The Propriety of Judicially Granted Provisional Relief in Pending Arbitration Cases

I. INTRODUCTION

One of the greatest benefits of arbitration is the amount of time saved in resolving disputes.[1] While the Federal Arbitration Act (FAA)[2] states that the enforceability of arbitration agreements is its primary goal,[3] it also promotes the policy favoring speedy and efficient dispute resolution. Ironically, however, one of the potential negatives of dispute resolution through arbitration is the possibility that the arbitration may not proceed quickly enough for a party to protect property interests. For this reason, the availability of preliminary relief, which takes the form of prehearing attachment of assets, and the preliminary injunction, is especially important.

With regard to the availability of such provisional relief, a distinction must be drawn between judicial prehearing relief in aid of arbitration and arbitrator-awarded prehearing relief. Although the authority of arbitrators to order interim relief in arbitration cases has rarely been challenged, the passage of the FAA has raised the question of the judiciary's authority to order such relief.

Judicially or arbitrator-imposed provisional remedies are not specifically mentioned in the FAA.[4] For this reason, as well as the fact that resolution of the dispute is pending in another forum, courts are especially reluctant to intervene.[5]

The FAA provides that if a suit is brought upon an issue subject to arbitration under the parties' agreement, the court "shall on application of one of the parties, stay the trial of the action" until the arbitration is concluded.[6] Thus, the FAA mandates the judicial enforcement of arbitration agreements. Because prior to the enactment of the FAA such

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1. *See* Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J., Feb. 1985, 78, 80.

2. 9 U.S.C. §§ 1-14 (1982).

3. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985). In *Byrd*, the Court found that the congressional intent of the Federal Arbitration Act required federal courts to enforce agreements to arbitrate pendent state law arbitrable claims regardless of the fact that they are "intertwined" with a federal claim that is not subject to arbitration. *Id.*

4. 9 U.S.C. §§ 1-14 (1982).

5. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286 (8th Cir. 1984). Granting preliminary injunctive relief in an arbitrable dispute runs counter to the congressional policy that the arbitration forum be speedy and not subject to delay or interference by the courts. *Id.* at 1292.

6. 9 U.S.C. § 3 (1982).

agreements were unenforceable at common law,[7] the question of the suitability of court-ordered provisional remedies is a contemporary subject of dispute among the lower courts.[8]

An example of such conflict is evidenced in *Roso-Lino Bev. Distrib. v. Coca-Cola Bottling Co.*[9] Coca-Cola notified Roso-Lino that it intended to terminate Roso-Lino's Coca-Cola distributorship.[10] Roso-Lino brought suit claiming wrongful termination and sought a preliminary injunction prohibiting Coca-Cola from terminating the distributorship.[11] Coca-Cola countered with a cross-motion for an order directing the parties to arbitration.[12] The district court directed the parties to arbitration on the wrongful termination claim and denied Roso-Lino's motion for a preliminary injunction.[13]

On appeal, the Second Circuit reversed the denial of the preliminary injunction because it appeared from the record that the district court believed that its decision to order arbitration eliminated its power to grant an interim remedy.[14] While courts differ on this issue, the Second Circuit held that an order to arbitrate does not relieve the court of its obligation to consider the merits of the requested provisional relief.[15]

The United States Supreme Court has not considered the appropriateness of judicially imposed provisional relief in pending arbitration cases. Consequently, state and federal circuit courts are divided on whether the FAA confers jurisdiction upon courts to issue preliminary relief in such instances.[16]

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7. *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-122 (1924) (finding New York's arbitration act constitutional and pronouncing the history of the common law with regard to the enforceability of arbitration agreements).

8. *See generally* David L. Zicherman, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667 (1989).

9. 749 F.2d 124 (2d Cir. 1984).

10. *Id.* at 125.

11. *Id.*

12. *Id.*

13. *Id.*

14. Roso-Lino Bev. Distrib. v. Coca-Cola Bottling Co., 749 F.2d 124, 124 (2d Cir. 1984).

15. *Id.*

16. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1287 (8th Cir. 1984) (standing for the proposition that injunctive relief is never available); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986) (holding that a court may order preliminary relief whenever the preliminary tests for such relief are satisfied -- usually involving some consideration of the merits of the case); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1053-54 (4th Cir. 1985) (stating that the issuance of

Some courts have required the party seeking provisional relief to demonstrate a significant probability of success on the merits in an arbitration setting before the court will issue interim remedies.[17] Other courts have held that the language and the purposes of the FAA prevent judicial issuance of such preliminary remedies in all cases.[18] Still other courts conclude that judicial interim relief is proper only when the parties have specifically contemplated this type of judicial intercession.[19]

This Note proposes several arguments in favor of the adoption of a standard approach to court issuances of preliminary relief which would turn on the contractual language of the arbitration agreement. Section II of this Note briefly sets forth the different approaches taken by the lower courts in interpreting the congressional intent of the FAA with regard to the judicial role in providing provisional relief. Section III sets out the three classifications of state and federal court treatment of the propriety of judicially-imposed provisional relief in arbitration disputes. Section IV contends that such judicial intervention is proper only when it was contemplated and explicitly provided for in the contract by the affected parties. Section V supports this theory by examining the pure contractual nature of arbitration agreements and the alternatives available to the parties under this view. Section VI argues that judicial interference in the arbitration process, through court-granted preliminary relief, jeopardizes the independence of the arbitral process and frustrates the intent of parties entering into arbitration agreements. Therefore, court-granted preliminary relief should be allowed only when it is provided for in the parties' agreement.

II. THE BASIS FOR JUDICIAL INCONSISTENCY

Provisional relief is a short-term remedy available to the plaintiff

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an injunction by the judiciary is appropriate only when the enjoined conduct would render the arbitration process a "hollow formality"); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 608 (Tex. Ct. App. 1984) (holding that the court must look to the arbitration agreement itself for authority to issue preliminary relief).

17. *See, e.g.*, Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986); PMS Distrib. Co. v. Huber & Suhner, A.G., 854 F.2d 355 (9th Cir. 1988); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983).

18. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson, 574 F. Supp. 1472 (E.D. Mo. 1983).

19. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286 (8th Cir. 1984); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d. 1163 (8th Cir. 1984); Guinness-Harp Corp. v. Jos. Schlitz Brewing Co., 613 F.2d 468 (2d Cir. 1980).

in order to maintain the status quo while the action is pending.[20] The American Arbitration Association (AAA) rules explicitly provide arbitrators with the authority to award any remedy that they deem just and, specifically, to award preliminary relief.[21]

Today, it is clearly recognized that an arbitrator has the power to award provisional remedies.[22] Historically, however, arbitrators did not have control over cases until the time of the hearing. Thus, many states enacted statutes that provided for judicial prehearing relief in aid of the arbitration process.[23] As a result, dual control over the ordering of provisional remedies exists in the context of arbitral disputes today.

Three conditions have laid the foundation for the unsettled state of the law regarding court-ordered provisional relief in arbitrable disputes: 1) the legislative confusion over judicial jurisdictional limits in arbitration proceedings, 2) the traditional jealousy of the courts for maintenance of their jurisdiction,[24] and 3) the silence of the FAA on this issue.[25] The current division among the circuits will persist until the issue is addressed by the Supreme Court.

III. CLASSIFICATIONS OF JUDICIAL TREATMENT

"Courts have taken widely divergent positions on when a district court should issue an injunction [or attach a defendant's assets] to maintain the status quo pending arbitration pursuant to the [FAA]."[26] There are three general classifications into which the courts' treatment of this issue may be grouped: 1) the Equitable Analysis Approach, 2) the Availability of Redress Approach, and 3) the Contractual Language Approach.

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20. BLACK'S LAW DICTIONARY 1224 (6th ed. 1990).

21. AM. ARB. ASS'N, SEC. ARB. R. 43 and 34 (1989).

22. Under the Uniform Code of Arbitration, a party may seek a prehearing conference to seek a preliminary injunction. UNIFORM CODE OF ARB. § 20 (d)-(e), *reprinted in* FOURTH REP. SEC. INDUS. CONF. ON ARB., Exhibit C (Nov. 1984). Also, under the AAA Securities Arbitration Rules the arbitrators are expressly empowered to "issue such orders for interim relief as may be deemed necessary to safeguard the property which is the subject matter of the arbitration" indicates that the arbitrators may use the prehearing conference for the purpose of ordering preliminary relief. AM. ARB. ASS'N, SEC. ARB. R. 10 (1989).

23. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 7502 (c) (McKinney 1993 Supp.) (allowing court-ordered prehearing attachment and preliminary injunctions in aid of arbitration).

24. *See* Mitchell v. Dougherty, 90 F. 639 (3d Cir. 1898).

25. 9 U.S.C. §§ 1-14 (1982).

26. Philip E. Karmel, Comment, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective From Contract Law*, 54 U. CHI. L. REV. 1373, 1375 (1987).

A. Equitable Analysis Approach

The Equitable Analysis Approach involves the application of each court's standard test used to determine whether interim relief is equitable in cases pending in a judicial forum. While the specific formulation of the test differs among the jurisdictions, one fundamental attribute is shared by all courts following this approach. Each jurisdiction requires the court to weigh the merits of the case itself in order to appraise the plaintiff's likelihood of success before interim relief will be granted.

For example, the First Circuit held that in order to warrant preliminary injunctive relief, a court must find: 1) that the party requesting such relief will suffer irreparable harm if it is not granted, 2) that this injury outweighs any harm which granting injunctive relief would inflict on the other party, 3) that the proponent of the preliminary remedy is likely to succeed on the merits, and 4) that public interests will not be adversely affected by such a grant.[27] The First, Second, Seventh, and Ninth Circuits all support the view that a court should grant provisional relief whenever, pending arbitration, such a remedy is shown to be necessary to preserve the status quo via the traditional equity test.[28]

Proponents of the Equitable Analysis Approach contend that judicial issuance of preliminary relief is not precluded by the FAA.[29] They argue that because the FAA was passed with a primary goal of enforcement of arbitration agreements,[30] courts may issue provisional

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27. Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981). However, the district court will be reversed if the reviewing court finds that it erred in applying the legal standard to the plaintiff's likely success on the merits or if it erred in applying the law to the facts of the case. *Id.* at 1009.

28. *See, e.g.*, Roso-Lino Bev. Distrib. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984) (holding that the fact that a dispute was to be settled through arbitration did not strip the court of its power to grant injunctive relief and that the proper course of action was for the court to determine whether the dispute was a proper case for an injunction); PMS Distrib. Co. v. Huber & Suhner, A.G., 854 F.2d 355 (9th Cir. 1988) (holding that the fact that a dispute is arbitrable under Section Four of the FAA does not strip the court of the authority to order a writ of possession); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986) (holding that a preliminary remedy can be granted by a court when it is necessary to protect the damages remedy when the four relevant criterion are met); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983) (holding that the right to arbitrate and seek injunctive relief were not incompatible and that the plaintiff was entitled to injunctive relief having satisfied the requisite tests for a preliminary injunction).

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

30. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985). The Supreme Court held that the "[p]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements [to arbitrate] into which parties had entered. . . ." *Id.*

relief if such issuance augments the enforceability of arbitration agreements.[31]

While it is clear that the primary goal of the FAA is to assure the execution of arbitration agreements, some consideration must be given to the purpose behind the decision to promote the arbitration method of dispute resolution in the first place. As the Supreme Court stated, "Congress' clear intent . . . [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible,"[32] and the FAA requires an "expeditious . . . hearing, with only restricted inquiry into factual issues."[33] A court's review of the merits of a case appears to delay arbitration, thereby frustrating the congressional mandate for expeditious presentation of the substance of the controversy to the arbitrators.[34] Moreover, judicial involvement in the rest of the arbitration process is severely limited, and necessarily so, in order that the objectives bargained for by the parties may be realized.[35]

There are numerous reasons for a party to enter into an arbitration agreement. For example, the parties may want a person with expertise and familiarity with the issues involved to hear the dispute. Arbitration clauses are popular in contracts because parties usually have the option to select the arbitrators who will decide their cases.[36] On the other hand, the parties may bargain for the accelerated and less expensive process that arbitration generally affords.[37] Additionally, arbitration can offer the anonymity that a court setting cannot.[38] However, despite a party's possible myriad of motives for entering into an arbitration agreement, judicial involvement, even at the preliminary stages, could undermine a party's goals in consenting to the agreement.

Another contention that counters those offered by the proponents of the Equitable Analysis Approach involves the courts' conflicting

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

32. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983).

33. *Id.*

34. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson, 574 F. Supp. 1472, 1478-79 (E.D. Mo. 1983).

35. *See, e.g.*, Revere Copper & Brass, Inc. v. Overseas Private Inv., 628 F.2d 81, 83 (D.C. Cir. 1980) (denying judicial review of an arbitration decision).

36. *Trade Policy: AAA President Says Use of Arbitration Increasing to Resolve Trade Disputes*, [3 Current Reports] Int'l Trade Rep. (BNA) 1204 (October 1, 1986).

37. *Id.* at 1204.

38. *Id.*

interpretations of the congressional intent of the FAA.[39] The Equitable Analysis Approach is based on the assumption that the courts are authorized to treat the issue of provisional relief in pending arbitration cases as within the jurisdiction of the judiciary. However, the uncertainty existing among the courts regarding the accuracy of this presumption casts serious doubt on the foundation of this approach.

The general reluctance of the courts to involve themselves in other aspects of ongoing arbitrations suggests another ground for questioning the soundness of the Equitable Analysis Approach.[40] Because the courts are disinclined to intervene in other forums, it is not apparent that the occasion to impose interim remedies in cases pending arbitration would be ardently exercised by the judicial system as a whole.

Advocates of this approach argue that the preliminary court findings regarding the enjoining party's prospect of prevailing in arbitration are made under the assumption that the findings are not binding on the subsequent proceeding on the merits.[41] However, it would be unreasonable to ignore the possibility that such a determination may influence the outcome of the arbitration proceedings and impede the arbitrator's independent determination of the merits.[42] The danger of interference "with the arbitrator's independent determination of the issues"[43] created by merely requiring that the traditional equitable criterion be satisfied further supports the contention that the Equitable Analysis Approach is an inappropriate standard.

B. Availability of Redress Approach

The Availability of Redress Approach is a more liberal method for finding the appropriateness of judicial issuance of provisional remedies. This approach was defined by the Fourth Circuit in *Merrill*

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39. *See, e.g.*, Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241, 1242 (S.D. Fla. 1988) ("Nothing in the [FAA] contemplates interference by the court in an ongoing arbitration proceeding. . . . Such action by the court would vitiate the purpose of the [FAA]. . . . "); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) (noting that courts should enforce the agreement of the parties rather than substitute their own judgments concerning the most expeditious manner of resolution of the dispute in order to realize the legislative intent of the FAA).

40. *See, e.g.*, Suarez-Valdez v. Shearson Lehman/Am. Express, Inc., 858 F.2d 648 (11th Cir. 1988) (directing the parties to proceed under the rules of the forum agreed to and not the court rules).

41. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

42. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro, 577 F. Supp. 616, 624 (W.D. Mo. 1983).

43. *Id.*

Lynch, Pierce, Fenner & Smith, Inc. v. Bradley.[44] The Fourth Circuit rejected the Equitable Analysis Approach due to its focus on the examination of the merits of the case, and instead employed the "hollow formality" test.[45] The "hollow formality" test focuses on the ability to return the parties to the status quo, thereby eliminating many of the difficulties associated with focusing on an examination of the case on its merits.[46] The "hollow formality" test, therefore, involves the determination of whether the proponent of the preliminary relief could obtain redress through arbitration without the aid of a court-ordered interim remedy.[47] Accordingly, judicial interim relief is appropriate only when "the arbitral award when rendered could not return the parties substantially to the *status quo ante.*"[48]

The court in *Bradley* stated that nothing in Section Three of the FAA denied the equitable authority of the courts to enter preliminary injunctions pending arbitration, and that this interpretation furthers the policies of the FAA by ensuring that the process of resolving the dispute would be meaningful.[49] The court also suggested that such judicially granted provisional relief actually advances rather than frustrates the congressional intent of the FAA.[50]

While this approach purports to further the goals of Section Three of the FAA, it fails to consider the intent of the contracting parties. Because it is clear that under modern legislation arbitrators have the authority to make interlocutory orders relevant to the arbitration prior to the hearing,[51] the Fourth Circuit approach, like the Equitable Analysis Approach, denies the parties the power to contract for such judicial disassociation.[52] For this reason, the Availability of Redress Approach to this issue actually frustrates the freedom of the parties to enter into an arbitration agreement and fails to adequately address the policy concerns of the FAA.

Although both the Availability of Redress Approach and the

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44. 756 F.2d 1048 (4th Cir. 1985).

45. A preliminary measure may be granted by the court only if the measure sought "would render that process a 'hollow formality.'" *Id.* at 1053.

46. *See supra* notes 32, 34, 41-43 and accompanying text.

47. *Bradley*, 756 F.2d at 1053.

48. Lever Bros. Co. v. International Chem. Workers, Local 217, 554 F.2d 115, 123 (4th Cir. 1976).

49. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985).

50. *Id.* at 1053-54.

51. *See supra* note 22.

52. *See supra* notes 36-38 and accompanying text.

Equitable Analysis Approach have been employed by a number of circuits, the foregoing criticisms of these approaches suggest that their utility as a universal method for determining the appropriateness of judicially-granted provisional relief is limited.

C. The Contractual Language Approach

An amalgamation of the Eighth and Second Circuits' tests for the issuance of a court-ordered preliminary remedy in the context of an arbitration dispute is both the most limited and the most suitable of the three approaches to the role of the courts in the arbitration process. The Contractual Language Approach involves the examination of the language of the contract containing the arbitration clause.[53]

In *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*,[54] the Court of Appeals for the Eighth Circuit decided that a preliminary injunction was inappropriate in an arbitrable case where the parties did not specifically provide for it in their agreement. The Second Circuit, in *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*[55] delineated the *Hovey* Contractual Language Approach further still by utilizing the traditional equitable requirements for interim relief. The court held that an injunction issued by the lower court to enforce the status quo provision of the parties' agreement during arbitration was available in this case.[56] Additionally, the court concluded that the traditional requirements of a preliminary injunction did not have to be met, but rather the movant was entitled to injunctive relief to enforce its interpretation of the status quo provision of the agreement.[57] This showing requires the satisfaction of the traditional equitable standards for specific performance of the contract.[58]

Thus, under the *Hovey* Court's approach, it must be clear, by the language of the agreement, that the parties contemplated the maintenance of the status quo.[59] Once this determination has been made, the court must then consider whether the party requesting the relief is entitled to specific performance of the status quo provision of the contract under

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53. *See, e.g.*, RGI, Inc. v. Tucker & Assoc., Inc., 858 F.2d 227 (8th Cir. 1988) (noting that the court may grant a preliminary injunction only if the language of the contract requires the parties to maintain the status quo judicially pending the resolution of their disputes).

54. 726 F.2d 1286 (8th Cir. 1984).

55. 613 F.2d 468 (2d Cir. 1980).

56. *Id.* at 473.

57. *Id.* at 472.

58. *Id.* at 471.

59. *Id.*

conventional equity principles.[60] This approach eliminates the judicial evaluation of the ultimate merits of the case while perpetuating the contractual intent of the parties.

Clearly, the concerns addressed in the discussion of the Equitable Analysis and the Availability of Redress Approaches are disposed of when the Contractual Language Analysis is employed. The court no longer considers the merits of the fundamental controversy,[61] and furthers, rather than frustrates, the intent of the parties.

IV. ANALYSIS OF THE CONTRACTUAL LANGUAGE APPROACH

The necessity of judicial intervention for the purpose of granting preliminary relief is minimal in most cases because there is legislative recognition of an arbitrator's authority to provide provisional remedies for the parties to an arbitration agreement.[62] Absent legal constraints, an arbitrator's crafting of equitable relief is limited only by the arbitration agreement itself.[63] Thus, the contracting parties have the opportunity to choose the forum in which their primary and preliminary disputes will be settled.

Advocates of limiting judicial issuance of interim remedies contend that preliminary relief is often essential prior to the time when the arbitrators have been appointed.[64] This opposition may be countered with references to legislation enacted to govern arbitration proceedings. Pursuant to the Uniform Code of Arbitration, a party seeking a preliminary remedy may request a prehearing conference at any time prior to the arbitration hearing.[65] Furthermore, under the Uniform Code of Arbitration, the National Association of Securities Dealers Code of

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60. Karmel, *supra* note 26, at 1385.

61. The proponent of the provisional remedy need only show that the contractual language provides for the maintenance of the status quo rather than his or her possible success on the merits since he or she is seeking a final rather than a preliminary remedy. Karmel, *supra* note 26, at 1384.

62. *See, e.g., supra* note 22; *see also* UNIFORM CODE OF ARB., § 20(d)(1), *reprinted in* FOURTH REP. SEC. INDUS. CONF. ON ARB., Exhibit C, (Nov. 1984); NASD CODE OF ARB. PROC. § 32(d)(1); NYSE ARB. R. 619(d)(1) (entitling a party to request a decision of a single arbitrator on the issue of provisional remedies if the preliminary dispute cannot be decided in the required prehearing conference).

63. *See, e.g.*, Local 345 Retail Store Employees Union v. Heinrich Motors, Inc., 473 N.E.2d 247 (Ct. App. N.Y. 1984).

64. 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, 1059 (1986).

65. *See supra* note 22.

Arbitration Procedure, and the New York Stock Exchange Arbitration Rules, a party may request a decision of a single arbitrator on the issue of provisional remedies when the issue cannot be remedied at the prehearing conference.[66] Consequently, a party in a pending arbitration case will not be deprived of interim remedies merely because the arbitrators who will hear the case have not yet been appointed.

Opponents also offer the arbitrators' lack of jurisdiction to enforce compliance with the ordered interim remedy as support for court-issued preliminary relief in arbitral cases.[67] Notwithstanding this shortcoming, an arbitration order is given full effect in the courts; thus the party seeking relief is assured enforcement indirectly through court intervention. The American Arbitration Association (AAA) rules also expressly provide for the issuance of preliminary awards by the tribunal in order to safeguard the property that is the subject matter of the dispute.[68]

Further proof of the soundness of the Contractual Language Analysis Approach is evidenced in its employment in international arbitration disputes. Under the International Centre for Settlement of Investment Disputes (ICSID) rules, judicially-granted interim relief is improper unless the parties have specifically provided for it in their agreement.[69]

The Third Circuit followed this development within the context of the international arbitration arena. It has held that the ICSID rules preempt the FAA's neutral approach to judicially-granted interim relief "so that it no longer gives courts the authority to grant pre-judgment attachments or temporary injunctions."[70] While there are opinions to the contrary,[71] the majority of the international arbitration legislation and case law represent a presumption favoring the Contractual Language

66. *See supra* note 62.

67. Fiotto, *supra* note 64, at 1060.

68. Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1708 & n.150 (1983); *see* AM. ARB. ASS'N, COM. ARB. R. 34 (eff. April 1, 1992).

69. Zicherman, *supra* note 8, at 684; *see* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 25 1965, 4 I.L.M. 524 (1965).

70. *Id.* at 688; *see also* McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032 (3d Cir. 1974); Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239 (Ct. App. N.Y. 1982).

71. *See* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977); Andros Compania Maritima, S.A. v. Andre & Cie., S.A., 430 F. Supp. 88 (S.D.N.Y. 1977).

Approach.[72]

Because 1) timely arbitrator-provided provisional relief is generally available to the parties, 2) arbitrators' orders are given full effect in the courts, and 3) legislation in the international arbitration area favors judicial abstinence, the Contractual Language Approach renders a viable solution for the current disharmony among the lower courts regarding this issue.

V. ARBITRATION AGREEMENTS IN THE CONTEXT OF CONTRACT LAW

The FAA was enacted to reverse the traditional judicial hostility toward arbitration contracts and to put these agreements on the "same footing" as other contracts.[73] Section Two of the FAA is the guiding provision on the issue of the contractual nature of arbitration agreements. Section Two provides:

> 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 in equity for the revocation of any contract.[74]

Section Two of the FAA makes clear the congressional intent to treat agreements to arbitrate as pure contracts which shall be enforced in the same manner as any other contract. For this reason, this Note briefly turns to the area of contract law, and, more specifically, to equitable relief, in order to evaluate the various courts' treatment of provisional relief in arbitrable disputes.

The fundamental rule in a court's interpretation of a contract is

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72. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott No. 83-2052 (D. Kan. 1983); Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 575 F. Supp. 904 (N.D. Tex. 1983); Janmort Leasing, Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282 (E.D.N.Y. 1979).

73. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

74. 9 U.S.C. § 2 (1982).

that the intention of the parties is to be ascertained[75] and effect is to be given to that intention if it can be done without usurping other legal principles.[76]

When a party to an arbitration agreement that provides for the settlement of all disputes arising under the contract petitions the court for a preliminary remedy, the petitioning party is in breach of the terms of the agreement. Because the substitutive relief (i.e. damages) would not protect the expectancy of the party bargaining specifically for an arbitration forum, specific performance of the arbitration contract would provide relief where the legal remedies are inadequate.[77] Accordingly, the provisions of the governing agreement should provide the basis for allowing or denying judicial intervention in the arbitration process.

An agreement that is not contrary to public policy and that is formed between competent parties is a contract that is constitutionally protected.[78] An agreement to arbitrate all disputes, including any requested interim remedies, falls into the category of contracts that the Contracts Clause of the United States Constitution was designed to protect.

The Contracts Clause prohibits the enactment of any law that will impair "the Obligation of Contracts."[79] The Contracts Clause prevents the states from passing statutes that would alleviate contractual obligations of a party to a contract.[80] Because arbitration agreements are contracts by nature, the judicial granting of provisional remedies by the state courts conflicts directly with the intent of the Contracts Clause.

The House Report on the FAA makes clear that: "[a]rbitration agreements are purely matters of contract and the effect of the bill is simply *to make the contracting party live up to his agreement.*"[81] Consequently, the legitimate burden placed upon the courts should be an analysis of the contract and of whether the contract contemplates judicial involvement in prehearing remedies. This method of determining the propriety of such judicial intervention is advanced in the Contractual

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75. *See, e.g.*, U.S. v. Moorman, 338 U.S. 457 (1950); Liberty Nat'l Bank v. Aetna Life & Casualty Co., 568 F. Supp. 860 (D.N.J. 1983); De Freitas v. Cote, 174 N.E.2d 371 (Mass. 1961); O'Neill v. German, 97 N.E.2d 8 (Ohio 1951).

76. *See, e.g.*, U.S. v. Choctaw Nation, 179 U.S. 494 (1900); Insurance Co. v. Gridley, 100 U.S. 614 (1879).

77. *See* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

78. *See, e.g.*, Chicago, Burlington and Quincy R.R. v. Nebraska, 170 U.S. 57 (1898).

79. U.S. CONST. art. I, § 10 (This law does not apply to the federal government.).

80. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, 103 (1973).

81. H.R. REP. NO. 96, 68th Cong., 1st Sess., at 1-2 (1924).

Language Approach[82] and supports the argument for its unilateral adoption.

VI. MAINTAINING THE INDEPENDENCE OF ARBITRATION

While the enactment of the FAA was inspired by the desire to enforce arbitration agreements,[83] an interpretation of the FAA policy to mean merely that the courts should abstain from deciding the merits of the dispute underestimates the breadth of the congressional intent. Plagued with judicial rebellion against the arbitration process as an alternative forum,[84] Congress enacted the FAA to reverse the courts' hostile treatment of arbitration and to establish its independence from judicial encroachment.[85]

The scope of the FAA is broad. It requires enforcement of all arbitration clauses, including executory provisions.[86] The FAA mandates a stay of judicial proceedings pending arbitration when an arbitration agreement governs the dispute.[87] Although there are areas within the FAA which are ambiguous, it is clear that the Act dictates a policy of forum independence.

This interpretation has gone unrecognized by many courts. Both the Equitable Analysis Approach and the Availability of Redress Approach require heavy judicial involvement despite the absence of contemplation of such involvement by the contracting parties.[88] Therefore, courts should first identify and give full effect to the intent of the parties.[89]

Often, parties enter arbitration agreements for the sole purpose of

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82. *See supra* notes 30-35 and accompanying text.

83. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985).

84. *See, e.g.*, Mitchell v. Dougherty, 90 F. 639, 642 (3d Cir. 1898):

> [W]e cannot agree that it is competent for the parties to any contract, by any stipulation which they may make a part of it, to oust the jurisdiction of the courts, and substitute for them an extra-legal tribunal of their own creation . . . [They] seek to accomplish what the law forbids,-the complete abrogation of the authority which it has conferred upon the courts.

Id.

85. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974).

86. 9 U.S.C. § 3 (1982).

87. *Id.*

88. *See supra* notes 29-61 and accompanying text.

89. ARTHUR L. CORBIN, 3 CORBIN ON CONTRACTS § 538 (1952).

avoiding costly litigation or of avoiding judicial intervention altogether.[90] Consequently, a court-ordered injunction would be contrary to the parties' intent because the party opposing the judicial order would be forced to utilize, in his defense, the very forum which he bargained to avoid. A tribunal's refusal to enforce a contractual term requiring judicial abstinence, therefore, is in fact a rejection of the policies underlying the FAA.

VII. CONCLUSION

Despite the enactment of the FAA and the policy concerns it attempts to employ throughout the dispute resolution system, the traditional judicial hostility toward any perceived ouster from its jurisdiction[91] still exists today. In order to disseminate this sequestered hostility, this Note suggests unilateral adoption of the Contractual Language Approach, an integration of the techniques employed by the Eighth and Second Circuits. In doing so, courts would validate the legislative intent of the FAA and would uphold the Contracts Clause of the Constitution while affording recognition to the intent of the parties to the arbitration agreement.

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90. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro, 577 F. Supp. 616, 625 (W.D. Mo. 1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson, 574 F. Supp. 1472, 1478 (E.D. Mo. 1983).

91. *See generally* H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).