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

by

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

¹ Dr. Jur., 1981, University of Vienna; L.L.M., 1983, University of California, Berkeley.
² The term pre-award attachment is used here to designate any order of attachment issued by a court before or during the pendency of arbitral proceedings, as contrasted to a post-award remedy. For general literature on the subject of pre-award attachment under the Convention see Hoellering, Pre-arbitral Attachment, 187 N.Y.L.J., June 10, 1982 at 1, col.1; Note, Pre-Arbitration Attachment: Is It Available in International Disputes?, 1 REV. LIT. 211 (1981); Note, Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 VA. J. INT'L. L. 785 (1981) [hereinafter cited as Note, Pre-Award Attachment]; Note, Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 36 WASH. & LEE L. REV. 1135 (1979) [hereinafter cited as Note, Attachment]. The inquiry of this Article is limited to the question of attachment, although other judicial action prior to entering judgment on an arbitral award (e.g., court orders for discovery, compelling attendance of witnesses, other provisional measures, etc.) raises analogous problems.
This Article examines the availability of pre-award attachment under the Convention in light of the Cooper decision. Part I establishes that the so-called problem of pre-award attachment actually consists of two separate issues. The first issue concerns the disposition of an action brought in contravention of an arbitration agreement falling under the Convention, while the second issue involves the compatibility of pre-award attachment with the Convention's general design and purpose. Part II discusses in detail the first issue and demonstrates that a suit brought in contravention of an arbitration agreement falling under the Convention must be stayed rather than dismissed. Part III shows that the provisions of the Convention, as seen in the light of internationally accepted principles of interpretation, do not require vacatur of a writ of attachment obtained before arbitration. The Article concludes that pre-award attachment is available under the Convention as provided for by the law of the forum in which attachment is sought.

I

THE COOPER LITIGATION

A. The Facts

The Cooper litigation arose out of an agreement to establish a New York subsidiary of Ateliers de la Motobecane S.A., a French corporation. The agreement provided that the shareholders of the New York subsidiary, Motobecane America, could tender their shares for repurchase by Motobecane S.A. and/or Motobecane America upon written notice.\(^5\) In the event of a dispute over the purchase price, either party could, within 10 days of notification of the intention to sell, demand arbitration in Zürich, Switzerland. Cooper and other shareholders gave notice of their intention to sell on April 13, 1978. After negotiations between the parties, Motobecane S.A. unequivocally demanded arbitration\(^6\) on September 1, 1978.

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

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6. 68 A.D.2d at 820, 414 N.Y.S.2d at 149.
the Supreme Court had denied the stay of arbitration in the first action and appeal had been taken, Cooper began the second action for money judgment against Motobecane S.A. and obtained an ex parte order of attachment of a debt owed to Motobecane S.A. by Motobecane America. A motion to dismiss by Motobecane S.A. was first denied and the order of attachment confirmed by the Supreme Court. After the Court of Appeals finally denied the stay of arbitration in Action I, Motobecane S.A. renewed its motion to dismiss and vacate which was granted by Special Term. On appeal the Appellate Division reversed in a 4 to 1 decision. Lastly, the Court of Appeals, in a 4 to 3 decision, reversed again and reinstated the Supreme Court order dismissing the action and vacating the attachment. This comment will examine only this final Court of Appeals decision.

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

9. This decision was issued after the Appellate Division had granted a stay in Action I.
11. Cooper, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728. As concerns the interplay of the present decision with the first action, for a stay of arbitration, the Cooper court noted that "the chronology of events indicates that the order of attachment should never have issued at all, as the underlying dispute is subject to arbitration." Id at 415, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732. It is unclear to which chronology the court refers. The reference might be to the fact that the ex parte order of attachment was issued although the Supreme Court had at that time already denied a stay of arbitration. If so, the court is merely restating its conclusion that confirmation of the attachment was erroneous. It is also possible, however, that the court was referring to an earlier passage in its opinion. The court, citing American Reserve Insurance Co. v. China Insurance Co. Ltd., 297 N.Y. 322, 79 N.E.2d 425 (1948), stated that "an order of attachment will remain valid if it was obtained with notice or has been confirmed in a contract action before a defendant obtains a stay of proceedings because the underlying dispute is subject to arbitration." Cooper, 57 N.Y.2d at 413, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. If the "chronology" reference concerns this statement it would seemingly imply that if the attachment action had been brought first the attachment would have been upheld, a result contradicting all other arguments made in the opinion.
12. Cooper, 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. For a discussion of the Convention's purpose, see infra Part III.
13. Cooper, 57 N.Y.2d at 411, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. For a discussion of the jurisdiction issue, see infra Part II.
14. Cooper, 57 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. This argument is inconsistent with both previous arguments. Since it goes to the ability of plaintiff to collect on a debt, it involves substantive New York law on attachment. (The ability to collect on a judgment is
case was only an attempt by Cooper to circumvent the ruling in Action I denying the stay of arbitration, and that permitting such an attachment to stand would expose American business to the risk of pre-award attachment abroad.

B. The Problem of Pre-Award Attachment

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

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

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


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

The Cooper court does not mention its reason for finding Article II of the Convention applicable. While Andros Compania Maritima v. Andre et Cie S.A., 430 F. Supp. 88, 90 (S.D.N.Y. 1977) [hereinafter cited as "Andros"] is a notable exception, most courts seem to overlook the problem of applicability. The court in I.T.A.D. Associates Inc. v. Podar Brothers, 636 F.2d 75 (4th Cir. 1981) for example, found the Convention applicable although there was no indication, at the time of decision, whether the arbitration would be held within the United States. Id. at 76-77. It was later ordered that the arbitration be held in New York. Note, supra note 4, at 115 n.90. See also Uranex, 451 F. Supp. at 1049 (In an arbitration between an American and a foreign party...
submit the subject matter to arbitration. While some courts have held a stay of the action to be appropriate pending arbitration,19 others have found dismissal to be required.20 If the Convention requires dismissal, there can be no attachment for lack of jurisdiction.21 The second problem, the "compatibility problem," addresses the compatibility of pre-award attachment with the Convention's own provisions, most notably Article II(3).22 Some courts have argued that the Convention's silence regarding pre-award attachment does not bar such attachment,23 while other courts have found to the contrary.24

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

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


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

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


The Cooper court summarily dismissed many of the cases cited supra note 23 as being inapplicable, since they were maritime cases, while Cooper was a non-maritime case. Cooper, 57 N.Y.2d at 415, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. This is a false distinction which reveals the Cooper majority's confusion between the referral and compatibility issues. The difference between maritime and non-maritime cases lies in the jurisdictional basis for attachment. In maritime cases, Section 8 of the Federal Arbitration Act provides for the availability of attachment notwithstanding the arbitration agreement. 9 U.S.C. § 8 (1976). In non-maritime cases, the jurisdictional basis for attachment depends on applicable state law which usually limits the availability of attachment to a certain category of actions. See generally S. MORGANSTERN, LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT 70-89 (1971). The compatibility question, since it addresses only the interpretation of the provisions of the Convention, is the same in both cases. Contrary to the Cooper majority's contention, maritime cases dealing with the compatibility issue can therefore be relied upon as precedent in non-maritime cases. See Cooper v. Ateliers de la
The *Cooper* court faced these two issues in determining whether Cooper's action for money damages should be stayed or dismissed\(^{25}\) (referral problem) and whether an order of attachment would be compatible with the Convention (compatibility problem). The two issues are interdependent. New York law allows attachment only in actions seeking, at least in part, money damages.\(^{26}\) If the referral problem is solved in favor of dismissal of a monetary damages action, New York law requires vacatur without any inquiry into the compatibility of pre-award attachment with the Convention.\(^{27}\)

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

II

THE REFERRAL ISSUE

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

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

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


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

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

29. This Article will only address the referral and compatibility issues in connection with the *Cooper* decision to vacate and dismiss since these are the two issues arising under the Convention. The other arguments advanced by the *Cooper* court are addressed *supra*, notes 14-16, and *infra*, notes 80 and 135.
court to stay the action. The court thereby retains jurisdiction, requiring the plaintiff to submit to arbitration to enforce his or her rights. The Convention, however, does not use the term "stay". Article II(3) provides:

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

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

A. The "Stripping of Jurisdiction" Argument

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

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31. 9 U.S.C. § 3 "does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate". Barge Anaconda v. American Sugar Refining Co., 322 U.S. 42, 44 (1944).
32. Where the Convention applies it supersedes Chapter I of the Arbitration Act. Insofar as the Convention and Chapter 2 are not in conflict with Chapter I, Chapter I applies to actions falling under the Convention as well. 9 U.S.C. § 208 (1976). See infra text accompanying note 75.
33. Convention, supra note 3, at Art. II(3) (emphasis added).
34. To date the courts have only interpreted "refer" to mean either "stay" or "dismiss" so that no other meaning needs to be taken into account. Also, it is settled that the possibility of actually directing the parties to arbitration under § 206 of the Federal Arbitration Act, 9 U.S.C. § 206 (1976), goes beyond the obligations imposed by the Convention. A.J. van den Berg, supra note 3, at 131; Aksen, Application of the New York Convention by United States Courts, 4 Yearbook of Commercial Arbitration 341, 350 (1979) [hereinafter cited as "Y.C.A."]; McMahon, Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States, 2 J. Mar. L. & Com. 735, 753 n. 83 (1971).
35. 501 F.2d 1032 (3d Cir. 1974).
36. Id. at 1035, 1038.
37. However, the court did so without providing its reasoning. Id. at 1037. See generally supra, note 18.
denial of a motion to dismiss is unappealable. Nevertheless, the court found the lower court's order denying the stay pending arbitration to be appealable. It reversed and directed the district court to refer the disputed claim to arbitration, reasoning that:

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

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

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

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

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

41. Id.

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

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

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

45. Given the ambiguity of the language in the quoted passage, this result does not ineluctably follow.
authority for a dismissal under the referral issue.46

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

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

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

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

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

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

48. Siderius, 453 F. Supp. at 25 & n.6. See also Cordoba Shipping Co. Ltd. v. Maro Shipping Ltd. 495 F. Supp. 183, 188 (D.Conn. 1980) ("Prejudgment attachment [under the Convention] is inappropriate since arbitration under the Convention ... divests the court of jurisdiction.")
49. Cooper, 57 N.Y.2d at 411, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.
Treaties.\textsuperscript{50} Although the United States is not a party to the Vienna Convention, the principles of interpretation in Articles 31-33 embody rules of customary international law,\textsuperscript{51} as can be inferred from the decisions of the International Court of Justice.\textsuperscript{52} Article 31(1) of the Vienna Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Paragraph 3(b) adds that there shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."\textsuperscript{53}

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

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\textsuperscript{51} H.F. Köck, \textit{Vertragsinterpretation und Vertragsrecht skonvention}, 79 n.4 (1976); G. Ress & C. Schreuer, \textit{Relationship between International Public Law and Constitutional Law in the Interpretation of International Treaties} 10-12 (23 Berichte der Deutschen Gesellschaft für Völkerrecht 1982); see also Briggs, \textit{U.S. Ratification of the Vienna Treaty Convention}, 73 Am. J. Int'l. L. 470, 472 (1979). Any inquiry into the difficult problems raised by the question of treaty interpretation in international law is beyond the scope of this article. The problems raised on a domestic level by "subsequent practice" (see infra text accompanying note 53) are extensively treated by G. Ress & C. Schreuer, supra. Gaja's proposal to refer to the local laws of Contracting States for the interpretation of doubtful expressions of the Convention (\textit{Gaja, supra} note 3, at I.A.3 & n.11) is not endorsed insofar as this goes beyond the "subsequent practice" or "preparatory materials" within Articles 31-33 of the Vienna Convention. It also seems doubtful that subsequent international conventions can be relied on to interpret the Convention. \textit{See}, e.g., Art. VI(4) of the European Convention on International Commercial Arbitration, Geneva 1961, 484 U.N.T.S. 364, which enables the courts to take interim measures. Such an interpretation of the Convention, although not in relation to Article II, has been suggested by Lebedev. \textit{See Schlosser, Missellen: VII Internationaler Arbitrage Kongress Hamburg 1982, 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht} 727, 733 (1982).
\textsuperscript{54} \textit{Webster's New World Dictionary of the American Language} 1193 (2d Collegiate ed. 1970) defines "refer" as: " . . . 2. to submit [a question] etc. for determination or settlement". Most definitions in legal dictionaries allude only to the American institution of the referee. \textit{See}, e.g., \textit{Black's Law Dictionary} 1151 (Rev. 5th ed. 1979). The French text is to the same effect. "Renverra" (\textit{Convention, supra} note 3, at Art. II(3), French text) is not a technical expression and is not equivalent to "se déclarera incompétente". \textit{See infra} note 63.
\textsuperscript{55} The supplementary means of interpretation provided in Article 32 of the Vienna Convention can only be used to confirm the meaning obtained under Article 31, or to clarify this meaning insofar as the interpretation under Article 31 leaves the result ambiguous or obscure or leads to a manifestly absurd result. See Article 32 Vienna Convention on the Law of Treaties,
stay or dismissal of the action pending arbitration. Similarly, viewing the term in context provides little clue as to its intended effect. The purpose of the Convention is also not determinative since, regardless of whether the court stays or dismisses the action, a party seeking enforcement of its rights must proceed to arbitration.

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

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


60. Arbitration Act 1975, § 1(1).


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


65. In Uranex, 451 F. Supp. 1044, plaintiff, a Carolina utility, sought to attach a debt owed to defendant, a French "groupement d'intérêt économique". After bringing the action plaintiff voluntarily agreed to submit to arbitration. Id. at 1045. The only issue, therefore, was whether the attachment could be upheld pending arbitration in New York. The court found the Conven-
The use of the general term "refer" reflects little more than the fact that the Convention must be applied in many very different legal systems, and possibly in circumstances where the use of the technical term "stay" would not be a meaningful directive. As used in the Convention, then, the term "refer" has no specific technical meaning beyond the proscription of court action on the merits. The Convention's mandate is therefore fulfilled by whatever procedure a Contracting State may use to prevent a court from adjudicating the merits of the dispute. Since the ordinary meaning and context of "refer" and the purpose of the Convention are broad enough to encompass this interpretation, it is consistent with the Vienna Convention.

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

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66. Uranex, 451 F. Supp. at 1052. Consequently the attachment was upheld.
70. Even if the court enters an order directing the parties to proceed to arbitration, it must dispose of the pending action. This can take either the form of a stay (as under 9 U.S.C. § 3) or a dismissal.
74. But see Note, Pre-Arbitration Attachment: Is It Available in International Disputes?, 1 REV. LIT. 211, 221-22 (relying on § 206 for the resolution of the "referral" question).
Where the Convention and applicable implementing provisions of Chapter 2 do not determine whether dismissal or stay is appropriate, Section 208 of the Federal Arbitration Act provides for the residual application of Chapter I of the Federal Arbitration Act "to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." Where an action is brought in contravention of an arbitration agreement, Chapter I Section 3 directs the court to "stay the trial of the action." Since both the Convention and Chapter 2 would allow a stay as well as a dismissal, the "stay" provision of Chapter I Section 3 is "not in conflict" and applies by virtue of Section 208.

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

III
THE COMPATIBILITY PROBLEM

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

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

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

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77. For example, it is uniformly held that since Article V of the Convention does not refer to the correct application of the law by the arbitrator, court review of this question is prohibited. Contini, International Commercial Arbitration, 8 Am. J. Comp. L. 283, 299 (1959); A.J. van den Berg, supra note 3, at 269-74 (with extensive further references).
an action in a matter in respect of which the parties have made an [arbitration] agreement." If it is, the court is not allowed to take action, but must refer the parties to arbitration.

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

78. Convention, supra note 3, at Art. II(3); see supra text accompanying note 33.
79. It is settled that "there is nothing discretionary" about the referral mandated by Article II(3). Van den Berg, supra note 3, at 135; see I.T.A.D. Associates Inc. v. Podar Brothers, 636 F.2d 75, 77 (4th Cir. 1981); Ledee v. Ceramiche Ragno, 528 F. Supp. 243, 245 (D. P.R.), aff'd 684 F.2d 184 (1st Cir. 1982); see generally, supra note 4, at 114-5. Therefore, the only issue is whether pre-award attachment is within the scope of Article II(3). The suggestion of a "balancing test" (Note, Attachment, supra note 2, at 1144) is thus incompatible with that author's contention that pre-award attachment falls under Article II(3).
80. See supra text accompanying note 50. Some courts try to avoid this issue and bolster their argument against pre-award attachment by noting that resort to such attachment is a "violation of [the] agreement to submit the underlying disputes to arbitration", McCready, 501 F.2d at 1038, a "bypass [of] the agreed upon method of settling disputes", id., or "contrary to contract", Cooper, 57 N.Y.2d at 410, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729. These statements beg the question. A preliminary question is whether the agreement to arbitrate indeed empowers the arbitrators to take, while barring the courts from ordering, interim measures. This depends on the procedural rules governing the arbitration. See, e.g., supra note 43 (arbitration under the old I.C.C. Rules). The Cooper majority does not mention whether the parties had agreed on any specific procedural rules. Even if the parties have agreed to empower only the arbitrators to take provisional measures, there still remains the question whether the Convention mandates enforcement of such an agreement. The existence of such an agreement alone does not resolve the question. See infra note 134.
81. As one court aptly stated: "The term 'action', in its usual sense . . . means a suit brought in court, a formal complaint within the jurisdiction of a court of law". Pathman Construction Co. v. Knox County Hospital Ass'n., 164 Ind. App. 121, 136, 326 N.E.2d 844, 853 (1975).
82. The argument that "in virtually all countries, attachment . . . cannot be ordered by the arbitrator, but has to be applied for at the court", A.J. Van den Berg, supra note 3, at 140, does not settle the question. The argument probably concerns "ordinary meaning" and "context" as used in the Vienna Convention on the Law of Treaties, in which case it implies that since virtually all countries do not permit such "actions" to be referred to the arbitrators, the meaning of "actions" in this context cannot include pre-award attachment. This argument fails because there are countries, including the United States, where arbitrators can order provisional remedies. See e.g., Sperry International Trade Inc. v. Government of Israel, 689 F.2d 301, 306-7 (2d Cir. 1982); Compañía de Navegación Y Financiera Bosnia S.A. v. National Unity Marine Corporation, 457 F. Supp. 1013, 1015 (S.D.N.Y. 1978) (United States); R. Huys & H. Keutgen, L'arbitrage en Droit Belge et International, 262-65 (1982) (Belgium); J. Robert, Arbitrage Civil et Commercial, 178-9 (1976) (France under the old law); Mezger, Überblick über das französische Recht der Schiedsgerichtsbarkeit nach dem Reformdekrete vom 14.5.1980, 94 Zeitschrift für Zivilprozess, 117, 144-45 (1981) (France under the new law). There is thus by far no uniform rule on this point, so that the ordinary meaning and context cannot be relied upon for guidance.
method, it misconstrues the Convention’s purpose. Thus, the Cooper majority maintained that the Convention was drafted “to minimize the uncertainty of enforcing arbitration agreements and to avoid the vagaries of foreign law for international traders”, and felt that “this policy would be defeated by allowing a party . . . to obtain an order of attachment before arbitration.” It followed that the purpose of the Convention “will be best carried out by restricting pre-arbitration judicial action to determining whether arbitration should be compelled.” Implicit in this reasoning is the assumption that the purpose of the Convention is to “avoid the vagaries of foreign law” by restricting the application of forum law to situations where the Convention specifically mandates its application.

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

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

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

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

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


89. See U.N. Doc. E/Conf. 26/2 at 4 (1958). The contention that “one of the primary purposes of the Convention [was] the promotion of uniformity of procedure surrounding enforcement of international arbitral awards” is therefore erroneous. But see Note, Pre-award Attachment, supra note 2, at 803.
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proved unacceptable to the majority of states because it contemplated an arbitration which would be independent of individual national laws.

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

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

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

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

96. Id. at 5-6.
B. The Dividing Line

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

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

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

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

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

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


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

into the ICC-draft\textsuperscript{104} and the ECOSOC-draft.\textsuperscript{105} While certain governments urged the incorporation of uniform rules of procedure into the New York Convention, this suggestion was not adopted for the same reason that it was not taken up in the Geneva Convention.\textsuperscript{106} As far as the summary records show, this matter ceased to be an issue at the Conference itself.\textsuperscript{107} Therefore, the distinction between “conditions for enforcement” (governed by the Convention) and “procedures for enforcement” (governed by forum law) is maintained by Article III for the sole reason that the great diversity of the procedural laws of the contracting states make uniform regulation by a convention impracticable.

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

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

\begin{itemize}
  \item \textsuperscript{104} See supra note 90.
  \item \textsuperscript{105} See supra note 92.
  \item \textsuperscript{106} See supra note 89.
  \item \textsuperscript{107} See U.N. Docs. E/Conf. 26/SR. 10, 11, 13, 26 (1958) where Article III (Article II of the ECOSOC Draft) was discussed. However, the matter was touched upon by the second sentence of Article III, see supra note 99. The discussion of this provision created a “Babel-like confusion” at the Conference due to the diversity of the procedural backgrounds of the delegates. A.J. Van den Berg, supra note 3, at 235. The minimum compromise reached in this area shows that the diversity of procedural laws had not diminished since 1927.
  \item \textsuperscript{108} Convention, supra note 3, at Art. II(1).
  \item \textsuperscript{109} Id., at Art. II(3).
  \item \textsuperscript{110} Id.
the Convention is barred.\textsuperscript{111}

Matters which are not "conditions for enforcement" are "procedural"\textsuperscript{112} and are left to forum law. The courts already have drawn and applied the distinction in certain procedural matters. In addressing the question of which court is competent for the enforcement of arbitral agreements, courts have applied forum law which, in the United States, includes Section 205 of the Federal Arbitration Act\textsuperscript{113} providing for removal to federal court. A strict Cooper rationale would argue that, since a motion to remove delays arbitration, it is one of the "vagaries" of American law which the Convention is "designed to avoid." However, no court has ever thought removal incompatible with the Convention,\textsuperscript{114} apparently because the Convention does not indicate which court is competent to enforce the arbitral agreement and, being a procedural matter, the question of removal is regulated by forum law.

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

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

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

\textsuperscript{112} It is a question of semantics whether these questions are called "procedural in the sense of Article III" or "incidental to the enforcement unregulated by the Convention". See \textsc{A.J. V}an \textsc{D}en \textsc{B}erg, \textit{supra} note 3, at 240 (endorsing the latter terminology).


Another example of this practice is discovery which was expressly allowed after a stay and referral to arbitration in London under the Convention. See Star-Kist Foods Inc. v. Diakan Hope S.A., 423 F. Supp. 1220 (C.D.Cal., 1976). The court order read: "To prepare for such arbitration the parties shall have the opportunity for such discovery as they would be entitled to \textit{under the rules} and jurisdiction of this Court, and this Court may exercise its continuing jurisdiction to entertain motions of the parties regarding discovery . . . ." \textit{Id.} at 1221 (emphasis added).
The availability of pre-award attachment is further compelled by the history and preparatory materials of Article II(3). The Convention was not intended, at the outset, to deal with the enforcement of arbitration agreements. However, concern voiced by several states that this omission might permit avoidance of the obligation to arbitrate under the arbitration agreement led to the creation of a working party which drafted an additional protocol. Article III of this protocol dealt with the subject matter now covered by Article II(3) of the Convention.

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

117. Article III of the protocol stated:
   1. The courts of the Contracting States Parties to this Protocol, if seized of an action relating to a contract which includes an arbitration agreement valid under article I and capable of execution shall, at the request of one of the parties, refer the parties concerned to arbitrators for decision.
   2. Such action shall not prejudice the competence of the courts if, for any reason, the arbitration agreement, arbitral clause or arbitration has become null and void or inoperative. Id.
119. Paragraph 3 stated: "In case one of the parties invokes the existence of an agreement in writing before the courts these (sic) will refer the parties to arbitrators, without prejudice however to the competence of the courts." Id.
121. Id. at 22.
123. Any other interpretation eliminates any difference between the two texts and therefore cannot be deemed to reflect the intention of the Conference. The text thus adopted at the plenary meeting, U.N. Doc. E/Conf. 26/L. 59 (1958), was referred to the drafting committee which produced a version corresponding to the present ArticleII(3), differing only in that the words "of its own motion or" were included after "shall". U.N. Doc. E/Conf. 26/L.61 (1958). There are no
indicate a distinction between the handling of procedural and substantive issues under Article II(3), suggesting that procedural matters be governed by local law. This inference is further supported by statements of Conference delegates in the debate over Article II itself, and leads to the conclusion that Article II(3) was intended to preclude court action only in substantive matters.124

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

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

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

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

(4) The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement . . . shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals, in case the agreement or the arbitration cannot proceed or becomes inoperative.

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

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

D. The United States Implementing Act

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

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

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129. See supra text accompanying notes 71-74.
130. See supra text accompanying note 75.

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

132. Murray Oil Products Co. Inc. v. Mitsui & Co. Ltd., 146 F.2d 381 (2d Cir. 1944); Uranex, 451 F. Supp. at 1051; Barge Anaconda v. American Sugar Refining Co., 322 U.S. 42, 44-45; 64 S.Ct. 863, 865, 88 L.Ed. 1117, 1120 (1944) (dictum). The continuing vitality of Murray Oil Products has been the subject of a controversy between the Uranex court and the court in McCready. Compare McCready, 501 F.2d at 1038 (the contention of Murray Oil Products, that arbitration is
the conditions under which attachment may be granted, Federal Rule of Civil Procedure 64 directs the federal courts to apply state law. The availability of pre-award attachment in non-maritime cases is therefore governed by state law. The Cooper court should therefore have examined the availability of pre-award attachment under New York law, rather than dismissing the action as not consonant with the Convention’s purpose.

IV
CONCLUSION

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

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

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

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

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

See Cooper, 957 N.Y.2d at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.
While Cooper's reasoning regarding the compatibility problem is delineated, this proves to be a mixed blessing, as other courts may use it as authority for finding pre-award attachment incompatible with the purposes of the Convention. This result is unfortunate, as the history and preparatory materials of the Convention as well as the language of the Convention and its implementing act demonstrate an intention to apply forum law to procedural issues in suits under the Convention. As pre-award attachment is such a procedural matter, courts are obliged to provide for pre-award attachment as available under local law.