commentators hailed the extension of its coverage to *all* arbitral agreements as a significant achievement.<sup>205</sup> One can understand the courts' desire to prevent a party from removing its assets to a country not party to the Convention. Nevertheless, they would have served the public better simply by refusing to follow *McCreary* rather than by rewriting the Convention to achieve the desired resolution of individual cases.

The Second Circuit offers another solution for parties who wish to obtain an attachment in a jurisdiction that follows *McCreary*. Instead of torturing the Convention, this exception relies on its express terms; however, it possesses almost no potential for practical application. In *Sperry Int'l v. Government of Israel*, the Second Circuit confirmed a partial final award that enjoined Israel from drawing on a \$15 million letter of credit until after the tribunal issued an award.<sup>206</sup> Moreover, the same court had previously refused to grant Sperry the injunction because it had not made any showing of irreparable harm.<sup>207</sup> Nonetheless, the court declined to second-guess the arbitrators' conclusions and confirmed the award.<sup>208</sup>

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202. Convention, *supra* note 8, art. I(3).

203. See *id.* art. II(1) (obligating contracting states to enforce all agreements to arbitrate).

204. Geneva Protocol, *supra* note 17, art. 1; Contini, *supra* note 18, at 295-96; Samuel Pissar, The United Nations Convention on Foreign Arbitral Awards, 33 S. Cal. L. Rev. 14, 15 (1959).

205. Contini, *supra* note 18, at 296; Pissar, *supra* note 204, at 15.

206. *Sperry Int'l v. Government of Israel*, 689 F.2d 301, 304 (2d Cir. 1982).

207. *Id.* at 303.

208. *Id.* at 306-07.



Inexplicably, however, the court in *Sperry* did not discuss the New York Convention. Therefore, one might argue that the court did not decide *Sperry* under the Convention and that it might have reached a different conclusion if it had. The argument is not implausible. The Second Circuit disposed of *Sperry* fully one year before it decided, in *Bergesen v. Joseph Muller Corp.*, that awards rendered in the United States can be treated as foreign awards by U.S. courts for purposes of the New York Convention.<sup>209</sup> Yet, even assuming that the Second Circuit decided *Sperry* as a case not falling under the Convention, it is difficult to envision a different result for a factually similar case arising under the Convention. If such an arbitration fell under the Convention, any final awards issuing from it would be enforced under article III.<sup>210</sup> Therefore, one cannot seriously maintain the argument that the possible inapplicability of the Convention had an effect on the outcome in *Sperry*.

Consequently, parties desirous of securing pre-award attachments should be able to do so in any jurisdiction by first obtaining a partial final award from the arbitrators. Although this may provide parties with a way to avoid *McCreary*, it possesses little practical utility. In theory, parties petition courts for interim measures when they fear imminent disposal of their adversary's assets. For this reason, courts often hear petitions for attachment *ex parte* and dispose of them in summary fashion.<sup>211</sup> Demands for arbitration, on the other hand, are never filed *ex parte* and hearings often commence only months later.<sup>212</sup> As a result, the "exception" promulgated in *Sperry* grants to defendants the opportunity to dissipate or conceal assets and may leave plaintiffs with too little security too late in the day.<sup>213</sup>

A final exception, which commentators have suggested but which parties surprisingly have never tested in court, concerns the situation in which parties provide for interim measures in their arbitration clauses.<sup>214</sup> No matter what the Convention says, our courts must give effect to its implementing legislation.<sup>215</sup> Section

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209. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932-33 (2d Cir. 1983).

210. Convention, *supra* note 8.

211. See N.Y. Civ. Prac. L. & R. § 6211 (McKinney 1992); see also Reichert, *supra* note 3, at 372-73.

212. Brower & Tupman, *supra* note 13, at 24-25.

213. *Id.* at 25.

214. McDonell, *supra* note 15, at 291; Zichenman, *supra* note 3, at 684.

215. Restatement, *supra* note 96, § 111 cmt. h, § 115(1)(a); see also U.S. Const. art. VI, § 2 (placing statutes and treaties on the same footing and, thus, suggesting the controlling

206 of the FAA, which implements article II(3) of the Convention, authorizes courts to direct parties to arbitration *in accordance with their agreement*.<sup>216</sup> Reading this provision literally, a court might have no choice but to grant proper requests for pre-award attachments in cases where the parties have provided for them.<sup>217</sup> If successful, this argument could moot the need for further debate about whether the Convention itself prohibits pre-award attachments. Two considerations, however, diminish the attractiveness of section 206 as a solution to the controversy.

First, just as courts that dislike *McCreary* can employ domestic law to limit the reach of the Convention's supposedly plain language, so can advocates of *McCreary* choose to read U.S. law in light of the Convention's plain language. This latter group might rely on the maxim that, when possible, courts must construe domestic law to conform to international obligations.<sup>218</sup> Because article II(3), in their opinion, clearly prohibits recourse to provisional measures and because section 206 of the FAA voices no intent to derogate from the Convention, they could argue with some force that the former provision cannot contradict the latter.

On a broader level, reliance on domestic law as a means of avoiding judicial assertions about the meaning of article II(3) merely repeats a serious flaw in the attitude with which our courts sometimes approach international obligations. When faced with the Convention's vague language, the Third Circuit never inquired into the collective will of the forty-five<sup>219</sup> sovereign states that drafted this international statute. Instead of consulting the Convention's *travaux*, the circuit court simply pronounced one of its possible meanings to be correct. Preferring a different outcome, certain panels of the Second Circuit have carved exceptions into the general rule. Their decisions likewise remain barren of arguments grounded in the Convention's drafting history. Worse yet,

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nature of subsequent implementing legislation, at least to the extent of any conflict with the treaty).

216. 9 U.S.C. § 206.

217. Parties' failure to raise this point is somewhat puzzling, especially in *Matrenord, S.A. v. Zokor Int'l, Ltd.*, No. 84 Civ. 1639 (N.D. Ill. Dec. 19, 1984) (LEXIS, Genfed library, Dist file), where the arbitration clause incorporated the ICC rules of arbitration. Article 8(5) of the ICC rules expressly authorizes parties to seek pre-award interim measures. *Id.* at n.1.

218. Restatement, *supra* note 96, § 114.

219. Samuel Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 1959 J. Bus. L. 219, 220 n.5; Allen Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 Am. J. Int'l L. 807, 815 (1959).

each exception that they approve relies upon a theory that is logically inconsistent with the Convention's drafting history or language.

The failure of our judges to consult the Convention's *travaux* and their Snark-like approach to its text<sup>220</sup> suggests a shortfall of either diligence or principled analysis. The presence of either quality raises philosophical questions about our legal system. It also raises intensely practical ones. When courts make unsupported assertions about the Convention's meaning, the resulting spider web of conflicting precedent and untenable exceptions increases the cost of international transactions for U.S. business people.

*Ex ante*, the cost is simply the uncertainty of whether or not a party can secure provisional measures in aid of future arbitrations. Both parties to a transaction will discount the likelihood that they will get what they want and will, therefore, charge more for their end of the bargain. Once an arbitration has commenced, the costs take the form of billable hours as the parties litigate whether or not *this* case presents another suitable opportunity to cut an exception out of whole cloth.

In a treaty designed to facilitate the settlement of disputes involving international transactions, the presence of such an untidy corner of doctrine is ironic. Irony, however, gives way to frustration when one understands that our courts could have avoided the creation of this doctrine had they taken the opportunity to examine and reflect upon the Convention's lineage and drafting history. In so doing, they would have learned that its drafters never intended to strip courts of jurisdiction to hear petitions for pre-award attachments.

### III. PEERING INTO THE *TRAVAUX*

The first step towards understanding why article II(3) of the Convention does not destroy judicial competence to grant pre-award attachments lies in the approach of English courts to this issue. In contrast to their U.S. counterparts, English judges and scholars have never doubted the power of courts to order such measures.<sup>221</sup> The second step towards enlightenment involves the

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220. In *The Hunting of the Snark*, the Bellman informs his crew, "What I tell you three times is true." Carroll, *supra* note 1, at 134; see *supra* note 1. This statement succinctly captures the tendency of our courts to make rulings that contradict the Convention, defy logic, or—at a minimum—lack the *travaux's* support.

221. See *infra* text accompanying notes 252-58.

formulation of a theory to explain why U.S. courts have created a doctrinal morass whereas the English courts have failed to encounter controversy. Although two U.S. commentators have formulated an explanation for this phenomenon, their theory amounts to little more than "English courts do not debate this point because it is settled law."<sup>222</sup>

The thesis of this section is that England's approach follows logically from its ratification of the Geneva Protocol of 1923<sup>223</sup> and participation in drafting the New York Convention.<sup>224</sup> As a consequence of these actions, England's courts understand that article IV of the Geneva Protocol allowed them to retain jurisdiction over parties after "referring" the merits of their dispute to arbitration.<sup>225</sup> Because of England's efforts to draft article II(3) as a reenactment of the Protocol's article IV, English courts have never conceived that the Convention might deprive them of jurisdiction to order interim measures. In contrast, the United States never became a party to the Geneva Protocol.<sup>226</sup> It also declined to play an active role in drafting the New York Convention.<sup>227</sup> As a result, it possessed little understanding either of article IV of the Geneva Protocol or its republication in article II(3) of the Convention. This ignorance, in turn, has provided a home for the doctrinal chaos that surrounds the authority of U.S. courts to order pre-award attachments under the Convention.

### A. *The English View*

Section 12(6) of the English Arbitration Act of 1950 (1950 Act) authorizes courts to assist international arbitrations by granting a variety of interim measures to the same extent that those measures

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222. Brower & Tupman, *supra* note 13, at 38 ("That English case law regarding court-ordered provisional measures under the New York Convention is limited is not surprising. English law recognizes that such measures are clearly compatible with arbitration agreements, and hence with the New York Convention.")

223. See Geneva Protocol, *supra* note 17. The United Kingdom, whose representative chaired the League of Nations' Subcommittee on Arbitral Clauses, also played an important role in drafting the Protocol. See *infra* notes 259-75 and accompanying text.

224. The United Kingdom was a member of the *Ad Hoc* Committee appointed by the United Nations to review a draft convention submitted by the International Chamber of Commerce (ICC) and played a key role at the U.N. Drafting Conference. See *infra* text accompanying notes 287, 296-97, 344-48.

225. See *infra* text accompanying notes 252-58.

226. See Pizar, *supra* note 219, at 219 n.3 (listing parties to the Protocol); see also Sultan, *supra* note 219, at 809 nn.22-23 (distinguishing between states that immediately ratified the Protocol and states that later acceded to it).

227. See *infra* text accompanying notes 287, 298-99, 353-56.

would be available in litigation.<sup>228</sup> Until the mid-1970s, however, English courts followed a nineteenth-century case, *Lister & Co. v. Stubbs*,<sup>229</sup> which held that a court normally could not enjoin the dissipation or removal of assets until it had rendered judgment.<sup>230</sup>

In 1975, on the basis of questionable authority, an English court granted a pre-judgment injunction in *Nippon Yusen Kaisha v. Karageorgis*.<sup>231</sup> That same year, another court followed suit in *Mareva Compania Naviera, S.A. v. International Bulkcarriers, S.A.*<sup>232</sup> Despite the courts' dubious justification for departing from precedent, their remedies enjoyed great popularity and were codified at section 37 of the Supreme Court Act of 1981.<sup>233</sup>

Today, the remedy is known as a "Mareva injunction."<sup>234</sup> Technically, it is not an attachment.<sup>235</sup> It does not issue against an asset *per se* but is an *in personam* order enjoining an owner or custodian from removing or dissipating assets.<sup>236</sup> Nonetheless, it has the same operational effect as an attachment and has been treated as the equivalent by commentators.<sup>237</sup>

Following *Karageorgis*, pre-judgment interim measures became available in England. Under section 12(6) of the 1950 Act, arbitrating parties could also obtain pre-award injunctive relief. That is, of course, if section 12(6) survived English accession to the New York Convention in 1975. The parties to a 1978 case, *The Rena K*, presented the English courts with the first recorded opportunity to decide what effect English ratification of the Convention had upon section 12(6) of the 1950 Act.<sup>238</sup>

In *The Rena K*, the plaintiff consigned his sugar cargo to the defendant's vessel.<sup>239</sup> When the vessel arrived without all of its

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228. Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 12(6) (Eng.), reprinted in 2 Halsbury's Statutes 571, 586 (4th ed. 1992).

229. *Lister & Co. v. Stubbs*, 45 Ch. D. 1 (C.A. 1890).

230. Shenton, *supra* note 199, at 60; Shenton, *supra* note 2, at 104; Zicherman, *supra* note 3, at 669. If the plaintiff claimed a proprietary right to the asset in question, however, the court could intervene. Shenton, *supra* note 199, at 60.

231. *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093 (C.A.); Shenton, *supra* note 199, at 60; Shenton, *supra* note 2, at 103-04.

232. *Mareva Compania Naviera, S.A. v. International Bulkcarriers, S.A.*, [1980] 1 All E.R. 213 (C.A. 1975).

233. Shenton, *supra* note 199, at 60; Shenton, *supra* note 2, at 103-04.

234. Shenton, *supra* note 2, at 103.

235. *Id.* at 104; Zicherman, *supra* note 3, at 674.

236. Shenton, *supra* note 2, at 104; Zicherman, *supra* note 3, at 674-75.

237. Sheaton, *supra* note 2, at 103; Zicherman, *supra* note 3, at 674-75.

238. *The Rena K*, 1979 Q.B. 377, 407 (1978).

239. *Id.* at 380.

sugar, having jettisoned most of it because it spoiled en route, the plaintiff brought suit against the defendant and sought to prevent him from removing his vessel.<sup>240</sup> The shipowner moved for a stay of litigation pending arbitration as required by the bill of lading.<sup>241</sup> He also argued that an injunction was not warranted.<sup>242</sup> He did not, however, suggest that the court lacked the power to order one. Having considered these arguments, the court granted the stay of litigation.<sup>243</sup> In light of the defendant's financial condition, however, the court determined that the defendant was not entitled to have his vessel released.<sup>244</sup> In arriving at its decision, the court noted that nothing in the laws governing arbitration requires a court to release secured assets after granting a stay of litigation.<sup>245</sup> It then turned to section 12(6) of the 1950 Act as authority for granting the injunction.<sup>246</sup>

*The Rena K* has become accepted law in England.<sup>247</sup> The author of the opinion maintained that other courts had already reached the same result in unreported cases.<sup>248</sup> The case may thus be viewed as confirmation of a trend in the law that had already developed. In any event, several English courts, including the House of Lords, have recognized the authority of courts to exercise jurisdiction in support of arbitration.<sup>249</sup>

The failure of *The Rena K* court to find any prohibition on the exercise of limited jurisdiction over arbitrating parties is consistent with section 1(1) of the Arbitration Act of 1975, which implements article II(3) of the Convention.<sup>250</sup> This provision authorizes parties to an arbitration clause to request a stay of litigation and directs courts to grant the stay.<sup>251</sup> Because the authors of the implement-

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240. *Id.* at 380, 385-86.

241. *Id.* at 386-89.

242. *Id.* at 409.

243. *Id.* at 391-95.

244. *Id.* at 406.

245. *Id.* at 404 (referring to the Arbitration Act of 1975, see *infra* text accompanying note 250, which implemented article II(3) of the New York Convention).

246. *Id.* at 407.

247. See *The Bazias 3*, [1993] 2 W.L.R. 854, 859 (C.A.); *The Tuyuti*, 1984 Q.B. 838, 850 (C.A.); *Gidrxslme Shipping Co. v. Tantomar-Transportes Maritimos Lda.*, [1994] 4 All E.R. 507, 513 (Q.B.); see also *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.*, 1993 App. Cas. 334, 335-36, 351-52 (appeal taken from Eng.) (failing to cite *The Rena K*, but holding that pre-award injunctions are available under the Convention).

248. *The Rena K*, 1979 Q.B. at 407.

249. See *supra* note 247 (listing cases).

250. *The Rena K*, 1979 Q.B. at 392-93.

251. Arbitration Act, 1975, ch. 3 § 1(1) (Eng.), reprinted in 2 Halsbury's Statutes 644 (4th ed. 1992).

ing legislation chose to interpret "refer" to mean "stay," English judges have no room to argue that the Convention precludes them from exercising limited jurisdiction over a matter they have sent to arbitration.

Someone unfamiliar with the history of the Geneva Protocol and the New York Convention's *travaux* might wonder how the drafters of the English implementing legislation arrived at this construction of "refer." English cases and scholarly writings yield no answer to this puzzle. Judges have taken the statute at face value.<sup>252</sup> Litigating parties have not urged them to do otherwise. Two notable English arbitration treatises say nothing regarding the subject.<sup>253</sup> Another well-known English commentator similarly failed to raise the matter in a piece analyzing the implementing statute.<sup>254</sup>

As befuddling as this may appear, the explanation is surprisingly simple. English authorities remain silent on the issue because it presents no controversy. It does not provide cause for debate because England played a pivotal role in incorporating article IV of the 1923 Protocol into article II(3) of the New York Convention.<sup>255</sup> Because England was one of the Protocol's signatories,<sup>256</sup> it understood that its drafters had intended "refer" to mean "stay."<sup>257</sup> Therefore, the statute implementing the Protocol had directed judges to "stay" litigation of disputes subject to arbitration clauses.<sup>258</sup> Consequently, it comes as no surprise that, in implementing a republication of article IV of the Protocol, the drafters also reenacted without question the language of its implementing statute. To demonstrate the efficacy of this theory, we now turn to

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252. See *Channel Tunnel Group*, 1993 App. Cas. at 351-52; *The Bazias 3*, 2 W.L.R. at 858; *The Rena K*, 1979 Q.B. at 393.

253. Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2d ed. 1989); Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (2d ed. 1991).

254. Julian D.M. Lew, *The Arbitration Act of 1975*, 24 Int'l & Comp. L.Q. 870 (1975).

255. See *infra* text accompanying notes 287, 296-97, 344-48.

256. See *supra* note 17.

257. See *infra* text accompanying notes 261-64, 344-48.

258. See *The Arbitration Clauses (Protocol) Act, 1924*, 14 & 15 Geo. 5, ch. 39, § 1(1) (Eng.), reprinted in 1 *Halsbury's Statutes* 469, 470 (1929), which provided that:

[I]f any party to a submission . . . to which the said protocol applies . . . commences any legal proceedings in any court against any other party to the submission . . . any party to such legal proceedings may . . . apply to that court to stay the proceedings, and that court . . . shall make an order staying the proceedings.

the drafting history of the Geneva Protocol and the New York Convention.

B. *A Voice From the Attic: The Convention's Lineage and Travaux*

In 1922, the Economic Committee of the League of Nations conducted an examination of national laws pertaining to the validity of arbitral clauses.<sup>259</sup> To facilitate its efforts, the Economic Committee appointed a Sub-Committee of legal experts (Sub-Committee of Experts or Sub-Committee),<sup>260</sup> the chair of which was an English judge.<sup>261</sup> The latter group met for two days in July, 1922.<sup>262</sup> After brief deliberation, the experts concluded that the League should sponsor a treaty that would require its adherents to enforce arbitral agreements.<sup>263</sup> In relevant part, paragraph 16 of their report suggested that “[i]f two parties . . . agree to *refer* [to arbitration] disputes that may arise between them . . . an action brought by either party . . . ought to be *stayed* by the court.”<sup>264</sup> Thus, it seems the Sub-Committee envisioned that courts could both refer the merits of a dispute to arbitration and still exercise limited jurisdiction over the parties.

Subsequently, the Economic Committee “fully endorse[d] the views of the Sub-Committee of Experts”<sup>265</sup> and, on September 16, 1922, submitted a resolution to the Council of the League to the effect “[t]hat the conclusions arrived at by the Committee of

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259. See, e.g., 3 League of Nations O.J. 1394-95, 1403-05, 1410-14 (1922) [hereinafter 3 League]; 4 League of Nations O.J. 835 (1923) [hereinafter 4 League] (explaining the chronology of the League's work on arbitral agreements by the Economic Committee, the Sub-Committee of Experts, and finally the Council of the League in a memorandum by the Secretary-General); League of Nations O.J. Spec. Supp. 13, at 241-42 (1923) [hereinafter League Spec. Supp. 13].

260. 3 League, supra note 259, at 1404; 4 League, supra note 259, at 835.

261. F.D. MacKinnon chaired the Sub-Committee. See 3 League, supra note 259, at 1404, 1414.

262. *Id.*

263. See *id.* at 1414; see also 4 League, supra note 259, at 835-36 (explaining that after the Council of the League passed a resolution approving the Sub-Committee of Experts' findings, the Economic Committee drafted a protocol on the enforcement of arbitral agreements).

264. 3 League, supra note 259, at 1413 (emphasis added).

265. *Id.* at 1404; see 4 League, supra note 259, at 835 (“The Economic Committee fully endorsed the views of the experts and especially their recommendation that the State Members of the League should remove any obstacles in their laws which hinder the recognition of [arbitral agreements] . . .”).



Experts (*especially in Paragraph 16* of the report) be endorsed."<sup>266</sup> The Council of the League adopted the proposed resolution and promised to introduce measures to enact the aims of paragraph 16.<sup>267</sup> As a result, the Economic Committee, in consultation with its legal experts, composed a draft protocol, article IV of which provided that:

Tribunals of the Contracting Parties which, on being seized of a dispute regarding a contract between persons to whom Article I applies, recognise the existence in the contract of an arbitration agreement, whether referring to present or future differences, which is valid and capable of being put into force, shall, on the application of any of the parties, *refer such parties to the decision of the arbitrators.*<sup>268</sup>

Although article IV does not specifically mention the court's power to stay, the intent of the Economic Committee seems to have been to adopt the principle behind paragraph 16 of the expert report. For example, when transmitting the draft protocol to member states, the Secretary-General specifically cited paragraph 16 of the experts' report, which suggested that courts stay actions that are subject to arbitral clauses.<sup>269</sup> The Secretary-General's memorandum further noted that the Economic Committee and the Council of the League fully approved of the proposals made in paragraph 16.<sup>270</sup> Finally, the Secretary-General also informed members of the League that "the Economic Committee . . . drew up the . . . draft protocol with the object of giving effect to the recommendations contained in the report of the Sub-Committee."<sup>271</sup>

In summary, a single thread runs through each step of the Geneva Protocol's drafting history—endorsement of paragraph 16 of the Sub-Committee of Experts' report, which directs courts to stay an action on the merits, but says nothing about relinquishing

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266. 3 League, *supra* note 259, at 1405 (emphasis added); see also 4 League, *supra* note 259, at 835 (discussing the chronology of the League's work on arbitral agreements).

267. 3 League, *supra* note 259, at 1189, 1191 (reporting the Council's acceptance of several resolutions made by the Economic Committee, including its reports on arbitration, *id.*, Annex 421 at 1392-95); 4 League, *supra* note 259, at 835.

268. 4 League, *supra* note 259, at 836 (emphasis added). Although the final language of article IV differs slightly from this draft, the highlighted language remained the same. See Geneva Protocol, *supra* note 17, art. IV. In addition, the drafters considered the amendments not to be substantive. See League Spec. Supp. 13, *supra* note 259, at 73, 339.

269. See 4 League, *supra* note 259, at 835.

270. *Id.*

271. *Id.* at 836.

jurisdiction over the parties.<sup>272</sup> Therefore, the instruction of article IV to “refer the parties . . . to the *decision of the arbitrators*”<sup>273</sup> could only be understood as preventing courts from deciding the merits of a dispute. It does not prohibit them from retaining limited jurisdiction over the parties. Subsequent English legislation supports the above proposition. England, whose representative chaired the Sub-Committee of Experts, implemented the Protocol through a statute that required only a stay of litigation.<sup>274</sup> Likewise, several scholars of that era described article IV of the Protocol as requiring courts to “stay” litigation and “refer” parties to arbitration.<sup>275</sup>

Although the Protocol made great strides towards the international recognition of arbitral agreements, it did little to facilitate international enforcement of awards. The Sub-Committee believed that the time was not yet ripe for such an ambitious step.<sup>276</sup> Therefore, the Protocol required only that its adherents enforce awards rendered on their own territory.<sup>277</sup>

Left unregulated, the enforcement of awards quickly ripened as an issue. Consequently, four years later, the League of Nations sponsored the Geneva Convention of 1927 (Geneva Convention), which required its signatories to honor awards rendered on the territory of any other party.<sup>278</sup> Unfortunately, this seemingly broad obligation attached only after the enforcing party proved that the arbitration had proceeded in strict accordance with the laws of the arbitral situs.<sup>279</sup> In practice, this meant that the successful party had to confirm the award in the courts of the arbitral situs before attempting to enforce the award abroad.<sup>280</sup>

272. See 3 League, *supra* note 259, at 1412-13 (although noting that some countries stayed or dismissed pursuant to arbitral agreements, the Sub-Committee endorsed only a stay in paragraph 16 of its report).

273. Geneva Protocol, *supra* note 17, art. IV (emphasis added).

274. See *supra* note 258 and accompanying text.

275. See Earnest G. Lorenzen, *Commercial Arbitration*, 45 *Yale L.J.* 39, 63 (1935); Arthur Nussbaum, *Treaties on Commercial Arbitration—A Test of International Private-Law Legislation*, 56 *Harv. L. Rev.* 219, 221 (1942); Pisar, *supra* note 204, at 15; Pisar, *supra* note 219, at 220.

276. See 3 League, *supra* note 259, at 1413-14 (“In our opinion the time is not yet come at which this question of the reciprocal enforcement of awards in different countries can be considered with profit.”).

277. Geneva Protocol, *supra* note 17, art. III.

278. Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 *L.N.T.S.* 301, art. I [hereinafter *Geneva Convention*].

279. *Id.*; see Redfern & Hunter, *supra* note 253, at 62; Contini, *supra* note 18, at 288-90; Lorenzen, *supra* note 275, at 64-65; Quigley, *supra* note 18, at 1054.

280. See Redfern & Hunter, *supra* note 253, at 62.

Although the drafters of the Geneva Convention strove to address the issue that the Protocol's drafters had left unresolved, they made no attempt to amend the older document. Viewing the instruments as mutually supportive, they extended membership only to those states that had already ratified the Protocol.<sup>281</sup> Thus, it follows logically that even advocates of an improved regime for recognizing awards found no need to tamper with the existing system for enforcing agreements to arbitrate.

In 1953, the International Chamber of Commerce (ICC) examined deficiencies in the existing system of international arbitration and proposed that the U.N. Social and Economic Council sponsor a convention on arbitral awards to replace the Geneva Convention.<sup>282</sup> The ICC had one main complaint regarding the *status quo*: the burden under the Geneva Convention of proving to the courts of the arbitral situs that the arbitration had been conducted in strict accordance with local procedure.<sup>283</sup> Indeed, apart from dropping this provision, the ICC's proposed convention did not differ greatly from the Geneva Convention with regard to enforcement of awards.<sup>284</sup> In relation to arbitral agreements, however, the ICC draft appears to have made an unintentional departure from the Geneva Convention. Although the ICC expressed no objection to the Geneva Protocol's regime for enforcing arbitration clauses, its draft failed to include the requirement of the Geneva Convention that signature be open only to the Protocol's adherents.<sup>285</sup>

Two years later, in 1955, the Economic and Social Council responded to the ICC's concerns by establishing an *Ad Hoc* Committee to study the enforcement of arbitral awards.<sup>286</sup> With experts representing Australia, Belgium, Ecuador, Egypt, India, Sweden, the United Kingdom and the Soviet Union, the committee met from March 1 to March 15, 1955.<sup>287</sup>

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281. Geneva Convention, *supra* note 278, art. VII; see also Pizar, *supra* note 204, at 15.

282. United Nations, Economic and Social Council, Enforcement of International Arbitral Awards at 7, U.N. Doc. E/C.2/373 (1953); see also Contini, *supra* note 18, at 290-91 (providing a brief historical sketch of the ICC's report and the subsequent action taken by the Economic and Social Council to study arbitral agreements).

283. U.N. Doc. E/C.2/373, *supra* note 282, at 7.

284. Contini, *supra* note 18, at 290.

285. See U.N. Doc. E/C.2/373, *supra* note 282, at 7.

286. See United Nations, Economic and Social Council, Report of the Committee on the Enforcement of International Arbitral Awards at 1, U.N. Doc. E/2704, E/AC.42/4/Rev. 1 (1955).

287. *Id.* at 1-2.

During one of these sessions, the Swedish delegation proposed that the new convention's first article should reproduce article I of the Geneva Protocol, explicitly requiring adherents to recognize the validity of arbitration agreements.<sup>288</sup> This, Sweden argued, would prevent parties from sabotaging the new convention by refusing to uphold arbitral clauses.<sup>289</sup> Although India and the United Kingdom considered such a provision necessary to secure the aims of the convention,<sup>290</sup> four members voted against it. Ecuador believed the validity of arbitral clauses to be implicit in a convention on the enforcement of awards; Egypt thought that an article on agreements transgressed the committee's mandate to draft a treaty on the recognition of final awards; Belgium voted against the proposal because it was "imprecise and superfluous;" the Soviet Union merely declared the suggestion to be unacceptable.<sup>291</sup> Having rejected Sweden's proposal, the committee submitted a text that addressed only the enforcement of final awards<sup>292</sup> and transmitted its report to the Economic and Social Council on March 28, 1955.<sup>293</sup>

On May 20, 1955, the Economic and Social Council requested that the Secretary-General transmit the *Ad Hoc* Committee's draft to U.N. members for their comments.<sup>294</sup> In response, Sweden reiterated its concern that, unless the new convention either incorporated or reproduced the language of the Geneva Protocol, parties to arbitral clauses might sabotage the new convention's object by declaring their agreements invalid and bringing their disputes before courts.<sup>295</sup>

In its own comments, the United Kingdom also noted that the draft made no reference to the Geneva Protocol, which it called

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288. *Id.* at 6.

289. *See id.*

290. *Id.*

291. *Id.*

292. United Nations, Economic and Social Council, Recognition and Enforcement of Foreign Arbitral Awards, Comments by Governments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Sweden) at 13, U.N. Doc. E/2822/Add.1/Annex I (1956); *id.* (United Kingdom), U.N. Doc. E/2822/Add.4/Annex I, at 3; U.N. Doc. E/CONF.26/2, *supra* note 65, at 13.

293. U.N. Doc. E/2704, *supra* note 286, at 1.

294. United Nations, Economic and Social Council, Recognition and Enforcement of Foreign Arbitral Awards; Report by the Secretary-General, U.N. Doc. E/2822, para. 1 (1956); Reichert, *supra* note 3, at 380 (citing E.S.C. Res. 570, U.N. ESCOR, 19th Sess. (resumed), Supp. No. 1A, at 3, U.N. Doc. E/2730/Add.1 (1955)).

295. U.N. Doc. E/2822/Add.1/Annex I, *supra* note 292, at 1.

the "necessary substratum" of the Geneva Convention of 1927.<sup>296</sup> Although the British government had not yet formulated a final position on the matter, it acknowledged the gravity of Sweden's concern that the draft would remain incomplete without some link to the Geneva Protocol.<sup>297</sup>

In contrast, the United States offered no comments on the draft.<sup>298</sup> Instead, it announced that it expected not to attend any drafting conference that the United Nations might convene to finish the work undertaken by the *Ad Hoc* Committee.<sup>299</sup> This notwithstanding, the Economic and Social Council noted the draft's generally favorable reception and called for an international conference on the matter.<sup>300</sup>

The United Nations Conference on International Commercial Arbitration (Conference) met in New York from May 20 to June 10, 1958.<sup>301</sup> As might have been anticipated, the third day of the Conference found Sweden submitting a proposal to amend the draft treaty to include an article that would reenact the substance of article I of the Geneva Protocol.<sup>302</sup> The next day, at the Conference's seventh meeting, Sweden turned the discussion to its draft article.<sup>303</sup> Ceylon, France, Italy and Norway announced their support for the amendment.<sup>304</sup> El Salvador and Turkey, on the other hand, suggested that an article on the validity of arbitral agreements did not belong in the body of a treaty dedicated to the enforcement of awards.<sup>305</sup> Responding to their concern, India's representative acknowledged that the Swedish text had failed to gain the endorsement of the *Ad Hoc* Committee.<sup>306</sup> He noted,

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296. U.N. Doc. E/2822/Add.4/Annex I, *supra* note 292, at 3, 9.

297. *Id.* at 9.

298. U.N. Doc. E/2822, *supra* note 294, para. 6.

299. *Id.*

300. Contini, *supra* note 18, at 291.

301. *Id.*

302. United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 of the Agenda), Sweden: Amendment to the Draft Convention, U.N. Doc. E/CONF.26/L.8 (1958). Surprisingly, Sweden allowed Poland to beat it to the punch. Poland submitted its own draft amendment on the second day of the Conference. See *id.*, Amendments to Draft Convention Submitted by the Polish Delegation, U.N. Doc. E/CONF.26/L.7 (1958).

303. United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record (7th mtg.) at 8, U.N. Doc. E/CONF.26/SR.7 (1958).

304. *Id.* at 9-11.

305. *Id.* at 10, 11.

306. *Id.* at 12.

however, that the committee's objections were "devoid of substance," and in any event decisions of the committee could not bind a conference of plenipotentiaries.<sup>307</sup> Because of his view that the validity of arbitral agreements and the enforcement of awards were "all but inseparable," he supported Sweden's proposal.<sup>308</sup> With that, the meeting adjourned and the matter remained unresolved.<sup>309</sup>

At its ninth meeting, the Conference resumed discussion of the Geneva Protocol. This time, Poland urged the Conference to adopt an article that it had drafted to deal with the matter.<sup>310</sup> Like Sweden, Poland hoped to prevent parties from evading enforcement of awards by attacking the validity of arbitral clauses.<sup>311</sup> Poland, however, touted its draft as more completely reproducing the text of the Geneva Protocol.<sup>312</sup> Ceylon, Norway and the Soviet Union voiced their support for the Swedish and Polish articles.<sup>313</sup> Displaying a change of heart, Turkey declared the inclusion of such a provision to be "essential to the proper completion of the Conference's task."<sup>314</sup>

Turkey, however, was not alone in its decision to switch sides in the debate. India retreated from its endorsement of the Swedish text.<sup>315</sup> What it had called an "inseparable" issue, it now termed "superfluous."<sup>316</sup> France also retracted its approval.<sup>317</sup> After due reflection, its representative stated that "the essential point was that by adopting such provisions, the plenipotentiaries would be going beyond the scope of the draft convention and would thus be misinterpreting the instructions . . . and powers which they had received from their Governments."<sup>318</sup> Belgium, Columbia, El Salvador, Guatemala, West Germany and Yugoslavia agreed that

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307. *Id.*

308. *Id.*

309. *Id.*

310. United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record (9th mtg.) at 2-3, U.N. Doc. E/CONF.26/SR.9 (1958).

311. *Id.*

312. *Id.*

313. *Id.* at 6, 11.

314. *Id.* at 10.

315. *Id.* at 6.

316. *Id.*

317. *Id.* at 7-8.

318. *Id.*

France had correctly perceived the main obstacle to the adoption of such a revision.<sup>319</sup>

In an attempt to forge a compromise, the Swiss and Turkish delegates asserted their belief that the Conference possessed the competence to formulate a provision regarding the validity of arbitral awards but suggested that its text be the subject of an annexed protocol.<sup>320</sup> After the Belgian representative called for a vote on the Conference's competence to address the issue, the Conference decided by twenty-five votes to nine (with six abstentions) that it had sufficient authority to address the matter.<sup>321</sup> By twenty-five votes to eight (with six abstentions), it then resolved to develop a provision concerning the validity of arbitral agreements.<sup>322</sup> Following the advice of Switzerland, however, it decided to draft the provision as an annex to the convention rather than inserting it in the convention's text.<sup>323</sup> To this end, the Conference appointed a working group consisting of Belgium, Poland, Sweden, Turkey, the Soviet Union, the United Kingdom and West Germany.<sup>324</sup>

Sweden quickly turned this partial defeat to its advantage. Two days later, it submitted to the working group a three-article protocol that reproduced the entire substance of the Geneva Protocol's provisions on the validity of arbitral awards.<sup>325</sup> Article I of the draft restated Protocol article I, in which contracting parties undertook to recognize the validity of arbitral agreements.<sup>326</sup> Article II of the draft reiterated the substance of Protocol article II, which provided that the arbitral procedure would "be governed by the will of the parties and subject to the . . . law of the . . . [arbitral

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319. *Id.* at 3-7, 9-10, 13.

320. *Id.* at 10-11.

321. *Id.* at 12.

322. *Id.* at 13.

323. *Id.*

324. *Id.* at 14.

325. Compare United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Additional Protocol on Arbitration Agreements, Sweden: Draft Submitted or Consideration by Working Party II, U.N. Doc. E/CONF.26/C.3/L.1 (1958) with Geneva Protocol, *supra* note 17, art. I. The reader will recall that previously Sweden had merely suggested that the Convention reproduce article I of the Geneva Protocol, which contains a general undertaking to recognize the validity of arbitration clauses. See *supra* text accompanying notes 288, 302.

326. Compare U.N. Doc. E/CONF.26/C.3/L.1, *supra* note 325, art. I, with Geneva Protocol, *supra* note 17, art. I.

situs].<sup>327</sup> Finally, article III of the draft reproduced Protocol article IV almost verbatim:

The courts of any Contracting States to which the present Protocol applies, on being seized of a dispute regarding a contract containing an arbitration agreement which is valid by virtue of article I and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.<sup>328</sup>

After making several cosmetic changes,<sup>329</sup> the working party adopted this text from the Swedish draft and submitted it to the full Conference.<sup>330</sup> When discussion of the draft protocol began on June 5, the Dutch delegate praised the working party's draft and suggested that the Conference reconsider its decision not to include it in the body of the Convention, particularly because the goal of the plenipotentiaries was "to adopt a single instrument."<sup>331</sup> The Dutch representative further proposed that the Conference review a new draft article prepared by his delegation.<sup>332</sup> This article, which became article II of the Convention, condensed the sub-

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327. Compare U.N. Doc. E/CONF.26/C.3/L.1, *supra* note 325, art. II with Geneva Protocol, *supra* note 17, art. II.

328. Compare U.N. Doc. E/CONF.26/C.3/L.1, *supra* note 325, art. III (reproduced in pertinent part in text) with Geneva Protocol, *supra* note 17, art. IV (reproduced in pertinent part below):

The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

329. For example, like article IV of the Geneva Protocol, article III of the Swedish draft directed courts to "refer the parties . . . to the decision of the arbitrators." U.N. Doc. E/CONF.26/C.3/L.1, *supra* note 325, art. III. Article III of the working party's final version directed them to "refer the parties . . . to arbitrators for decision." United Nations, Economic and Social Council, Text of Additional Protocol on the Validity of Arbitration Agreements Submitted by Working Party No. 2, art. III, U.N. Doc. E/CONF.26/L.52 (1958). Substantively identical, both renditions of article III appear to require judges to surrender only the power to impose a final resolution of the dispute at hand.

330. See U.N. Doc. E/CONF.26/L.52, *supra* note 329.

331. United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record (21st mtg.) at 17, U.N. Doc. E/CONF.26/SR.21 (1958). See generally Haight, *supra* note 18, at 24 (summarizing the U.N. records of the meetings of the United Nations Conference on International Commercial Arbitration).

332. U.N. Doc. E/CONF.26/SR.21, *supra* note 331, at 17.



stance of the draft protocol's three articles into three paragraphs.<sup>333</sup> Thus, an economy of language was required. Consequently, paragraph three of the Dutch text reduced the Swedish draft's "refer the parties . . . to arbitrators for decision"<sup>334</sup> to "refer the parties to arbitrators."<sup>335</sup> Of significance, it appears this revision sprang from the need to simplify the language of the draft protocol, not from a desire to modify its substance.<sup>336</sup> After minimal discussion, the Conference passed the Dutch motion by eighteen votes to eight (with four abstentions).<sup>337</sup>

On the Conference's last working day, Belgium reasserted its view that the Conference had exceeded its mandate in adopting what had by now become article II, a provision on the validity of arbitral agreements.<sup>338</sup> Guatemala joined Belgium in its last-minute attempt to derail article II.<sup>339</sup> The debate reached a climax when the Argentinean delegate, who had chaired the Conference's Drafting Committee,<sup>340</sup> agreed that the plenipotentiaries might drop article II from the Convention.<sup>341</sup> The Conference, he reasoned, had initially voted by a large majority not to include such a provision.<sup>342</sup> The Conference's decision to reverse itself on this point had passed by a much narrower margin.<sup>343</sup>

With a perfect sense of timing, the United Kingdom's representative stepped into the fray, arguing that clarification of the proposal was essential to avoid a misunderstanding.<sup>344</sup> He urged that

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333. Compare U.N. Doc. E/CONF.26/c.3/L.1, *supra* note 325 with United Nations, Economic and Social Council, Netherlands: Amendment to Proposal Made by Working Party No. 2, U.N. Doc. E/CONF.26/L.54 (1958).

334. U.N. Doc. E/CONF.26/L.52, *supra* note 329, art. III.

335. U.N. Doc. E/CONF.26/L.54, *supra* note 333, para. 3. The final version of article II(3), adopted well into the evening of the Conference's last working day, changed this portion of the text to "refer the parties to arbitration." See Convention, *supra* note 8, art. II(3); United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record (23rd mtg.) at 13, U.N. Doc. E/CONF.26/SR.23 (1958); see also Holmes, *supra* note 15, at 790-91 (stating that article II "was hastily prepared and inserted on the last day of the conference"). The record does not explain when or why the Conference decided upon this revision. It appears, however, this was simply another step in the Conference's effort to restate the substance of three articles in three simple paragraphs.

336. See *supra* text accompanying notes 331-33.

337. U.N. Doc. E/CONF.26/SR.21, *supra* note 331, at 17.

338. U.N. Doc. E/CONF.26/SR.23, *supra* note 335, at 7.

339. *Id.*

340. *Id.*

341. *Id.* at 8.

342. *Id.*

343. *Id.*

344. *Id.* at 8-9.

“[c]ountries should not be permitted to sign the Convention under the impression that they could then avoid its application by refusing to recognize the validity of arbitral agreements.”<sup>345</sup> Without article II, he believed that the Convention would be inferior to the Geneva Convention of 1927.<sup>346</sup> Therefore, he told the delegates that abandoning the Convention entirely presented a better choice than modifying it to conform to Belgian demands.<sup>347</sup> With that said, the debate subsided and the Conference adopted the final text of article II by twenty-seven votes to two (with five abstentions).<sup>348</sup> As a result, the substance and language of Geneva Protocol article IV reappeared in article II(3) of the Convention.

In summary, the lineage and drafting history of article II(3) clearly demonstrate that it was never intended to strip courts of the jurisdiction necessary to grant pre-award attachments. Part III of this Note has demonstrated that the drafters and signatories of the Geneva Protocol intended article IV to require courts to surrender to arbitrators only the power to impose a final resolution of the merits of disputes that fell within its scope. Consequently, they understood article IV to require only a stay of litigation. Even according to *McCreary*, a court that is obliged to stay proceedings still retains sufficient jurisdiction over the parties to order interim measures pending an award.<sup>349</sup> Therefore, article IV of the Geneva Protocol could not have rendered courts incompetent to order pre-award attachments.

Fearing that the United Nations’ draft convention on arbitral awards would fail of its purpose without some reference to the validity of arbitration clauses, Sweden fought vigorously for the inclusion of an article that would republish the spirit of the Geneva Protocol.<sup>350</sup> At every stage—in the *Ad Hoc* Committee, in its comments and at the Conference—the United Kingdom served as a

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345. *Id.* at 8.

346. *Id.* Article 7 of the Geneva Convention, *supra* note 278, extended membership only to those states that had previously ratified the Geneva Protocol on Arbitration Clauses.

347. U.N. Doc. E/CONF.26/SR.23, *supra* note 335, at 8-9.

348. United Nations, Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record (24th mtg.) at 10, U.N. Doc. E/CONF.26/SR.24 (1958).

349. See *McCreary*, 501 F.2d at 1038 (“*Unlike* § 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.’” (emphasis added)); see also *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806, 811-12 (3d Cir. 1989) (holding that pre-award attachments are available in chapter 1 cases).

350. See *supra* text accompanying notes 288-89, 295, 302-03, 325-28.

key advocate for the Swedish position.<sup>351</sup> As a result, the Conference adopted article II(3), which reenacts the substance and most of the language of article IV of the Geneva Protocol.<sup>352</sup> This, combined with the United Kingdom's intimate understanding of the Geneva Protocol, helps to explain why English courts have never questioned their jurisdiction to order pre-award interim measures.

In contrast, the United States never became a member of the League of Nations. Therefore, it neither signed the Geneva Protocol—much less participated in its drafting—nor devoted serious attention to the drafting of the New York Convention. It never bothered to comment on the work of the *Ad Hoc* Committee and initially resolved not to take part in the Conference.<sup>353</sup> Although the United States ultimately sent a delegation to the Conference, it arrived with instructions to participate “in a limited way.”<sup>354</sup> Therefore, it took no part in any of the working sessions.<sup>355</sup> It similarly declined even to cast a vote on the question of whether the Conference should adopt the final text of the Convention as a whole.<sup>356</sup>

Only this lack of involvement and inquiry can explain why *McCreary*, *Cooper* and their progeny have interpreted article II(3) to render courts powerless to hear actions for pre-award attachments.<sup>357</sup> To be sure, the near total absence of scholarly works dedicated to the drafting of the New York Convention has exacerbated the uninformed approach of U.S. courts towards the vague language of article II(3).<sup>358</sup> This notwithstanding, the key to understanding the meaning of article II(3) has always remained accessible. The gap in ready-made scholarly analysis hardly provides

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351. See *supra* text accompanying notes 290, 296-97, 344-48.

352. See *supra* text accompanying notes 325-48.

353. See *supra* text accompanying notes 298-99.

354. A. Jason 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, 486 (1975) (footnote omitted).

355. *Id.*

356. See *Pisar*, *supra* note 219, at 220 n.5.

357. I do not imply that, had they read the Convention's *travaux*, these courts would have been inclined to make liberal use of their power to grant pre-award interim measures; I merely assert that the question of their jurisdiction to hear such actions would have disappeared.

358. Although van den Berg, *supra* note 82, provides a detailed analysis of the Convention's drafting history, this work only discusses how states have subsequently interpreted article II(3). It sheds no light upon how this provision made its way into the Convention. Only Haight, *supra* note 18, devotes considerable attention to this issue. Even his work, however, offers only a limited summary of the record.

sufficient justification for two decades of judicial debate and doctrinal chaos.

### CONCLUSION

This Note has posed and answered two versions of the following question: what is the law regarding judicial competence to order pre-award attachments under the New York Convention? The first version examined current U.S. law on this issue. This discussion first exposed the propensity of our courts to resolve the matter on the basis of unsupported assertions regarding the meaning of article II(3), or on policy grounds. No court has yet to peer into the Convention's readily accessible *travaux*. This judicial attitude towards our international obligations provides cause for reflection on the role of our judiciary in developing a coherent body of international law.

Because commentators have, heretofore, given serious consideration only to three seminal cases, this Note also introduced its audience to the full range of U.S. doctrine on the issue. It described how our courts have generated a three-way split, the complexity of which is augmented by a host of illogical exceptions. Thus, instead of using article II(3) to facilitate international transactions by reducing the price of dispute resolution, our courts have imposed additional uncertainty costs. As a result, businesses contemplating arbitration agreements with companies holding assets in the United States incur the expense of discovering where those assets are located and what the local law is regarding interim measures. Where the law of the jurisdiction is uncertain, the expenses increase. The parties will discount the probability that they will get what they want, and each will charge more for its end of the bargain. Even if it is clear that *McCreary* applies in a given jurisdiction, the cost of uncertainty remains: could a court be persuaded that this situation presents another suitable exception to the rule? Because of the effect of conflicting doctrine upon the price of international business transactions, this Note called for a definitive resolution of the meaning of article II(3).

To this end, this Note posed and answered a second version of the question: *according to its drafters*, what is the law regarding the jurisdiction of courts to order pre-award attachments under the Convention? Pursuant to the differences between English and U.S. law and the two countries' levels of participation in the Convention's drafting, this Note examined the Convention's *travaux*, which reveals that the Conference adopted article II(3) for the pur-

pose of reenacting article IV of the Geneva Protocol. Article IV of the Protocol, in turn, had required courts only to stay litigation and to refer the merits of a dispute to arbitration. Even the *McCreary* court acknowledged such language provides courts with sufficient authority to order pre-award attachments.<sup>359</sup>

In conclusion, the Convention's drafters intended to enhance the viability of private dispute resolution in order to reduce the overall costs of international business transactions. Judges who wish to preserve the integrity of this aim should examine the Convention's *travaux préparatoires* and accept the fact that article II(3) does not strip courts of authority to grant pre-award interim measures. This would put an end to the expensive controversy that has surrounded the issue for twenty years. As a result, interim measures will secure their position in the framework of judicial power that gives force to privately chosen methods of dispute resolution.

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359. See *supra* note 349.