

NOTE

JUDICIAL ENFORCEMENT OF ARBITRATION AGREEMENTS: THE STAY-DISMISSAL DICHOTOMY OF FAA SECTION 3

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I. INTRODUCTION

The meaning of section 3 of the Federal Arbitration Act (“FAA”)¹ has been the subject of substantial litigation and uncertainty.² Section 3 applies to a suit or proceeding brought in court where the issues are referable to arbitration under an agreement in writing.³ The statute states:

[T]he court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceedings is referable to arbitration under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.⁴

As an initial matter, in deciding whether to compel arbitration, courts must first find that a valid arbitration agreement exists and that the dispute in question is within the scope of such agreement.⁵ Once this has been established, according to FAA section 3, the presiding judge “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”⁶ The United States Courts of Appeals have differing views as to whether judges have the discretion to deny a motion for a stay pending arbitration and instead dismiss a complaint where it finds all of the claims before it to be arbitrable.⁷

1. Federal Arbitration Act, 9 U.S.C. § 3 (2005). Originally titled the United States Arbitration Act, title 9 U.S.C. §§ 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669). Chapter 2 was added on July 31, 1970 (84 Stat. 692) and Chapter 3 was added on August 15, 1990 (104 Stat. 448).

2. See generally *Lloyd v. HOVENSA, LLC*, 369 F.3d 263 (3rd Cir. 2004); *Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001); *Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988).

3. Federal Arbitration Act, 9 U.S.C. § 3 (2005).

4. *Id.* (emphasis added).

5. STEPHEN K. HUBER, *ARBITRATION: CASES AND MATERIALS* 61, 215 (1998).

6. Federal Arbitration Act, 9 U.S.C. § 3 (2005).

7. Compare *Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001) (“Notwithstanding the terms of § 3, however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.”); *Green v. Ameritech Corp.*, 200 F.3d 967, 973 (6th Cir. 2000) (quoting and relying on *Sparling*); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141,

A stay is a court-ordered, short-term postponement or halting of a proceeding or judgment.⁸ Procedurally, issuing a stay pending arbitration postpones judicial trial, and allows parties time to arbitrate their dispute. When a court issues a stay there are no court proceedings on matters subject to arbitration, until the arbitration is complete.⁹ A court's authority under section 3 of the FAA to stay a proceeding pending arbitration does not expressly include the authority to compel arbitration.¹⁰ However, the grant of the stay is enough without the power to order that the arbitration proceed, since the plaintiff would be unable to obtain relief without proceeding to arbitration.¹¹ An order staying judicial proceedings is not an appealable final decision.¹²

Some courts have held that issuing a stay pending arbitration is mandatory under FAA section 3 when requested by one of the parties.¹³ However, other courts, either at the request of a party or *sua sponte*, have held that dismissing litigation rather than issuing a stay pending arbitration is the more appropriate measure.¹⁴ The Supreme Court has yet to rule on this issue. In a recent decision, *Lloyd v. HOVENSA, LLC*,¹⁵ the Third Circuit Court of Appeals exacerbated the split among the

156 & n.21 (1st Cir. 1998) (remanding a case to the district court to decide whether to dismiss or stay, depending upon whether all issues before the court are arbitrable); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1165 (5th Cir. 1992) (supporting dismissal), *and Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988); *with Lloyd v. HOVENSA, LLC.*, 369 F.3d 263, 269 (3rd Cir. 2004) (“the District Court was obligated . . . to grant a stay”), *and Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) (“The proper course . . . would have been for the district court to grant Defendant’s motion and stay the action pending arbitration.”).

8. BLACK’S LAW DICTIONARY 1453 (8th ed. 2004). “An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.” *Id.*

9. *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20 (1st Cir. 1978).

10. *M & I Elec. Indus., Inc. v. Rapistan Demag Corp.*, 814 F. Supp. 545, 546 (E.D. Tex. 1993).

11. *Id.*; *Anaconda v. Am. Sugar Co.*, 322 U.S. 43, 45 (1943).

12. *See discussion infra* Part V.C.; *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 87 n.2 (2000) (“Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable.”); *see also Apache Bohai Corp. v. Texaco China, B.V.*, 330 F.3d 307, 309 (5th Cir. 2003) *cert. denied* 540 U.S. 880 (2003) (dismissing an appeal for lack of appellate jurisdiction, holding that the issuance of a stay is not a final decision and thus not immediately appealable, and reasoning “a stay, by definition, constitutes a postponement of proceedings, not a termination, and thus lacks finality”).

13. *See generally Lloyd v. HOVENSA, LLC.*, 369 F.3d 263 (3rd Cir. 2004); *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994).

14. *See generally Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001); *Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988).

15. 369 F.3d 263 (3rd Cir. 2004).

circuits by interpreting FAA section 3 as requiring a presiding judge to issue a stay pending arbitration instead of an order of dismissal.¹⁶

This Note addresses the split among the circuits and posits how the Supreme Court should resolve this discrepancy. Part II begins with an overview of the FAA and the purpose for its enactment. Part III discusses the legislative history behind the FAA. Part IV introduces the conflicting case law concerning the issue of granting a stay versus granting a dismissal. Part V offers that when either party makes a motion for a stay pending arbitration, such stay must be granted instead of an order of dismissal. This is the correct measure to take even when all issues before the court are arbitrable. The FAA should be read as requiring the issuance of a stay pending arbitration, as a matter of statutory construction, legislative history, and sound public policy.

II. OVERVIEW OF THE FEDERAL ARBITRATION ACT

A. *Scope of the FAA*

The FAA governs arbitration agreements involving maritime disputes and contracts involving interstate commerce.¹⁷ Under the FAA, interstate commerce includes commerce with foreign countries and the FAA's strong policy of arbitration extends to disputes involving international transactions.¹⁸ Commerce with other countries encompasses contracts negotiated in another country that are to be performed outside of the United States.¹⁹

As a result of subsequent judicial expansion of the meaning of interstate commerce, the United States Supreme Court reinterpreted the FAA to cover the full scope of interstate commerce.²⁰ In *Primary Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that

16. *Id.* at 268, 271.

17. 9 U.S.C. § 1 (2005).

18. *Id.*

19. *Id.*

20. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (“We have interpreted the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’ . . . [b]ecause the statute provides for ‘the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually ‘in commerce’—that is, ‘within the flow of interstate commerce.’”) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1994) (emphasis added)); *Nelson v. INSIGNIA/ESG, Inc.*, 215 F. Supp.2d 143, 149 (D.D.C. 2002) (“Since its adoption, the Supreme Court has consistently given an expansive interpretation to the scope of the FAA.”). This Note will focus on those instances where the FAA would be deemed applicable because the contract involved “affects” interstate commerce.

Congress intended for the FAA to apply to diversity cases and enacted the FAA pursuant to the commerce clause.²¹ Also, in *Southland Corp. v. Keating*, the Court held that the FAA applies to federal claims, as well as state law claims in state court and that the FAA pre-empts all contrary state arbitration statutes.²²

B. Initiating Arbitration—How This Issue Arises in Court

In general, there are a number of patterns that may arise from a dispute involving a contract containing an arbitration clause. First, a plaintiff can initiate arbitration, and the defendant can contest that the dispute is not covered by the parties' arbitration agreement.²³ Second, either party can file suit to compel arbitration.²⁴ Finally, a plaintiff can ignore the arbitration contract and file suit in a court of law.²⁵ This third scenario will be the focus of this Note.

In such an instance a defendant can either request a court to grant a stay of the suit pending arbitration under FAA section 3, or make a motion to compel arbitration of the dispute under FAA section 4, or concurrently seek both types of relief.²⁶ According to Judge Posner, Congress appeared to have assumed that a section 3 stay would be used to "stop a lawsuit begun by the party resisting arbitration, and then, if the stay didn't induce him to arbitrate . . . the party wanting arbitration would bring a separate action under section 4."²⁷ This Note presumes that the party seeking to enforce the arbitration agreement makes a timely motion to stay litigation pending arbitration.

Three requirements must be satisfied before a court can grant relief permitted by FAA sections 3 and 4.²⁸ First, there must be a binding written arbitration agreement.²⁹ Second, the issue in the dispute must be within the scope of the arbitration provision.³⁰ Third, the claim must be

21. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

22. *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984).

23. See MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 22.1 (Larry E. Edmonson ed. 3d ed. 2005).

24. See *id.*

25. See *id.*

26. *Id.* Remedies under FAA sections 3 and 4 can be pursued separately or in conjunction with each other. *Id.*

27. *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 871 (7th Cir. 1985) (citing S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924)); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 267 (1926).

28. See DOMKE, *supra* note 23, at § 22.2 (2005).

29. See *id.*

30. See *id.*

arbitrable.³¹ The concept of arbitrability can be described as the inquiry of whether the parties' dispute is to be resolved through a judicial proceeding rather than an arbitration proceeding.³²

Upon such a finding courts must compel arbitration and leave the merits of the claim and defenses to be decided by the arbitrator. According to *Dean Witter Reynolds, Inc. v. Byrd*, “[b]y its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”³³ In enforcing an arbitration agreement, courts have either stayed the suit, stayed the suit and compelled arbitration, or dismissed the suit and compelled arbitration. This Note questions a court's decision to dismiss a pending suit instead of granting a motion to stay litigation pending arbitration.

III. LEGISLATIVE HISTORY OF THE FAA

A. *Historical Basis for the FAA*

The need for a federal arbitration act stemmed from “an anachronism of our American law.”³⁴ Centuries ago, English courts “refused to enforce specific agreements to arbitrate.”³⁵ The Senate Report on the FAA explained that the purpose of the statute was to overturn the “very old law . . . that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action nor would such an agreement be ground for a stay of proceedings until arbitration was had.”³⁶ This archaic rule of law was firmly embedded in the English common law and was adopted by the American courts.³⁷

31. *See id.*

32. TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSITIONAL PERSPECTIVE 208 (2d ed. 2003) (“[C]ountries have traditionally been reluctant to allow arbitration in spheres where there is a strong public interest at stake. Even after the early hostility towards arbitration was reversed, countries continued to distinguish between domains in which public interest and public control are relatively weak, and areas in which society (the state) has strong vested interests and policies. Disputes belonging to the first domain are arbitrable; lawsuits falling into the latter area are reserved for courts and other state authorities. The issue of arbitrability is thus one of the most important threshold questions in the arbitration process.”).

33. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added).

34. H. R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).

35. *Id.*

36. S. Rep. No. 536, 68th Cong., 1st Sess., 2 (1924).

37. *Id.*

Several reasons have been given to explain why, prior to the enactment of the FAA, state and federal courts continued to follow the old English common law of refusing to enforce arbitration agreements.³⁸ First, there was an “expressed fear on the part of the courts that arbitration tribunals did not possess the ability to give full or proper redress” of legal harms.³⁹ Second, courts feared being “ousted from much of their jurisdiction” through use of a private agreement.⁴⁰ Finally, arbitration agreements were not enforced because of established precedent.⁴¹ The old English rule was carried on long after courts themselves began to question whether it was founded in reason or justice; courts were hesitant to change established precedent.⁴² Due to this “strongly fixed” precedent, prior to 1925 courts felt that such a rule could not be overturned without legislative enactment.⁴³

B. *The FAA’s Process of Enactment*

The FAA was modeled after the New York State Arbitration Act⁴⁴ which was the first U.S. statute validating agreements to submit disputes to arbitration.⁴⁵ After its adoption “several states followed the lead of New York and enacted arbitration statutes to remove the common law

38. H. R. Rep. No. 96 at 1-2.

39. S. Rep. No. 536 at 2.

40. H. R. Rep. No. 96 at 1-2. Prior to the enactment of the FAA, an agreement to arbitrate would not be enforced in U.S. courts because there was a concern of parties by private agreement ousting the jurisdiction of the courts. *See Am. Sugar Ref. Co. v. Anaconda*, 138 F.2d 765, 766-67 (5th Cir. 1943) (“The act was passed not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement.”).

41. S. Rep. No. 536 at 3 (1924).

42. *Id.* (“Established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.”).

43. *See* H. R. Rep. No. 96 at 2 (1924); *see also Atlantic Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924) Holding that the federal court sitting in admiralty could not compel arbitration under an arbitration clause, Judge Hough declared:

[W]ithout legislation, and because the trend of modern opinion is toward the literal enforcement of the contracts of men of mature years and presumably sound mind, this court is asked to provide some method of overriding, or explaining away not only its own previous decisions but those of the Supreme Court, which for a generation or so have been regarded as declaring the law to be that any agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted.

Id.

44. 1920 N.Y. Laws, Ch. 275; *see also* KATHERINE V.W. STONE, *ARBITRATION LAW* 10 (2003).

45. *See* STONE, *supra* note 44, at 6 (“Modern arbitration law has its origin in the New York Arbitration Act of 1920.”).

doctrine of revocability and provide for legal enforcement of executory promises to arbitrate.”⁴⁶ The American Bar Association Committee on Commerce, Trade, and Commercial Law prepared drafts for a federal arbitration act in 1921, 1922, and 1923.⁴⁷ On December 20, 1922, Senator Sterling and Congressman Mills introduced a bill in the 67th Congress that provided for a federal arbitration act.⁴⁸ The bill was referred to the Committee on the Judiciary in each House of Congress.⁴⁹ Unfortunately the bill did not reach the Senate for a full vote, due to lateness of the session and the pressure of other important business, and died in committee the same year.⁵⁰

After some rewriting, the American Bar Association proposal was reintroduced in the 68th Congress.⁵¹ The proposal was reintroduced by Congressman Mills on December 5, 1923, in the House of Representatives, and in the Senate by Senator Sterling on December 12, 1923.⁵² The following month, Congress held hearings on the proposed bill.⁵³ It was unanimously supported by the Senate and House Committees on the Judiciary sub-committees.⁵⁴ On February 12, 1925, the United States Arbitration Law, later renamed the Federal Arbitration Act, was signed by President Coolidge.⁵⁵

C. *The Principles Underlying the FAA*

According to the House Report, the enactment of a federal arbitration act was intended “to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal courts.”⁵⁶ The FAA was meant to properly place arbitration agreements on the “same footing as other contracts.”⁵⁷ Further, the Report stated that arbitration agreements are “purely matters

46. *Id.* at 10.

47. *See id.*

48. W. H. H. Piatt et al., *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 153 (1925).

49. *See id.*

50. *See id.*

51. *See id.*

52. *Id.*

53. *See* STONE, *supra* note 44, at 10.

54. *Id.* at 11; Piatt et al., *supra* note 48, at 153; H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (“There was no opposition to the bill before the committee.”); S. Rep. No. 536, 68th Cong., 1st Sess., 1 (1924) (“[T]he committee recommended that the bill do pass.”).

55. *See* STONE, *supra* note 44, at 11; Piatt et al., *supra* note 48, at 153.

56. H. R. Rep. No. 96 at 1.

57. *Id.*

of contract,” and that the effect of the FAA was “simply to make the contracting party live up to his agreement.”⁵⁸

In *Dean Witter Reynolds, Inc. v. Byrd*,⁵⁹ the Supreme Court further clarified the purpose behind the enactment of the FAA.⁶⁰ According to the Court, Congress pursued two independent objectives when enacting the FAA.⁶¹ First, the FAA’s ratification was primarily motivated by a congressional desire to “enforce agreements into which parties had entered.”⁶² Second, Congress sought to encourage efficient and speedy dispute resolution.⁶³ Thus, in order to determine adequately the requirements under FAA section 3, one must take into account these two goals which are the backbone of the FAA. Courts must not only provide a forum for the specific enforcement of arbitration agreements, but must also reduce technicality, delay, and expense of arbitration.

D. Comparison to New York Arbitration Act of 1920

As discussed above, the FAA was modeled after the New York Arbitration Act of 1920 (“New York Arbitration Act”).⁶⁴ Julius Cohen, a principal drafter of the FAA, stated that “there can be little doubt that the attitude and the decisions of the New York courts will be persuasive in the interpretation of the Federal statute since the provisions of the two are largely identical.”⁶⁵ Accordingly, the FAA should be afforded the same interpretation given to the New York Arbitration Act at the time of the FAA’s enactment.

58. *Id.*

59. 470 U.S. 213 (1985).

60. *See id.* at 220-21.

61. *See id.*

62. *Id.*

63. *See id.*

64. *See supra* notes 43-45 and accompanying text.

65. Cohen & Dayton, *supra* note 27, at 275.

Similar to other arbitration statutes,⁶⁶ the New York Arbitration Act has an analogous stay requirement to the one found in section 3 of the FAA.⁶⁷ Under the language of section 5 of the New York Arbitration Act, “[i]f any suit or proceeding be brought upon any issue otherwise referable to arbitration . . . the supreme court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration . . . shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”⁶⁸ Except for minor differences,⁶⁹ the New York Arbitration Act’s language was copied in section 3 of the FAA.⁷⁰ Thus, it is reasonable to infer that FAA section 3 was meant to mirror the New York Arbitration Act’s standard for requiring the issuance of a stay pending arbitration.

In *Berkovitz v. Arbib & Houlberg, Inc.*,⁷¹ the New York Court of Appeals interpreted the New York Arbitration Act.⁷² The case dealt with parties who had contracted for the sale of goods.⁷³ The parties also agreed that claims in regards to the contract “shall not invalidate [such] contract,” but “shall be settled amicably or by arbitration”⁷⁴ The

66. Under the Uniform Arbitration Act, section 2(d) “[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration . . . has been made.” Additionally, “[w]hen the application is made in such action or proceeding, the order for arbitration shall include such stay.” Uniform Arbitration Act, 7 U.L.A. § 2(d) (Supp. 2004). The Uniform Arbitration Act (“UAA”) governs the arbitration of disputes arising from intrastate matters and matters in which state law controls. DOMKE, *supra* note 23, § 22.13. Many states have adopted the UAA while other states have used it as a pattern for their state arbitration statutes. Pursuant to England’s Arbitration Act of 1996 Part I Section 9 “[a] party to an arbitration agreement against whom legal proceedings are brought . . . in respect of a matter which under the agreement is to be referred to arbitration may . . . apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.” In addition, “[o]n application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.” England Arbitration Act of 1996, §§ 9(1), 9(4).

67. Compare New York Arbitration Act of 1920, N.Y. Laws, Ch. 275, § 5, with Federal Arbitration Act, 9 U.S.C. § 3 (1925).

68. 1920 N.Y. Laws, Ch. 275, § 5 (emphasis added).

69. Differences between the New York Arbitration Act of 1920 section 5 and the Federal Arbitration Act section 3 include (1) the FAA’s reference to its scope including “any of the courts of the United States”; (2) the FAA’s explicit requirement that the agreement to arbitrate be in writing; (3) the FAA’s requirement that an application for a stay be made by one of the parties; and (4) the FAA’s additional requirement that the applicant for the stay not be in default in proceeding with such arbitration. See Federal Arbitration Act, 9 U.S.C. § 3 (1925).

70. Compare New York Arbitration Act of 1920, 1920 N.Y. Laws, Ch. 275, § 5, with Federal Arbitration Act, 9 U.S.C. § 3 (1925).

71. 130 N.E. 288 (N.Y. 1921).

72. See *id.* at 289 (“The validity of the Arbitration Law and its application to existing contracts and pending actions, are the questions here involved.”) (citations omitted).

73. See *id.*

74. *Id.*

court held, that the “[c]ontending parties . . . contracted that the merits of their controversy . . . be conditioned upon the report of arbitrators”⁷⁵ The court then questioned arbitrability of the claims.⁷⁶ It held that if the contract had not been made or was invalid, “the court will proceed, as in any other case to a determination of the merits.”⁷⁷ However, if the contract was in fact made and was valid, “*the court will stay its hand* till the extrinsic fact is ascertained, and the condition thus fulfilled.”⁷⁸

According to this early interpretation, at the time of the FAA’s enactment, New York courts were required to issue stays pending arbitration under section 5 of the New York Arbitration Act. Thus, since the FAA was drafted with the New York arbitration statute as a model, the FAA should also be read as requiring the issuance of a stay pending arbitration and not a dismissal, even when all actions before the court are arbitrable.

IV. ISSUING A STAY PENDING ARBITRATION: THE SPLIT AMONGST THE COURTS

A. Circuits Requiring Stay Pending Arbitration

This Note takes the position that under the FAA, if a court decides to compel arbitration the court must stay litigation instead of issuing a dismissal, even when all issues are found to be arbitrable. This is the proper procedure to take in accordance with the language of the FAA and the policies in support of arbitration. Some circuit courts have mistakenly permitted a dismissal when all issues are referable to arbitration and when one of the parties motioned for a stay.⁷⁹

However, even when all legal disputes are capable of being resolved through arbitration, courts should nonetheless issue a stay. There are considerable benefits associated with a stay that would not be achieved if the presiding judge were to dismiss the pending lawsuit. For example, issuing a stay would prevent the undue burden of reestablishing subject matter jurisdiction at the stage of enforcement of

75. *Id.* at 291.

76. *See id.* (“Whether they have so contracted is a question which the court must still determine for itself.” (citing 1920 N.Y. Laws, Ch. 275, § 3)).

77. *Id.*

78. *Id.* at 291-92 (emphasis added).

79. *See* cases cited *supra* note 7 (citing cases in support of dismissal).

an arbitral award.⁸⁰ In addition, issuing a stay would allow for judicial supervision during arbitration and would prevent the undue burden of an appeal.⁸¹ Courts prematurely dismiss litigation instead of issuing a stay in order to clear their dockets; such courts do not act in the best interests of the parties. Instead, issuing a stay would allow a court to successfully protect the parties' contractual rights as well as their rights under the FAA.

1. The Tenth Circuit

The leading case in the Tenth Circuit with respect to this issue is *Adair Bus Sales Inc. v. Blue Bird Corp.*⁸² The case involved two parties who had contracted for the license to sell Blue Bird school buses.⁸³ The parties signed a distribution contract which contained an arbitration agreement.⁸⁴ Soon after contracting, a dispute arose between the parties.⁸⁵ In an effort to avoid arbitration, plaintiff Adair Bus Sales Inc., brought suit against defendant, Blue Bird Corp., in the United States District Court for the District of New Mexico, alleging breach of contract and requesting damages.⁸⁶ Plaintiff sought a declaratory judgment that the arbitration clause did not apply to the parties' dispute.⁸⁷ In response, defendant moved for a stay pending arbitration.⁸⁸ Plaintiff countered by seeking an injunction prohibiting defendant from pursuing litigation.⁸⁹ At trial, the district court found that the dispute was within the scope of the arbitration agreement and that all issues of the case were arbitrable.⁹⁰ The district court dismissed the complaint and ordered the case to proceed to arbitration.⁹¹

On appeal, the United States Court of Appeals for the Tenth Circuit vacated the district court's order of dismissal and remanded the case for entry of stay pending arbitration in accordance with FAA section 3.⁹² The court reasoned that Congress intended to "promote appeals from orders barring arbitration and limit appeals from orders directing

80. See *infra* notes 209-16 and accompanying text.

81. See *infra* Part V.C.

82. 25 F.3d 953 (10th Cir. 1994).

83. See *id.* at 954.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 954-55.

92. See *id.* at 955-56.

arbitration.”⁹³ Since the issuance of a dismissal would result in an appeal⁹⁴ and the issuance of a stay would not,⁹⁵ it is clear that Congress intended for courts to issue stays because it would limit an appeal of an order directing arbitration.⁹⁶ Accordingly, the court held that upon a motion for stay pending arbitration, the proper course “would have been for the district court to grant defendant’s motion to stay the action pending arbitration,” rather than dismiss the action.⁹⁷

2. The Third Circuit

In *Lloyd v. HOVENSA, LLC*⁹⁸ plaintiff Bruno Lloyd, applied for employment with one of the defendants in the case, Wyatt, V.I. Inc. (“Wyatt”).⁹⁹ Plaintiff signed a dispute resolution agreement as a condition of having his application considered.¹⁰⁰ After being denied employment, plaintiff brought suit against Wyatt in the United States District Court of the Virgin Islands, alleging several claims, including discriminatory conduct in violation of Title VII of the Civil Rights Act of 1964.¹⁰¹ In response, Wyatt filed a motion to compel arbitration, and to stay the proceedings pending arbitration.¹⁰² Plaintiff opposed the motion, arguing that the agreement to arbitrate was unenforceable.¹⁰³ After an evidentiary hearing, the district court granted Wyatt’s motion to compel arbitration and dismissed the complaint with prejudice.¹⁰⁴

On appeal, the Third Circuit Court of Appeals held that the district court “erred in refusing to enter a stay order,”¹⁰⁵ and was obligated “to

93. *Id.* at 955; *see also* *Filanto, S.P.A. v. Chilewich Int’l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993) (citing Pub. L. 100-702, tit. X § 1019(a), 102 Stat. 4642, 4670-71 (1988), codified as 9 U.S.C. § 16) (“When Congress in 1988 added a new provision governing appeals of orders concerning arbitration, it endeavored to promote appeals from orders barring arbitration and limit appeals from orders directing arbitration.”).

94. *See* *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86-87 (2000).

95. *See id.* at 87 n.2; *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) (noting that “a stay pending arbitration entered pursuant to § 3 will virtually always be characterized as an interlocutory, and not a final decision within § 16(a) (3). Because § 3 contemplates a suit brought on ‘any issue referable to arbitration under an agreement in writing,’ the likelihood of the presence of issues other than the dispute’s arbitrability is inherent.”).

96. *See Adair*, 25 F.3d at 955.

97. *Id.*

98. 369 F.3d 263 (3d Cir. 2004).

99. *See id.* at 266.

100. *Id.*

101. *Id.* at 266-67.

102. *Id.* at 267.

103. *Id.*

104. *Id.*

105. *Id.* at 271.

grant the stay once it decided to order arbitration.”¹⁰⁶ The court offered several reasons for its holding which included, “taking the Congressional text at face value.”¹⁰⁷ In addition, the court held that even in instances where parties are ordered to arbitrate all claims, such parties are still entitled to seek the court’s assistance during the course of the arbitration.¹⁰⁸ Also, issuing a stay would allow the parties to proceed immediately to arbitration without the delay of an appeal.¹⁰⁹ Finally, the court held that “a literal reading of section 3 of the FAA not only leads to sensible results, it also is the only reading consistent with the statutory scheme and the strong national policy favoring arbitration.”¹¹⁰

B. Circuits Permitting Dismissals

Courts that have left the decision of whether to stay or dismiss to the presiding judge offer several policy arguments in favor of such interpretation. These courts argue that FAA section 3 was not intended to limit dismissal of a case in the proper circumstances—for example, when all claims raised in court are subject to arbitration.¹¹¹ Proponents argue that any post-arbitration remedies sought by the parties will not entail renewed consideration and adjudication of the controversy on the merits.¹¹² Instead, any post-arbitration remedies sought would be circumscribed to judicial review of the arbitrator’s award in the limited manner prescribed by law.¹¹³ As such, retaining jurisdiction and staying the action would serve no purpose.¹¹⁴

In addition, such courts reason that the FAA does not “divest district courts of their customary authority to provide appropriate relief and to manage their dockets.”¹¹⁵ Moreover, these courts do not believe that Congress intended to defer appellate review in all cases until

106. *Id.* at 269.

107. *Id.*

108. *See id.* at 270 (“[T]he District Court has a significant role to play under the FAA even in those instances in which the District Court orders the arbitration of all claims. Even in those instances, the parties are entitled to seek the Court’s assistance during the course of the arbitration.”); *see also infra* Part V.B.

109. *See Lloyd*, 369 F.3d at 270.

110. *Id.* at 271.

111. *Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992).

112. *Alford*, 975 F.2d at 1164 (quoting *Sea-Land Serv., Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)).

113. *Id.*

114. *Id.*

115. Mark I. Levy, *Arbitration Appeals II*, NAT’L L. J., Aug. 16, 2004, at 12, 12.

completion of the contested arbitration.¹¹⁶ Proponents of dismissals argue that requiring a stay would render part of FAA section 16 largely ineffective because unlike a dismissal, an order to stay litigation is not a final decision and not immediately appealable.¹¹⁷ This, however, is a misguided interpretation of FAA section 16 as it fails to take into account the other instances where a court decision is considered final and immediately appealable. One example of where a decision is considered final and immediately appealable is when a court denies a motion to compel arbitration. Thus, even by disallowing a dismissal under FAA section 3, FAA section 16 is still effective.

1. The Ninth Circuit

*Sparling v. Hoffman Construction Co.*¹¹⁸ is the controlling authority in the Ninth Circuit with regard to the requirements of FAA section 3.¹¹⁹ In this case, plaintiffs Michael and Jean Sparling and Active Erectors & Installers, Inc. (“Active”), filed suit against Hoffman Construction Co (“Hoffman”) over a dispute that arose out of an agreement to construct a high school.¹²⁰ The contract between Active and Hoffman contained an arbitration clause.¹²¹ In response to the lawsuit brought by plaintiffs, Hoffman made a motion to stay the proceedings until the matter was arbitrated.¹²² The United States District Court in Washington dismissed Active’s claims, because the contract between Active and Hoffman required such claims to be submitted to arbitration.¹²³

On appeal, Active argued that dismissal was improper on several grounds.¹²⁴ First, Active argued that dismissal was improper because defendant only requested a stay pending arbitration, not a dismissal.¹²⁵ Active also argued that the district court lacked discretion to dismiss the claims, because the provision for stay in FAA section 3 was defendant’s only remedy where there is an arbitration clause.¹²⁶ The Court of Appeals for the Ninth Circuit rejected each of these arguments. First, the court held that the fact that a dismissal was not requested does not make

116. *See id.*

117. *See id.*

118. 864 F.2d 635 (9th Cir. 1988).

119. *Id.* at 638.

120. *Id.* at 636.

121. *Id.* at 637.

122. *Id.* at 636.

123. *Id.* at 637.

124. *Id.*

125. *Id.*

126. *Id.* at 638.

it improper.¹²⁷ With regard to Active's second argument, the court agreed that FAA section 3 "gives a court authority, upon application by one of the parties, to grant a stay pending arbitration"¹²⁸ However, FAA section 3 does not limit the court's authority to grant summary judgment or dismissal when all claims are to be sent to arbitration.¹²⁹

2. The Fifth Circuit

In *Alford v. Dean Witter Reynolds, Inc.*,¹³⁰ plaintiff Joan Chason Alford sued her former employer, Dean Witter Reynolds, Inc., and former supervisor Don Harris, alleging discrimination in violation of Title VII of the Civil Rights Act of 1964.¹³¹ Defendants demanded that plaintiff arbitrate her claims based on an arbitration clause in the broker registration agreement plaintiff signed pursuant to her employment.¹³² Defendants made a motion to dismiss the claim and to compel arbitration.¹³³ The district court dismissed plaintiff's claims with prejudice and ordered arbitration.¹³⁴

On appeal, plaintiff argued that the district court's dismissal with prejudice of her claim was "contrary to the precise terms" of FAA section 3.¹³⁵ Plaintiff claimed that it was mandatory to grant a stay "upon a showing that the opposing party has commenced suit 'upon any issue referable to arbitration under an agreement in writing for such arbitration.'" ¹³⁶ The Court of Appeals for the Fifth Circuit denied these arguments, and held that the weight of authority supports dismissal of a case when all of the issues faced in the trial court must be submitted to

127. *Id.* at 637-38.

128. *Id.* at 638.

129. *See id.* (relying on *Martin Marietta Aluminum, Inc. v. Gen. Elec. Co.*, 586 F.2d 143 (9th Cir. 1978)). In *Martin Marietta*, the party seeking to invoke arbitration did not apply for a stay under FAA section 3. *Martin Marietta*, 586 F.2d at 147. The court held that a request for a stay pending arbitration is not mandatory. *Id.* Thus, since a stay must be at the request of one of the parties, the court decided to instead grant a motion for summary judgment since the arbitration provision was sufficiently broad enough to bar all of plaintiff's claims. *Id.* at 147-48. However, the facts in *Martin Marietta* differ substantially in comparison with *Sparling v. Hoffman Construction Co.* because the latter involved a defendant who did in fact motion for a stay under FAA section 3. Thus, although summary judgment may have been appropriate in *Martin Marietta*, it was not appropriate in *Sparling* because the defendant in *Sparling* moved for a stay pending arbitration.

130. 975 F.2d 1161 (5th Cir. 1992).

131. *Id.* at 1162.

132. *Id.*

133. *Id.* at 1163. The defendant in *Alford* did not motion to stay the proceedings pending arbitration. Thus, this case does not address the same factual question which is at issue in this Note.

134. *Id.*

135. *Id.* at 1164.

136. *Id.* (citing *Campeau Corp. v. May Dept. Stores Co.*, 723 F. Supp. 224, 227 (S.D.N.Y. 1989)).

arbitration.¹³⁷ The court reasoned that any post-arbitration remedies sought by the parties in court would be limited.¹³⁸ In general, courts do not give renewed consideration to the merits of a controversy after an arbitral proceeding has taken place.¹³⁹ The only future court action brought by the parties that would require judicial intervention would be to assess the legality of the arbitrator's award.¹⁴⁰ Relying on such rationale, the court held that retaining jurisdiction and staying the action would serve no purpose.¹⁴¹

3. The First Circuit

In *Bercovitch v. Baldwin School Inc.*,¹⁴² plaintiff Bercovitch, brought a suit against defendant Baldwin School Inc., after being indefinitely suspended by the school.¹⁴³ Defendant moved to dismiss the case and compel arbitration, based on an arbitration agreement between the parties found in the school's by-laws.¹⁴⁴ At trial, the district court denied the motions and maintained jurisdiction over the case.¹⁴⁵ On appeal, the First Circuit vacated the district court's decision. The court dismissed the claim and referred the matter to arbitration.¹⁴⁶ The court reasoned that a dismissal is proper when all claims are arbitrable.¹⁴⁷

4. The Sixth Circuit

Green v. Ameritech Corp.,¹⁴⁸ is the primary authority in the Sixth Circuit with regard to this stay-dismissal dichotomy.¹⁴⁹ In this case, defendants Ameritech Services Inc. and Ameritech Corp. (collectively "Ameritech") faced state law claims of age and race discrimination and retaliation brought by its former employee Daniel Green.¹⁵⁰ Green

137. *Id.* at 1164.

138. *Id.* (quoting *Sea-Land Serv., Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)).

139. *Id.*

140. *Id.*

141. *Id.*

142. 133 F.3d 141 (1st Cir. 1998).

143. *Id.* at 143.

144. *Id.* at 143, 146. Here, however, the defendant did not motion for stay, thus this case does not bear on the concerns at issue in this Note.

145. *Id.*

146. *Id.*

147. *Id.* at 156 (citing *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)).

148. 200 F.3d 967 (6th Cir. 2000).

149. *Id.* at 974.

150. *Id.* at 967.

brought a state court action which was removed to federal court.¹⁵¹ At trial, the parties agreed to binding arbitration and the district court dismissed the action with prejudice.¹⁵² The arbitral proceedings resulted in an award in favor of Ameritech.¹⁵³ Green then appealed the arbitrator's decision under the same case number as its original federal court action.¹⁵⁴ His second time before the court, Green argued that the arbitrator breached the arbitration agreement by failing to explain his decision with respect to each of the legal theories advanced by Green during arbitration.¹⁵⁵ The United States District Court for the Eastern District of Michigan held that the arbitrator had exceeded his powers and remanded the case to a new arbitrator.¹⁵⁶

On appeal, Ameritech argued that a stay rather than a dismissal would be necessary, in order for Green to challenge the arbitrator's award before the original federal court.¹⁵⁷ This was due to the fact that the district court's dismissal of the first case left "no open proceeding below" through which Green could challenge the arbitrator's ruling.¹⁵⁸ Thus, in order to have established subject matter jurisdiction, Green should have instituted a new action under section 10 of the FAA.¹⁵⁹ The court held that the district court's jurisdiction to review the employee's challenge was not limited by section 10 or the parties' agreement.¹⁶⁰

5. The Fourth Circuit

Choice Hotels International, Inc. v. BSR Tropicana Resort, Inc.,¹⁶¹ involved a franchise agreement that allowed plaintiff BSR Tropicana Resort to open a motel using defendant Choice Hotels International, Inc.'s brand name.¹⁶² The franchise agreement between the parties contained an arbitration provision which required "any controversy or claim relating to [the] agreement" to be "sent to final and binding arbitration."¹⁶³ Plaintiff filed suit for failure to pay the affiliation fee and

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 972.

158. *Id.*

159. *Id.* at 972-73.

160. *Id.* at 974.

161. 252 F.3d 707 (4th Cir. 2001).

162. *Id.* at 709.

163. *Id.*

breach of their franchise agreement.¹⁶⁴ In response, defendant moved to dismiss the lawsuit, asserting that the claims were to be sent to arbitration.¹⁶⁵ The district court denied the motion.¹⁶⁶

On interlocutory appeal, the Fourth Circuit Court of Appeals vacated and remanded the case with instructions to stay the proceedings pending arbitration since there was at least one non-arbitrable claim.¹⁶⁷ The court conceded that the FAA requires a district court, upon motion by any party, to stay judicial proceedings involving issues covered by written arbitration agreements.¹⁶⁸ The court stated that defendant's "motion to dismiss was not a proper § 3 motion because the sole remedy available under § 3 is a stay."¹⁶⁹ However, "[n]otwithstanding the terms of § 3 . . . dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."¹⁷⁰ The court further reasoned that a "hyper technical reading" of defendant's pleadings would be inconsistent with the "liberal federal policy favoring arbitration agreements," and that it was clear during proceedings in the district court that defendant was seeking to enforce the arbitration clause.¹⁷¹

V. EVIDENCE IN SUPPORT OF WHY COURTS MUST STAY RATHER THAN DISMISS UNDER FAA SECTION 3

There are several reasons why section 3 of the FAA should be interpreted to require courts to issue a stay pending arbitration, if requested by either party, instead of an order of dismissal even when all issues before the court are arbitrable. First, according to the plain language of the statute, the FAA affords courts no discretion in choosing to dismiss the case instead of issuing a stay pending arbitration. Second, the court plays a vital and important role throughout and at the close of the arbitral proceedings. Issuing a stay pending arbitration will, in a practical sense, encourage such a role. Third, undue burden will result from an appeal of a dismissal. Finally, the overall legislative scheme supports arbitration and arbitration will be further supported by the issuance of a stay rather than a dismissal.

164. *Id.*

165. *Id.*

166. *Id.* at 710.

167. *Id.* at 712.

168. *Id.* at 709.

169. *Id.*

170. *Id.* at 709-10.

171. *Id.* at 710 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

A. *Plain Language Interpretation of FAA Section 3*

In general, “the starting point for interpreting a statute is the language of the statute itself.”¹⁷² Courts should look beyond the plain meaning of statutory language only when it produces a result “demonstrably at odds with the intentions of the drafters,”¹⁷³ or that is “so bizarre that Congress could not have intended it.”¹⁷⁴ Here, interpreting FAA section 3 as requiring a stay would produce a result that would uphold the intention of the drafters, because it would keep technicality, delay, and expense to a minimum.¹⁷⁵ According to the language of section 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.¹⁷⁶

The use of the word “shall” in FAA section 3 affords courts no discretion in deciding whether to grant a motion to stay pending arbitration.¹⁷⁷ In *Lloyd v. HOVENSA, LLC* the court held, that the “directive that the Court ‘shall’ enter a stay simply cannot be read to say that the Court shall enter a stay in all cases except those in which all claims are arbitrable and the Court finds dismissal to be the preferable approach.”¹⁷⁸ By contrast, “the statute clearly states, without exception, that whenever suit is brought on an arbitrable claim, the Court ‘shall’ upon application stay the litigation until arbitration has been concluded.”¹⁷⁹ Accordingly, the precise language of section 3 does not

172. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

173. *BFP v. Resolution Trust Corp.* 511 U.S. 531, 563 (1994).

174. *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991).

175. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985) (stating that the FAA’s ratification was motivated by a congressional desire to enforce agreements into which parties had entered, and to encourage efficient and speedy dispute resolution).

176. Federal Arbitration Act, 9 U.S.C. § 3 (2005) (emphasis added).

177. *See Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir. 1994).

178. *Id.*

179. *Id.*

afford courts leeway to dismiss a case where one of the parties applies for a stay pending arbitration.¹⁸⁰

Although the FAA contains no express provision¹⁸¹ for dismissing litigation, rather than staying it, some courts have mistakenly done so.¹⁸² Courts have held that a dismissal is appropriate, primarily in situations where all claims can be submitted to arbitration.¹⁸³ This however is not a valid justification for denying a party's motion to stay. The language of section 3, by its terms, takes into consideration the situation where all claims presented before a court are being submitted to arbitration. The drafters envisioned such a state of affairs, as evidenced by the phrase, "[i]f any suit or proceeding be brought in any of the courts of the United States *upon any issue referable to arbitration.*"¹⁸⁴ Thus, arguing that a dismissal is permitted under FAA section 3 when all issues are arbitrable completely misconstrues the language of the statute. The statute by its terms takes into account situations where a case may entail both arbitrable and non-arbitrable claims. Thus, according to the language of FAA section 3, courts must determine whether an issue is arbitrable, and even if such court finds all issues arbitrable, it must on application of one of the parties issue a stay.¹⁸⁵ Accordingly, the correct interpretation of section 3 of the FAA is to require courts to issue a stay pending arbitration upon application of one of the parties. The precise language of the FAA fails to justify any other action by the court.

B. *A Stay Supports the Judicial Role of Supervision and Review*

In order for arbitration to function as an efficient and effective process of private dispute resolution, litigation challenging the arbitral process must be minimized.¹⁸⁶ There is an ever-present need to prevent "judicialization" of the arbitral process,¹⁸⁷ which would involve courts over-exerting their control. At the same time, some public supervision and control is needed in order to protect broader social interests that may be ignored or jeopardized by private arbitrators.¹⁸⁸ This is why the FAA

180. *See id.*; *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994).

181. *See generally* Federal Arbitration Act 9 U.S.C. §§ 1-16 (2005).

182. *See cases cited supra* note 7.

183. *See Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988).

184. Federal Arbitration Act, 9 U.S.C. § 3 (2005).

185. *Lloyd*, 369 F.3d at 269; *Adair*, 25 F.3d at 955.

186. ALAN SCOTT RAU ET AL., *ARBITRATION* 134 (2d ed. 2002).

187. *See id.*

188. *See id.*

is structured to allow for judicial supervision and control over issues that may arise at different stages of the arbitral process.¹⁸⁹ Such supervision can be exercised during the arbitration, or when an award made by arbitrators comes before the court for review and enforcement.¹⁹⁰

Thus, in order to serve both the need for public supervision and the need for speedy dispute resolution, courts must issue a stay of litigation pending arbitration instead of dismissal. Otherwise, if a presiding judge dismisses a case, the parties would be forced to file a new action whenever they may require the court's assistance. Also, should the arbitrators fail to resolve the entire controversy, a stay would spare the parties the burden of a second litigation.

There is another policy reason for issuing a stay over a dismissal. While it is possible that an arbitration may proceed without the aid of the court, such scenario is beyond the scope of this Note. Instead, this Note addresses the situation where a lawsuit has commenced and the trial court seeks to submit the matter to arbitration. This occurs when one party seeks to avoid arbitration and the other party openly and willingly wishes to arbitrate. A court must compel arbitration because there is a party present who does not wish to willingly arbitrate. Thus, as a matter of policy, it would seem to be in the best interest of the party seeking to avoid arbitration to have the court retain its jurisdiction over the dispute in such a situation. Issuance of a stay pending arbitration is the only method to achieve this goal and thus should, as a matter of policy, be granted upon the application of one of the parties.

1. Judicial Assistance During Arbitral Proceedings

The types of disputes settled by a court during arbitration include the appointment of an arbitrator or filling of an arbitrator vacancy,¹⁹¹ compelling the attendance of witnesses, or punishing a witness for contempt.¹⁹² Other relief granted by courts in pending arbitration

189. *See id.*

190. *See id.*

191. Federal Arbitration Act, 9 U.S.C. § 5 (1925) ("If in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed; but if no method be provided therein . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator . . .").

192. *See id.* § 7.

The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness . . . Said summons shall . . . be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators,

includes the issuance of interim remedies.¹⁹³ Interim relief ordered by arbitrators can include preliminary injunctions,¹⁹⁴ temporary restraining orders, orders of attachment,¹⁹⁵ liens, security bonds,¹⁹⁶ and other mechanisms that serve to protect parties' property or interests until disputes are finally adjudicated by the arbitrator.¹⁹⁷ Another role the courts may play during arbitration is ordering consolidation of arbitral proceedings,¹⁹⁸ or granting class arbitration classification.¹⁹⁹ In some cases, preliminary injunctive relief is necessary to ensure that the arbitration process remains a meaningful one for both parties.²⁰⁰ Thus, a stay is a more appropriate solution than a dismissal because a stay preserves the court's authority to order such interim remedies without unduly interfering in the arbitration of the underlying claims.²⁰¹

or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses of their punishment for neglect or refusal to attend in the courts of the United States.

Id.

193. IAN R. MACNEIL ET. AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, § 24.1.2 (1999). The majority view is that courts have the authority to award interim remedies in appropriate cases, however, there is a minority of cases that have reached the opposite conclusion. *See id.* § 25.4.1.

194. *Id.* § 25.4.2.

195. *Id.* § 25.4.3.1; *Am. Reserve Ins. Co. v. China Ins. Co.*, 79 N.E. 425 (N.Y. 1948).

A plaintiff seeking an attachment must show, *inter alia*, that he has a cause of action. If plaintiff's complaint and affidavits fail to establish a prima facie cause of action, or if they clearly establish the plaintiff must ultimately be defeated, the defendant may vacate the warrant of attachment Certainly, it cannot be said that a plaintiff fails to state a prima facie cause of action merely because the contract upon which suit is brought contains an agreement to arbitrate. Defendant's sole remedy is to apply for a stay of plaintiff's action until the arbitration has been had.

Id. at 427.

196. MACNEIL ET AL., *supra* note 193, § 25.4.3.2.

197. *Id.* § 25.4.1.

198. *See* DOMKE, *supra* note 23, § 32.2. ("Two or more separate arbitration proceedings may be ordered to be consolidated by the courts when at least one party is common to the arbitrations to be held and the issues are substantially the same, as long as no substantial right of a party is prejudiced by the consolidation."); *see also* *Hoover Group Inc. v. Probala & Assocs.*, 710 F. Supp. 677, 679 (N.D. Ohio 1989) (quoting DOMKE, *supra* note 23, § 32.2).

199. DOMKE, *supra* note 23, § 32.3 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)). "The Federal Arbitration Act does not foreclose class arbitration and the question of whether class arbitration was permissible under an arbitration clause was a matter of contract interpretation under state law." *Id.*

200. *Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1325 (M.D. Tenn. 1990).

201. *See id.*

2. Judicial Assistance After Arbitral Proceedings

An arbitral award is not self-enforcing and must be confirmed in a court of law.²⁰² Upon completion of arbitration, a court either enforces a judgment on an award or enforces an order vacating or modifying an award.²⁰³ If confirmed, the award is reduced to an enforceable judgment.²⁰⁴ When an arbitration award has been rendered into a judgment, it is enforceable in the courts in the same manner as any other judgment.²⁰⁵ In domestic United States cases, the FAA and companion state arbitration statutes provide for judicial enforcement of arbitral awards.²⁰⁶ In international cases, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 provides for uniform and efficient enforcement of awards internationally.²⁰⁷

Re-establishing subject matter jurisdiction is a procedural problem that may arise at the time of enforcement or modification of an arbitral award.²⁰⁸ Whether the problem arises is dependent on whether the trial court previously issued a stay pending arbitration or a dismissal following a determination that the issue was arbitrable. Issuing a dismissal may have bearing on whether a court will respect the subject matter jurisdiction of the claim after the dismissal.²⁰⁹

In order to challenge an arbitrator's decision under the FAA or to enforce an award, the moving party must establish subject matter

202. DOMKE, *supra* note 23, § 44.2.

203. 9 U.S.C. § 9 (2005). "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order." *Id.*

204. DOMKE, *supra* note 23, § 45.1.

205. *Id.* § 46.1.

206. *See* 9 U.S.C. § 9 (2005).

207. N.Y. Convention, U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

208. *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957 (S.D.N.Y. 1988). Plaintiffs were unable to re-establish federal question jurisdiction after the court dismissed litigation and ordered arbitration under FAA section 4. *Id.* at 958. The original suit was for securities violations and clearly conferred federal question jurisdiction on the court. *Id.* However, the court held that it did not have jurisdiction to grant intermediary relief. According to the court "the fact that the dispute was initially waged in federal court does not, without more, vest [the court] with [federal subject matter] jurisdiction." *Id.* at 959. The court further discussed that if the previous court had issued a stay, and retained jurisdiction then the present court "would have had ancillary power also to consider an application to compel" under FAA section 4. *Id.* However, since the action was dismissed and there was no federal action pending to which the arbitration could be ancillary then federal jurisdiction did not exist. *Id.* For federal jurisdiction to exist it "must be premised on this petition itself and not on a prior action no longer before the federal court." *Id.*

209. MACNEIL ET AL., *supra* note 193, § 9.2.3.4.

jurisdiction.²¹⁰ With regard to domestic arbitration, the FAA itself does not confer federal question jurisdiction.²¹¹ Under the FAA, federal jurisdiction is available only if otherwise available through some independent source such as diversity or federal question.²¹² If, however, there was a pending proceeding in the district court, then there would be no need to re-establish subject matter jurisdiction.

The issuance of a stay under FAA section 3 allows parties to return to the federal court in which the stayed litigation is pending.²¹³ Upon returning, the federal court will decide whether to confirm, vacate or modify the arbitral award received by the parties.²¹⁴ Issuing a stay will prevent the need to re-establish subject matter jurisdiction when such parties return to court after receiving an award.²¹⁵

Granting a motion to dismiss will “create a new need for subject matter jurisdiction if the parties seek to return to the court for any purpose.”²¹⁶ Thus, for efficiency reasons and to prevent subjecting parties to such risk of re-establishing subject matter jurisdiction, courts must grant motions to stay litigation pending arbitration when one of the parties makes such an application.

C. Undue Burden Would Result Due to an Appeal Resulting from Dismissal

A problem parties seeking to invoke arbitration presently face occurs when a presiding judge in compelling arbitration dismisses the claim.²¹⁷ This action is problematic because the dismissal of an action triggers appellate jurisdiction, “whereas staying the proceedings pending arbitration would preclude an immediate appeal.”²¹⁸ Congress, in an

210. See *Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000).

211. *MACNEIL ET AL.*, *supra* note 193, §§ 9.1, 9.2.2.

212. *Id.*; see also 28 U.S.C. §§ 1331-32.

213. *MACNEIL & SPEIDEL ET AL.*, *supra* note 195, at § 9.2.3 (By issuing a stay under FAA section 3, “[a]fter an award, parties desiring to confirm, vacate, or modify the award, can return to the federal court in which the stayed litigation is pending for determination of those issues.”).

214. *Id.*

215. *Id.*

216. *Id.* § 9.2.3.4. However, “where in addition to dismissing the litigation the court orders arbitration under FAA § 4, the existence of that order may continue the jurisdiction of the court sufficiently so that no new showing of subject matter jurisdiction will be required if a party returns for further judicial action in connection with the arbitration.” *Id.*

217. See generally *Lloyd v. HOVENSA, LLC*, 369 F.3d 263 (3d Cir. 2003); *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994).

218. Pierre H. Bergeron, *District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 *EMORY L. J.* 1365, 1378 (2002); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86, 87 n.2 (2000).

effort to “promote appeals from orders barring arbitration and limit appeals from orders directing arbitration,” amended the FAA.²¹⁹ Section 16(b) of the FAA prohibits appeals from an interlocutory order staying an action pending arbitration pursuant to FAA section 3.²²⁰ On the other hand, appellate review of a court order is permitted if the order is classified as a “final decision.”²²¹ When a court dismisses all claims before it, that decision is a “final decision” within the meaning of FAA section 16(b), and therefore appealable.²²²

The United States Supreme Court, in *Green Tree Financial Corp.-Alabama v. Randolph*, held that a dismissal is a final judgment and immediately appealable.²²³ At the trial level, the district court granted a motion compelling arbitration, denied a motion to stay, and dismissed the claims with prejudice.²²⁴ On appeal, the United States Supreme Court addressed the question of whether an order compelling arbitration and dismissing a party’s underlying claim was a “final decision with respect to an arbitration” within the meaning of [section 16(a)(3) of the FAA] and thus is immediately appealable pursuant to that Act.²²⁵

The Court held that the term “final decision” found in FAA section 16 has a well developed and “longstanding interpretation.”²²⁶ It is a decision that “ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.”²²⁷ Since the FAA “does

219. *Adair*, 25 F.3d 953 at 955 (citing *Filanto, S.P.A. v. Chilewich Int’l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993)).

220. 9 U.S.C. § 16(b)(1)(4) (2005). Section 16 of the FAA governs appellate review of arbitration orders. Subsection (b) provides: “Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order . . . (1) *granting a stay of any action under section 3 of this title*; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.” Federal Arbitration Act, 9 U.S.C. § 16(b) (2005) (emphasis added).

221. 9 U.S.C. § 16(a)(1)-(3). Subsection (a) of FAA section 16 lists which procedural orders trigger appellate jurisdiction. It provides:

An appeal may be taken from . . . (1) an order . . . (A) refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed, (C) denying an application under section 206 of this title to compel arbitration, (D) confirming or denying confirmation of an award or partial award, or (E) modifying, correcting, or vacating an award; (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or (3) *a final decision with respect to an arbitration that is subject to this title.*

Id. (emphasis added).

222. *See* 531 U.S. 79, 89 (2000).

223. *Id.*

224. *See id.* at 83.

225. *Id.* at 82.

226. *Id.* at 79.

227. *Id.*

not define a final decision or otherwise suggest that the ordinary meaning of final decision should not apply, the court accords the term its well-established meaning.”²²⁸ Since a claim leaves nothing more for the court to do but execute the ruling it is a “final decision with respect to an arbitration.”²²⁹

Accordingly, courts must grant a motion to stay litigation pending arbitration, upon application of one of the parties. This is because a dismissal results in an immediate appeal, while a stay is considered an interlocutory order and is not appealable. On one hand, an appeal from a dismissal causes further delay and hinders the disputing parties’ ability to arbitrate.²³⁰ On the other hand, issuing a stay pending arbitration protects the rights of a party entitled to arbitrate. Granting a motion to stay litigation pending arbitration achieves two results.²³¹ It relieves the party entitled to arbitrate of the burden of continuing to litigate the issue before the court,²³² and it alleviates the burden of an appeal and allows parties to continue directly to arbitration.²³³ In contrast, an appeal from a dismissal would force upon the party willing to arbitrate the unnecessary burdens of delays and the costs associated with an appeal.²³⁴ Denying a motion to stay and granting a motion to dismiss would thwart the overall purpose of the FAA which is to encourage efficient and speedy dispute resolution.²³⁵

D. The Overall Legislative Scheme Supports the Issuance of a Stay

The primary objective behind the enactment of the FAA was to “enforce agreements into which parties had entered.”²³⁶ Secondly, the FAA was enacted to encourage efficient and speedy dispute resolution which would not be subject to delay and obstruction of the courts.²³⁷ Since its adoption, there has been a “liberal federal policy favoring arbitration agreements,” as well as a strong presumption in support of arbitration seen in the federal courts.²³⁸ This strong pro-arbitration policy has been evidenced in a number of ways.

228. *Id.* at 79-80.

229. *Id.* at 80.

230. *See* Lloyd v. HOVENSA, LLC, 369 F.3d 263, 270 (3d Cir. 2004).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

236. *Id.* at 220.

237. *Id.* at 221; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

238. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

Examples of the pro-arbitration policy include the concept of separating arbitration clauses from the remainder of the agreements containing them in determining the validity of those clauses.²³⁹ Another example is the rule requiring arbitration to proceed before litigation is complete in cases involving both arbitrable and non-arbitrable issues.²⁴⁰ Further, there is the rule that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.²⁴¹ Finally, the rule that a court's inquiry is limited to ascertaining the existence of an agreement to arbitrate and the viability of the arbitration clause, is a sign of the courts' overall support of arbitration.²⁴²

In addition, the prevailing "spirit" of the FAA extends far beyond its specific provisions.²⁴³ Such overall legislative policy supports the notion that the drafters intended for parties to immediately pursue arbitration. If a dismissal is awarded it would deprive the party seeking arbitration of the opportunity to immediately commence arbitration proceedings without incurring delay and the costs associated with an appeal. Furthermore, issuing a stay pending arbitration will expedite the judicial process because a single judge can preside over an entire dispute. This is far more efficient than constantly reassigning a case to a new judge who will have to learn the facts of the case anew.²⁴⁴

VI. CONCLUSION

The practice of issuing a dismissal instead of a stay pending arbitration under FAA section 3 is highly questionable. Not only does the language of the statute fail to justify a dismissal, but a dismissal can lead to unfortunate consequences. When a court grants a stay pending arbitration it retains jurisdiction. This keeps the proceeding alive and eases securing judicial assistance if any is needed in connection with the arbitration. When a court decides to send a lawsuit to arbitration, the presiding judge must issue a stay if requested by either side, instead of an order of dismissal, even when all issues before the court are arbitrable. The FAA should be read as requiring the issuance of a stay pending arbitration as a matter of statutory construction, legislative

239. See *Prima Paint Corp.*, 388 U.S. at 409; MACNEIL ET AL., *supra* note 193, § 8.6.

240. See *Dean Witter Reynolds, Inc.*, 470 U.S. at 218-19, 221; *Moses H. Cone Memorial Mem'l. Hosp.*, 460 U.S. at 24; see also MACNEIL ET AL., *supra* note 193, § 8.6.

241. See *Moses H. Cone Mem'l. Hosp.*, 460 U.S. at 24-25.

242. *Prima Paint Corp.*, 388 U.S. at 404.

243. MACNEIL ET AL., *supra* note 193, § 8.6.

244. See *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 270 (3d Cir. 2004).

history, and sound public policy. Any other requirement would impose undue burdens on parties seeking to arbitrate.

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