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Attachment Under The United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards

ATTACHMENT UNDER THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

To avoid the vagaries of disparate legal systems[1] international businessmen contract to submit disputes to impartial arbitration.[2] The utility of arbitration agreements remained uncertain until recently, since some nations would not recognize arbitration awards.[3] In 1970 the United States acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention),[4] ensuring the efficacy and uniform enforcement of arbitration agreements in international contracts.[5] Although the Convention assures foreign enforcement of domestic

[1] Even among nations with similar legal traditions, principles determining the victor in contract disputes vary considerably. For instance a limitation of damages clause often is unenforceable in America but is given effect in England. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 23 (1972) (Douglas, J., dissenting). Even if a party wins in one forum, he still cannot be sure a foreign government will enforce his judgment. Bellet, *The Evolution of French Judicial Views on International Commercial Arbitration,* 34 ARB. J. 28, 29 (No. 1) (1978) [hereinafter cited as Bellet]; 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, 1051, n. 13 (1961) [hereinafter cited as Quigley]; Note, *Maritime Attachment & Arrest: Facing a Jurisdictional and Procedural Due Process Attack,* 35 WASH. & LEE L. REV. 153, 170 n. 122 (1978). Eliminating such legal uncertainties is indispensible in foreign trade. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972); S. LAZARUS, J. BARY, L. CARTER, K. COLLINS, B. GEIDT, R. HOLTON, P. MATTHEWS, G. WILLARD, RESOLVING BUSINESS DISPUTES, 142-43, 147 (1965) [hereinafter cited as *Lazarus*].

[2] International merchants invariably prefer abritration over judicial dispute resolution. *Lazarus supra* note 1, at 168. Arbitration affords fairness and efficiency, and leaves technical issues in the hands of experts. *Id.* Arbitration also is relatively inexpensive and causes less friction than an adversary judicial proceeding, tending to preserve commercial relationships. *Id.* at 14; Quigley, *supra* note 1, at 1049. *See also* Comment, *International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statutes,* 47 WASH. L. REV. 441, 442 (1972) [hereinafter cited as *International Commercial Arbitration*].

[3] Mirabito, *The United Nations Convention On the Recognition and Enforcement of Foreign Arbitral Awards: the First Four Years,* 5 GA. J. OF INT. & COMP. L. 471, 472 (1975) [hereinafter cited as Mirabito]; Quigley, *supra* note 1, at 1051; *International Commercial Arbitration, supra* note 2, at 444. American courts only recently have reversed centuries of hostility to arbitration. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974), Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *cert. dismissed,* 364 U.S. 801 (1960). Disfavor for enforcing arbitration agreements and arbitral awards now lingers only in Latin American countries. Shaus, *Why International Commercial Arbitration is Lagging in Latin America: Problems and Cures,* 33 ARB. J. 21, 22-24 (No. 1) (1979).

[4] [1958] 21 U.S.T. 2517-22; T.I.A.S. No. 6997 (1970) [hereinafter cited by Article within the Convention]. Congress passed enabling legislation to adopt the Convention for use in federal courts, and the Convention was enforceable in the United States as of the date the legislation took effect in 1970. 9 U.S.C. § 201 (1976).

[5] The American business community unanimously favored accession to the Convention

arbitral awards, businessmen facing arbitration under the Convention sometimes invoke American attachment statutes to freeze an opponent's assets in this country pending a final decision.[6] Whether arbitration under the Convention should preclude resort to American attachment laws is currently unsettled.[7]

The Convention states that a court "seized of an action" covered by an international arbitration agreement "shall refer the parties to arbitration."[8] The debate over pre-arbitral attachment centers on whether a referral to arbitration curtails American court jurisdiction for considering a requested attachment.[9] Closely tied to this jurisdictional issue is the policy question of whether attachment so impinges upon international arbitration that courts should refuse attachment to avoid infringing the Convention's

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in the hope that a uniform procedure for international arbitration would quell the chaos in international dispute settlement. *Proposed Amendments to Title 9, United States Code, to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Hearings on S. 3274 Before the Senate Committee on Foreign Relations, S. Rep.* 91-702, 91st Cong. 2d Sess. 2, 10 (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's advisory committee on Private International Law). [hereinafter cited as *Hearings*]. *See also* Mirabito, *supra* note 3, at 487; Quigley, *Convention on Foreign Arbitral Awards,* 58 AM. BAR ASS'N J. 821, 822 (1972) [hereinafter cited as Quigley, *Convention*]; *International Commercial Arbitration, supra* note 2, at 444 n. 7.

[6] Attachment preserves a defendant's property in the custody of the court while the plaintiff establishes a claim to the property. S. MORGANSTERN, LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT, 2 (1971). The grounds for attachment vary widely among the states. *Id.* at 70-89 (survey of attachment requisites for fifty states). Most states require fraud, an attempt to conceal assets, or the likelihood that assets will be removed from the jurisdiction before allowing attachment. *Id.* at 5. Requisites for attachment are defined by statute, *id.* at 4, and federal courts make use of the attachment statutes of the state in which they sit. FED. R. CIV. PRO. 64; *see* note 26 *infra.*

[7] Only six cases have considered whether the Convention precludes pre-arbitral attachment, and the most recent cases indicate a trend in favor of attachment. *See* McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032, 1038 (3d Cir. 1974) (attachment denied as a form of "suit" violating agreement to arbitrate); Atlas Chartering Serv., Inc. v. World Trade Group, Inc. 453 F. Supp. 861, 863-64 (S.D.N.Y. 1978) (maritime attachment granted, as not being in conflict with Convention); Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1052 (N.D. Cal. 1977) (state law attachment granted because of perceived necessity); Coastal Sales Trading, Inc. v. Zenith Navigation S.A., 446 F. Supp. 330, 341-42 (S.D.N.Y. 1977) (attachment granted because court interpreted dispute to be between two U.S. citizens, not covered by Convention); Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88, 93 (S.D.N.Y. 1977) (maritime attachment granted since maritime procedure does not infringe Convention); Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2, 4 (S.D.N.Y. 1975) (attachment denied since Convention is meant to protect international disputes from vagaries of state law).

[8] The Convention requires a court to "refer the parties to arbitration" at the request of one of the parties. Convention - Article II (3); Siderius, Inc. v. Compania de Acero del Pacifico, 453 F. Supp. 22, 24-25 (S.D.N.Y. 1978) (New York Court held arbitration must be ordered on request under Convention, and since arbitration already underway in Chile, court ordered plaintiff to procede with arbitration in Chile).

[9] *Compare* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1052 (N.D. Cal. 1977) *with* McCreary Tire & Rubber Co. v. C.E.A.T. S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974).

general protection of arbitration.[10] The Convention itself is silent on the matter of prearbitral attachment.[10.1]

The Convention precludes usurping the role of the arbitrators by asserting jurisdicition to consider the merits of a dispute.[11] Originally the courts held that the Convention curtails all jurisdiction over an arbitrable dispute, including authority for granting attachment.[12] However, a California court recently drew a distinction between jurisdiction on the merits and jurisdiction limited to maintaining an attachment, and asserted provisional jurisdiction to grant attachment in California after a New York court had already referred the parties to arbitration.[13]

In *Carolina Power & Light Co. v. Uranex*[14] the plaintiff, Carolina Power & Light Co. (CP&L) sought pre-arbitral attachment of 85 million dollars owed by a third party[15] to defendant Uranex, a French *groupement d'interet economique.*[16] The California court held that the word "refer" in the Convention is too equivocal to curtail all exercises of jurisdiction after

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[10] *Compare* Atlas Chartering Serv., Inc. v. World Trade Group, Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978) *and* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1052 (N.D. Cal. 1977) *with* Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional 427 F. Supp. 2, 4 (S.D.N.Y. 1975).

[10.1] Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1051 (N.D. Cal. 1977). The *Carolina* court held that the Convention in remaining silent did not preclude attachment, *id.* at 1050, while another court decided that the ommission of authorizing language forbade attachment, Metropolitan World Tanker, Corp. v. P.N. Pertembangan Minjakdangas Bumi Nasional, 427 F. Supp. 2, 4 (S.D.N.Y. 1975); *accord,* Siderius, Inc. v. Compania de Acero del Pacifico, S.A., 453 F. Supp. 22, 25 (S.D.N.Y. 1978).

[11] Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1045 (N.D. Cal. 1977) (parties agreed that arbitration under the Convention precludes jurisdiction on the merits); McCreary Tire & Rubber Co. v. C.E.A.T. S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974) (arbitration under the Convention curtails all attempts to assert jurisdiction on the merits.)

[12] McCreary Tire & Rubber Co. v. C.E.A.T. S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974); Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2, 3 (S.D.N.Y. 1975) (by implication).

[13] Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977).

[14] *Id.*

[15] *Id.* at 1045. The debt to Uranex bore no relation to the litigation except as a potential fund to satisfy CP&L's arbitral award. *Id.* Most of the money did not belong to Uranex. *Id.* Uranex acted only as a channel by which the money would flow to another corporation which was an arm of the French government. *Id.* at 1052. At first the California court attached only about 1 million dollars, calculated as Uranex's eventual commission out of the fund. *Id.* at 1055. However, in a subsequent memorandum order the court attached the entire 85 million dollars since Uranex failed to meet the burden of showing how much of the money belonged to the French government rather than to Uranex. *Id.* at 1054-56.

[16] Uranex, a *groupement d'interet economique,* resembled a partnership or joint venture. *Id.* at 1054 n. 6. Ostensibly the California court granted attachment of the entire 85 million dollars because, unable to ascertain exectly what Uranex's corporate structure was under French law, *id.* at 1052 n. 5, 1054 n. 6, the court could not determine how much of the money belonged to Uranex. *Id.* at 1053-54; 1056; *see* note 15 *supra.* The court noted that the *Carolina Power* case illustrated that federal courts are ill-equipped to navigate the shoals of foreign law. *Id.* at 1053.

arbitration has commenced.[17] The court drew an analogy between a referral under the Convention and a stay of proceedings under the United States Arbitration Act,[18] noting that a stay precludes further review on the merits but permits continued jurisdiction for attachment.[19] Treating the referral as a stay pertaining only to action inconsistent with arbitration,[20] the California court asserted jurisdiction for the sole purpose of considering the attachment,[21] and so established that a limited form of jurisdiction may survive a referral of a controversy to arbitration under the Convention.[22]

In light of the purpose of the Convention, the California court's jurisdictional holding was sound. Jurisdiction is a court's authority to consider questions brought before it,[23] and the Convention is not meant to circum-

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[17] *Id.* at 1051-52. *But see* McCreary Tire & Rubber Co. v. CEAT, S.p.A., 501 F.2d at 1038 (a "referral" acts to forbid entertaining any suit once arbitration commences).

[18] 451 F. Supp. at 1051-52. *See* 9 U.S.C. § 3 (1976) (stay of trial for arbitration under United States Arbitration Act).

[19] The Anaconda v. American Sugar Refining Co., 322 U.S. 42, 44 (1944); Coastal States Trading, Inc. v. Zenith Navigation, 446 F. Supp. 330, 341 (S.D.N.Y. 1977); Andros Compania Maritima, S.A. v. Andre & Cie, S.A. 430 F. Supp. 88, 93 (S.D.N.Y. 1977).

[20] 451 F. Supp. at 1049 n. 2. *But see* text accompanying notes 31-40 *infra.* The Convention requires a referral to arbitration, *see* note 8 *supra,* but does not require anything other than a referral until the arbitral award is entered.

[21] 451 F. Supp. at 1049 n. 2.

[22] Note, *Jurisdiction to Attach a Defendant's Property Pending Adjudication in a Foreign Forum,* Carolina Power & Light Co. v. Uranex, 58 B.U.L. REV. 841, 847, 851 (1978) (discussion of jurisdiction in *Carolina Power*) [hereinafter cited as *Jurisdiction to Attach*]. The *Carolina Power* court actually faced two jurisdictional inquiries: whether under the Constitution the court could assert jurisdiction, 451 F. Supp. at 1046-49, and whether under the Convention American jurisdiction is curtailed. *Id.* at 1049-1052. Normally the Constitutional requirement for jurisdiction is that Uranex have minimum contacts with California, which Uranex lacked. *Id.* at 1046-47; *see* Shaffer v. Heitner, 433 U.S. 186, 209 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945). However, the California court decided that *Shaffer* created a special jurisdiction for attachment not subject to the *International Shoe* minimum contacts test, which could be invoked whenever extraordinary need for attachment exists. 451 F. Supp. at 1048. *See Jurisdiction to Attach, supra,* at 851. *But see* Sanko Steamship Co. v. Newfoundland Refining Co., 411 F. Supp. 285, 286 n. 5 (S.D.N.Y.), *aff'd* 538 F.2d 313 (2d Cir.), *cert. denied,* 429 U.S. 858 (1976) (pre-*Shaffer* case, noting that there is no provision that permits holding an attachment "in limbo" pending award in another jurisdiction). *See also* Healy, *Obtaining Security in Aid of Arbitration,* [1976] LLOYD'S MARITIME & COM. L. Q. 267 (discussion of *Sanko*).

After holding than an assertion of jurisdiction would be constitutional the *Carolina Power* court turned to the issue of whether a referral to arbitration under the Convention curtails whatever jurisdiction an American court might constitutionally assert. 451 F. Supp. at 1049. The court's opinion submerged the policy question of the propriety of attachment within a legal analysis of what jurisdiction the Convention permits. *Id., see* note 23 *infra.*

[23] WEBSTERS NEW TWENTIETH CENTURY DICTIONARY (unabridged) 993 (2d ed. 1976); BLACK'S LAW DICTIONARY, 991 (revised 4th ed. 1968); *see* United States v. First Nat'l City Bank, 379 U.S. 378, 387-388 (1965) (Harlan, J., dissenting) (jurisdiction is a combination of power and policy; the naked power to act does not bear on the propriety of acting). *But see* Amey v. Colebrook Guaranty Sav. Bank, 92 F.2d 62, 63 (2d Cir. 1937) (forbearance to act, even if court could act, is sometimes called lack of "jurisdiction").

scribe the authority of a nation's courts.[24] The Convention precludes only judicial action that impinges on arbitration.[25] Merely asserting jurisdiction without taking action does not affect arbitration, and passively retaining jurisdiction could prove useful later for efficacious enforcement of an arbitral award.[26] Unfortunately the California court not only asserted jurisdiction but exercised its powers in the form of an attachment order before the arbitral award.[27]

The California court granted attachment on the assumption that if Uranex were given the chance to transfer the 85 million dollars home to France, CP&L could not collect its anticipated arbitral award.[28] Here the court erred, since the Convention is specifically designed to make arbitral awards enforceable in foreign countries,[29] and France had consistently enforced American arbitral awards both before and after signing the Convention.[30] Granting attachment was unnecessary, since under the facts of the *Carolina Power* case, CP&L could have enforced its arbitral award without resorting to attachment to keep Uranex's money in this country. The court's mistaken assumption of a pressing need for attachment was less significant, however, than the conclusion that followed. Perceiving a "unique necessity" of attachment, the court concluded that when attachment is warranted the Convention permits attachment.

The California court reasoned that the Convention permits judicial action to "encourage" arbitration,[31] and that attachment would expedite the arbitration already in progress.[32] Whether the Convention permits judi-

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[24] Quigley, *Convention supra* note 5 at 824; 9 U.S.C. § 201-08 (1976), *Hearings, supra* note 5, at 6 (Convention and enabling legislation do not redefine the role of the courts).

[25] Quigley, *Convention, supra* note 5, at 824. While the California court might have authority to order attachment, and have jurisdiction in that sense, the propriety of ordering attachment should be a separate question. *See* note 23 *supra.*

[26] The Convention permits use of whatever powers a national court may have to enforce an arbitral award that has already been rendered. Convention - Article III; *see* Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976) (attachment is appropriate for enforcing an award under the Convention), *accord* McCreary Tire & Rubber Co. v. CEAT, S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974) (denying pre-arbitral attachment but postulating that post-arbitral attachment is permissible under the Convention). By retaining jurisdiction while arbitration proceeds a court would enable the plaintiff to obtain prompt enforcement of a final award without relitigating jurisdictional issues.

[27] 451 F. Supp. at 1050-52.

[28] The *Carolina Power* court decided that if Uranex transferred the 85 million dollars to France, the New York arbitral award would be an "empty formality". 451 F. Supp. at 1048 n. 1.

[29] Convention - Article I(1) & Article III. *See* text accompanying notes 4-6 *supra. See also* note 26 *supra.*

[30] France acceded to the Convention eleven years before the United States, and consistently enforced foreign arbitral awards both before and after the Convention. Holley, *Enforcement of American Awards in France,* 14 ARB. J. 83, 86 (1959); Mirabito, *supra* note 3, at 476. Virtually all major commercial nations are parties to the Convention, and would enforce an American award. Mirabito, *supra* note 3, at 475-77.

[31] 451 F. Supp. at 1052.

[32] The *Carolina Power* opinion cited a Supreme Court decision that an injunction to stop

cial action to encourage arbitration is problematic, since the Convention might be understood to proscribe all judicial interference, whether or not intended to encourage arbitration. Arguably one purpose of the Convention is to curb possible misuse of judicial leverage by judges unschooled in foreign law and unfamiliar with the complexities of an ongoing international business relationship.[33] Even if the Convention does permit judicial action that "encourages" arbitration, however, the key question would be whether attachment helps or hinders arbitration.[34] The California court skirted this issue, briefly noting that the Convention must permit attachment since attachment provides an incentive for speedy dispute resolution, and accordingly "encourages" arbitration.[35]

Attachment expedites arbitration because the defendant is eager to free his assets.[36] Yet attachment may also give the plaintiff reason to delay, hoping that financial pressure will force the defendant to succumb to a favorable settlement.[37] Other courts have recognized that attachment exacerbates tensions between the parties[38] and shifts the advantage in favor

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a strike encourages arbitration of labor disputes. 451 F. Supp. at 1052, *citing* Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). While the California court did not articulate its reasoning, ostensibly the analogy the court drew was that pressuring a union to cease striking makes the union more amenable to arbitration, and likewise an attachment exerting financial pressure on a defendant makes the defendant more likely to cooperate with arbitrators. Therefore attachment, like an injunction to stop a strike, encourages arbitration.

[33] The California court acknowledged its ignorance of French law, and attached a substantial sum of money at least part of which unquestionably did not belong to Uranex. *See* notes 15-16 *supra.* The court made no finding of whether the attachment would contravene Uranex's obligations in France. 451 F. Supp. at 1052-54.

[34] *See* text accompanying note 10 *supra.*

[35] The California court did not specify how attachment encourages arbitration, noting only that "in other contexts the Supreme Court has concluded that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate." 451 F. Supp. at 1052. *See* note 32 *supra.*

[36] Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision,* 44 BROOKLYN L. REV. 199, 200-01 (1978) [hereinafter cited as Kheel]. Note, *Prejudgment Attachment as a Means of Reaching Foreign Securities,* 10 J. POL. INT. BUS. 1017, 1017 (1978); Note, *Attachment in California, A New Look at an Old Writ,* 22 STAN. L. REV. 1254, 1260 (1970).

[37] Kheel, *supra* note 36, at 201. After the *Carolina Power* court attached the 85 million dollar debt owed to Uranex, the parties did indeed settle. 451 F. Supp. at 1056 n. 6. The settlement occurred before the court could make a final determination of how much money actually belonged to Uranex, and the money was tied up for several months in the interim. *Id.*

[38] In Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975) the court denied attachment to forestall undue "pressure" on the defendant. *Id.* at 4. *See also* Incontrade, Inc. v. Oilborn International, S.A., 407 F. Supp. 1359, 1361 (S.D.N.Y. 1976) (attachment denied to prevent "harsh consequences"). While allowing maritime attachment, a New York court noted that attachment may "further embarass already unsettled relations." Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88, 92 (S.D.N.Y. 1977). The *Andros* court decided that the desirability of protecting an eventual award outweighed the drawbacks of antagonizing the parties. *Id.* at 92-93. The court's holding is limited to disputes under single-transaction

of the plaintiff.[39] The Convention would undoubtedly be ill served by the use of judicial power to alter the position of the parties, giving the plaintiff an advantage the longer arbitration is stalled, and reducing the likelihood of present or future cooperation. Since the courts agree that the Convention precludes judicial action impinging on arbitration,[40] use of attachment must be strictly circumscribed.

The shortcomings of the *Carolina Power & Light* decision to grant attachment can be traced to the attitude common to American courts of treating an international controversy as if it were subject to American law.[41] The California court relied on an analogy between the Convention and the United States Arbitration Act,[42] which permits attachment, when in fact the Convention's entire purpose is to protect international arbitration against the eccentricities of particular nations' legal systems.[43] American attachment statutes are a legacy of the English common law,[44] and may not have any counterpart in countries with different legal traditions.[45] Thus Anglo-American attachment is one of the local legal peculiarities the

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contracts, since a long-term contract requiring continued cooperation between the parties may in fact depend on mutual goodwill. The court acknowledged that attachment does not generally promote goodwill. *Id.* at 93. One of the benefits businessmen seek in choosing arbitration over judicial dispute resolution is avoidance of hostility caused by adversary proceedings. *See* note 2 *supra.* Thus if attachment alienates the parties and provokes animosity, it infringes the arbitration that the Convention seeks to protect.

[39] *Kheel, supra* note 36, at 201.

[40] *See* text accompanying note 11 *supra.*

[41] Courts holding that attachment is consistent with the Convention usually do so out of unwillingness to disturb the American tradition of protecting the plaintiff's interest in collecting a judgment. Atlas Chartering Serv., Inc. v. World Trade Group, Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978) (attachment has long coexisted with domestic arbitration); Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1048 (N.D. Cal. 1977) ("fair play" includes consideration of plaintiff's ultimate recovery); Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88, 93 (S.D.N.Y. 1977) (traditional maritime attachment should not be sacrificed for arbitration). *But see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 (1974) (American courts should not take parochial view of international arbitration); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (". . .we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts").

[42] *See* text accompanying notes 18-20 *supra.*

[43] *See* notes 1 & 2 *supra.*

[44] *See,* e.g. Penoyar v. Kelsey, 150 N.Y. 77, 79-81, 44 N.E. 788, 789 (1896) (reflections on the history of attachment in England and America); 1 POLLOCK & MAITLAND, THE HISTORY OF THE ENGLISH COMMON LAW, 592 (1968) (1st ed. 1845).

[45] German law, for example, furnishes a provisional remedy remarkably similar to American attachment in its current form. VON MEHREN & GORDLEY, THE CIVIL LAW SYSTEM, 185-87 (2d ed. 1977). Since defendants the world over attempt to dispose of assets to frustrate collection of judgments against them, *id.* at 195, many countries may protect plaintiffs with some form of provisional remedy with varying degrees of similarity to American attachment procedures. However, for businessmen from countries that do not furnish such protection, American attachment may be an unpleasant surprise. The Convention's draftsmen did not consider the possibility of American prearbitral attachment, since no American participated in drafting the Convention. Mirabito, *supra* note 3, at 486.

Convention attempts to guard against. Furthermore, in granting attachment to keep a defendant's assets in this country, an American court could be undercutting the Convention by assuming that the Convention could not effect foreign enforcement of an arbitral award.[46] International law derives much of its strength from customary observance,[47] and if the Convention is ignored or regarded as ineffective, its function will be impaired. In summary, attachment may contravene the Convention by adversely affecting arbitration,[48] may circumscribe the Convention by upsetting the world-wide uniformity of arbitration procedures the Convention attempts to establish,[49] and may undercut the authority of the Convention as an international instrument of award enforcement.[50]

In spite of considerable arguments against the use of attachment under the Convention, the trend in American courts favors prearbitral attachment and the *Carolina Power & Light* decision is the culmination of that trend.[51] Prior to this decision, courts faced with controversies cognizable under admiralty law, as well as the Convention, had granted pre-arbitral attachment.[52] Even while acknowledging that little difference exists between admiralty attachment and foreign attachment under state law, one court that previously denied state-law attachment under the Convention permitted prearbitral maritime attachment.[53] The court's holding implied dissatisfaction with its intitial position that arbitration under the Conven-

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[46] *See* text accompanying note 6 *supra.*

[47] "International law . . . has at times . . . a twilight existence . . . . till at length the *imprimatur* of a court attests its jural quality." New Jersey v. Delaware, 291 U.S. 361, 383 (1934). *See also* W. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW, 140-41 (1957). The International Court of Justice looks to the practice of national courts to furnish subsidiary means of determining international law. I.C.J. STAT. 38(1)(d) (1946). Thus if the *Carolina Power* court presupposed that the Convention would be useless in enforcing an arbitral award in France, the California court's decision might diminish the practical significance of the Convention both in the United States and abroad. The California court made no specific finding on this point, however, and it is likely that the court simply failed to consider that the Convention's international protection of arbitral awards might have made attachment unnecessary. *See* 451 F. Supp. 1049-52.

[48] *See* notes 1, 3 and 5 *supra.*

[49] *See* note 2; and text accompanying notes 43-45 *supra.*

[50] *See* text accompanying note 47 *supra.*

[51] *See* note 7 *supra.*

[52] Atlas Chartering Serv., Inc. v. World Trade Group, Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978) (Convention does not preclude maritime attachment); Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88, 93 (S.D.N.Y. 1977). *But see* Sanko Steamship Co., v. Newfoundland Refining Co., 411 F. Supp. 285, 286 (S.D.N.Y.), aff'd 538 F.2d 313 (2d Cir.) cert. denied 429 US 858 (1976) (arbitration clause included forum selection provision referring all litigation to London preventing jurisdiction for maritime attachment in New York.)

[53] *Compare* Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88, 93 (S.D.N.Y. 1976) (allowing prearbitral attachment) *with* Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2, 4 (S.D.N.Y. 1975) (denying prearbitral attachment under the Convention).

tion precludes attachment.[54] In another instance a court strained to avoid deciding whether the Convention permits attachment by classifying a defendant corporation as both a U.S. citizen and a foreign corporation.[55] Since the dispute was between two U.S. citizens (making the Convention inapplicable) the court was free to grant attachment unencumbered by the Convention; yet in order to allow attachment the court termed the defendant a foreign corporation within the meaning of the state attachment statute.[56] The court considered the attachment necessary,[57] and tacitly acknowledged that it had created a legal anomaly in order that the attachment could be granted.[58] Such cases demonstrate the strength of the attachment tradition in American courts.

Courts should not avoid the issue of whether the Convention permits attachment. Since some cases may indeed warrant prearbitral attachment,[59] courts should face squarely the question of what effect a requested

[54] Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88, 90-91 (S.D.N.Y. 1976). The court noted that prior cases in the Southern District of New York denying attachment under the Convention were not genuinely distinguishable from the maritime attachment Andros Compania Maritima now requested. *Id.* at 91. The court granted attachment nonetheless, tacitly reversing its earlier position that attachment is inimical to the Convention. *Id.* at 92.

[55] The Convention only applies in this country to disputes between foreign citizens, or an American and a foreign citizen. Convention - Article I(1); 9 U.S.C. § 202 (1976); *Mirabito, supra* note 3, at 488-93. *See* Coastal Sales Trading, Inc. v. Zenith Navigation, S.A., 446 F. Supp. 330, 341 (S.D.N.Y. 1977).

[56] Coastal Sales Trading, Inc. v. Zenith Navigation, S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977).

[57] *Id.*

[58] *Id.* The *Coastal* dispute was cognizable under admiralty law, but the court did not consider the applicability of maritime attachment provisions. *Id.* at 340-42; *see* text accompanying note 52 *supra.*

[59] Congress acceded to the Convention with reservations allowing enforcement of foreign arbitral awards only if American awards could be enforced reciprocally in the defendant's country. Convention - Article I(3), *see* U.S.C.S. *Administrative Rules* 801 (*appendix*) (1977) (reprinting congressional strictures on enforcement of Convention). If the defendant's nation has not signed the Convention, the Convention is inapplicable and of no use in enforcing an award abroad. Therefore attachment to keep assets in this country may be necessary. The defendant also may be able to escape his obligations by transfering funds to a country that will not recognize arbitral awards, *see* note 3 *supra,* or to a country that would not enforce the arbitral award as a matter of public policy. Convention - Article V(2)(b); Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Abritral Awards Under the New York Convention: A Modest Proposal,* 51 TEMPLE L. Q. 832, 839 (1978). Public policy has different meanings in different nations. *Id.* at 832, 840. Therefore the plaintiff should be prepared to demonstrate specifically that enforcing his award abroad would be impossible because it would violate a foreign nation's public policy. The plaintiff carries a heavy burden on this point since to prevent this exception swallowing the rule courts here and abroad narrowly circumscribe the public policy exception. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 973-74 (2d Cir. 1974); Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1317-23 (2d Cir. 1973), *cert. denied,* 416 U.S. 986 (1974); *see* Mirabito, *supra* note 3, at 494-95. *See also* Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 514, 516 (2d Cir. 1975) (American bankruptcy judge cannot avoid foreign arbitral award under public policy exception).

attachment will have upon arbitration protected under the Convention. Addressing this question will require that courts follow the *Carolina Power & Light* precedent in granting limited jurisdiction to consider an attachment request.[60] Having asserted jurisdiction, the courts should follow a two-part inquiry, balancing the need for attachment against its adverse effects. The plaintiff must first satisfy the court that attachment is permitted, not only by state law, but necessary because the Convention could not be used to enforce an arbitral award abroad.[61] Then the defendant should have the opportunity to demonstrate that attachment would cause serious financial distress and unbalance arbitration.[62] A court should take into account the amount attached, the defendant's obligations here and abroad, and the defendant's general financial strength.[63] Attachment involving international arbitration warrants great circumspection because of the frangible nature of international trade. Courts should not grant attachment under the Convention as a matter of course, but only when circumstances are extraordinary enough to warrant possible intrusion on internationally protected arbitration.[64]

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[60] *See* text accompanying notes 13-26 *supra.*

[61] *See* note 59 *supra.* If the convention cannot be used to enforce an award, then the possibility that attachment will undercut the Convention as an international instrument of award enforcement is obviated. *See* text accompanying notes 46-50 *supra.*

[62] *See* text accompanying notes 36-40 *supra.* If the attachment will not tie up a large part of the defendant's assets or prevent the defendant from meeting obligations abroad, then the argument that attachment will create pressure and unbalance arbitration is assuaged.

[63] The defendant should have the burden of proof on this issue since the defendant is best able to provide documentation of his own financial position and to acquaint the court with his obligations under foreign law. *See, e.g.,* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1055-56 (N.D. Cal. 1977).

[64] *See* note 41 *supra.*