

PRELIMINARY INJUNCTIONS PENDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT: JUDICIAL MISINTERPRETATION, JUDICIAL INTERVENTION, AND CONFUSION

I. INTRODUCTION

Whether courts can order preliminary injunctions pending arbitration “has divided state and federal courts” for years.¹

Congress and the Supreme Court must resolve this confusion by not only affording the Federal Arbitration Act (“FAA” or the “Act”)² its plain meaning, but also by following the congressional intent of precluding court-ordered provisional remedies, such as preliminary injunctions pending arbitration. Although the Court has denied certiorari on this issue on previous occasions,³ several Justices have noted the impact of permitting such court

1. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127, 1129 (1985). A number of courts have addressed this issue. *Id.*; *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983).

Other notes have addressed this same issue and have concluded that courts should grant preliminary injunctions pending arbitration. See Cynthia J. Butler, Note, *The Propriety of Judicially Granted Provisional Relief in Pending Arbitration Cases*, 9 OHIO ST. J. ON DISP. RESOL. 145 (1993) (discussing arguments in favor of adopting the “contractual language” test, which contends that judicial intervention is proper only when the contract between the parties specifically provides for this type of relief); Anthony S. Fiotto, Note, *The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute*, 66 B.U. L. REV. 1041 (1986) (explaining that courts have the power under the Federal Arbitration Act to permit preliminary injunctions pending arbitration because the purpose behind arbitration agreements demands such provisional relief, the public interest would be better served, and issuance of injunctions will not impinge on the rights of the arbitral process); Philip E. Karmel, Comment, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. CHI. L. REV. 1373 (1987) (arguing that the judiciary has the power to grant injunctive relief pending arbitration and that “unless a specific contractual provision to the contrary exists, courts should imply a status quo maintenance provision into arbitration agreements where breach of the status quo would constitute bad faith”); Elizabeth A. Phillips, Note, *Injunctions Pending Arbitration: Do the Courts Really Have Jurisdiction?* Blumenthal v. *Merrill Lynch*, 1991 J. DISP. RESOL. 381 (analyzing a Second Circuit case that held that a district court is not precluded from issuing a preliminary injunction); Megan J.F. Williams, Note, *The Federal Arbitration Act and the Power of the District Court*, 7 OHIO ST. J. ON DISP. RESOL. 389 (1992).

2. 9 U.S.C. §§ 1-16 (1994).

3. See, e.g., *McCollum*, 469 U.S. at 1127 (1985).

orders.⁴ The Justices have stated that the importance of resolving this issue stems from the fact that court orders granting provisional relief are, in essence, final because the “imminence” of the pending arbitration severely lessens the desirability of an appeal.⁵

Lower Court opinions imply that if the Supreme Court does not address and resolve the division among courts with respect to this issue, lower courts will erroneously continue to order preliminary injunctions pending arbitration for years.⁶ Recently, a Sixth Circuit Court of Appeals opinion dealt with this specific issue. In accordance with a majority of the circuits, the Sixth Circuit approved of preliminary injunctions pending arbitration. In *Performance Unlimited, Inc. v. Questar Publishers, Inc.*⁷ a licensor brought suit against a book publisher for the publisher’s failure to pay royalties under a licensing agreement.⁸ The district court denied the licensor’s motion for injunctive relief on the grounds that such relief was precluded under “the mandatory arbitration provision in the parties’ licensing agreement.”⁹ The Sixth Circuit held that in a dispute subject to “mandatory arbitration under the Federal Arbitration Act, a district court has subject matter jurisdiction under section 3 of the Act to grant preliminary injunctive relief.”¹⁰ A number of other circuits have come to the same conclusion.¹¹ However, by permitting injunctive relief, the courts are ignoring the plain text of the FAA, the legislative history and intent behind the Act, and Supreme Court precedent favoring arbitration.¹²

This Note explains why the FAA prohibits judicially ordered provisional

4. *Id.* at 1129 (White, J., dissenting). Justice White, with whom Justice Blackmun joined, filed a dissenting opinion to the Court’s denial of certiorari. Justice White opined that the importance of resolving this issue stems from the fact that parties to an arbitration agreement have a great interest in knowing whether judicially ordered provisional relief is available pending arbitration of their dispute. *Id.* at 1131. Although Justice White noted that the issue of preliminary injunction pending arbitration would be moot in this particular case because the arbitration process was over by the time the case reached the Court, he referred to the “capable of repetition, yet evading review” doctrine as a justification for the granting of certiorari. *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393 (1975); *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

5. *Id.* at 1130.

6. Justice White appears to have been a good predictor of the future because district courts, with the approval of a majority of the courts of appeal, have consistently granted provisional relief pending arbitration. *See supra* note 1.

7. 52 F.3d 1373 (6th Cir. 1995).

8. *Id.* at 1376-77.

9. *Id.* at 1375.

10. *Id.* at 1380.

11. *See, e.g.*, *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054-55 (4th Cir. 1985).

12. For a detailed analysis of each, *see infra* Part IV.

relief pending arbitration. Part II discusses the legislative history of the FAA and analyzes Supreme Court decisions examining the Act's purpose. Part III details the four different approaches taken with respect to this issue, while Part IV analyzes the problems with these approaches. Finally, Part V proposes alternative means to eliminate the judiciary's power to grant provisional relief while arbitration is pending.

II. BACKGROUND

A. Arbitration and Preliminary Injunctions

The parties to a dispute utilize arbitration to take advantage of not only the cost effectiveness and confidentiality that normally accompany the proceedings but also the finality of the arbitral process.¹³ In 1925, Congress enacted the FAA in response to a continuing effort on the part of many reformers to enact a federal statute to eliminate the traditional rule that arbitration provisions¹⁴ in contracts were revocable at the court's will.¹⁵ The stated purpose of the Act was to promote more efficient resolution of disputes¹⁶ and to enforce arbitration provisions within contracts.¹⁷ As one

13. See *infra* note 16.

14. For examples of a standard arbitration clause within a contract, see MARGARET C. JASPER, *THE LAW OF DISPUTE RESOLUTION: ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION* (1995). One example Jasper uses is worded as follows:

Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Id. at 61 (footnote omitted).

15. For an in-depth analysis of the reformation movement and its political ramifications, see IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, AND INTERNATIONALIZATION* (1992). After years of model arbitration acts drafted by the American Bar Association, the FAA was passed by both the House and Senate and subsequently signed into law by President Calvin Coolidge on February 12, 1925. *Id.* at 83-101. The settlement of disputes through arbitration was an element of American legal and business society for years prior to the enactment of the FAA in 1925. See generally FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* (1948). However, the role of arbitration was secondary to that of traditional litigation as a means for parties to resolve disputes. *Id.* at 1-9, 63. With the modernization of law and the development of organizations advocating the arbitral process, the arbitration alternative was publicized through a number of means that included business and trade organizations, state legislatures, the judiciary, and the press. *Id.* at 9-13.

16. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

The American Bar Association ("ABA") enthusiastically endorsed the Act: "No piece of commercial legislation, no enactment at the request of lawyers has been passed by Congress in a quarter of a century comparable in value to this." Committee on Commerce, Trade and Commercial

legal scholar has noted, “[t]he aim of the statute was to treat arbitration clauses like other contract terms. Its goal was to implement the consent of the parties to arbitration clauses by enforcing those clauses where that was what the parties intended.”¹⁸ Prior to the FAA, courts had rescinded arbitration agreements at will in order to maintain their own jurisdiction and to deny a private party the option of dispute resolution through arbitration.¹⁹ However, after numerous discussions,²⁰ Congress responded with an emphatic approval

Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153 (1925) [hereinafter ABA Committee]. The ABA continued its praise by stating that the relevant sections of the FAA “assure a prompt, speedy and non-technical determination of the merits . . . in [the] controversy” and that arbitration agreements eliminate many of the delays associated with traditional litigation. *Id.* at 155. One author, in an analysis of how arbitration has affected the contract, insurance, and professional liability areas of law, ranked the efficiency of resolving disputes through arbitration first in a list of factors for choosing between arbitration and litigation. Alan I. Widiss, *Introduction to ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS 1-7* (Alan I. Widiss ed. 1979). Some of the procedural requirements of the judicial system are absent in the arbitral process. The arbitral process under the FAA requires “no technical pleadings to be drawn and settled, no multiplicity of motions to be decided, and only the very briefest delay in the decision of the preliminary matter, where and how the arbitration should proceed.” ABA Committee, *supra* note 156. Some of the other advantages of arbitration include: (1) an overall lower cost to clients; (2) the privacy of the confidential, arbitral process; and (3) the ability to make arbitrations binding and not reviewable by an appeals court. *See JASPER, supra* note 14, at 9, 12-13.

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

18. MACNEIL, *supra* note 15, at 148. *But see* 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW §§ 1433-1435, at 389-406 (1962). Corbin outlines many of the positive attributes of the common-law practice of holding arbitration clauses unenforceable. 6A *id.* at 391-401. Corbin further states and details some of the inadequacies, both legal and social, of the arbitral process. 6A *id.*

19. H.R. REP. NO. 68-96, at 1-2 (1924). In fact, the courts would normally not order specific performance on a valid arbitration provision or enforce it; instead, they would only order damages for breach of an arbitration provision. ABA Committee, *supra* note 16, at 155. Under the direction of the Supreme Court, district courts in the early 20th century continually found that they had no power or authority to enforce arbitration provisions without legislative approval. *See, e.g., United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915).

20. A detailed chronology of the Senate and House activities with respect to the FAA bill is discussed by Ian MacNeil. *See* MACNEIL, *supra* note 15, at 83-101. The House Judiciary Committee issued a report in favor of the bill to the House of Representatives. H.R. REP. NO. 68-96, at 1-2 (1924). The report included important statements regarding the purposes of the bill and a brief history of the judiciary’s view toward arbitration:

The purpose of this bill is to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts. It was drafted by a committee of the American Bar Association and is sponsored by that association

....

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

of arbitration clauses in contracts and thereby commanded the judiciary to enforce them in legal and business agreements.²¹

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

Id.

On May 14, 1924, a favorable report with some amendments to the bill presented in the House was reported to the Senate. S. REP. NO. 68-536, at 1 (1924). The Senate report expounded on the courts' view toward arbitration prior to the proposed FAA bill:

But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and 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

. . . .

Various reasons have been given for these ancient rules of English law, followed as they have been by our State and Federal courts. Among these reasons were, first, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress Second, the jealousy of their rights as courts

It has been said that "arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society." The desire to avoid the delay and expense of litigation persists.

Id. at 2-3.

The bill was presented to the House on June 6, 1924 and was passed quickly without objections. 65 CONG. REC. H11,080-82 (daily ed. June 6, 1924). Subsequently the bill came to the floor of the Senate on January 31, 1925, and was passed with only a few objections that were later withdrawn. 66 CONG. REC. S2759-62 (daily ed. Jan. 31, 1925). The speed and unobstructed passage of the FAA through Congress indicate the extraordinary support of the bill by both houses of Congress.

A Supreme Court decision rendered just a few months prior to the enactment of the FAA demonstrated a limited transformation of the Court's distaste for arbitration provisions. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), held that a New York arbitration statute was applicable to an admiralty case and that the Court had "no occasion to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified." *Id.* at 125 (citation omitted). The reasoning behind the enforcement of the agreement, however, was not based on the validity of the arbitration provision; rather, the basis for the holding was that the New York arbitration statute did not displace or modify any maritime law. *Id.* The Court implied that if the arbitration statute of New York was not in accordance with maritime law, the statute would be invalid. *Id.*

Although *Red Cross Line* presented a slight transformation, most courts would have continued to exercise their equitable power and deny the enforceability of arbitration clauses if Congress had not passed the FAA. Therefore, the FAA was needed in order to place a limit on the judiciary's consistent discouragement of arbitration.

21. In passing the FAA and requiring that arbitration provisions be treated identically to other contract terms, Congress rendered the FAA "policy neutral" with respect to the desirability of arbitration as compared to other contract provisions. MACNEIL, *supra* note 15, at 148. However, demanding the enforcement of arbitration agreements changed the law and any change in the law cannot be considered policy neutral in reality. *See id.* at 148-49. This is because the very reason

The FAA declared that when one of the parties to a contract containing a valid arbitration provision²² brings suit, the other party may petition the court to “stay the trial” until an arbitration²³ is held in accordance with the contract terms.²⁴ After the trial court declares that an enforceable arbitration clause exists, the dispute should proceed to arbitration as quickly as possible²⁵ with

justifying the difference in the law is founded on a policy favoring arbitration. *Id.* at 149.

22. Congress stated clearly the inviolability of a valid arbitration provision when it passed section 2 of the FAA. Section 2 reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract.

9 U.S.C. § 2 (1994).

23. For a general discussion of arbitration and its internal mechanism, see MACNEIL, *supra* note 15, at 7-8 and KELLOR, *supra* note 15, at 63-73. In arbitration, an arbitrator, usually an unbiased third party, presides over a dispute between two parties. See JASPER, *supra* note 14, at 7. Under normal circumstances, the agreement to arbitrate is voluntary between the two parties; however, in some instances, the court may order arbitration. *Id.* Arbitration is an attractive avenue that parties utilize in a number of areas. For example, arbitration is used in commercial and business contract disputes, labor and employment disputes, consumer litigation, insurance, and some intellectual property cases. *Id.* Parties to a dispute, with the aid of the American Arbitration Association (“AAA”), agree to select an arbitrator or a panel of arbitrators that in most circumstances have a certain level of expertise in the area that is at issue. *Id.* at 7-9.

24. The statutory language that directs courts to stay all proceedings in court states:

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 proceeding 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.

9 U.S.C. § 3 (1994).

Section 4 prohibits the court from deciding or ruling on issues that have been reserved for arbitration. If the court determines, due to a valid arbitration clause, that the suit must be resolved through arbitration, the merits of the case and all other related issues are reserved for the arbitrator. *Id.* § 4. Section 4 states in full:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Id.

25. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (noting that the FAA was passed by Congress in order to ensure that resolution of arbitrable disputes “be speedy

no further judicial intervention.²⁶

Once a district court holds that an enforceable arbitration provision exists and issues an order to arbitrate the dispute, one of the parties may seek a preliminary injunction²⁷ in order to maintain the status quo²⁸ during arbitration.²⁹ Preliminary injunction³⁰ hearings differ from trials in that the hearings are normally less formal,³¹ however, the other party still must be

and not subject to delay and obstruction in the courts”).

26. *Id.*

27. See generally 42 AM. JUR. 2D *Injunctions* § 13, at 740-42 (1969) (explaining general functions of preliminary injunctions). The terms “preliminary injunction,” “interlocutory injunction,” and “temporary injunction” are used interchangeably in case law, statutes, and other legal writings. 42 *id.* at 740.

28. 42 *id.* at 741. The goal of a preliminary injunction is not to determine whether any particular person’s rights have been violated; rather, it is to prevent a future wrong or injury from occurring. 42 *id.* at 740. For the Supreme Court’s view on the role of this provisional remedy, see *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), where the Court stated, “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” See also *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) (stating that “[t]he primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief”); *Board of Provincial Elders v. Jones*, 159 S.E.2d 545 (N.C. 1968) (stating that the subject matter of a suit will be sustained regardless of an issuance of a preliminary injunction). But see John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 546 (1978) (discussing provisional relief and criticizing courts and legal scholars who utilize the preservation of status quo as justification for granting of provisional relief). Professor Leubsdorf reasoned that

[e]mphasis on preserving the status quo is a habit without a reason. To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate. The status quo shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the status quo preserved as when it changes it.

Id. (footnotes omitted).

29. *University of Texas*, 451 U.S. at 395.

30. The most typical form of provisional relief is the preliminary injunction order. DAN B. DOBBS, *THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 2.11(1), at 184 (2d ed. 1993). After the plaintiff files a petition with the court for a preliminary injunction, notice must be given to the defendant before the injunction is issued so that the defendant is given an opportunity to object to the plaintiff’s petition. *Id.* The judicial determination of whether a preliminary injunction should be issued rests on the outcome of a factual inquiry into the specific circumstances surrounding the case. *Id.* at 185. Provisional relief can be ordered in a variety of situations to protect a party’s property, economic, constitutional, personal, and public rights. *Id.* at 185-87.

There are a number of factors the courts consider in determining whether a preliminary injunction is appropriate. Three factors often considered are the harm to the plaintiff if injunctive relief is not granted, the harm to the defendant if injunctive relief is granted, and the probability that the plaintiff will prevail on the merits of the case at trial. *Id.* at 187.

31. See *University of Texas*, 451 U.S. at 395. Because the maintenance of the status quo is such a limited purpose and the fact the a motion for a preliminary injunction is filed so hastily, the due process and procedures involved with the hearing are informal. *Id.*

given notice of the hearing.³² The two main factors courts consider in determining the merits of the preliminary injunction motion are the irreparable harm that each party will suffer if the other party prevails and the likelihood that the moving party will prevail on the merits of the case at trial.³³ Although preliminary injunctions have long been established as part of courts' equitable powers,³⁴ Congress has occasionally enacted statutes that have specifically prevented courts from utilizing this power.³⁵

B. Supreme Court Interpretation of the FAA

The Supreme Court has on numerous occasions discussed arbitration as prescribed by the FAA as a possible alternative for dispute resolution.³⁶ The Court has noted that once an arbitration agreement is pronounced valid and enforceable by a court, the arbitration must proceed expeditiously.³⁷

Although the Supreme Court has never addressed the legal validity of ordering preliminary injunctions pending arbitrations, the Court has identified the congressional intent behind the FAA and the role of the judiciary with respect to arbitration provisions.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*,³⁸ the

32. FED. R. CIV. PROC. 65(a); *see also supra* note 30 (discussing requirements of preliminary injunctions).

33. *See* Leubsdorf, *supra* note 28, at 540-48; *see also supra* note 28 and accompanying text. Some commentators have suggested that the court must also take into consideration the impact the issuance or denial of a preliminary injunction will have on the public interest. Fiotto, *supra* note 1, at 1052 (citing O. FISS & D. RENDLEMAN, *INJUNCTIONS* 343 (2d ed. 1984)).

34. *See generally supra* note 30 (discussing process of and factors in granting a preliminary injunction).

35. Fiotto, *supra* note 1, at 1052 & n.6 (citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 17 (1942)). The Emergency Price Control Act of 1942 precluded the judiciary from granting an injunction with respect to an agency's administrative order. *Scripps-Howard Radio, Inc.*, 316 U.S. at 17.

36. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

37. *See, e.g., Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22; *Prima Paint Corp.*, 388 U.S. at 404.

38. 460 U.S. 1 (1983). In *Moses H. Cone Memorial Hospital*, the hospital and a construction company "entered into a contract for the construction of additions to the Hospital building." *Id.* at 4. One provision in the contract stated that either party could require binding arbitration of any dispute between the parties arising out of the contract or its breach. *Id.* at 5. A dispute arose and the hospital filed an action to prevent the issue from going to arbitration. *Id.* at 7. Later, the construction company sought an order from the district court compelling arbitration. *Id.* at 6-7. The district court stayed the federal suit until after the identical issue of "arbitrability" was resolved by the state court. *Id.* at 7. The court of appeals reversed the district court's stay order and compelled the district court to order an arbitration. *Id.* at 8. The Supreme Court upheld the court of appeals, holding that the district court erred in granting a stay of the action to compel arbitration. *Id.* at 29.

Supreme Court stated that the clear congressional intent of the FAA was “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”³⁹ The Court further noted that “[t]he Act provides two parallel devices for enforcing an arbitration dispute.”⁴⁰ First, section 3 provides a judicial stay of any dispute that involves the question of arbitrability and, second, section 4 allows a court to issue an order directing the parties to arbitrate.⁴¹ Any delay, resulting from a district court’s intervention into an arbitrable dispute “frustrate[s] the statutory policy of rapid and unobstructed enforcement of arbitration agreements.”⁴² The Court stated that the duty of a district court is first to determine the validity of an arbitration provision, and then, if it is valid, to remove the dispute from the court’s jurisdiction and into the arbitral process.⁴³

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁴⁴ the Court held that judicial intervention is appropriate only in consideration of the issues relating to the validity of an arbitration clause within a contract.⁴⁵ The Court reasoned that this conclusion would “not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”⁴⁶

Although not addressed by the Supreme Court, the question of the judiciary’s power to grant provisional relief pending arbitration has been decided by lower courts. Generally, four approaches have emerged: (1) the “hollow formality” test, (2) the preliminary injunction test, (3) the contractual

39. *Id.* at 22.

40. *Id.*

41. *Id.* The Court further stated that both of these mechanisms are designed to encourage “expeditious” progress towards arbitration, “with only restricted inquiry into factual issues” by the court. *Id.*

42. *Id.* at 23.

43. *Id.* at 22 n.27.

44. 388 U.S. 395 (1967). The plaintiff sued seeking rescission of a contract on the basis of alleged fraud by the defendant. *Id.* at 398. The defendant sought a stay of the trial in federal court and filed a notice of intention to arbitrate. *Id.* at 395, 399. The district court stayed the action and held that the charge of fraud was an issue for the arbitrator to decide. *Id.* The court of appeals affirmed the stay. *Id.* The Supreme Court affirmed the courts below for three reasons. *Id.* at 409 (Black, J. dissenting). First, the agreement is evidence of a transaction involving interstate commerce, exactly the type of contractual provision Congress created the FAA to cover. *Id.* Second, section 4 permits the analysis of the arbitration clause without reference to other terms of the contract. *Id.* at 403-04, 410. Third, Congress had the authority under the Commerce Clause to require enforcement of arbitration agreements. *Id.* at 404-05, 411.

45. *Id.* at 403-04.

46. *Id.* at 404.

language test, and (4) the plain meaning test.

III. THE FOUR DIFFERENT APPROACHES

A. The "Hollow Formality" Test

The Fourth Circuit utilizes the "hollow formality" test in determining whether it is an abuse of power for a district court to grant a preliminary injunction.⁴⁷ In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*,⁴⁸ the Fourth Circuit held that preliminary injunctions are appropriate in any circumstance where the conduct sought to be enjoined would render the arbitration a "hollow formality."⁴⁹ If the conduct that the moving party is requesting the court to enjoin were allowed to continue and no award of the arbitrator could return the moving party to the status quo, then a preliminary injunction would be appropriate.⁵⁰ The *Bradley* court reasoned that section 3

47. Fourth Circuit case law that utilizes the "hollow formality" test in the labor law area includes *Teamsters Local Union No. 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336 (4th Cir. 1978), and *Lever Bros. Co. v. International Chem. Workers Union, Local 217*, 554 F.2d 115 (4th Cir. 1976).

48. 756 F.2d 1048 (4th Cir. 1985). From December 1981 until July 1984, Bradley was employed as an account executive at Merrill Lynch. *Id.* at 1050-51. Bradley's employment contract stated that "[i]n the event of termination of my services . . . I [Bradley] will not solicit any of the clients of Merrill Lynch whom I served . . . while in the employ of Merrill Lynch." The contract continued and determined that "any controversy between myself [Bradley] and Merrill Lynch arising out of . . . the termination of my employment . . . shall be settled by arbitration . . ." *Id.* at 1050.

Bradley resigned from Merrill Lynch and was subsequently named as a defendant in a suit brought by Merrill Lynch for "breach of contract, breach of fiduciary duty, and violation of [a provision of the Virginia] Code. . ." *Id.* at 1051. Merrill Lynch brought this suit to enjoin Bradley, who was employed at a new firm, from soliciting or "participating in the servicing of" clients from Merrill Lynch. *Id.* The district court granted Merrill Lynch's injunction, pending the outcome of the arbitration. *Id.*

49. *Id.* at 1053.

50. *Id.* The court looked to *Lever Brothers Co. v. International Chemical Works Union, Local 217*, 554 F.2d 115 (4th Cir. 1976), and *Teamsters Local Union No. 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336 (4th Cir. 1978), for support. In *Lever Brothers Co.*, the union brought suit under the Labor Management Relations Act of 1947 against the employer in order to prevent the employer from relocating the plant until the employer met certain contractual obligations. 554 F.2d at 117. The district court granted the union a preliminary injunction that precluded the employer from moving pending arbitration. *Id.* The Fourth Circuit held that the move was subject to arbitration under the terms of the contract and the issuance of the preliminary injunction was necessary to maintain the status quo of the parties until completion of the arbitral process. *Id.* at 119. The court set the standard of the "hollow formality" test with the following statement:

An injunction to preserve the *status quo* pending arbitration may be issued either against a company or against a union . . . where it is necessary to prevent conduct by the party enjoined from rendering the arbitral process a hollow formality in those instances where, as here, the arbitral award when rendered could not return the parties substantially to the *status quo ante*.

Id. at 123.

“does not preclude a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration.”⁵¹ Moreover, the court reasoned that no clear mandate or language within the statute abrogates district courts’ equitable powers.⁵² The court further noted that Congress could not have intended to deny courts the equitable remedy of provisional relief without detailed discussions and “evaluation of the statute’s effects.”⁵³ The court found the “hollow formality” test to be the best approach in determining whether a district court has surpassed its power in granting a preliminary injunction pending arbitration.⁵⁴ The Fourth Circuit reasoned that the district court, in determining whether the denial of an injunction would render the arbitration meaningless, had not decided the ultimate issues of the case and therefore had not violated section 3 of the FAA.⁵⁵ The Fourth Circuit affirmed the district court’s order granting provisional relief and set the hollow formality test as the standard that district courts in the Fourth Circuit must follow when deciding this issue.⁵⁶

B. The Preliminary Injunction Test

Some courts apply the preliminary injunction test as a basis for granting injunctive relief pending arbitration.⁵⁷ The preliminary injunction test allows a

51. *Bradley*, 756 F.2d at 1052 (footnote omitted).

52. *Id.* The court noted that nothing in the history of the statute indicated an intent on the part of Congress to foreclose the courts from using their equitable powers prior to the actual arbitration. *Id.* The court in *Bradley* asserted, without any substantive support, that they did not believe the FAA was enacted with the intention of divesting the judiciary of their equitable powers. *Id.*

53. *Id.*

54. *Id.* at 1053.

55. *Id.* at 1052, 1054. The court noted that section 3 “states only that the court shall stay the ‘trial of the action’; it does not mention preliminary injunctions or other pre-trial proceedings.” *Id.* at 1052. The court reasoned that the stay “the trial of the action” terminology within the FAA was intended to preclude court interference in issues that affect the “ultimate resolution of the dispute on the merits.” *Id.* Therefore, because the district court was not adjudicating the final merits of the case, it had the power to issue a preliminary injunction. *Id.*

The *Bradley* court distinguished *Moses H. Cone Memorial Hospital and Prima Paint Corp.*, which courts have cited to support the proposition that preliminary injunctions are precluded under the FAA. To distinguish, the court first stated that *Moses H. Cone Memorial Hospital* involved section 4 of the FAA; thus, the portion of the opinion that addresses section 3 is dicta. *Id.* Next, the court opined that the Supreme Court’s conclusion in *Prima Paint Corp.*, permitted only the arbitrator to determine the voidability of an arbitration clause for fraud; thus in a nonfraud case such as *Bradley*, *Prima Paint Corp.* was not mandatory authority. *Id.* at 1054. Neither *Prima Paint Corp.* nor *Moses H. Cone Memorial Hospital* addressed the precise issue that was before the Fourth Circuit in *Bradley*. *Id.*

56. *Id.* at 1055.

57. *See, e.g., Teradyne Inc. v Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Roso-Lino*

district court to grant injunctive relief as long as the criteria required for injunctive relief are satisfied.⁵⁸

In *Teradyne Inc. v. Mostek Corp.*,⁵⁹ the First Circuit observed that preserving the status quo of the parties pending arbitration was a goal of the FAA which in itself provided the basis for injunctive relief.⁶⁰ The *Teradyne* court relied on the reasoning from specific cases in the Second,⁶¹ Fourth,⁶² and Seventh⁶³ Circuits.⁶⁴ Although it agreed with the Fourth Circuit's analysis in *Bradley* with respect to the goal of maintaining the status quo pending arbitration, the *Teradyne* court did not follow the "hollow formality" test.⁶⁵ Instead, the court held that a moving party must satisfy a four-part preliminary injunction test in order to be granted provisional relief.⁶⁶ The *Teradyne* Court's prerequisites required the district court to find:

Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125 (2d Cir. 1984); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 351 (7th Cir. 1983).

58. *Teradyne*, 797 F.2d at 51.

59. 797 F.2d 43 (1st Cir. 1986). In *Teradyne*, the plaintiff, an electronic supplier, had a contract to supply the defendant with "memory testers and laser systems." *Id.* at 45. The defendant cancelled the order and the plaintiff demanded cancellation charges. *Id.* The plaintiff filed a demand for arbitration on the basis of an arbitration provision in the contract. *Id.* The plaintiff then brought an action requesting an injunction to force the defendant to set aside funds that would satisfy the cancellation charges, if awarded in arbitration. *Id.* at 44-45. The district court issued the preliminary injunction. *Id.* at 44. The defendant appealed the ruling to the First Circuit. *Id.*

60. *Id.* at 51. After analyzing and differentiating a number of Supreme Court cases that held that one of the goals of the FAA was a quick and expeditious path to arbitration, the First Circuit reasoned that the issuance of a preliminary injunction would in fact promote the congressional directive to enforce arbitration provisions. *Id.* at 49-51. The court stated, "We believe that the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process." *Id.* at 51.

61. *Id.* at 47; see *Roso-Lino Beverage Distrib., Inc.*, 749 F.2d at 125 (holding that arbitration agreements falling within the FAA do not relieve the judiciary of its duty to determine merits of a preliminary injunction); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972) ("[I]n a proper case . . . the only way to preserve the *status quo* during the pendency of the arbitration proceeding is by the granting of injunctive relief.").

62. *Teradyne*, 797 F.2d at 47-48. For a discussion of the Fourth Circuit's position, see *supra* notes 47-56 and accompanying text.

63. *Teradyne*, 797 F.2d at 48 (citing *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983)). In *Sauer-Getriebe KG*, the plaintiff claimed that the defendant's announcement concerning the sale of its assets was tantamount to a breach of contract with plaintiff. *Sauer-Getriebe KG*, 715 F.2d at 349. The Seventh Circuit held that a party's right to arbitrate is not inconsistent with its right to a preliminary injunction so pursuing one does not extinguish the other. *Id.* at 350.

64. *Teradyne*, 797 F.2d at 47-51.

65. *Id.* at 51.

66. *Id.* at 51-52. The court based its test on the four criteria listed in *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981).

(1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.⁶⁷

In so determining, the district court must weigh the facts and merits of the dispute and use its discretion to reach a conclusion.⁶⁸

C. *The Contractual Language Tests*

The Eighth Circuit and the Second Circuit approaches have been referred to as the “contractual language” test and the “contractual term and inadequacy at law” test.⁶⁹ In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*,⁷⁰ the Eighth Circuit held that if there is an enforceable arbitration agreement between two parties and the language of the agreement does not contemplate judicially ordered injunctive relief, then all issues, including preliminary injunctions, are for the arbitrator to decide.⁷¹ On that basis, the court of appeals reversed the district court’s issuance of the preliminary injunction because the employment contract between the litigants in the dispute did not explicitly provide for injunctive relief.⁷² Relying on Supreme Court precedent, the court reasoned that “the judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the

67. *Teradyne*, 797 F.2d at 51-52.

68. *Id.* at 52. After analyzing the *Teradyne* case in conjunction with the four criteria, the First Circuit held that injunctive relief was appropriate under the facts of the case. *Id.* at 52-57.

69. Karmel, *supra* note 1, at 1382-86.

70. 726 F.2d 1286 (8th Cir. 1984). A brokerage firm “sought injunctive relief against five former employees to prevent their use of [the firm’s] records and their solicitation of [the firm’s] clients.” *Id.* at 1287. The employment contract prohibited the employees from retaining any firm information or soliciting clients, and also subjected both parties to arbitration in case of a dispute. *Id.* at 1287-88. The Eighth Circuit determined that a valid arbitration agreement existed and that the particular controversy was within the subject matter of arbitration as contemplated by the parties in their contract. *Id.* at 1288-91. The court then addressed the district court’s order granting a preliminary injunction. *Id.* at 1291.

71. *Id.* at 1291. The court of appeals justified its position by stating that “[t]he congressional intent revealed in the Arbitration Act is to facilitate quick, expeditious arbitration.” *Id.* The court of appeals indicated that if the contractual language of the agreement explicitly contemplates judicial intervention in the form of injunctive relief, then a district court may grant an injunction pending arbitration. *Id.* However, the court of appeals never cited any Supreme Court case or legislative intent justifying such district court power.

72. *Id.* at 1291.

merits of issues more appropriately left to the arbitrator.”⁷³

A similar contractual test, the “contractual term and inadequacy at law test” was discussed in *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*⁷⁴ In *Guinness-Harp*, the Second Circuit stated that the moving party must show that the arbitration agreement contemplated the maintenance of the status quo through injunctive relief.⁷⁵ The court of appeals noted that there was a status quo provision in the contract and the language evinced an intention of the parties to allow provisional relief in order to maintain the status quo.⁷⁶ The court further opined that the preliminary injunction test requirements need not be satisfied in order for a district court to grant injunctive relief.⁷⁷ Rather, the plaintiff must satisfy the “traditional equitable standards for specific performance.”⁷⁸ Although this approach is similar to the Eighth Circuit approach in *Hovey* with respect to the contractual language requirements, the *Guinness-Harp* court, in addition to taking into account equitable considerations, did not require explicit language as did the Eighth Circuit in *Hovey*.

D. The Plain Meaning Test

Several district courts have taken the position that permitting courts to grant preliminary injunctions pending arbitration is contrary to the intent of Congress and violates the plain meaning of the FAA.⁷⁹ In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson*,⁸⁰ the court held “that once a determination is made that a controversy is arbitrable under the Arbitration

73. *Id.* at 1292.

74. 613 F.2d 468 (2d Cir. 1980).

75. *Id.* at 472-73. The maintenance of the status quo did not necessarily need to be stated explicitly in the contract. *Id.* at 472-73. The case involved a distribution agreement between the two parties. *Id.* at 470. The agreement contained both an arbitration provision and a status quo clause. *Id.* at 470-71. The defendant indicated to the plaintiff its intent to terminate the distribution agreement. *Id.* at 470. The plaintiff responded by asking the court to order arbitration and to enjoin the defendant from terminating the contract until resolution of the dispute. *Id.*

76. *Id.* at 471-73.

77. *Id.* at 471.

78. *Id.*

79. *See, e.g.*, *JAB Indus., Inc. v. Silex S.P.A.*, 601 F. Supp. 971, 979 (S.D.N.Y. 1985) (generally, provisional remedies are not available in arbitration); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro*, 577 F. Supp. 616, 624 (W.D. Mo. 1983) (district courts are limited to inquiries only pertaining to “making and performance of an arbitration agreement; all other inquiries are for the arbitrator”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert*, 577 F. Supp. 406 (M.D. Fla. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson*, 575 F. Supp. 978 (N.D. Fla. 1983).

80. 574 F. Supp. 1472 (E.D. Mo. 1983).

Act, the [c]ourt cannot do anything further on the merits save compel arbitration and stay the proceedings pending arbitration.”⁸¹ District Judge Cahill first emphasized the plain meaning of section 3. Judge Cahill stated that once an arbitration agreement is found valid and a section 3 stay is ordered, the “mandatory terms” of the FAA prohibit any further judicial intervention on the merits of the case.⁸² In Judge Cahill’s view, the granting of a preliminary injunction would “deeply involve the [c]ourt in the factual issues of the case.”⁸³ The court reasoned that

[e]ven though at this stage of the proceedings granting a preliminary injunction pending arbitration would not involve inordinate delay, it would establish a precedent that would eviscerate the policy of the Arbitration Act. To provide an avenue for injunctive relief in the district courts, even though the subject matter of the case is arbitrable under the Arbitration Act, will add yet another weapon in a litigant’s arsenal of delaying tactics.⁸⁴

The court further noted that allowing preliminary injunctions pending arbitration would encourage parties to divert cases from arbitration to the courts, thereby resolving some of the merits prior to the arbitration.⁸⁵ This delay would be contrary to the congressional mandate stated in the FAA.⁸⁶

IV. ANALYSIS

The main problem with the “hollow formality” test, the preliminary injunction test, and the contractual language tests is that each, in essence, requires a judicial inquiry into the merits of the case.⁸⁷ This inquiry is not only directly contrary to the language and intent of Congress, but also contrary to Supreme Court precedent.⁸⁸ The plain meaning of the FAA, the history preceding its enactment, and the Supreme Court’s interpretation of the Act

81. *Id.* at 1478. Merrill Lynch brought suit in the district court to enjoin former employees from using the firm’s confidential client information. *Id.* at 1473.

82. *Id.* The court relied on *Prima Paint Corp.* and *Moses H. Cone Memorial Hospital* in interpreting of the statute.

83. *Id.*

84. *Id.* at 1478-79.

85. *Id.* at 1479.

86. *See supra* notes 41, 46 and accompanying text.

87. For the reasoning underlying the three tests, see *supra* notes 47-78 and accompanying text.

88. For the legislative history of the FAA and the Supreme Court precedent interpreting the FAA, see *supra* Part II.

indicate that once an arbitration provision is held valid, a court's inquiry with respect to the merits of the case has ended.⁸⁹ The merit-based inquiry is statutorily placed into the hands of the arbitrator.

A. Case-Law Analysis

The "hollow formality" test requires the court to rule on a number of issues that all relate to the merits of the case. First, whether a course of conduct would render the arbitration process a "hollow formality" necessarily requires a court to predict the results of inaction.⁹⁰ In order to predict the future, the court must weigh the relative merits of the case, and, as a result, the court would preside over a mini-trial on the various facts giving rise to the dispute.⁹¹ The whole point of arbitration is for the issues giving rise to the dispute to be decided by an arbitrator and not a court.⁹²

The Fourth Circuit assumed in *Bradley* that section 3 would not be violated by preliminary injunction orders because section 3 only precludes courts from deciding ultimate issues.⁹³ This assumption is erroneous on two grounds. First, section 3 does not distinguish between ultimate and

89. See *infra* notes 112-29 and accompanying text.

90. See *supra* notes 54-56 and accompanying text.

91. But see Williams, *supra* note 1, at 404. Williams argues that the "hollow formality test used by the Fourth Circuit is the most logical test to use It is vital to the integrity of the arbitration procedure that the arbitrator retain the power to render meaningful decisions." *Id.* However, Williams fails to address how this test is consistent with the Supreme Court's view towards courts and the arbitration process. See *supra* notes 38-46 and accompanying text. The Court has stated that judicial intervention is appropriate only with respect to the validity of the arbitration clause and nothing else. *Supra* note 45 and accompanying text.

The "hollow formality" test requires a district court to determine whether the arbitration will be rendered a hollow formality if relief is not granted. See *supra* note 49 and accompanying text. Williams seems to suggest that preventing arbitration from being rendered a hollow formality should be the overriding concern of the FAA. Williams, *supra* note 1, at 404. Moreover, that author suggests that a district court should delve into the merits of a dispute if the dispute would otherwise become a hollow formality at arbitration. *Id.* Neither the language of the statute nor the legislative history of the FAA indicates that Congress was concerned with the possibility that an arbitration would be rendered a hollow formality. However, there is substantial history demonstrating a congressional intent to reduce the judiciary's influence over valid arbitration clauses. See *supra* notes 13-21 and accompanying text. Additionally, the Supreme Court has never stated that the district courts can expand their power under the FAA to hear the merits of cases to prevent arbitration proceedings from being rendered a hollow formality. Nor does the Court imply that concern over rendering arbitration a hollow formality would justify expansion of the district courts' power beyond that which is statutorily mandated.

92. See *supra* notes 24-26 and accompanying text.

93. See *supra* notes 51-52 and accompanying text.

nonultimate issues.⁹⁴ It clearly “stays the proceedings” pending arbitration on all issues.⁹⁵ Second, if Congress had wished to limit the arbitrator’s inquiry to only ultimate issues, it could have specifically incorporated that language.⁹⁶ Congress could have simply required courts to “stay the proceedings on all ultimate issues” pending arbitration. No such language is in the FAA.

The preliminary injunction test of *Teradyne* requires even more judicial intervention than the “hollow formality” test.⁹⁷ The court indicated that preserving the status quo of the parties outweighed the goal of expeditious arbitration proceedings.⁹⁸ In fact, the main goal of Congress in the enactment of the FAA was for the enforcement of valid arbitration agreements.⁹⁹ For years prior to the enactment of the FAA, the courts had denied the validity of arbitration agreements in favor of maintaining their own jurisdiction.¹⁰⁰ However, Congress intended to weaken the territorial nature of the judiciary with respect to arbitration agreements. By granting preliminary injunctions, courts are attempting to regain control over an area of law that Congress specifically intended to limit. The courts’ only role is to determine the enforceability of arbitration provisions.¹⁰¹ If such provisions are enforceable, the judiciary must then make sure the parties expeditiously proceed to arbitration;¹⁰² all other issues should be left for the arbitrator.¹⁰³ The four

94. See *supra* note 24 (text of sections 3-4 of the FAA).

95. See *supra* note 24.

96. See *supra* note 24.

97. See *supra* notes 57-68 and accompanying text.

98. See *supra* notes 59-60 and accompanying text. The *Teradyne* court offered no support for the assumption that the maintenance of the status quo outweighed the goal of a speedy resolution to the dispute in arbitration. The court merely asserted, without proving, that maintenance of the status quo was one of the primary goals of the FAA. *Supra* note 60. In fact, the legislative history supports the assertion that Congress was more interested in the expeditious resolution of disputes than any preservation of the parties’ status quo. *Supra* note 16 and accompanying text.

99. *Supra* note 17 and accompanying text.

100. *Supra* note 19 and accompanying text.

101. *Supra* note 45 and accompanying text.

102. *Supra* notes 41, 46 and accompanying text.

103. *But see* Fiotto, *supra* note 1, at 1053. Fiotto argues that all of the district court’s powers are assumed unabridged unless a statute expressly displaces those powers. *Id.* He continues that thus the FAA does not remove any powers from the courts because

the Act is silent as to whether interim equitable remedies may be sought pending arbitration. Additionally, the statute’s effect on the courts’ equitable powers is not mentioned in the House or Senate Reports, nor discussed in hearings or debates. This complete absence of contrary evidence strongly indicates that the Act was not intended to strip the courts of their traditional equity powers.

Id.

However, this analysis ignores the express language found in section 3 of the FAA. The language, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in

requirements of the *Teradyne* court are a blatant attempt to retain some control over the arbitration process when Congress has affirmatively denied the judiciary this power.

The *Hovey* court's holding, that injunctive relief is not appropriate unless contemplated by the parties, falls short analytically as well.¹⁰⁴ The analysis of the "contractual language" test involves inquiries that are wholly superfluous. Whether the litigants in the dispute contemplated either explicitly or implicitly a provision authorizing preliminary injunctions is irrelevant.¹⁰⁵ Congress makes the law, not private, individual parties. There are many provisions in contracts agreed on by both parties that are not enforceable for a variety of reasons under the law. The court correctly reasoned that the judicial inquiry required to determine the propriety of injunctive relief would "inject the court into the merits of issues more appropriately left to the arbitrator."¹⁰⁶ The court further notes that this inquiry is inimical to the intent of Congress.¹⁰⁷ However, the court fails to establish why a contractual provision contemplating injunctive relief automatically authorizes the judiciary to grant that relief. Because Congress intended to preclude courts from analyzing the merits of the case, it is improper for two private parties in litigation to ignore that congressional directive.¹⁰⁸ The *Hovey* court's reasoning and the

such suit or proceeding 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,

9 U.S.C. § 3 (1994), expressly divests the district courts of all their powers once they find an arbitration agreement to be valid. However, Fiotto argues that the statute is silent on the issue of the courts' equity powers. Fiotto, *supra* note 1, at 404. On the contrary, the displacement of all the courts' powers under section 3 necessarily eliminates the courts' equitable powers also.

Further, although the legislative history does not directly address the issue of the courts' equitable powers, the House and Senate both affirmatively indicated a congressional intent to divest the judiciary of all its powers when dealing with arbitration falling within the FAA. *See supra* note 20 and accompanying text. The principal reason Congress enacted the FAA was the courts' consistent refusal to enforce arbitration clauses. *See supra* note 19 and accompanying text. The FAA enabled private parties to agree to arbitrate their disputes without the interference of the courts. Fiotto's argument that the legislative history of the FAA did not directly address the courts' equitable powers, and that therefore they are unaffected under the Act, is misleading. Fiotto is ignoring the purposes underlying the enactment of the FAA. *See supra* note 20 and accompanying text.

104. For a discussion of the *Hovey* court holding, *see supra* notes 69-73 and accompanying text.

105. *See supra* note 72-73 and accompanying text.

106. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1292 (8th Cir. 1984).

107. *Id.*

108. Several commentators have argued that court-granted provisional relief pending arbitration should be allowed only when it is expressly provided for in the parties' arbitration agreement. *See Butler, supra* note 1, at 147; Karmel, *supra* note 1, at 1374.

Karmel primarily relies on section 4 of the FAA in support of the proposition that the courts have the authority to issue provisional relief pending arbitration. *Id.* at 1395.

contractual language requirement are not only inconsistent but also illogical.

The approach taken by the court in *Guinness-Harp*, although not adopting the explicit contractual language requirement of *Hovey*, also contemplates that the parties must have at least contractually implied their intent to preserve the status quo through provisional relief.¹⁰⁹ This requirement fails for the

The critical phrase here is "order . . . to proceed to arbitration in accordance with the terms of the agreement." If the terms of the agreement contemplate the maintenance of the status quo pending arbitration, then § 4 gives the court authority to issue an order implementing that part of the arbitration agreement as well as authority to order the parties to arbitrate. If the court could only order the parties to arbitrate—and could not order the parties to maintain the status quo as well—then arbitration would not proceed in accordance with the terms of the agreement.

Id.

This interpretation of section 4 implies that only the courts can direct the parties to satisfy the terms of the agreement; but this overstates the purpose of section 4. Section 4 merely directs the court to "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (1994); see *supra* note 24. This language is not a congressional directive to courts to use their powers to make certain that all the terms of the arbitration clause are satisfied by the parties. The language simply directs the parties to proceed to arbitration as the parties originally agreed. Section 4 does not direct the courts to intervene and use their equitable powers to maintain the status quo of the parties pursuant to their contract. See *supra* note 24. Even if maintenance of the status quo is in the agreement, there is another alternative that does not involve the judiciary. See *infra* notes 132-44 and accompanying text. This alternative would not only fulfill the terms of the contract but also, more important, would not violate the FAA.

Karmel also argues that injunctive relief is appropriate as an implied remedy because parties are given substantive rights under the FAA. Karmel, *supra* note 1, at 1397. "Another possible basis for the power of a court to issue an injunction to maintain the status quo prior to arbitration is that the Arbitration Act implies a right of injunctive action to parties given substantive rights under the Act." *Id.* Karmel further states that a party has a right to arbitrate in accordance with the terms of the agreement; but if the agreement includes a status quo maintenance provision without means of enforcing that provision, then the courts may "imply a remedy." *Id.*

Karmel concedes that the Supreme Court has consistently held that there is no implicit private remedy absent clear congressional intent. *Id.* at 1398. Nevertheless, he states that because the law with respect to a right to an implied remedy was different when the FAA was originally passed in 1925, the courts should hold that an implied remedy exists under the FAA. *Id.* at 1399-400.

In answer to Karmel's argument, even if one assumes that an implied remedy existed in 1925 and that it should be applied to cases today, there is no indication who should enforce that right. If an implied remedy does exist, arbitration is the logical forum to enforce the remedy. See *infra* notes 132-44 and accompanying text. The parties to an arbitration have agreed that an arbitrator must determine the legal remedy to their dispute. The arbitrator could also suggest an implied remedy and not violate the FAA in the process. A court-granted implied remedy would violate the FAA because it involves judicial intervention beyond the issue of the validity of the arbitration clause. See *supra* note 103 and accompanying text.

Another commentator has advanced the "contractual language" test as the best solution to this issue. Butler, *supra* note 1, at 139. Although Butler outlines many of the problems with judicial intervention through grants of provisional relief pending arbitration, she concludes that "the Contractual Language Approach renders a viable solution for the current disharmony among the lower courts regarding this issue." *Id.* at 156.

109. See *supra* note 75 and accompanying text.

same reason as in *Hovey*.¹¹⁰ Furthermore, the “traditional equitable standards” that must be satisfied prior to issuance of a preliminary injunction require courts to weigh the equities involved in the case.¹¹¹ This intervention necessarily requires courts to decide some of the merits and relevant issues.

B. Statutory Interpretation

Congress intended to remove arbitrable disputes from the jurisdictional purview of the courts, preventing any jurisdiction the courts took with respect to the merits of an arbitrable dispute.¹¹² Courts should never order preliminary injunctions pending arbitration for a number of reasons. First, the plain language and meaning of section 3 of the FAA preclude the court from granting such relief.¹¹³ Second, the legislative history of the Act demonstrates a congressional intent to bar the judiciary from utilizing this power.¹¹⁴ Finally, Supreme Court precedent indicates that granting preliminary injunctions would be contrary to the rationale underlying section 3.¹¹⁵

Section 3 grants the judiciary only the power to “stay the trial of the action until such arbitration has been had.”¹¹⁶ The express and unambiguous intent of Congress was to enforce arbitration provisions and shift the resolution of disputes away from the courts and towards arbitrators.¹¹⁷ As a result, the stay order is the only power the court retains once an arbitration agreement is deemed enforceable. An interpretation of section 3 that retains for the courts a provisional relief option renders the text of the statute superfluous and ignores the express limitation on the courts’ power.¹¹⁸

110. See *supra* notes 104-08 and accompanying text.

111. See *supra* note 78 and accompanying text.

112. *Supra* notes 13-26 and accompanying text.

113. See *infra* notes 116-18 and accompanying text.

114. See *infra* notes 119-23 and accompanying text.

115. See *infra* notes 124-29 and accompanying text.

116. 9 U.S.C. § 3 (1994). For the text of section 3, see *supra* note 24.

117. *Supra* note 20 and accompanying text.

118. Other commentators have argued that nothing in the language of the statute expressly bars court-ordered injunctive relief pending arbitration. See, e.g., Karmel, *supra* note 1, at 1386-87. Looking at one example, Karmel concedes that the statutory language implies that “the court must not decide issues that the parties have left to arbitrators.” *Id.* at 1386. Nevertheless, through the use of linguistic gymnastics, the note concludes that the Act permits provisional relief in certain circumstances. *Id.* at 1394. Karmel, further argues that if the parties foresaw the maintenance of the status quo pending arbitration, then the court, pursuant to section 3, must issue provisional relief where appropriate. *Id.* at 1386. Karmel also states, “the mandatory term ‘shall’ can only mean that the court must stay the trial of those issues that the contract leaves for the arbitrator to determine.” *Id.* He suggests that section 3 merely orders the court to stay the trial on those issues specifically

The main goal of the FAA was to enforce valid arbitration clauses and preclude courts from usurping the arbitrators' jurisdiction.¹¹⁹ Maintaining the status quo of the litigants pending arbitration was an additional goal of the FAA.¹²⁰ However, nowhere in the statute or legislative history is there any indication that this latter goal outweighed the former goal, thereby justifying judicially ordered provisional relief.¹²¹ Determining the validity of arbitration clauses was the only duty that Congress imposed on the judiciary.¹²² The judiciary's actions, in cases such as *Bradley* and *Teradyne*, effectively write the preliminary injunction powers into the statute.¹²³

contemplated in the private party agreement. *Id.* Thus, if the parties incorporate a status quo provision, that is sufficient to grant the court the power to rule on some of the merits of the dispute and order provisional relief. *But see* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (judicial intervention is only permitted in determining "issues related to the making and performance of the agreement to arbitrate"); *see supra* note 43 and accompanying text.

This interpretation of the Act, especially section 3, legislates language into the statute that is not there. The language does not state that the court "shall stay the trial" on only certain issues. Instead, it explicitly states that the court "shall . . . stay the trial . . . until such arbitration has been had." 9 U.S.C. § 3 (1994); *see supra* note 24. After finding an arbitrable dispute, the court can only order arbitration and nothing else. Karmel provides no support or authority for an interpretation that would alter this plain language reading.

119. *Supra* notes 16-18, 24 and accompanying text.

The legislative history of the Act and the Act's construction by the Supreme Court show plainly that the preeminent purpose of the Act was to abrogate the long-standing common law doctrine that promises to arbitrate are unenforceable. . . .

Common law and equity courts had traditionally refused to enforce agreements to arbitrate, even if embodied in otherwise valid contracts. They declined to order a recalcitrant party to submit to arbitration and refused to stay court proceedings in a cause of action over a dispute that the parties had agreed to arbitrate.

Karmel, *supra* note 1, at 1390.

120. For case law that specifically details the status quo maintenance as a goal of the FAA, *see supra* Part III.

121. In fact, there is significant evidence in the legislative history supporting the proposition that the FAA was enacted because of the benefits associated with arbitration. These benefits include the speed of resolving the dispute, the confidentiality of the proceedings, and the finality of the arbitral process. *See supra* notes 16, 41, 46 and accompanying text. This history makes no mention of the status quo ante.

122. *Supra* note 45 and accompanying text.

123. *See supra* note 118. Karmel argues that no evidence in the legislative history expressly prohibits the district court from granting preliminary injunctions. Karmel, *supra* note 1, at 1390. This conclusion is a result of form rather than function. It is true that no language in the congressional history of the FAA explicitly precludes the court from granting provisional relief. *See supra* note 20 and accompanying text. However, all the goals and objectives underlying the FAA lend support for the implication that Congress did not want the judiciary to retain any powers, including their equitable ones. *See supra* note 103 and accompanying text.

The main objective of the FAA was to prevent the courts from refusing to enforce valid arbitration clauses. *Supra* note 19 and accompanying text. Thus, Congress wished to limit the judiciary's jurisdiction in the arbitration forum. Although there is no express language in the legislative history

The Supreme Court has indicated that preliminary injunction orders contravene both the motive and intent behind section 3.¹²⁴ The FAA's purpose was to promote the expeditious resolution of disputes.¹²⁵ In *Prima Paint Corp.*, the Court stated that the FAA's aim was to make the "arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts."¹²⁶ In *Moses H. Cone Memorial Hospital*, the Supreme Court held that the FAA was intended "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."¹²⁷ The Court further stated that the FAA calls "for an expeditious and summary hearing, with only restricted inquiry into factual issues."¹²⁸ A hearing held by the court to determine whether a preliminary injunction should be granted most certainly delays the arbitration process and also injects the court into the merits of a particular case.¹²⁹ This type of injunction is implicitly prohibited

denying the judiciary the power to grant preliminary injunctions, there is language limiting the courts' overall powers with respect to arbitration. *See supra* note 20, 24. One can thus conclude that the courts' equitable powers were within this limitation.

124. *See supra* notes 4-6 and accompanying text.

125. *See supra* notes 41-42, 46 and accompanying text.

126. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

127. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

128. *Id.*

129. A preliminary injunction hearing prior to arbitration would severely limit four of the major advantages associated with arbitration: (1) speedy resolution of the dispute; (2) cost effectiveness; (3) confidentiality; and (4) finality of the proceedings. *See supra* note 16 (discussing benefits of arbitration).

First, a preliminary injunction hearing in a district court would delay the arbitration proceeding. As stated earlier, parties prefer the expedited process of arbitration when compared to the lengthy litigation process. *See supra* note 16. A preliminary injunction hearing would require both parties to file pleadings with the court and schedule places on the court's docket. Depending on the complexity of the issues in the specific case, a preliminary injunction hearing could last several days and possibly even longer.

Second, arbitration is an attractive alternative to litigation because of the lower cost to clients, especially as regards to legal fees. *See supra* note 16. Allowing a mini-trial before the district court on the preliminary injunction petition as well as the full arbitration hearing before the arbitrator would essentially eliminate the cost savings of arbitration. Clients choose arbitration in order to avoid the numerous hearings and pretrial motions associated with litigation. A preliminary injunction hearing is exactly the type of judicial excess that the arbitral process seeks to avoid.

Third, as with any judicial hearing or case, a preliminary injunction hearing is public and a public record is kept. Clients often prefer arbitration because the process is confidential and the facts and substantive merits of the case can never reach the public. *See supra* note 16. Enabling a district court to hold a public injunction hearing, which necessarily requires inquiry into the facts and merits of a case, would be blatantly inconsistent with the confidentiality that the private parties seek so often to obtain in arbitration. Under the FAA, the parties to a valid arbitration provision are entitled to a private arbitration and the district court does not possess the power to deny the parties that right.

Finally, litigation often lasts for several years depending on the number of appeals and remands. As a result, parties find refuge in the finality of the arbitral process. *See supra* note 16. Once an

by the statute and precluded by Supreme Court precedent interpreting the FAA.

By using the equitable power of granting preliminary injunctions, courts are attempting to resurrect their power in the arbitration process. Congress specifically enacted the FAA in order to eliminate the courts' role in the arbitration process once an enforceable agreement was found. The recent trend among the courts to conduct mini-trials on the merits of the case pending arbitration is an attempt to retain some jurisdiction in the resolution of disputes clearly left to the arbitration process.

V. PROPOSAL

Congressional action would be the most effective means of returning authority to the arbitration process under the FAA and precluding judicial intervention in arbitrable disputes. Arbitrators, not judges, should determine the appropriateness and necessary scope of injunctive relief under the circumstances of each case.¹³⁰ Therefore, Congress should amend the FAA both to explicitly bar courts from exercising this type of equitable power pending arbitration and to allow arbitrators to do so instead.¹³¹

Those advocating court retention of equitable powers pending arbitration argue that the maintenance of the status quo is the primary reason behind their position.¹³² Permitting arbitrators to grant provisional relief would not only

arbitrator enters a decision, it is usually final and not subject to appellate review (except in the rarest of circumstances). Private parties who agree to arbitrate intend for only one arbitrator or panel of arbitrators to decide all the substantive merits of their dispute. Permitting the district court to rule on some of the merits of the case by way of a preliminary injunction hearing introduces yet another adjudicator. Further, a preliminary injunction order by the district court is reviewable by the appellate court. As stated earlier, parties seek to avoid appellate review by choosing arbitration so they are not tied up in litigation for years. Appellate review of preliminary injunctions would largely dissipate that advantage.

130. See *infra* notes 132-44 and accompanying text.

131. See *infra* notes 145-48 and accompanying text.

132. Those advocating this position have correctly diagnosed the problem, but are offering the incorrect remedy to cure that problem. For example, suppose that Company X and Company Y enter into a three-year distributorship contract where X promises to supply bottles to Y. Company Y is a manufacturer of soft drinks and requires bottles in order to operate its business and sell its product. In the distributorship contract, there is an arbitration clause that states the parties must enter into arbitration over any dispute pertaining to this contract and that the parties shall maintain a status quo relationship until their dispute is resolved by the arbitrator. During the second year of the contract, X decides to breach the contract with Y because of Y's environmental policies and stops delivering bottles to Y. X claims that, under the current environmental laws, it could be jointly liable with Y for Y's violations and that fact alone justifies the breach of contract. Company Y files suit. The district court, pursuant to section 3 of the FAA, finds that a valid arbitration provision exists and orders

comport with this objective but also satisfy the aim of the FAA.¹³³ An arbitrator could determine whether an injunction is necessary to maintain the status quo and then, if needed, issue one to protect the parties.¹³⁴ This approach would reinforce three main advantages of arbitration under the FAA. First, at all levels, the merits of the case would be decided by the arbitrator with no judicial interference.¹³⁵ Second, a preliminary injunction hearing could be held expeditiously under this approach.¹³⁶ Arbitrator selection normally does not take very long, and a preliminary hearing prior to the arbitration could be held specifically to address one party's demand for an injunction against the other party.¹³⁷ Finally, allowing only arbitrators to rule

arbitration. Besides filing suit, *Y* also seeks a preliminary injunction in order to prevent *X* from not supplying the bottles. *Y* contends that if *X* continues not to furnish the bottles to *Y*, *Y*'s business will be so severely harmed that no arbitration award will save it.

This is the point at which the courts have intervened and violated the FAA. The advocates of court-ordered provisional relief have stated that protection of *Y* pending arbitration justifies judicially granted equitable relief for *Y*. These advocates have the correct diagnosis, but the wrong cure.

Certainly, the maintenance of the status quo should be a goal, so that one party does not suffer irreparable harm. However, the FAA should not be violated in order to attain that goal. The status quo could be maintained simply by the court ordering a preliminary arbitration hearing in order to resolve Company *Y*'s preliminary injunction request.

If the arbitrator finds that a preliminary injunction against Company *X* is justified, then the court would have the power to enforce such a finding under the FAA. This method does not involve the court in the merits of the case, which are more appropriately left to the arbitrator.

133. For the main goal of the FAA, see *supra* notes 16-18 and accompanying text.

134. The arbitrator would use the same analysis as the court to determine whether a preliminary injunction would be appropriate. For the elements of a preliminary injunction analysis, see *supra* notes 27-30 and accompanying text. See *supra* text accompanying note 67. For example, in the hypothetical set out in note 132, *supra*, the arbitrator would have to find: (1) that Company *Y* will suffer irreparable injury if the injunction against Company *X* is not granted; (2) that Company *Y*'s injury outweighs any harm that will be inflicted on Company *X* if the injunction is granted; (3) that Company *Y* has established a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of provisional relief to Company *Y*. If all these elements are proved to the satisfaction of the arbitrator, then a preliminary injunction order could be issued by the arbitrator and enforced by the district court.

Professor Neil Bernstein, an expert in the field of arbitration and one who regularly presides as an arbitrator, stated that he foresaw no problems with arbitrators granting provisional relief pending arbitration. He further stated that it would be logical for the arbitrator to grant preliminary injunctions because, ultimately, all other issues would be decided by the arbitrator. Interview with Neil Bernstein, Professor of Law, Washington University School of Law, St. Louis, Mo. (Jan. 15, 1996) [hereinafter Bernstein Interview].

135. As noted earlier, *supra* note 30, the third step in a preliminary injunction determination requires plaintiff to demonstrate a likelihood of success on the merits. The Supreme Court has indicated that any merit-based inquiry must be left to the arbitrator. See *supra* notes 73, 81-82 and accompanying text. Enabling arbitrators to grant provisional relief is consistent with this interpretation.

136. Speedy resolution of disputes is one of the main advantages of arbitration. See *supra* note 25.

137. Normally, arbitrator selection can be completed within four to six weeks. Bernstein Interview, *supra* note 134.

on preliminary injunction motions would preserve the confidentiality of the proceedings.¹³⁸ As noted earlier, the private nature of arbitration is one of the main reasons parties agree to submit their disputes to arbitration.¹³⁹

This approach is also practical because arbitrators, in past cases, have ordered equitable relief historically reserved for the courts.¹⁴⁰ The arbitrator decides whether the preliminary injunction sought is appropriate, and the court then enforces the arbitrator's order. This solution is consistent with the relationship between court and arbitrator in cases where the arbitrator awards damages to one party. If the losing party refuses to pay the damages, the court steps in and enforces the arbitration award. Similarly, if an arbitrator were to grant an injunction enjoining certain conduct by one party, the court would prevent any deviation from that order. The court's role as an enforcer, rather than an adjudicator, is much more consistent with the role Congress envisioned for the judiciary under the FAA.

One way of implementing this approach would be for the courts simply to defer to the arbitrators on the issue of whether a preliminary injunction should be granted in a particular controversy. However, the judiciary's historic aversion to arbitration makes such deference unlikely in practice.¹⁴¹ The best solution, another which would legally require courts to allow arbitrators to rule on the merits of a preliminary injunction, would be to compel them to do so under the Act. Congress should pass an amendment to the FAA explicitly enabling arbitrators to issue preliminary injunctions.¹⁴² The provision should also preclude the courts from exercising that same power in relation to

138. The preliminary injunction hearing before the arbitrator would be confidential and outside the public record similar to all other arbitration proceedings. For example, in the hypothetical set out in note 132, *supra*, this would enable Company Y's environmental policies to be kept private and not subject to public scrutiny. If Company X's claim that Y's policies violate the law is meritless, Y would suffer no misplaced public backlash from X's unfounded claim. Companies and businesses often have to deal with public anger from false statements made by third parties. The confidentiality of a preliminary injunction hearing before an arbitrator would protect businesses from such falsehoods reaching the public.

139. *Supra* note 16.

140. *See, e.g., Falls Stamping & Welding Co. v. International Union, United Auto., Aircraft & Agric. Implement Workers*, 575 F.2d 1191 (6th Cir. 1978) (holding that arbitrator had authority to order reinstatement of employee).

141. *See supra* notes 19-20 and accompanying text.

142. A less attractive alternative solution would be a clearly written amendment to the FAA strictly barring judicially ordered provisional relief without any mention of the arbitrators' duties. This approach would not address the issue of the maintenance of the status quo. However, *status quo ante* was not an expressed concern of Congress in 1925 in enacting the FAA and is not an issue that has to be addressed in an analysis of the FAA.

pending arbitration.¹⁴³ The amendment should be simple and unambiguous and should read as follows:

If the dispute or controversy in an arbitrable case requires provisional relief pending arbitration, the arbitrator, and not the judiciary, may hold a preliminary hearing in order to rule on the merits of the relief being sought. Upon consideration of the merits, if the arbitrator rules in favor of provisional relief for one party, the judiciary shall enforce such order.¹⁴⁴

This amendment would allow the parties to resolve all aspects of their dispute through the arbitral process, as they initially contemplated when they entered into the agreement to arbitrate.

In 1925, Congress wished to end the courts' mistreatment of arbitration clauses in contracts.¹⁴⁵ Although courts attempted to deny jurisdiction to the arbitration forum for years, Congress finally commanded the judiciary to legally recognize the arbitral process.¹⁴⁶ Now, seventy years later, the judiciary is once again attempting to usurp power away from the arbitral process and back into the courts' jurisdiction. As noted earlier, determining whether to grant preliminary injunctions necessarily requires inquiry into the merits of the dispute.¹⁴⁷ The Supreme Court, relying on section 3 of the FAA, has stated that courts should not make any merit-based inquiry into an arbitrable dispute.¹⁴⁸

Although the "stay the trial" language in section 3 is a sufficiently unambiguous definition of the judiciary's role in the arbitration process, a clear and concise amendment would unequivocally end courts' misinterpretation of that section and prevent court-ordered preliminary injunctions.

CONCLUSION

This Note's proposal would prevent the judiciary from interfering in the

143. A plain reading of the current language of section 3 precludes judicial intervention. However, the courts have worked around the language. Therefore, even more explicit language is required so that the courts have no opportunity to misinterpret the language.

144. The amendment could be placed between sections 3 and 4 and named section 3a.

145. *Supra* notes 16-20 and accompanying text.

146. *Supra* note 20.

147. *Supra* notes 90-111 and accompanying text.

148. *Supra* notes 45, 73 and accompanying text.

merits of an arbitrable dispute, while allowing parties to seek any necessary provisional relief from an arbitrator. Erroneous holdings like the one in *Performance Unlimited Inc.*, would no longer occur if this Note's proposal were implemented.¹⁴⁹ For example, if the arbitrator had ruled on the appropriateness of a preliminary injunction in *Performance Unlimited Inc.*, there would have been no judicial intervention at any level. The court would only have enforced, not decided, any provisional relief the arbitrator might have ordered.

At some point, courts must accept the inferior role to which Congress has relegated the judiciary in this area. Allowing courts to issue preliminary injunctions pending arbitration defeats the purpose of the Act and renders part of its language superfluous. Congress should resolve this issue and deny the courts power to grant provisional remedies pending alternative dispute resolution as a matter of deference to the legislature and its power to make laws.

With respect to the courts' attitude toward arbitration and the FAA, the old adage, "the more things change, the more things stay the same" holds true. Courts seem unable to accept the fact that an alternative arena is available for dispute resolution. However, it is time the FAA is given the recognition it deserves.

Caz Hashemi

149. See *supra* notes 7-10 and accompanying text.

