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Carolina Power and Light Co. v. Uranex: Quasi in Rem Jurisdiction to Secure a Potential Arbitral Award: An Exception to *Shaffer v. Heitner*'s Minimum Contacts Requirement

In 1977 the United States District Court for the Northern District of California held in *Carolina Power and Light Co. v. Uranex*[1] that the *Shaffer v. Heitner*[2] requirement of minimum contacts for quasi in rem jurisdiction contained an exception which permitted attachment of assets for security purposes.[3] The court determined that prejudgment attachment of a debt due to a foreign defendant was constitutional under *Shaffer*,[4] and, significantly, that an attachment order could be maintained pending arbitration under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[5] The court found no conflict between the factors underlying a decision to arbitrate and the procedural requirements of prejudgment attachment.[6] Finally, the court addressed the issue of ownership of accounts payable to the defendant. Applying French law, the court held that Uranex was not the owner of the attached debt and that the attachment could be maintained only in the amount representing Uranex' commission as agent.[7]

Defendant Uranex, a French *groupement d'interet economique*,[8] contracted with Carolina Power and Light Company (CP&L), a North Carolina public utility company, to deliver uranium concentrates to CP&L during the years 1977 to 1986. The contract provided that all disputes would be submitted to arbitration in New York. Subsequently, world uranium prices rose sharply and Uranex was either unwilling or unable to deliver at the contract price. In 1977, CP&L filed an action against Uranex and proceeded to attach an $85 million debt owed to Uranex by

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[1] 451 F. Supp. 1044 (N.D. Cal. 1977).

[2] 433 U.S. 186 (1977).

[3] 451 F. Supp. at 1048.

[4] *Id.* at 1051.

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S.3. For U.S. implementing legislation, see 9 U.S.C. §§ 201-208 (1976).

[6] 451 F. Supp. at 1052.

[7] *Id.* at 1054.

[8] A *groupement d'interet economique* is an association of economic concerns formed to perform various functions. Such a group may represent the interests of its members in the legislative process. In the instant case, one of Uranex' purposes was to act as an agent in making contracts for other business entities.

Homestake Mining Company, a corporation based in San Francisco. The debt was due to Uranex in its role as *commissionaire*[9] for a third party, and had no relationship to the dispute with CP&L.

Arbitration proceedings began in New York after the lawsuit was filed, thereby precluding the court from considering the merits of the case. However, CP&L sought to maintain the attachment pending arbitration as security for any future award.[10] Uranex challenged the jurisdiction of the court under the standards of *Shaffer v. Heitner* and asserted that, in any event, the attachment was contrary to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[11] Additionally, Uranex argued that as *commissionaire* in the contract with Homestake, it was merely an agent with no ownership interest in the debt.[12] Therefore, under California law, the funds could not be attached.

Although *Shaffer* extended the *International Shoe Co. v. Washington*[13] minimum contacts requirement for in personam jurisdiction to cases based on quasi in rem jurisdiction, the *CP&L* court found *Shaffer* contained a specific exception for cases brought solely to attach assets for security purposes.[14] The court reasoned that "traditional notions of fair play and substantial justice" applied to a plaintiff's interests as well as to those of a defendant. Therefore, the policy favoring attachment to secure a plaintiff's potential judgment served to reduce the quantity and quality of contacts necessary to bring a defendant into a forum.[15]

In maintaining the attachment order, the court acted in the wake of an academic storm precipitated by the Supreme Court's decision in *Shaffer*.[16] *Shaffer* was hailed as a much needed decision which rejected the earlier theories of jurisdiction espoused in *Pennoyer v. Neff*,[17] *Harris v. Balk*[18] and *Hanson v. Denckla*[19] by broadening the application of the minimum contacts theory first espoused in *International Shoe*. The plaintiff in

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[9] The *commissionaire* acts as an agent by contracting with third parties to buy or sell goods for the *commettant* or principal. The *commissionaire* enters the contract in his own name and is personally bound. *See* 451 F. Supp. at 1053. *See also* R. PENNINGTON, THE FRENCH LAW OF DISTRIBUTORSHIP AGREEMENTS (1976).

[10] 451 F. Supp. at 1045-46.

[11] *Id.* at 1046, 1049.

[12] *Id.* at 1052.

[13] 326 U.S. 310 (1945).

[14] 451 F. Supp. at 1052.

[15] *Id.* at 1048.

[16] There are many excellent law review notes interpreting the *Shaffer* decision. The most helpful comments include Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33 (1978); *Symposium: State-Court Jurisdiction after Shaffer v. Heitner*, 63 IOWA L. REV. 991 (1978); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997 (1978); Note, *Shaffer v. Heitner's Effect on Pre-Judgment Attachment Jurisdiction Based on Property, and New York's Seider Doctrine: Have We Finally Given Up the Ghost of the Res?*, 27 BUFFALO L. REV. 323 (1978).

[17] 95 U.S. 714 (1877). The Supreme Court held that the state had exclusive jurisdiction over all persons and property within its territory; its jurisdiction did not extend beyond its borders.

[18] 198 U.S. 215 (1905). The Supreme Court held that state courts could acquire jurisdic-

Shaffer, a nonresident shareholder of a Delaware corporation, brought a shareholder's derivative suit based solely on the sequestration of stock in the Delaware corporation owned by the defendants. The Delaware Supreme Court held that *International Shoe* did not apply to the action because it was quasi in rem and not dependent on prior contacts of the defendant.[20] The U.S. Supreme Court, however, reconsidered the theoretical and policy supports of the precedent cases in light of the appellants' contention that the Delaware sequestration statute as applied violated the due process clause of the fourteenth amendment. It found a fundamental weakness in the distinction made by the courts between jurisdiction over people and property. The Court stated that jurisdiction over a thing was no more than "a customarily elliptical way of referring to jurisdiction over the interests of persons in a thing."[21] Consequently, the Court rejected the use of property as a basis for asserting what is essentially jurisdiction over the person. It held that henceforth "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[22]

Thus, the district court in *CP&L* was faced with determining the jurisdictional issue under the new requirements of *Shaffer*. Without discussion, the court found no basis for in personam jurisdiction.[23] It noted that since *Shaffer* set identical standards for both in personam and quasi in rem jurisdiction, the finding of no basis for in personam jurisdiction might be considered determinative of the entire jurisdictional issue.[24]

CP&L, however, contended that the *Shaffer* opinion set out an exception when quasi in rem jurisdiction was asserted for security purposes.[25] In *Shaffer*, the Supreme Court rejected the argument that *International Shoe* should not apply to quasi in rem jurisdiction because this would allow a wrongdoer to remove assets from within the reach of the plaintiff. However, in assessing the argument, the Court stated, "[a]t most it suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be

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tion over a garnishee temporarily in the state and could then garnish the debt he owed plaintiff's out-of-state debtor.

[19] 357 U.S. 235 (1958). The Supreme Court held the Florida courts had no jurisdiction over a Delaware trust company, despite the presence in Florida of the settlor and most of the beneficiaries of the trust. The Court found the nature and purpose of the Delaware corporation's activities within Florida insufficient to permit Florida's assertion of in personam jurisdiction.

[20] Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976).

[21] 433 U.S. at 207.

[22] *Id.* at 212.

[23] 451 F. Supp at 1047. It could be argued that the minimum contacts standard as applied in *Hanson* and McGee v. International Life Insurance Co., 355 U.S. 235 (1968), would allow in personam jurisdiction on the facts of the case.

[24] *Id.*

[25] *See* Mehrer & Troutman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). In suggesting new standards for quasi in rem jurisdiction based on minimum contacts, the authors argued in favor of such an exception.

maintained consistently with *International Shoe*."[26]

The district court undertook to interpret the meaning of this passage in the context of the entire opinion. It concluded that the broad standard of "fair play and substantial justice" included "consideration of both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought."[27] On the basis of this conclusion, the court adopted a two-part test for the purpose of determining whether it could constitutionally assume limited jurisdiction to attach assets pending litigation in another forum.[28] The requirements under *CP&L* are first, that the property be present within the state in the ordinary course of events rather than by mere fortuity; and second, that the attaching court be a convenient forum for the defendant to litigate the limited issues arising from the attachment.[29] Applying its own test, the court found that since the debt arose as a consequence of Uranex' contract with Homestake, a California corporation, and Uranex had agreed to litigate disputes with Homestake in California, the attachment was constitutional.[30]

However, the court conditioned the attachment order on the filing of an in personam action by CP&L in a forum with jurisdiction in compliance with Marshall's dictum in *Shaffer*.[31] The effect of this condition is that, in addition to the arbitral proceeding, two judicial actions must be filed in order for the plaintiff to secure a *potential* arbitral award. One action must be filed in the state where the assets to be attached are located, and another in a forum with jurisdiction to adjudicate the merits of the case. This requirement frustrates the purposes of arbitration; it forces parties into court after they make a contractual commitment to avoid entering the judicial process. Furthermore, since the courts will ultimately enforce the agreement to arbitrate, the filing of the in personam action is an empty exercise that causes extra expense and loss of time.

Next, the court addressed Uranex' contention that prejudgment attachment pending arbitration was inconsistent with the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[32] However, after examining the Convention, the court con-

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[26] 433 U.S. at 210.

[27] 451 F. Supp. at 1052.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1049.

[32] *Id.* The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations in order to encourage the arbitration of international commercial disputes by providing a method of enforcing foreign arbitral awards. The United States acquiesced to the Convention on July 31, 1970, to become effective December 29, 1970. *See* 9 U.S.C. §§ 201-208 (1976). The advantages of the Convention over prior treaties were summarized by the president of the 1958 U.N. conference as follows: 1) it reduces and simplifies requirements for the party seeking recognition or enforcement of an award; 2) the burden of proof is placed on the party opposing recognition or enforcement of an award; 3) the parties have greater control of choice of law and procedure; and 4) it gives the right to the authority consid-

cluded that it provided no guidance.[33]

The court then turned its attention to Uranex' argument that the holding of the Third Circuit in *McCreary Tire and Rubber Co. v. CEAT S.p.A.* should be followed.[34] McCreary, a Pennsylvania corporation, entered an exclusive distributorship contract with an Italian corporation, CEAT. The contract provided that all disputes would be arbitrated in Brussels, Belgium.[35] However, when a dispute arose, McCreary initiated suit in Pennsylvania by attaching property of CEAT located within that state. The litigation was removed to federal court where defendant's motions to stay the lawsuit pending arbitration and to dissolve the attachment were denied.[36]

CEAT appealed to the Third Circuit, which held that it had jurisdiction to review the denial of the stay but lacked jurisdiction to review the denial of the motion for dissolution of the attachment.[37] Despite its finding, the court decided to review both denials because they were incorporated into the same order.[38] The court held that the Convention clearly mandated a stay of the lawsuit pending arbitration.[39] In addition, it analyzed the attachment as analogous to the lawsuit itself. It found the motion for attachment to be "a violation of McCreary's agreement to submit the underlying disputes to arbitration."[40] Attachment was characterized as a bypass of the arbitration agreement which forced a party into court in violation of his contract and in contravention of the purposes of the Convention.[41] The court did not address the policy reasons which have traditionally supported prejudgment attachment, such as providing the plaintiff with security for any future award, but stated only that attachment might be available to enforce an award.[42]

A subsequent district court case, *Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional*,[43] followed the reasoning of *McCreary*. The *Metropolitan* court rejected the plaintiff's claim that the Convention embraced the procedures applicable to domestic arbitration disputes.[44] It noted that case law allowed a plaintiff to proceed by attachment under the United States Arbitration Act[45] if the applicable law

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ering the recognition or enforcement to order the opposing party to supply suitable security. Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821 (1972).

[33] 451 F. Supp. at 1052.

[34] *Id.* at 1050.

[35] 501 F.2d at 1033.

[36] *Id.*

[37] *Id.* at 1037.

[38] The court in *CP&L* stated that the *McCreary* court ruled on the attachment despite its lack of jurisdiction.

[39] 501 F.2d at 1038.

[40] *Id.* at 1033.

[41] *Id.*

[42] *Id.*

[43] 427 F. Supp. 2 (S.D.N.Y. 1975).

[44] *Id.* at 4.

[45] 9 U.S.C. §§ 1-14 (1976). *See* U.S.C. § 8 (1976) (pertaining to proceedings in admiralty).

otherwise contained an attachment provision.[46] However, as in *McCreary*, the court interpreted the silence of the Convention as an implication that attachment was not authorized.[47] Furthermore, the court elaborated on the policy objectives apparently underlying the *McCreary* opinion. It stated,

> [t]he very purpose behind the Convention is to bring about settlement of disputes solely through arbitration proceedings, and to allow a resort to attachment before [arbitration] would seem to put an unnecessary and counterproductive pressure on a situation which could otherwise be settled expeditiously and knowledgeably in an arbitration context.[48]

This rationale was flatly rejected in *CP&L*.[49] The court attacked the *McCreary* court's analysis of the distinctions between the Act and the Convention.[50] It rejected the finding that the Convention negated the court's jurisdiction by requiring "referral" of the case to arbitration while the Act permitted continued jurisdiction since only a "stay" of the action pending arbitration was mandated. This distinction between the terms "stay" and "referral" was found to be a purely semantic rather than a substantive difference, attributable to the Convention's applicability to many different legal systems where the technical term "stay" might be meaningless.[51]

The *CP&L* court noted that the Act, which functions like the Convention for domestic agreements involving maritime or interstate commerce, contained no provision prohibiting prejudgment attachment pending arbitration.[52] Under section 8 of the Act, prejudgment attachment had been granted in a case involving maritime law, *The Anaconda v. American Sugar Refining Co.*[53] The court in *Anaconda* reasoned that without the attachment provisions, "an arbitral award would be wholly unenforceable as the vessel might seldom or never be within the jurisdiction of our courts."[54]

Finally, the court cited *Boys Market, Inc. v. Retail Clerks*[55] and stated 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."[56] However, *Boys Market* involved a union-company dispute governed by a collective bargaining agreement. The agreement contained a clause which provided that there would be no work stoppage, lockout, picketing or boycott for the duration of the contract.[57]

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46 427 F. Supp. at 4.
47 *Id.*
48 *Id.*
49 451 F. Supp. at 1051.
50 *Id.* at 1052.
51 *Id.*
52 *Id.* at 1052.
53 322 U.S. 42 (1943).
54 *Id.* at 46.
55 398 U.S. 235 (1970).
56 451 F. Supp. at 1052.
57 398 U.S. at 235.

Subsequently, the union members struck and engaged in picketing and the company sought injunctive relief. In granting the injunction, the Supreme Court recognized the congressional policy encouraging arbitration of labor disputes. Nevertheless, it found that under the circumstances, injunctive relief could facilitate the implementation of that congressional policy by removing an obstacle which engendered controversy and ill-will.[58] The court characterized its decision as a narrow holding.[59] Thus, the *CP&L* court based its policy argument on a case in which the Supreme Court granted an injunction to enforce a no-strike provision in a labor contract. The court did not explain how, under the facts in *CP&L*, the maintenance of the attachment order would facilitate arbitration agreements. Unlike *Boys Market*, the court allowed an intermediary step to occur between the occurrence of the dispute and commencement of the arbitration.

The final issue addressed by the court was: Who actually owned the attached funds?[60] Uranex asserted that it had contracted with Homestake only as an agent or *commissionaire* for Compagnie General de Materiele Nucleonie (COGEMA), a French corporation wholly owned by the French government.[61] Since California law permits a creditor to attach only the debtor's actual interest in property,[62] the court had to determine whether Uranex or COGEMA was the owner of the debt under French law. CP&L advanced the theory that since the *commissionaire* is personally bound by the contract with the third party (Homestake) and the principal or *commettant* (COGEMA), and the third party generally have no legal recourse against each other, the proceeds of the contract are the property of the *commissionaire* while in his or the third party's possession.[63] Alternatively, CP&L argued that the relationship between Uranex and COGEMA was essentially a partnership, making COGEMA liable for Uranex' debts. The court quickly dispensed with the second theory by stating that under California law a partner cannot be personally liable unless he is made a party to the action and COGEMA was never made a party to the suit.[64]

CP&L emphasized three points in support of its primary theory. First, the *commissionaire* contracts with third parties in his own name. Second, payments by the third party go into the general funds of the *commissionaire*. Finally, the *commissionaire* may pay the *commettant* with assets other than those received under the contract.[65] Uranex rested its argument on inconsistencies between the proposition that the *commission-*

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58 *Id.* at 253.
59 *Id.*
60 *See generally* R. PENNINGTON, *supra* note 9.
61 451 F. Supp. at 1052.
62 *See* Kinnison v. Guaranty Liquidating Corp., 18 Cal. 2d 256, 115 P.2d 450 (1941).
63 451 F. Supp. at 1053.
64 *Id.* at 1054 n.6.
65 *Id.* at 1053.

aire owns the commission sales proceeds and other aspects of the *commissionaire-commettant* relationship. Most important was the fact that the *commissionaire* never holds title to the goods sold on behalf of the *commettant*. Moreover, the *commettant* may reclaim the goods in the event of the *commissionaire's* bankruptcy. Although the parties were in disagreement on the crucial issue of the *commettant's* right to unpaid sales proceeds, this point was not resolved by the court. Instead it relied on the rule that allows the third party to offset payments to the *commissionaire* by any claims the third party has against the *commettant*. The court held that this rule "implied that the unpaid price is to be regarded as the property of the *commettant*."[66]

The court, in determining who owned the assets, recognized a fundamental problem encountered in international law. It stated, "despite the excellent briefing that has attended this litigation, it is difficult to weigh the relative significance of these features without a broader understanding of the role these commission arrangements play in French commerce. Furthermore, important and relevant features of French law on commission sales apparently remain unresolved."[67] This illustrates the difficulty involved in applying foreign law, a difficulty sought to be avoided by arbitration. Ultimately, the court resolved the issue by finding the *commissionaire* analogous to the American agent. Therefore, it held that Uranex did not own the debt due from Homestake.[68] However, the court noted that 1.5 percent of the account payable constituted Uranex' commission on the transaction. It maintained the attachment in the amount of $1,278,000, Uranex' interest in the fund.

By authorizing attachment of Uranex' assets, the court recognized the state's interest in providing security for a plaintiff in the event of a judgment in his favor. However, the court failed to consider fully the implications of granting jurisdiction to the courts when the parties have agreed to arbitrate. The arbitration agreement signifies the parties' intent to settle their dispute privately. The holding in *CP&L* requires the defendant to appear in court to litigate the issues involved in the attachment proceeding. The incongruity of prejudgment attachment with the policies favoring arbitration is illustrated by the fact that it is conditioned on the filing of an in personam suit. Thus, the defendant who is bound to arbitrate must appear to protect his property in one forum, and, additionally, must appear to file a motion to refer the in personam suit required by *CP&L* to arbitration.

Other factors compound the problem caused by the *CP&L* decision. Efficiency is lost in the barrage of judicial and arbitral proceedings required to complete the attachment action. The parties' quest for convenience by specifying the site of arbitration contractually is defeated by the

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66 *Id.*
67 *Id.*
68 *Id.* at 1054.

requirement of appearing before the court to attain or attack a prejudgment attachment. The relative economy of arbitration as opposed to litigation is diminished as multiple actions force costs upward. The parties' control over many aspects of dispute settlements, such as choice of forum and choice of law, is relinquished.

Carolina Power and Light Co. v. Uranex offers an excellent illustration of this problem. Although it contracted to arbitrate all disputes in New York, Uranex was brought into a California court to litigate the attachment issues. The court conditioned the attachment on the filing of an in personam suit, a requirement directly contrary to the parties' intent. Conceivably, a defendant could be brought into several courts to litigate issues arising from attachments in different jurisdictions. This result is clearly contrary to the purpose of the Convention. As the *McCreary* court argued, the Convention was enacted to encourage arbitration by insuring the integrity of arbitral awards. The decision in *CP&L* frustrates the intent of the parties to arbitrate by allowing multiple judicial actions to precede termination of the arbitration.

—LOU ANN NEWMAN