JOINT REPORT OF THE INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE AND COMMITTEE ON ARBITRATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Amendment of New York Civil Practice Law and Rules Section 7502(c) to Permit Attachments and Preliminary Injunctions in Connection with National and International Arbitrations

EXECUTIVE SUMMARY

The Courts of the State of New York have long had the authority to issue provisional remedies such as orders of attachment or preliminary injunctions in appropriate cases. The Courts have done so in recognition that there are times when such provisional remedies are needed at the beginning of a case in order to protect the rights of a party while the case is pending.

Over the past number of years, arbitration has become an increasingly important and widely-used forum for parties to resolve disputes. Unfortunately, New York law regarding the authority of the courts to issue the provisional remedies of orders of attachment and preliminary injunctions in cases involving arbitration is inconsistent, contrary to the prevailing rules in effect in other jurisdictions, and seriously out of date.

Section 7502(c) of the Civil Practice Laws and Rules (CPLR) is the statutory provision that governs when the Courts can grant orders of attachment or preliminary injunctions in connection with arbitrations. At present, Section 7502(c) has been interpreted as granting courts the authority to issue such provisional remedies only in certain purely domestic arbitration cases. In particular, Section 7502(c) has been interpreted as depriving the Courts of the State of New York of the authority to issue these often essential preliminary remedies in any case that involves disputes between a U.S. person and a person from any foreign country (e.g. a dispute between New York and English companies). The statute has similarly been interpreted as denying New York courts the power to issue these provisional remedies in any case where the arbitration is to take place outside of New York (e.g. a dispute between New York and French companies, where the arbitration is to take place in Geneva). At present, the statute has been interpreted as granting New York courts the authority to issue orders of attachment or preliminary injunctions only in cases that are completely domestic in nature, meaning that they are located in New York and do not involve any foreign persons as parties.

This narrow restriction on the power of New York courts is not consistent with the laws of other States of the United States, with the laws of other countries, or with the rules of national and international arbitration organizations. To the contrary, the model arbitrational law issued by the United Nations Commission on International Trade Law, as well as the national laws of Australia, Canada, Germany, Great Britain, India, Mexico, Japan, the Russian Federation, and numerous other countries, expressly provide national courts with the authority to issue provisional remedies, such as orders of attachment and injunctions, in connection with an arbitration. This same authority is granted under the arbitration laws of California, Connecticut, New Jersey, Oregon, Texas, and numerous other States. Similarly, the right of the Courts to

issue such provisional remedies is expressly acknowledged by the rules issued by major national and international arbitration institutions, such as the American Arbitration Association and the International Chamber of Commerce.

New York is one of the world's major centers for national and international arbitration. The failure of New York law to give its Courts authority to issue, where appropriate, the provisional remedies of orders of attachments and preliminary injunctions in connection with all arbitrations, both domestic and international, prejudices the rights of New York citizens and companies by denying them access to these sometimes vital provisional remedies. This artificial limitation on the power of New York courts also leads to unfair and inconsistent results.

The amendment requested is not intended to and will not have any effect on the standards under which a court will determine whether to grant a provisional remedy. The court will continue to decide whether an order of attachment or preliminary injunction is warranted based on the facts of any particular case as examined pursuant to the criteria currently set forth under New York law. The only effect of the proposed amendment to CPLR Section 7502 is that the courts' current authority to issue such provisional remedies in domestic arbitrations will be extended to include all arbitrations.

The problems caused by this limited and inconsistent grant of authority to the Courts can be seen by the following illustrations.[1]

Illustration One: **New York Courts Currently Lack The Authority To Issue A Provisional Remedy If Any Of the Parties Are Non-U.S. Persons**.

Plaintiff, a New York small business, has the right to distribute in Manhattan the products of an English soft drink manufacturer for a 10-year term. The English company gives the New York plaintiff notice that the distribution contract will be terminated in one week, even though the term of the contract does not expire for another five years. The contract is governed by New York law and contains an arbitration clause requiring that arbitration be held in New York. Plaintiff sues, claiming wrongful termination and seeking a preliminary injunction requiring the English company to continue honoring the distribution agreement during the arbitration in which the right to terminate is being challenged.

Under Section 7502(c) as currently interpreted, a New York court does not have the authority to even consider the request by the New York small business for a preliminary injunction to maintain the status quo so that it can continue in business during the arbitration.

However, if the New York resident filed suit in Federal Court, it could seek such relief under federal law. In the similar case of Roso-Lino Beverage Distribs., Inc. v. The Coca-Cola Bottling Co. of NY, Inc., 749 F.2d 124 (2d Cir. 1984), the Second Circuit held that plaintiff was entitled to a preliminary injunction "prohibiting [the soft drink manufacturer] from terminating Roso-Lino's distributorship pending completion of the arbitration." Id. at 127. The

[1] These illustrations are generally based upon, but modified from, actual cases.

Second Circuit noted that a preliminary injunction was appropriate because terminating the distributorship rights of "an ongoing business representing many years of effort and the livelihood of its husband and wife owners, [would] constitute[] irreparable harm." Id. at 126-27.

There is no justification for this artificial limitation on the authority of New York courts. It is also both illogical and inappropriate to require that a New York plaintiff sue in Federal Court on a contract governed by New York law in order to obtain effective relief.

Illustration Two: **A New York Court Which Has Determined That A Preliminary Injunction Is Needed Is Deprived Of The Authority To Issue A Provisional Remedy If The Contract At Issue In The Dispute Includes An Arbitration Provision**

Plaintiff, a Company organized under the laws of Bermuda, with its principal headquarters in New York, has developed what is conceded to be a confidential and unique proprietary product. One of its senior officers resigns, and tells the Company's General Counsel that he does not feel bound to observe confidentiality with respect to any information obtained through his employment. The defendant also boasts that, unbound by any pledge of confidentiality, he will take $1 million worth of business away from plaintiff. The confidentiality agreement signed by the senior officer provides that it is governed by New York law and provides for arbitration. In U.S. Reinsurance Corp. v. Humphreys, 205 A.D.2d 187 (2d Dep't 1994), a case which involved essentially the same facts but no arbitration clause, the Appellate Division granted a preliminary injunction finding that on the "state of the record, the need for injunctive relief is overwhelmingly apparent." Id. at 192.

However, under Section 7502(c) as currently interpreted, if the contract or confidentiality agreement between the Company and the officer contained an arbitration clause, a New York court would be without authority to even consider the request by the Company for a preliminary injunction. The New York court is currently without authority to prohibit the former senior officer from disclosing the Company's confidential information or trade secrets.

Illustration Three: New York Courts Are Also Denied The Authority To Issue Orders Of Attachment In Arbitration Cases Involving A Non-US Person Or Where The Arbitration Is To Be Held Outside of New York

A New York brokerage firm has a dispute with a West German client, alleging that the brokerage firm is owed $230,000 for stock purchased. The brokerage firm seeks an order attaching as security the assets of a separate bank account of the West German client that is located in New York. The brokerage agreement contains an arbitration clause. On essentially these facts, in Drexel Burnham Lambert Inc. v. Ruebsamen, 139 A.D.2d 323 (1st Dep't 1988), the Appellate Division held that, despite the fact that the brokerage firm met all the requirements for prejudgment attachment, it did not have the authority to grant an order of attachment because, under New York law, prearbitration attachment is not an available remedy.

The fact that a contract with an international company contains an arbitration clause or provides for the arbitration hearings to be held outside of New York should not act as an absolute bar depriving a party of the right to seek provisional relief from New York courts prior to or in connection with the commencement of an arbitration. Moreover, the possibility of the arbitration panel entertaining an application for such relief is not an effective alternative. In most cases it can take several weeks or even months for the arbitration panel to be selected and to convene. But it is at the commencement of an action that provisional relief is most needed. Moreover, the ability of an arbitration panel to provide effective relief is also more limited, both because it has no direct authority to enforce its orders without Court assistance and because it has no power over persons who are not participants in the arbitration. This means that arbitration panels would have virtually no practical ability to issue orders of attachment of money or property.

THE PROPOSED LEGISLATION

The goal of providing the courts with the authority to issue orders of attachment or preliminary injunctions in all appropriate cases, and removing the artificial constraint now in place can be accomplished by amending Section 7502(c) of the CPLR to read as follows:

> With respect to an arbitration that is pending or that is to be commenced inside or outside this State, a Supreme Court ~~in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a)~~, may entertain an application for an order of attachment or for a preliminary injunction in connection with ~~(an arbitrable controversy)~~ the controversy, whether or not it is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. , The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) ~~if the application is made before commencement~~, except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration concerning the arbitrable controversy is not commenced within 30 days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The Court may reduce or expand this period of time for good cause shown.

Such an amendment would make clear that attachments or injunctions may be granted by New York courts in aid of arbitrations in any appropriate case. It should be emphasized that this change is not intended to and will not change the standards under which such provisional remedies may be granted under CPLR Section 7503. Such a statutory change would also make clear that preliminary injunctions in support of international arbitration would

be available in both state and federal courts, eliminating the inconsistency that now appears to exist in New York as to that question.

JOINT REPORT OF THE INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE AND COMMITTEE ON ARBITRATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Amendment of the New York Civil Practice Law and Rules to Permit Attachments and Preliminary Injunctions in Support of International Arbitration Proceedings in New York and Elsewhere

New York state courts, virtually alone among courts of the major centers of commercial arbitration, are prohibited from granting attachments or preliminary injunctions in aid of international arbitration proceedings, even when such arbitrations take place in New York. New York courts also may not grant such provisional remedies in aid of arbitrations taking place outside of New York State, even where the parties or property are present in New York. Instead, these important provisional remedies are available in New York courts only in support of "domestic" arbitrations that take place in the State of New York.

The Committees propose a legislative change to the New York Civil Practice Law and Rules to eliminate these anomalous distinctions and permit attachments of property and preliminary injunctions in New York, where all other requirements for such relief are met in support of both (i) international arbitrations taking place in New York, and/or (ii) arbitrations taking place in other U.S. States and foreign countries but having other appropriate jurisdictional connections with New York.

The amendment requested is not intended to and will not have any effect on the standards under which a court will determine whether to grant a provisional remedy. The court will continue to decide whether an order of attachment or preliminary injunction is warranted based on the facts of any particular case as examined pursuant to the criteria currently set forth under New York law. The only effect of the proposed amendment to CPLR Section 7502 is that the courts' current authority to issue such provisional remedies in domestic arbitrations will be extended to include all arbitrations.

I.

The unavailability of provisional remedies in support of international arbitration under New York law is based on a 1982 interpretation of Article II(3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") by the New York Court of Appeals in *Cooper v. Ateliers de la Motobecane, S.A.* 57 N.Y.2d 408, 456 N.Y.S.2d 728, 442 N.E.2d 1239 (1982) ("*Cooper*"). After more than 20 years of experience with interpretation of the New York Convention in other jurisdictions, it is apparent that the *Cooper* interpretation is inconsistent with the understanding of the same provision by the courts of other nations and other States of the United States, and is inconsistent with the rules of major international arbitration institutions. Its reasoning also has been widely condemned by commentators on the New York Convention. New York's law should be brought into conformity with international norms regarding interpretation of the important commercial arbitration treaty that bears New York's name.

Reasons for Interim Measures in International Arbitration

There are practical reasons why a court may be required to assist in the arbitral process with interim measures in support of international arbitration, just as courts do in support of purely domestic arbitration. These include the following:

1. Arbitral tribunals do not possess the same powers as a court. They cannot impose judicial sanctions for breach of their orders. Moreover, it may be considered inappropriate for them to "punish" non-compliance with their substantive award.

2. Even where a tribunal would have the necessary powers, it cannot issue interim measures until the tribunal has been established.[2] Consequently, the need often arises to protect the status quo while an arbitration is pending, just as it does when litigation is pending.

[2] In the case of International Chamber of Commerce arbitrations, for example, interim measures cannot be issued until the file has subsequently been transmitted to the tribunal.

However, because considerable time can elapse between a respondent first being alerted to a claim and a tribunal being appointed, a respondent may dissipate its assets or take other irrevocable action prior to the time it could obtain a hearing before an arbitration panel, rendering an eventual award ineffective.

3. The powers of an arbitral tribunal to direct actions (other than to subpoena evidence) generally are limited to the parties to the arbitration. An arbitrator does not, for example, have a court's power to order a bank to freeze a party's bank account.

Nevertheless, New York courts do not have the authority under New York state law to issue orders of attachment or preliminary injunctions if the case either (i) involves a non-U.S. party or (ii) the arbitration hearings are to be held outside New York.

The *Cooper* decision

In *Cooper*, the New York Court of Appeals was asked to determine whether an order of attachment could be issued in an action that was subject to arbitration. The dispute in *Cooper* concerned a contract, entered into by Cooper and others with a French corporation, which provided for disputes to be resolved by arbitration in Switzerland.

The Court in *Cooper* discussed two obstacles to the ability of a court to grant an order of attachment in a case that was subject to arbitration. First, the Court noted that under New York law as it existed at that time, the "provisional remedy of attachment is, in part, a device to secure payment of a money judgment," and pursuant to CPLR Section 6201 (as it was then), "is available only in an action for damages." 57 N.Y.2d at 413. In particular, the Court held that the provisional remedy of "attachment would not be available in a proceeding to compel arbitration (see CPLR [Section] 7503, subd [a]), as that is not an action seeking a money judgment." *Id.*

Second, the Court in *Cooper* also held that the New York Convention, which applied in the case because the dispute involved a French defendant, "precludes the courts from acting in any capacity except to order arbitration, and therefore an order of attachment could not be issued." *Id*. at 414. The Court based its decision on Article II(3) of the New York Convention which states:

> 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.

The New York Court of Appeals held, by a vote of 4 to 3, that this Article is inconsistent with pre-award attachment in any case to which the UN Convention applies. The Court reasoned that Article II(3) of the New York Convention not only does not authorize but actively prevents courts in any nation that is a party to the Convention from taking any action other than "referring" the parties to arbitration.

Judges Meyer, Jasen, and Gabrielli, in the dissenting opinion, noted that "nothing in the UN Convention or in the history of its negotiation or its implementation by Congress suggests that the word 'refer' as used in Section 3 of article II of the UN Convention was intended to foreclose the use of attachment where permitted by the law of the jurisdiction in which the attachment is obtained . . . . " *Id*. at 416.

Moreover, it is important to point out that, in both the *Cooper* case and in the *McCreary* case, the decision upon which the *Cooper* Court relied, the parties requesting attachment were seeking to bypass arbitration altogether. Indeed, the New York Court of Appeals in *Cooper* made clear that "it has long been the policy in New York to encourage the use of arbitration."[3]

[3] In addition, the decision in *Cooper* appears inconsistent with the legislative purpose behind New York General Obligations Law Section 5-1402, which allows any person to bring a proceeding in New York against a foreign corporation, nonresident, or foreign state under a contract which designates New York law as the applicable law (a

Over the past 23 years since *Cooper* was decided, the vast majority of courts, both here and abroad, have agreed with the dissent. Indeed, the Second Circuit in *Borden, Inc v. Meji Milk Products Co*., 919 F.2d 822 (2d Cir. 1990), in interpreting the very same UN Convention, held that as a matter of federal law, "[e]ntertaining an application for such a remedy, moreover, is not precluded by the Convention but rather is consistent with its provisions and its spirit. *Id*. at 826.

In reaching its decision in the *Borden* case, Circuit Judge Timbers, speaking for the Court, held that "an application for a preliminary injunction *in aid of arbitration* is consistent with the court's powers pursuant to [FAA] § 206." *Id*. (emphasis added). Judge Timbers distinguished the decision in *McCreary*, stating that the underlying complaint in that case "*sought to bypass arbitration altogether*." *Id*. (emphasis added). The changes to CPLR Section 7502(c) that we propose will assist only those parties seeking to arbitrate, and will not encourage parties seeking to bypass arbitration altogether.

It is our understanding that, if the proposed changes to CPLR Section 7502(c) are adopted, courts can and should refer parties to arbitration, while at the same time handling their applications for provisional remedies and attachments without permitting parties to hinder or delay the arbitral process. Courts can, and should. refer the parties to arbitration even as they also go through the process of hearing argument and taking decisions on provisional relief. In this manner, the proposed changes to CPLR Section 7502(c) will enable courts to refer parties expeditiously to arbitration where their case falls under the New York Convention, and when their contracts so require. This approach will strengthen greatly the reputation of New York for encouraging arbitration, and specifically, as a premier location for international commercial arbitration. If our proposed changes are adopted by the legislature, we strongly urge the legislature to make this expectation clear in the legislative history of the changes.

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common situation) and where the contract involves a transaction for not less than $1,000,000 and such foreign party agreed in the contract to submit to the jurisdiction of the courts of New York. N.Y. GEN. OBLIG. LAW § 5-1402.

CPLR Section 7502(c) Fails to Change *Cooper*

In response to the *Cooper* decision, the New York Legislature amended Article 75 of the CPLR, with effect from Jan. 1, 1986, to add a new subsection 7502(c). As noted in the legislative history, the purpose of the amendment was limited to addressing only the first problem noted by the Court in *Cooper*, namely that under New York law at that time, the provisional remedy of "attachment would not be available in a proceeding to compel arbitration (see CPLR [Section] 7503, subd [a]), as that is not an action seeking a money judgment." *Cooper*, 57 N.Y.2d at 413. The 1986 amendment was limited to addressing this issue, and because of the comments made by the *Cooper* majority concerning the New York Convention, there was no effort made to amend Section 7502(c) so that it would apply to cases governed by the New York Convention.

CPLR Section 7502(c), as amended, now provides:

> The Supreme Court in the County in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a),[4] may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above.

The reference to "the County in which an arbitration is pending" has been interpreted to mean that Section 7502(c) may not permit orders in support of arbitrations other than those located or to be located in New York.[5]

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[4] CPLR Section 7502(a) is a detailed venue provision that the courts have interpreted consistently with the *Cooper* limitation on Section 7502(a). *Contichem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426, 430-31 (2d Cir. 2000).

[5] *See* Vincent C. Alexander, Supplementary Practice Commentary at C7502:6, N.Y. C.P.L.R. 7502 (McKinney 2001); *Koob v. IDS Fin. Servs., Inc.*, 213 A.D.2d 26, 34 (1st Dep't 1995).

As a consequence of the legislative history, New York's courts have held that Section 7502(c) leaves *Cooper* intact in regard to international arbitrations, even if the arbitration in question is taking place or will take place in New York.[6] Accordingly, under Section 7502(c), as it currently exists, prejudgment attachments may not be granted in New York state courts in cases to which the New York Convention applies. *See, e.g., Shah v. Eastern Silk Indus. Ltd*., 112 A.D.2d 870, 871, 493 N.Y.S.2d 150 (1st Dep't 1985); *Faberge Int'l Inc. v. Di Pino,* 109 A.D.2d 235, 491 N.Y.S.2d (1st Dep't 1985); *Drexel Burnham Lambert Inc. v. Ruebsamen,* 139 A.D.2d 323 (1st Dep't 1988). Moreover, it appears that Section 7502(c) likewise precludes preliminary injunctions in aid of arbitration because the statute discusses the provisional remedies of preliminary injunction and attachment together. *See Contichem LPG v. Parsons,* 229 F.3d at 432.

Comparison of New York Law with Other Interpretations of the New York Convention

All member countries of the UN Convention, with rare exception, do not regard it as contrary to Article II(3) for a local court to grant interim measures in support of an arbitration, if such remedies are available under its domestic arbitration law. This is because, as leading commentators have explained, the Convention was not intended to supplant completely each country's national law governing arbitration. Professor A. J. van den Berg has written:

> [T]he Convention does not provide for a mechanism for settling disputes which is entirely different from arbitration under domestic law. In fact, an agreement and award falling under the Convention always relate to an arbitration governed by a national arbitration law. The Convention has only the limited purpose of facilitating on an

[6] Because the language permitting provisional remedies in such contexts does not limit the nature of such local arbitrations to purely "domestic" ones, some commentators had assumed that the amendment reversed the *Cooper* decision in regard to arbitrations of whatever type occurring or to occur in New York. The amendment was suggested by a Report of the Subcommittee on Provisional Remedies of the Committee on Arbitration of this Association. Although Section 7502(c) was recommended specifically to reverse the *Cooper* outcome, the legislative bill "wrapper" contained a notation in the memorandum of the Office of Court Administration that stated precisely the opposite: that there was "no inconsistency" between the proposed amendment and *Cooper*. The memorandum added, without explanation: "The Amendment would not affect proceedings governed by such international agreements." 1985 Report of the Advisory Committee on Civil Practice, *reprinted in* McKinney's 1985 Session Laws at 3432.

> international level the enforcement of the agreement and award. Consequently, whether pre-award attachment is possible does not depend on, nor is it precluded by, the Convention, but is to be determined by the law of the forum. As the National Reports on the laws of arbitration in the *Yearbook Commercial Arbitration* demonstrate, there is almost no law which does not permit that a court be requested to order attachment as a provisional remedy in aid of arbitration.[7]

This is also the view of the United Nations Commission on International Trade Law ("UNCITRAL"). The issue of whether the Convention precludes resort to Court-imposed provisional remedies was addressed directly by the UNCITRAL Model Law on International Commercial Arbitration,[8] promulgated three years after *Cooper*. Article 9 of the Model Law provides:

> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

The laws of such countries as Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Cyprus, Egypt, France, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Japan, Kenya, Lithuania, Macau, Madagascar, Malta, Mexico, the Netherlands, New Zealand, Nigeria, Oman, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, and Zimbabwe, all allow their domestic courts to award provisional remedies, where needed, in connection with arbitrations.[9] The same is true within the United States under the laws of California, Connecticut, New Jersey, Ohio, Oregon, and Texas, among others.

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[7] A. J. van den Berg, *The New York Arbitration Convention of 1958* 142 (Kluwer Law and Taxation, 1981) (emphasis added).

[8] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), as adopted by the United Nations Commission on International Trade Law on June 21, 1985.

[9] See generally W. Laurence Craig et al., *International Chamber of Commerce Arbitration* 471-79 (3d ed. 2000).

International Laws

For example, Section 1033 of the German Code of Civil Procedure provides:

> It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.

Still other countries set out more fully the powers that a court may exercise in support of arbitration. For example, Section 2GC of the Arbitration Ordinance of Hong Kong provides:

(1) The Court or a judge of the Court may, in relation to a particular arbitration proceeding, do any of the following–
  (i) make an order directing an amount in dispute to be secured;
  (ii) in relation to relevant property–
    (a) make an order directing the inspection, photographing, preservation, custody, detention or sale of the property by the tribunal, a party to the proceedings or an expert; or
    (b) make an order directing samples to be taken from, observations to be made of, or experiments to be conducted on the property;
  (iii) grant an interim injunction or direct any other interim measure to be taken.

(2) Property is relevant property for the purposes of subsection (l)(b) if–
  (i) the property is owned by or is in the possession of a party to the arbitration proceedings concerned; and
  (ii) the property is subject to the proceedings, or any question relating to the property has arisen in those proceedings.

(3) The Court or a judge of the Court may order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other material evidence.

(4) The Court or a judge of the Court may also order a writ of habeas corpus ad testificandum to be issued requiring a prisoner to be taken for examination before an arbitral tribunal.

(5) The powers conferred by this section can be exercised irrespective of whether or not similar powers may be exercised under Section 2GB in relation to the same dispute.

(6) The Court or a judge of the Court may decline to make an order under this section in relation to a matter referred to in subsection (1) on the ground that–
  (i) the matter is currently the subject of arbitration proceedings; and
  (ii) the Court or the judge considers it more appropriate for the matter to be dealt with by the relevant arbitral tribunal.

A further example is Section 44 of the English Arbitration Act of 1996, which provides:

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are–

(i) the taking of the evidence of witnesses;

(ii) the preservation of evidence;

(iii) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings–

(iv) for the inspection, photographing, preservation, custody or detention of the property, or

(v) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorizing any person to enter any premises in the possession or control of a party to the arbitration;

(vi) the sale of any goods the subject of the proceedings;

(vii) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

United States Laws

Within the United States, Section 1297.91 of the California Code of Civil Procedure (which applies even where the place of arbitration is not in California) closely parallels the Model Law:

> It is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection and for the court to grant such measure. [10]

Section 36.470 of the Oregon International Commercial Arbitration and Conciliation Act[11] and Section 50a-109 of the Connecticut Act Concerning the UNCITRAL Model Law on International Commercial Arbitration are stated in similar terms, save that the Connecticut law begins with the words, "Unless otherwise provided in the arbitration agreement…." [12] As in the case of the California Code, both Acts apply even where the place of arbitration is not in the State.

Section 172.175 of the Texas Civil Practice and Remedies Code provides:

a) A party to an arbitration agreement may request an interim measure of protection from a district court before or during an arbitration.
b) A party to an arbitration may request from the court enforcement of an order of an arbitration tribunal granting an interim measure of protection under Section 172.083. The court shall grant enforcement as provided by the law applicable to the type of interim relief requested.
c) In connection with a pending arbitration, the court may take appropriate action, including:
    1) ordering an attachment issued to assure that the award to which the applicant may be entitled is not rendered ineffectual by the dissipation of party assets; or
    2) granting a preliminary injunction to protect a trade secret or to conserve goods that are the subject matter of the dispute.
d) In considering a request for interim relief, the court shall give preclusive effect to a finding of fact of the arbitration tribunal in the arbitration, including a finding of fact relating to the probable validity of the claim that is the subject of the order for interim relief that the tribunal has granted, if the interim order is consistent with public policy.
e) If the arbitration tribunal has not ruled on an objection to its jurisdiction, the court may not grant preclusive effect to the tribunal's finding until the court makes an independent finding as to the jurisdiction of the tribunal. If the court rules that the tribunal did not

[10] CAL. CODE CIV. PROC. § 1297.91 (2004).

[11] OREGON REV. STAT. § 36.470 (2003).

[12] CONN. GEN. STAT. § 50a-109 (2003).

> have jurisdiction under applicable law, the court shall deny the application for interim measures of relief.[13]

As is true of the other Acts, this Article applies whether or not the arbitration takes place in Texas.[14]

In sum, the vast majority of countries that are parties to the Convention, as well as numerous states, have legislated, either specifically or through the adoption of the Model Law, to authorize their courts to grant interim measures in support of all arbitrations. It is clear, therefore, that these laws, many of them enacted after *Cooper*, demonstrate not only that New York law is unusual in this respect, but also that the reasoning of *Cooper* is flawed. The majority opinion stated:

> Whenever a matter of foreign relations is involved, one must consider the mirror image of a particular situation. Is it desirable to subject American property overseas to whatever rules of attachment and other judicial process may apply in some foreign country when our citizen has agreed to arbitrate a dispute?[15]

The reality, however, as is evident from the existence of the numerous laws that permit such attachments, is that American property overseas today is subject to provisional remedies in support of arbitration in the courts of the countries where the property is situated. *See* Craig, *International Chamber of Commerce Arbitration* at 483-84 ("Of the 125 countries that have signed the New York Convention, the United States stands alone in having developed case-law to the effect that attachment pending international arbitration is somehow incompatible with the Convention."). No other foreign judicial system of which the Committees are aware has declared itself incapable, by reason of the Convention, of granting interim pre-award protection in support of international arbitration.

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[13] TEX. CIV. PRAC. & REM. CODE ANN. § 172.175 (2004).

[14] *Id.* at § 172.001.

[15] 57 N.Y.2d at 415.

Arbitration Rules of Major Institutions

The arbitration rules of major international arbitration institutions, as well as the Arbitration Rules promulgated by the UNCITRAL, are based on the assumption that courts may grant interim measures in support of arbitrations taking place under the respective rules, whether or not the New York Convention might be applicable. Thus, the interpretation of the Convention underlying the *Cooper* decision does not appear to be shared by any of the major arbitration institutions.

Article 26(3) of the UNCITRAL Arbitration Rules provides:

> A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Article 23(2) of the International Chamber of Commerce ("ICC") Rules of Arbitration states:

> Before the file is transmitted to the Arbitral Tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

Article 21(3) of the American Arbitration Association ("AAA") International Arbitration Rules similarly but more succinctly states:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

Article 25(3) of the London Court of International Arbitration ("LCIA") International Arbitration Rules provides:

> The power of the Arbitral Tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal under Article 25.2

Article 46(d) of the World Intellectual Property Organization ("WIPO") Arbitration Rules states:

> A request addressed by a party to a judicial authority for interim measures or for security for the claim or counterclaim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement.

Article 31(2) of the Stockholm Chamber of Commerce Arbitration Rules similarly provides:

> A request addressed by a party to a judicial authority for interim measures shall not be deemed to be incompatible with the arbitration agreement or these Rules.

The fact that all of these major international arbitration institutions regard such judicial assistance as consistent with an arbitration agreement belies the reasoning of the *Cooper* majority that assumed a lack of interest in or need for such relief.

There are in reality many cases where disputes arising from arbitration agreements require immediate preliminary relief to protect the parties while the merits of the dispute are being arbitrated. There are also situations where the value of bringing arbitral proceedings may be lost if one party is able to withdraw its assets from effective reach of enforcement before an award is

made. Moreover, contracts do not habitually provide for indefinite escrow accounts to be set up to cover damages in the event of breach.

Indeed, it seems likely that the New York Convention does not mention pre-award attachments because there was no reason to do so. As noted above, the Convention has a limited scope: the recognition and enforcement of arbitral agreements and awards. It is not a global scheme covering every aspect of international arbitration. The New York Convention does not purport to have any bearing on court-ordered interim measures in support of arbitration. The better view is that expressed by the minority opinion in *Cooper*:

> [I]n light of the majority's concessions that foreign arbitration awards are enforced on the same terms as domestic awards, that there are circumstances under which a domestic award may be enforced under our law through use of a preaward attachment and that the UN [New York] Convention speaks only in terms of postaward security, and of the fact that the UN [New York] Convention does not specifically address the subject of preaward attachment, the UN [New York] Convention cannot properly be said to have proscribed such an attachment by implication.[16]

The Power to Grant Preliminary Injunctions In Aid Of Arbitration: The Conflict Between Federal And State Law

The need for revision of Section 7502 is further supported by the inconsistency that currently exists between the federal and state courts in New York as to the power to grant preliminary injunctions in aid of arbitrations. While U.S. federal courts normally apply state law to requests for attachments (except in admiralty cases),[17] they are not so limited with respect to preliminary injunctions.[18] Consequently, the federal courts have the authority to and do grant preliminary injunctions under the Federal Arbitration Act ("FAA") in connection with arbitrations that are either domestic or international, regardless of where the arbitration is to take place. However,

[16] *Id*. at 416.

[17] FED. R. CIV. P. 64.

[18] FED. R. CIV. P. 65.

due to the *Cooper* majority's rationale, injunctions are unavailable in New York state courts as to any international arbitration, even where the arbitration is to take place in New York, and to any arbitration where the hearing is to be held outside of New York.

In *Borden Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 826 (2d Cir. 1990), the Second Circuit Court of Appeals held that "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the courts' powers" under Chapter 2 of the FAA. The court noted that in *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974), the Third Circuit had held that the New York Convention precluded the grant of pre-award attachment. However, the Second Circuit distinguished *McCreary* and declined to follow it because the complaint there sought to bypass arbitration. 919 F.2d at 826. Instead, in *Meiji Milk*, the Second Circuit relied on its own reasoning in a pre-*Cooper* case, *Murray Oil Products Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944), to uphold the authority to grant a preliminary injunction in aid of arbitration, [19] stating that entertaining an application for a provisional remedy "is not precluded by the Convention but rather is consistent with its provisions and its spirit." 919 F.2d at 826. The Second Circuit added that "[in] *Murray*, we held that an arbitration clause does not deprive the promisee of the usual provisional remedies," and that "the desire for speedy decisions in arbitration is entirely consistent with the desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do." *Id.* That, of course, is also what attachments do.[20]

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[19] The Court in *Meiji Milk* affirmed dismissal on grounds of forum non conveniens, but granted Borden the right to reapply to the District Court for a preliminary injunction if the Japanese court did not rule on Borden's application within 60 days. As the Court noted in *Filanto, SpA v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), "[The New York Convention], as a treaty, is the supreme law of the land, U.S. Const. art. VI cl. 2, and controls any case in any American court falling within its sphere of application." *Id.* at 1236.

[20] The reach of the *Meiji Milk* precedent continues to be limited in one respect, however. The Second Circuit more recently declined to grant a preliminary injunction in aid of arbitration where the effect of the injunction would have been to prohibit the transfer of funds out of New York and would have had the same effect as an attachment. *Contichem LPG v. Parsons*, 229 F.3d at 430-434 (2d Cir. 2000). Moreover, the United States Supreme Court has held that Fed. R. Civ. P. 65 does not empower a federal court to issue a preliminary injunction to restrain a party to an action in a federal court from dissipating assets as to which no lien or equitable interest is claimed. *Grupo Mexicano de Desarrolo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). The New York Court of Appeals reached the same conclusion under New York state law. *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000).

Thus, there is a clear inconsistency between the availability of preliminary injunctions in support of international arbitration in federal courts within the Second Circuit, and the unavailability of either attachments or injunctions in support of international arbitration in New York state courts. This illogical distinction exists because the Second Circuit has recognized that there is nothing in the New York Convention that prohibits a court from granting a provisional remedy in aid of a national or international arbitration.

The majority of other federal courts have also disagreed with the *McCreary/Cooper* rationale, holding that neither the FAA nor the New York Convention strips the courts of authority to grant interim relief in aid of arbitration. In *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1984), for example, the Seventh Circuit held that a party's "right to seek injunctive relief in court and its right to arbitrate are not incompatible." 715 F.2d at 350. In particular, the court noted that the parties had agreed that the arbitration would be governed by the rules of the ICC Court of International Arbitration, and that Article 8, Section 5 of the ICC Arbitration Rules expressly authorizes parties to seek interim relief or conservatory measures from a judicial authority, without infringing their right to arbitrate. *Id*.

Numerous courts have held likewise in regard to granting provisional remedies in connection with international arbitration. *See PMS Distrib. Co., Inc. v. Huber & Suhner, A.G.*, 863 F.2d 639 (9th Cir. 1988) (granting a writ of possession in aid of arbitration); *Danieli & C. Officine Meccaniche S.p.A., v. Morgan Constr. Co.*, 190 F. Supp. 2d 148 (D. Mass. 2002) (granting a preliminary injunction in aid of arbitration); *Alcatel Space, S.A. v. Loral Space & Communications Ltd.*, 154 F. Supp. 2d 570 (S.D.N.Y. 2001), *aff'd*, 2002 U.S. App. LEXIS 2018 (2d Cir. 2002) (granting preliminary injunction in aid of arbitration); *James Assoc. (USA) Ltd. v. Anhui Mach. & Equip. Imp. & Exp. Corp*., 171 F. Supp. 2d 1146, 1148-50 (D. Colo. 2001) (granting a preliminary injunction in aid of arbitration); *Tennessee Imp., Inc. v. Filippi*, 745 F. Supp. 1314, 1329 (M.D. Tenn. 1990) (recognizing that the majority of courts have held the grant of preliminary injunctive relief as not inconsistent with the FAA); *Carolina Power and Light Co. v. Uranex*, 45l F. Supp. 1044 (N.D. Cal. 1977) (granting writ of attachment in aid of arbitration).

Indeed, even the Third Circuit (the court that decided *McCreary* in 1974) held in *Ortho Pharmaceutical Corp. v. Amgen*, 882 F.2d 806 (3d Cir. 1989), a case governed by Chapter 1 of the FAA, "that a district court has the authority to grant injunctive relief in an arbitral dispute, provided that the traditional prerequisites for such relief are satisfied." *Id.* at 812. As summarized by the court in *Amgen*:

> We find guidance, however, in the reasoning of the Courts of Appeals for the First, Second, Fourth, Seventh and Ninth Circuits, all of which have determined that the Arbitration Act does not deprive the district court of the authority to grant interim relief in an arbitral dispute, provided the court properly exercises its discretion in issuing the relief. Only the Court of Appeals for the Eighth Circuit appears to have expressly held otherwise. See Merrill Lynch, Pierce, Fenner & Smith v. Hovey, 726 F.2d 1286, 1291-92 (8th Cir 1984) . . . .[21]

While some of the cases cited by the *Amgen* court are cases governed by Chapter 1 of the FAA, their reasoning equally applies to cases under Chapter 2 of the FAA, which is the portion of the FAA which deals with cases under the Convention.[22]

Scholarly commentators also disapprove of the *McCreary/Cooper* rationale. For instance, Professor van den Berg has written:

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[21] 882 F.2d at 811-12 (citations omitted).

[22] See *China Nat'l Metal Prod.*, 155 F. Supp. 2d at 1179-80 ("Moreover, 9 U.S.C. 208 ("Section 208") undermines McCreary's reasoning. Section 208 provides that the provisions of Chapter 1 of the FAA governing domestic arbitration apply to proceedings involving agreements subject to the Convention to the extent that the provisions of Chapter 1 do not conflict with Chapter 2 of the FAA or the Convention. The provisions of Chapter 2 of the FAA and of the Convention do not prohibit issuing a stay, and thus, do not conflict with Section 3."). Another case recognizing the authority of courts to issue provisional relief is *Teradyne, Inc v. Mostek Corp.*, 797 F.2d 43 (1st Cir 1986) (granting a preliminary injunction in aid of arbitration). There appears to be a conflict on this issue in the Fourth Circuit. *Compare I.T.A.D. Assoc., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981) (vacating an attachment in a case under Chapter 2 of the FAA, citing *McCreary*) *with Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985) (preliminary injunction in aid of arbitration may issue under Chapter 1 of the FAA). The Eight Circuit has held that the courts do not have the power to issue provisional remedies in aid of an arbitration, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984), unless the contract between the parties provides otherwise. *See Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46, 47 (8th Cir. 1994).

> [E]ven for state law attachment, the *McCreary* doctrine should be rejected as the Convention must be held, in general, not to preclude provisional remedies... It may be recalled that the incompetence of the court as a consequence of a stay of court proceedings pursuant to Article II(3) is not complete. The court has a continuing competence in matters related to arbitration including provisional remedies such as attachment.[23]

Likewise, Alan Redfern and Martin Hunter, discussing *McCreary*, agree that "an application to a national court for interim measures should *not* be regarded as incompatible with an agreement to arbitrate." [24]

Richard Hulbert, another commentator, has added:

> The McCreary decision represents an extreme statement of the position that local provisional measures are simply and in principle inapplicable in a case subject to arbitration. There is no trace of any consideration of whether, in the circumstances, an attachment might have assisted the eventual enforcement of the award, thus rendering the arbitral process more efficacious. The rationale of the decision appeared to have precluded any such analysis. [25]

Professor David Siegel, the leading commentator on the New York CPLR, has stated that because courts "continue to bar attachment in treaty-governed cases despite the intervening adoption of CPLR [Section] 7502(c), the point seems worthy of reconsideration by the Court of Appeals in view of the policy underlying the statute."[26]

In sum, the very purpose of the New York Convention is to facilitate on an international level the enforcement of arbitral awards. It is therefore ironic that, in seeking to uphold the Convention,

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[23] *The New York Arbitration Convention of 1958, supra* note 5, at 142.

[24] *Law and Practice of international Commercial Arbitration* (Sweet & Maxwell, 3rd Ed., 1999).

[25] Richard W. Hulbert, *The Role of the Courts: The American Law Perspective, in Conservatory & Provisional Measures in International Arbitration* 92, 96 (1993).

[26] David D. Siegel, *New York Practice* 1016 (3d Ed. 1999)

the *McCreary* and *Cooper* decisions in fact may have achieved the opposite effect, in that international enforcement of an award is hindered if assets are dissipated because of a court's inability to grant an attachment.

Arbitrations Taking Place Outside New York

Article 9 of the UNCITRAL Model Law provides that it is not incompatible with the New York Convention for a court to grant interim measures of protection without regard to the site of the arbitration.[27] Accordingly, in those countries where the Model Law has been adopted, interim measures are available in support of arbitrations regardless of the place of the arbitration. For example, Article 1025 of the German Code of Civil Procedure provides that Article 1033 shall apply even if the place of arbitration is outside Germany or has not yet been determined. Further examples of attachments being available in support of foreign proceedings (on the basis of the presence of the defendant's assets in the jurisdiction) appear in the Belgian Judicial Code, Article 633; the French New Code of Civil Procedure, Articles 48-57; and the Italian Code of Civil Procedure, Articles 670-71. The same is true in England. Article 2(3) of the Arbitration Act of 1996 provides that the powers conferred by Section 44 of the Act apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined.[28]

Likewise, the arbitration statutes of California, Connecticut, New Jersey, Ohio, Oregon, and Texas, among others, all provide their courts with authority to grant provisional remedies, without regard to whether the place of the arbitration is within the State. *See* CAL. CODE CIV. PROC. § 1297.91 (2004) ("interim measure of protection"); CONN. GEN. STAT. § 50a-109 (2003) ("interim measure of protection"); N.J. STAT. ANN. § 2A:23B-8 (2004) ("provisional remedies to

[27] UNCITRAL Model Law at art. 1(2).

[28] However, Section 2(3) goes on to state: "but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so."

protect the effectiveness of the arbitration proceeding"); OHIO REV. CODE ANN. §§ 2712.14-15 (2004) (provisional remedies, including preliminary injunctions and orders of attachment); OREGON REV. STAT. § 36.470 (2003) (same); TEX. CIV. PRAC. & REM. CODE ANN. §§ 172.001, .175 (2004) (same).

Since the New York Convention exists to assist enforcement of awards in countries other than the country where the award was made, it is appropriate that these States and countries allow provisional remedies, regardless of the location of the arbitration hearing. Moreover, especially in international arbitrations, it is often the case that the site identified for the place of the arbitration is one selected for its neutrality and which may have no connection to either the parties or the underlying dispute. Nevertheless, the need for quick and effective access to the courts in aid of a provisional remedy often exists. *See, e.g., Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1984) (preliminary injunction granted in connection with arbitration sited in London); *Danieli & C. Officine Meccaniche S.p.A., v. Morgan Constr. Co.*, 190 F. Supp. 2d 148 (D. Mass. 2002) (preliminary injunction granted in aid of arbitration sited in Paris); *Alcatel Space, S.A. v. Loral Space & Communications Ltd.*, 154 F. Supp. 2d 570 (S.D.N.Y. 2001), *aff'd*, 2002 U.S. App. LEXIS 2018 (2d Cir. 2002) (preliminary injunction granted in aid of arbitration sited in Geneva); *Carolina Power & Light Co., v. Uranex*, 451 F. Supp. 1044 (N.D. Calf. 1977) (attachment granted of assets located in California in aid of arbitration sited in New York). Thus, it may well be appropriate in such a case for a New York court to take protective action in the form of preliminary injunctions or orders of attachment with respect to assets in New York, even though the site of the arbitration is in another State or outside the United States.

Furthermore, it is a source of confusion for users of commercial arbitration that New York is unique among the world's major centers of arbitration in not permitting pre-award attachments in support of all arbitrations. Thus, New York's position as an important arbitration venue would be enhanced by a legislative amendment to CPLR Section 7502(c), which would reverse the effect of *Cooper* and provide New York courts with the same authority to issue attachments and injunctions in aid of all arbitral proceedings, be they domestic, national, or international.

However, in proposing this statutory amendment, there is no intent to change the standards under which a court will determine whether to grant a provisional remedy. All existing jurisdictional requirements and standards under which a New York court will determine whether to grant a provisional remedy remain the same. *See, e.g., Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000) (preliminary injunction not available to restrain defendants' assets beyond that allowed by an order of attachment); *Koob v. IDS Financial Services, Inc.*, 213 A.D.2d 26 (1st Dep't 1995) (request for provisional relief in aid of arbitration denied where there is lack of jurisdiction over the defendant and because the contract contained a clause designating the courts of Minnesota "for determining any controversy in connection with the agreement").

II.

Proposed Legislation

The goal of making pre-award interim relief available in New York in aid of national and international arbitration can be served by amending CPLR Section 7502(c) to read as follows:

> With respect to an arbitrable controversy that is pending or that is to be commenced inside or outside this State, a Supreme Court may entertain an application for an order of attachment or for a preliminary injunction in connection with the controversy, whether or not it is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. If the application is made before commencement of arbitration, the provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration concerning the arbitrable controversy is not commenced within 30 days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The Court may reduce or expand this period of time for good cause shown.

A "black-lined" version showing proposed changes follows:

> With respect to an arbitration that is pending or that is to be commenced inside or outside this State, a Supreme Court ~~in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a)~~, may entertain an application for an order of attachment or for a preliminary injunction in connection with ~~(an arbitrable controversy)~~ the controversy, whether or not it is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. , The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) ~~if the application is made before commencement~~, except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration concerning the arbitrable controversy is not commenced within 30 days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The Court may reduce or expand this period of time for good cause shown.

The grounds for granting the provisional remedies of an order of attachment or preliminary injunction remain unaffected by this proposed amendment. The changes requested are not directed to and do not have any effect on the standards under which a court will determine whether to grant a provisional remedy. The Court will continue to decide whether an order of attachment or preliminary injunction is warranted based on the facts of any particular case as examined pursuant to the criteria currently set forth under New York law. The only effect of the proposed amendment to CPLR Section 7502 is that the courts' current authority to issue such provisional remedies in domestic arbitrations will be extended to include all arbitrations.

The amendment requested would make clear that attachments or injunctions may be granted by New York courts in aid of pending or imminent arbitrations anywhere in the world. Not only would such a legislative change have a beneficial effect by clarifying the law for cases in the courts of New York State, it also would be applied in the federal courts in New York with respect to attachments, pursuant to Rule 64 of the Federal Rules of Civil Procedure. There is no need to change the standards under which such provisional remedies may be granted under

CPLR Section 7503. Such a statutory change would additionally make clear that preliminary injunctions in support of international arbitration would be available in both state and federal courts, eliminating the inconsistency that now appears to exist in New York as to that question.

Dated February 11, 2005

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