reimbursed for his actual disbursements; and that he was to be paid a royalty of 2% on the retail price of all records sold throughout the world. On that cause of action plaintiff seeks an accounting. A second cause of action, bottomed on the doctrine of quantum meruit is also set forth.

Shortly before the date fixed for trial defendants moved to amend their answer to include the defense of Statute of Frauds. That motion was granted. Thereupon defendants moved to dismiss the complaint asserting that the first cause of action was barred by the Statute of Frauds and that the agreement between the parties provided that plaintiff was to be reimbursed for his actual expenses and, in addition thereto, he was to be paid the sum of $7.50 per hour for time spent in producing the master recording and that such sum was paid to him. That motion was granted and plaintiff appeals from the judgment entered thereon.

[1] We agree that the dismissal of the first cause of action was warranted. The Statute of Frauds (GOL § 5–701[a][1]) provides that an agreement which by its terms is not to be performed within one year must be in writing. In point of time, the agreement alleged by plaintiff is open-ended. Under it defendants' liability endured so long as a single record of the Star Club performance was sold anywhere in the world. In these circumstances the agreement could not be performed within one year and the statute is applicable (cf. *Dukes of Dixieland v. Audio Fidelity, Inc.*, 19 A.D.2d 872, 244 N.Y.S.2d 178 [1st Dept.]).

[2] The second cause of action presents a somewhat different situation. The defendants contend that the agreement was to pay plaintiff $7.50 per hour for the time spent in making the master recording and that the sum was paid to him. Plaintiff concedes, for the purpose of this appeal, that he received such payment. However, he insists that this was merely the basic payment and that he was to be paid additional sums for his work. While the agreement between the parties cannot furnish the basis for such additional compensation, plaintiff remains free to show, if he can, that the base payment was intended to be only the initial installment for the services performed by him; that such services were in fact worth considerably more.

Intl UNCONV MFH

Robert R. COOPER, Plaintiff-Appellant,

v.

ATELIERS DE LA MOTOBECANE, S. A., Defendant-Respondent.

Supreme Court, Appellate Division, First Department.

Jan. 26, 1982.

Plaintiff brought action against French corporation under a contract which included an arbitration provision covered by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Supreme Court, New York County, Nadel, J., granted the French corporation's motion to vacate the prearbitration attachment and dismissed the complaint for lack of subject-matter jurisdiction, and plaintiff appealed. The Supreme Court, Appellate Division, held that plaintiff was entitled to attachment before the arbitration award was rendered.

Order reversed, motion denied and attachment reinstated.

Arbitration ⇐23.7

Plaintiff, who brought action against a French corporation under a contract which included an arbitration provision covered by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was entitled to attachment before the arbitration award was rendered. 9 U.S.C.A. § 201 et seq.; Convention on the Recognition and Enforcement of Foreign

Arbitral Awards, Art. I et seq., 9 U.S.C.A. § 201 note.

S. L. Cohen, New York City, for plaintiff-appellant.

R. K. Bernstein, New York City, for defendant-respondent.

Before SANDLER, J. P., and CARRO, SILVERMAN, BLOOM and FEIN, JJ.

MEMORANDUM DECISION.

Order, Supreme Court, New York County, entered on October 16, 1980, granting defendant-respondent's motion to vacate the pre-arbitration attachment and dismissing the complaint for lack of subject matter jurisdiction, reversed, on the law, motion denied and attachment reinstated, without costs.

Respondent ("Motobecane") is a French corporation. A New York subsidiary ("Motobecane America") was established with Motobecane maintaining voting control. Appellant ("Cooper") was a shareholder in the New York corporation. The shareholders' agreement provided that the shareholders could tender their shares for repurchase by Motobecane and/or Motobecane America, with the obligation to repurchase being joint and several between the companies. The agreement further contained a provision for arbitration, under certain circumstances, of disputes over the purchase price, the arbitration to be held in Zurich, Switzerland.

Cooper gave notice of his intent to sell his shares, and thereafter Motobecane demanded arbitration. Cooper brought on a special proceeding to stay arbitration. A stay was denied, and he appealed that order. While the appeal was pending, he obtained an *ex parte* order of attachment and served a summons and complaint on Motobecane in this action for a money judgment. Cooper moved to confirm the attachment and Motobecane cross-moved to vacate the attachment and dismiss the complaint. While that motion was pending, this court's memorandum decision issued (68 A.D.2d 819) reversing the order previously appealed from and staying the arbitration. The pending motion and cross-motion concerning confirmation of the attachment order was decided in light of that decision. The attachment order was confirmed and the cross-motion denied in its entirety. The Court of Appeals later reversed this court's memorandum decision (49 N.Y.2d 819), citing *Matter of United Nations Development Corp. v. Norkin Plumbing Co.*, 45 N.Y.2d 359, 408 N.Y.S.2d 424, 380 N.E.2d 253, and reinstated the Supreme Court's denial of the application for a stay of arbitration. Motobecane then moved to renew the motion to dismiss and vacate the attachment, on the grounds that the instant money action does not lie because the arbitrator will render an award on the claim of plaintiff; the plaintiff is not entitled to attachment before the arbitration award is rendered, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [9 U.S.C. § 201 et seq.] ("the Convention"); and further, that "by ordering the parties to proceed to arbitration, the Court of Appeals stripped the courts of New York of their subject matter jurisdiction over the instant action." The Supreme Court granted Motobecane's motion and dismissed the complaint and vacated the attachment. Cooper appealed.

The Court of Appeals, by its reinstatement of the denial of a stay of arbitration, did not "strip" the courts of New York of their jurisdiction. It reversed the order of the Appellate Division which held that the question of compliance with the ten day notice requirement (with which we are not concerned here) was a question for the courts and that the condition was not complied with; holding therefore, that the timeliness of the demand for arbitration presented a question to be determined by the arbitrator, because it was not expressly made a condition to arbitration.

Congress has provided (9 U.S.C. § 201 et seq.) that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) "shall be enforced in United States courts." The crux of this appeal lies in the interpre-

tation of Article II(3) of the Convention which provides:

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

Motobecane maintains, and Special Term held, that the word "refer" in this language requires a court to dismiss any action brought under a contract which includes an arbitration provision covered by the Convention, and to discharge any attachment, rather than to merely stay the proceedings pending the outcome of the arbitration.

We do not agree. Motobecane relies primarily on three cases, *Mc Creary Tire & Rubber Company v. Ceat*, 501 F.2d 1032 (3rd Cir. 1974); *Metropolitan World Tanker Corp. v. P. N. Petambagen Minjakdangras Bumi Nasional*, 427 F.Supp. 2 (SDNY 1975) and *Siderius, Inc. v. Compania de Acero del Pacifico*, 453 F.Supp. 22 (SDNY 1978). Only two of these cases, *Metropolitan World Tanker* and *Mc Creary*, discuss pre-arbitration attachment. They both have been criticized by more recent decisions which have refused to follow their reasoning. In *Siderius*, the court dismissed the complaint for lack of subject matter jurisdiction, citing *Mc Creary*.

In *Andros Compania Maritima, S. A. v. Andre & Cie, S. A.*, 430 F.Supp. 88 (SDNY 1977), the court discussed both *Mc Creary* and *Metropolitan World Tanker* and concluded that there was no conflict between pre-arbitration attachment and the convention. The Court stated at 92,

"Nor is the Court's retention of jurisdiction under Section 8 (9 U.S.C. § 8, libel in admiralty), pending arbitration, in any respect inconsistent with the Convention or its implementing legislation, notwithstanding the *Mc Creary* court's suggestion to the contrary. This is by no means to ignore Article II(3) of the convention.... Rather, this court merely concludes that article II(3), thus framed, surely may accommodate the stays of litigation impliedly contemplated by section 8 and expressly directed by section 3."

In *Paramount Carriers Corp. v. Cook Industries, Inc.*, 465 F.Supp. 599, 602 (SDNY 1979) the court also disagreed with *Metropolitan World Tanker* and *Mc Creary*, citing *Andros* and stating,

"I am fully persuaded by my colleague's reasoning and analysis that section 8 of the Arbitration Act is not in conflict with the policies of the convention. 'The most common reason for arbitration is to substitute the speedy decision of specialists in the field for that of juries and judges; and that is entirely consistent with a desire to make as effective as possible recovery upon awards after they have been made, which is what provisional remedies do.' "

Both *Andros* and *Paramount* concerned maritime libel actions. Motobecane attempts to distinguish those cases which permit pre-arbitration attachment on the ground that their underlying basis is maritime law. This is an artificial distinction. The purpose and language of the Convention and its implementing legislation remain the same with reference to either admiralty or commercial law. There is nothing in the Convention or the Arbitration Act which divests this court of jurisdiction or requires that a pre-arbitration attachment be vacated. See: *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044, 1049 et seq. (N.D.Cal.1977).

Carolina Power is similar to our instant case. Plaintiff California corporation instituted an action against a French consortium and obtained an *ex parte* attachment, although both parties agreed that the underlying dispute was subject to arbitration. The opinion stated at pp. 1051–1052 that,

"This court, however, does not find the reasoning of *Mc Creary* convincing. As mentioned above, nothing in the text of the Convention itself suggests that it precludes prejudgment attachments." ....
"the use of the general term 'refer' might reflect little more than the fact that the

Convention must be applied in many very different legal systems, and possibly in circumstances where the use of the technical term 'stay' would not be a meaningful directive. Furthermore, § 4 of the United States Arbitration Act grants district courts the power to actually order the parties to arbitration, but this provision has not been interpreted to deprive the courts of continuing jurisdiction over the action...." "Finally, it should be noted that in other contexts the Supreme Court has concluded that the availability of provisional remedies encourages rather that obstructs the use of agreements to arbitrate. See: *Boys Market, Inc., v. Retail Clerk's Union*, 398 U.S. 235 [90 S.Ct. 1583, 26 L.Ed.2d 199] (1970)"

As was stated in *Compania de Navegacion y Financiera Bosnia, S. A. v. National Unity Marine Salvage Corp.*, 457 F.Supp. 1013, 1014 (SDNY 1978) "this court has the power to order provisional relief pending a foreign arbitration ... and the plaintiff is entitled to the protection of the outstanding order of attachment."

All concur except SILVERMAN, J. who dissents and would affirm for the reasons stated by NADEL, J., at Special Term.

AMERICAN THEATRE PRESS, INC., Plaintiff-Appellant,

v.

The TAX COMMISSION OF the STATE OF NEW YORK, et al., Defendants-Respondents.

Supreme Court, Appellate Division, First Department.

Jan. 26, 1982.

Appeal was taken from an order and judgment of the Supreme Court, New York County, Stadtmauer, J., finding that a theatre publication was subject to sales and compensatory use taxes. The Supreme Court, Appellate Division, held that theatre publication which was distributed in theatres with production casts inserted was not "shopping paper" under exemption from sales and compensatory use taxes where publication was not available to public.

Affirmed.

Kupferman, J.P., dissented and filed memorandum.

Taxation ⇐1241

Theatre publication which was distributed in theatres with production casts inserted was not "shopping paper" under exemption from sales and compensatory use taxes where publication was not available to public. McKinney's Tax Law §§ 1105, 1115(i)(D).

D. S. Snider, New York City, for plaintiff-appellant.

P. Milbauer, New York City, for defendants-respondents.

Before KUPFERMAN, J. P., and BIRNS, SULLIVAN, LUPIANO and BLOOM, JJ.

MEMORANDUM DECISION.

12422—Order and judgment (one paper) of the Supreme Court, New York County dated May 7, 1980, granting defendants' motion for summary judgment and declaring that Playbill Magazine was not a periodical within the definition of the New York State Tax Law and Regulations during the period December 1, 1974 through November 20, 1977 and that it is subject to the New York State Sales and Compensatory Use Tax for that period, affirmed, without costs.

12423—Appeal from order of the Supreme Court, New York County, entered September 3, 1981 denying plaintiff's motion for leave to renew and reargue is hereby unanimously deemed solely a