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Injunctions Pending Arbitration: Do the Courts really Have Jurisdiction

Elizabeth Phillips

INJUNCTIONS PENDING ARBITRATION: DO THE COURTS REALLY HAVE JURISDICTION?

Blumenthal v. Merrill Lynch[1]

I. INTRODUCTION

Several recent Supreme Court decisions articulate a strong federal policy favoring arbitration.[2] Many decisions mandate speedy removal of arbitral disputes from the courts.[3] However, whether a district court retains equitable power to issue an injunction pending arbitration is the subject of conflicting decisions[4] and commentary.[5] The First,[6] Second,[7] Third,[8] Fourth,[9] and Seventh[10] Circuits hold that federal courts have the power to issue injunctions pending arbitration. The Eighth[11] and the Tenth[12] Circuits, however, have determined that courts do

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1. 910 F.2d 1049 (2d Cir. 1990).

2. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974); Southland Corp. v. Keating, 465 U.S. 1, 9 (1984); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226 (1987).

3. *See* Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 403 (1967); Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985).

4. *See* Merrill Lynch v. Bradley, 756 F.2d 1048, 1052 (4th Cir. 1985) (Congress did not intend the Federal Arbitration Act (FAA) to strip the judiciary of its equitable powers and does not preclude a court from granting preliminary injunctive relief); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 47-51 (1st Cir. 1986) (a district court may grant injunctive relief in an arbitrable dispute pending arbitration provided the prerequisites for traditional injunctive relief are satisfied). *But see* Merrill Lynch v. Hovey, 726 F.2d 1286, 1292 (8th Cir. 1984) (where the FAA is applicable and no qualifying contractual language is alleged, the district court errs in granting injunctive relief); Merrill Lynch v. Thomson, 574 F. Supp. 1472, 1478-79 (E.D. Mo. 1983).

5. *See* Comment, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. CHI. L. REV. 1373 (1987) [hereinafter Comment, *Injunctions Pending Arbitration*]; Comment, *The Federal Arbitration Act; A Threat to Injunctive Relief*, 21 WILLAMETTE L. REV. 674 (1985) [hereinafter Comment, *The Federal Arbitration Act*]; Note, *The United States Arbitration Act And Preliminary Injunctions: A New Interpretation Of An Old Law*, 66 B.U.L. REV. 1041 (1986).

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

7. *Blumenthal*, 910 F.2d at 1054.

8. Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806, 812 (3d Cir. 1989).

9. *Bradley*, 756 F.2d at 1051-54.

10. Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350-52 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984).

11. *Hovey*, 726 F.2d at 1292.

not have the power to issue injunctions unless explicitly provided in the arbitration agreement. These conflicting decisions underscore the importance of resolving the questions surrounding the availability of injunctive relief pending arbitration.[13] The federal district court decisions are effectively final because the imminence of arbitration may sharply limit a party's incentives to appeal an adverse decision.[14]

The issue of injunctive relief pending arbitration stems from the language of the Federal Arbitration Act (FAA),[15] which compels arbitration.[16] The instant decision falls within the growing majority of cases holding that the issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate.[17]

II. FACTS AND HOLDING

The plaintiffs, Blumenthal and Fein, were registered representatives of the New York Stock Exchange (NYSE) who resigned from Merrill Lynch to join another firm.[18] Over Merrill Lynch's objection, the plaintiffs took customer lists with them.[19] The NYSE through its constitution and rules mandates "arbitration of disputes arising out of the employment or termination of employment of a registered representative with a member firm."[20] Blumenthal and Fein filed with the NYSE for arbitration concerning their continued dealings with clients from Merrill Lynch.[21] They informed Merrill Lynch of their willingness to arbitrate on the next available business day, but Merrill Lynch resisted.[22]

The plaintiffs then sought to compel arbitration under the FAA.[23] The district court ruled the dispute arbitrable, but on a cross motion by Merrill Lynch,

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12. Merrill Lynch v. Scott, No. 83-1480, slip op. at 1 (10th Cir. May 12, 1983). The district court issued a preliminary injunction pending arbitration, reasoning that although a stay was mandatory for the underlying proceeding, the stay pending arbitration should not extend to preliminary injunctive relief because the defendant delayed his arbitration request until after Merrill Lynch sought injunctive relief. *Id.* In a one page unpublished summary order the Tenth Circuit reversed the district court's grant on injunctive relief. *Id. But see* Merrill Lynch v. Dutton, 844 F.2d 726, 728 (10th Cir. 1988) (the court upheld the grant of injunctive relief pending arbitration but prohibited an open-ended injunction, stating that the injunction should be modified to expire when the issue of preserving the status quo is presented and considered by the arbitration panel).

13. Merrill Lynch v. McCollum, 469 U.S. 1127, 1130 (1985) (mem. opinion of White, J. and Blackmun, J., dissenting from denial of certiorari).

14. *Id.*

15. 9 U.S.C.A. § 1-16 (1970 & Supp. 1991).

16. *See infra* notes 42-46 and accompanying text.

17. *Blumenthal*, 910 F.2d at 1054.

18. *Id.* at 1051.

19. *Id.*

20. *Id.* (citing New York Stock Exchange (NYSE) Rule 347; New York Stock Exchange (NYSE) Constitution, art. XI § 1).

21. *Id.* at 1051.

22. *Id.*

23. *Id.*

preliminarily enjoined the plaintiffs from using Merrill Lynch customer records, soliciting Merrill Lunch clients, or accepting any business from Merrill Lynch clients.[24] In addition, the court ordered Merrill Lynch to post a $100,000 bond.[25]

After a two-day session, the NYSE arbitration panel terminated the preliminary injunction's effect against the plaintiffs in "a full and final settlement."[26] The district court also denied the plaintiff's motion for recovery against the bond.[27] On appeal, the plaintiffs contended that the district court was without jurisdiction to enter an injunction pending arbitration, and in the alternative, the arbitrator's ultimate disposition rendered the injunction substantively wrongful.[28] The United States Court of Appeals for the Second Circuit held that the FAA does not bar a federal district court from issuing a preliminary injunction pending arbitration, but that when the arbitrators dissolved the injunction, it was rendered "wrongful," thereby, permitting the plaintiffs to recover on the bond.[29]

III. BACKGROUND

The FAA does not specifically address whether a court[30] may issue a preliminary injunction pending arbitration.[31] Recent attacks[32] on the court's jurisdiction to issue preliminary injunctions may be divided into three categories: (1) statutory arguments premised on sections three and four of the FAA;[33]

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1050.

28. *Id.*

29. *Id.* at 1056.

30. For cases involving interstate commerce or maritime transactions, the Act created a new body of federal substantive law affecting the interpretation and validity of arbitration agreements. *Prima Paint Corp.*, 388 U.S. at 403. According to the Supreme Court, the Act creates a body of federal substantive law applicable both in state and federal courts. *Moses H. Cone*, 460 U.S. at 24. Thus, when a state court is faced with an issue of arbitrability, federal law in terms of the Act governs the issue under the Supremacy Clause and Congress's power under the Commerce Clause. *Southland Corp.*, 465 U.S. at 10-12. Although the Act creates federal substantive law requiring the parties to hone arbitration agreements, it does not create any independent federal question jurisdiction under 28 U.S.C. section 1331 or otherwise. *Moses H. Cone*, 460 U.S. at 25 n.32; Comment, *The Federal Arbitration Act, supra* note 5, at 675 n.7. Section 4 of the FAA, providing for an order compelling arbitration, does not by itself confer federal court jurisdiction. An independent basis is required. *Blumenthal*, 910 F.2d at 1051 n.1.

31. 9 U.S.C. §§ 1-14.

32. *See* sources cited *supra* notes 6-12.

33. *See* sources cited *infra* notes 46-92.

(2) congressional intent and legislative history arguments;[34] and (3) judicial precedent and policy arguments.[35]

A. *The Four Threshold Requirements for the Act's Applicability*

For the FAA to be applicable, the dispute must related to a maritime transaction or a "contract evidencing interstate commerce."[36] Section one of the FAA defines "commerce" and "maritime transactions" for purposes of the Act.[37] Legislative history suggests that the definitions be interpreted very broadly as evidenced by statements such as "the control over interstate commerce reaches not only the actual physical interstate shipment of goods, but also contracts relating to interstate commerce."[38] The courts followed with an equally expansive interpretation of "commerce." In *Southland Corp. v. Keating*,[39] the United States Supreme Court determined that the Act applies to agreements concerning all types of commerce among individuals of more than one state, subject only to the employment exception spelled out in the statute.[40]

Section two of the FAA provides that an arbitration agreement in a contract involving interstate commerce or a maritime transaction[41] "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[42] Section two requires the agreement to be

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34. *See Prima Paint Corp.*, 388 U.S. at 404 (the legislative intent of the Act was to provide speedy arbitrations which are not subject to delay and obstruction in the courts); *Thomson*, 574 F. Supp. at 1478-79; Merrill Lynch v. Shubert, 577 F. Supp. 406, 407 (M.D. Fla. 1983).

35. *See* cases cited *infra* notes 130-43.

36. *See* 9 U.S.C. § 2.

37. 9 U.S.C. § 1. That Section states:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Id.

38. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

39. 465 U.S. 1.

40. *Id.* at 11; *see* 9 U.S.C. § 1.

41. *Southland Corp.*, 465 U.S. at 11.

42. 9 U.S.C. § 2. That Section states:

> 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.

Id.

in writing,[43] but more importantly, it abrogates the common law doctrine that promises to arbitrate are unenforceable.[44] The legislative history of the Act reflects congressional intent to mandate enforcement of arbitration agreements as illustrated by the following House Report:

> [The common law rule] arises from an anachronism of our American law. Some centuries ago . . . English courts refused to enforce agreements to arbitrate. Courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they [modern courts] have frequently criticized the rule and recognized its illogical nature and injustice which results from it.[45]

Under section three of the FAA, if a party to an arbitration agreement brings an action in court, the opposing party may petition the court to "stay trial of the action" pending arbitration of the dispute.[46] The court will stay trial on the action once it is satisfied that the agreement covers the subject matter of dispute.[47] As a general rule, the subject matter is determined by the language and intent of the arbitration agreement.[48]

Section four of the FAA provides, in relevant part, that "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 . . . for an order directing that such arbitration proceed."[49] Once the court finds a valid agreement to arbitrate and that the agreement covers the subject matter of the dispute, it must determine whether the non-petitioning party breached the arbitration agreement before it can compel or stay trial of the action under sections three and four of the FAA.[50]

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43. Merit Ins. v. Leatherby Ins., 581 F.2d 137, 142 (7th Cir. 1978) (enforceability of an arbitration agreement requires a writing).

44. *See, e.g.*, JULIUS HENRY COHEN, LAW: BUSINESS OR PROFESSION 306 (1918).

45. H.R. REP. NO. 96, *supra* note 38, at 1-2.

46. 9 U.S.C. § 3. That Section 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 upon 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.

Id.

47. *Id.*

48. Bedell & Ebling, *Equitable Relief in Arbitration: A Survey of American Case Law*, 20 LOY. U. CHI. L.J. 39, 40 (1988).

49. 9 U.S.C. § 4.

50. *Thomson*, 574 F. Supp. at 1474.

B. The Statutory Arguments

Many attacks on federal court jurisdiction to issue preliminary injunctions have used section three of the FAA for ammunition.[51] Section three states that on a motion by one of the parties to an agreement, the court shall "stay the trial of the action" pending arbitration.[52] Accordingly, courts have construed the language to be a mandatory stay of *all* action and proceedings, including injunctive relief.[53] In *Merrill Lynch v. Thomson*,[54] the court stated that once a controversy is determined to be arbitrable under the Act, the court cannot do anything further on the merits "save compel arbitration and stay the proceedings pending arbitration."[55]

Merrill Lynch v. Shubert[56] is factually identical to *Blumenthal*, the instant case. Merrill Lynch alleged that Shubert, upon resignation, took customer records and solicited the company's clients.[57] The court denied Merrill Lynch's motion for a preliminary injunction enjoining Shubert's action based primarily on the mandatory language of section three of the Act and policy considerations.[58] The court interpreted the mandatory language of the FAA to mean a stay of all judicial proceedings—injunctive relief included[59]—not simply to "stay the *trial* of the action until such arbitration has been had in accordance with the agreement."[60]

In *Merrill Lynch v. Hovey*,[61] the plaintiffs sought to enjoin five former employees from soliciting clients and using company records.[62] The Eighth Circuit refused to grant injunctive relief stating that the language of the Act directs courts to stay all judicial *action*.[63] The court concluded that injunctive relief, absent a contractual agreement to the contrary, cannot be granted based upon the plain meaning of the Act.[64]

Other courts have interpreted section three of the FAA similarly;[65] however, the growing majority of the courts do not interpret section three as a mandate to stay all judicial action.[66] In *Merrill Lynch v. Bradley*,[67] the Fourth Circuit

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51. *Hovey*, 726 F.2d at 1289; *Bradley*, 756 F.2d at 1052; *Shubert*, 577 F. Supp. at 407.
52. *See supra* note 46.
53. *Thomson*, 574 F. Supp. at 1474.
54. 574 F. Supp. 1472.
55. *Id.* at 1478.
56. 577 F. Supp. 406.
57. *Id.* at 406.
58. *Id.* at 407.
59. *Id.*
60. 9 U.S.C. § 3 (emphasis added).
61. 726 F.2d 1286.
62. *Id.* at 1287.
63. *Id.* at 1291 (emphasis added).
64. *Id.* at 1292. The court also supported its decision based on congressional intent of the Act. *Id.* at 1291.
65. *See Thomson*, 574 F. Supp. at 1474.
66. *See* cases cited *supra* notes 6-10.

enjoined a former employee from using confidential information in violation of a non-solicitation clause in his contract.[68] The court gave "trial of the action" a more limited interpretation: "Section 3 does not contain a clear command abrogating the equitable power of district courts to enter preliminary injunctions to preserve the status quo pending arbitration."[69] The Fourth Circuit reasoned that in section three the word "trial" should not be given any other meaning than its "common and ordinary usage."[70] Thus, "trial of the action" does not include preliminary injunctions.[71]

In *Merrill Lynch v. McCollum*,[72] Justice White cited a 1951 opinion in his dissent memorandum on the denial of certiorari.[73] Justice White referred to an opinion written by Judge Weinfield stating that the power to issue a preliminary injunction pending arbitration follows from the court's power to compel arbitration:

> It would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach a contract and to substitute payment of damages for nonperformance.'[74]

Another statutory argument is based on the language of section four of the FAA.[75] That section provides that a party seeking to compel arbitration pursuant to a valid written agreement "may petition any United States district court which, *save for such agreement*, would have jurisdiction" over the subject matter of the case for an order to arbitrate according to the agreement.[76] In *Blumenthal*, the former employees contended that they were wrongfully enjoined from soliciting clients pending arbitration.[77] Blumenthal asserted that the language "save for such agreement" operates to divest the court of jurisdiction over a dispute covered by an arbitration agreement except to order arbitration or other powers explicitly provided for in the FAA.[78] The court rejected this interpretation of section four as being inconsistent with judicial precedent and congressional intent.[79]

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67. 756 F.2d 1048.
68. *Id.* at 1049.
69. *Id.* at 1052.
70. *Id.*
71. *Id.*
72. 469 U.S. 1127.
73. *Id.* at 1130.
74. Albatross S.S. Co. v. Manning Bros., 95 F. Supp. 459, 463 (S.D.N.Y. 1920) (quoting O.W. HOLMES, COLLECTED LEGAL PAPERS 167, 175 (1951)).
75. 9 U.S.C. § 4.
76. *Id.* (emphasis added).
77. *Blumenthal*, 910 F.2d at 1049-50.
78. *Id.* at 1052.
79. *Id.* at 1054.

The argument has been made that the very language of section four authorizes the court to issue injunctive relief.[80] Section four allows the court to "order . . . [the parties] to proceed to arbitration in accordance with the terms of the agreement."[81] One commentator cites Judge Newman's decision in *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*[82] in support of this statutory construction.[83] Judge Newman argued that because a federal court is entitled to adjudicate issues relating to the making and *performance* of the agreement to arbitrate and "maintenance of the status quo pending arbitration relates in a substantial way to the performance of the agreement," the court must be able to issue injunctive relief.[84] Judge Newman stated that "an injunction to enforce the status quo provision is available whether this provision is regarded either as part of the obligation to arbitrate subject to the federal arbitration law, or as a condition precedent to, or consideration for arbitration subject to federal arbitration law."[85]

Enforcement of arbitration agreements under the FAA was intended, inter alia, to elevate the agreements to an enforceable contract status.[86] The House Report states that an arbitration agreement is to be "upon the same footing as other contracts, where it belongs."[87] Therefore, enforceability of arbitration agreements is rooted in contract law, and the courts are understandably reluctant to act when the parties have selected arbitration as their forum of relief.[88] However, the *Blumenthal* court rejected the argument that section four divests the judiciary of all equitable powers.[89] "The fact that the statute posits a situation where the district court would have jurisdiction in the absence of an agreement to arbitrate does not preclude us from holding that a court retains sufficient jurisdiction to issue an injunction pending arbitration when such an agreement is present."[90]

Similarly, the court in *Merrill Lynch v. Bradley* refused to hold that the FAA abrogated all equitable powers of the judiciary, saying "[w]e do not believe that Congress would have enacted a statute intended to have the sweeping effect of stripping the federal judiciary of its equitable powers in all arbitrable commercial disputes without undertaking a comprehensive discussion and evaluation of the statute's effect."[91] The court's reasoning is supported by a multitude of case law

80. *See* sources cited *supra* note 5.

81. 9 U.S.C. § 4.

82. 613 F.2d 468 (2d Cir. 1980).

83. *See* Comment, *Injunctions Pending Arbitration*, *supra* note 5, at 1394.

84. *Guinness-Harp*, 613 F.2d at 472 (citation omitted).

85. *Id.* at 473.

86. H.R. REP. NO. 96, *supra* note 38, at 1.

87. *Id.*

88. *See Provisional Remedies, Disclosure and Arbitration* (June 15, 1975), *reprinted in* LAWYER'S ARBITRATION LETTERS 1970-79, at 76 (1981).

89. *Blumenthal*, 910 F.2d at 1053.

90. *Id.*

91. *Bradley*, 756 F.2d at 1052.

concerning congressional authority to abridge the equity jurisdiction of the courts.[92]

C. *The Congressional Purpose and Legislative Intent Arguments*

In *Merrill Lynch v. Hovey*, the Eighth Circuit held that issuance of injunctive relief in a controversy that is arbitrable abrogates the intent of the FAA and, therefore, is an abuse of discretion.[93] The dispute in *Hovey* arose when former employees used the firm's records to solicit clients.[94] The court stated that the congressional intent revealed in the FAA is to facilitate quick, expeditious arbitration.[95]

Additionally, the court stated that the judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the courts into the merits of issues more appropriately left to the arbitrator.[96] The court concluded there was compelling authority to hold that "where the Arbitration Act is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief."[97]

Other courts, however, interpret the legislative intent differently than the Eighth Circuit. In *Teradyne, Inc. v. Mosteck Corp.*,[98] the court concluded that the authorities cited by the Eighth Circuit in *Hovey* were not so compelling.[99] The cases[100] relied upon by the court in *Hovey* manifest a strong federal policy favoring arbitration of disputes; however, none of these cases specifically addressed the power of a federal court to issue an injunction pending arbitration.[101] Furthermore, the legislative intent of the FAA, articulated by the Eighth Circuit, to "facilitate quick expeditious arbitration"[102] is compatible with the availability of injunctive relief to preserve the meaningfulness of the arbitration process.[103]

In addition, the Eighth Circuit's reliance on *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*[104] might be outdated. A more recent

92. *See* sources cited *infra* notes 120-29.

93. *Hovey*, 726 F.2d at 1291. However, the court did intimate that injunctive relief would be available if the arbitration agreement itself contained injunctive relief provisions. *Id.*

94. *Id.* at 1286.

95. *Id.* at 1291 (citing *Moses H. Cone*, 460 U.S. at 1).

96. *Id.* at 1292 (relying on *Prima Paint Corp.*, 388 U.S. at 395).

97. *Id.*

98. 797 F.2d 43.

99. *Id.* at 48-51.

100. *Hovey*, 726 F.2d at 1292 (relying on *Prima Paint Corp.*, 388 U.S. 395; Buffalo Forge Co. v. United Steel Workers, 428 U.S. 397 (1976); *Moses H. Cone*, 460 U.S. 1).

101. *Blumenthal*, 910 F.2d at 1053.

102. *Hovey*, 726 F.2d at 1291 (relying on *Moses H. Cone*, 460 U.S. at 1).

103. *Teradyne Inc.*, 797 F.2d at 51.

104. 460 U.S. 1.

Supreme Court decision, *Dean Witter Reynolds v. Byrd*,[105] distinctively alters earlier pronouncements on the intent of the Act.[106] The Supreme Court rejected the former position that the overriding objective of the FAA was to facilitate quick, expeditious arbitration.[107] The Court stated:

> The legislative history of the Act establishes that the purpose behind its passage was to ensure the judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.[108]

The Supreme Court continued by stating that the passage of the Act was motivated "first and foremost" by a congressional desire to enforce agreements into which parties had entered.[109]

Additionally, the Court determined that when faced with the competing interests of full enforcement of an arbitration agreement and quick and expeditious arbitration, the courts are required to "enforce the bargain of the parties."[110] If the Act's goal is to give arbitration agreements full enforcement, then injunctive relief should be available to preserve the status quo. One district court concluded:

> The Arbitration Act would serve little social purpose if the invocation of the arbitration process meant potential damages would be left to mount up as the administrative process spent its course, or that the tactical posturing of the disputants could continue with a life of its own outside the arbitration framework which both sides bargained for.[111]

Accordingly, the *Dean Witter* decision rebuts the proposition that expeditious dispute resolution precludes provisional remedies.[112]

Aside from Congress' motivation for passing the FAA, the question is whether Congress intended to curtail the equitable powers of the judiciary in a dispute pending arbitration. The power to issue a preliminary injunction, an in personam order, historically developed in the Court of Chancery in England.[113] The English dichotomy between courts of law and equity were merged together

105. 470 U.S. 213.
106. Note, *supra* note 5, at 1054.
107. *Dean Witter*, 470 U.S. at 219.
108. *Id.*
109. *Id.* at 220.
110. *Id.* at 221.
111. Speedee Oil Change Sys. v. State St. Capital, Inc., 727 F. Supp. 289, 292 (E.D. La. 1989).
112. Note, *supra* note 5, at 1055.
113. *See, e.g.*, D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 106-07 (1973).

in the American judicial system by the Field Code of 1848[114] and the Federal Rules of Civil Procedure of 1938.[115]

The preliminary injunction developed as an emergency measure before a full hearing could be held.[116] There is no right to discovery and the hearing is not on the merits.[117] Because the hearing is inadequate in scope and given on short notice in most situations, the party seeking the injunction must post a bond as security in case the opposing party is wrongfully enjoined.[118] The courts typically consider several factors when determining whether to grant an injunction: (1) risk of irreparable harm; (2) adequacy of the legal remedy; (3) balancing of the hardships; (4) likelihood of success on the merits; and (5) public interest.[119]

Clearly, Congress does have the power to restrict the exercise of the court's discretion and its equitable powers.[120] However, in determining whether Congress intended to abridge the equitable powers of the judiciary, the intent must be clear and unequivocal.[121] Congressional intent will not be lightly applied.[122] The judiciary's equitable powers are not to be restricted without a "clear and valid legislative command."[123] In terms of the FAA, there is nothing in the legislative history concerning injunctions or other pre-trial provisions. As the court in *Teradyne, Inc.* rightfully concluded, the FAA contains no express ban on provisional remedies.[124] The complete absence of intent in the House and Senate Reports to divest judicial equitable powers strongly suggests there was no intent to do so.[125]

In *Mitchell v. Robert DeMario Jewelry, Inc.*,[126] the Supreme Court established that a grant of equitable power to enforce a statute should be construed broadly in light of statutory purposes.[127] As the Supreme Court stated in *Dean Witter*, the purpose of the FAA is to give full judicial enforcement of agreements to arbitrate.[128] The congressional intent to enforce arbitration agreements could

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114. With the exception of Maryland, Arkansas, Tennessee and Delaware.

115. R. LEAVELL, J. LOVE, G. NELSON, EQUITABLE REMEDIES RESTITUTION AND DAMAGES 8 (4th ed. 1986).

116. D. DOBBS, *supra* note 113, at 106-07.

117. *See id.*

118. *Id.* at 106-07.

119. *Id.*

120. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). "Congress may intervene and guide or control the exercise of the court's discretion [to issue injunctions] but we do not lightly assume that Congress has intended to depart from established principles." *Id.*

121. *Id.*

122. *Bradley*, 756 F.2d at 1052. "Section 3 [of the FAA] states only that the court shall stay the trial of the action; it does mention preliminary injunctions or other pre-trial proceedings. Certainly Congress knows how to draft a statute which addresses all actions within the judicial power." *Id.*

123. Porter v. Warner Co., 328 U.S. 395, 398 (1946).

124. *Teradyne, Inc.*, 797 F.2d at 51.

125. Note, *supra* note 5, at 1053.

126. 361 U.S. 288 (1960).

127. *Id.* at 291.

128. *Dean Witter*, 470 U.S. at 213.

be thwarted if the court were precluded from issuing preliminary injunctions to preserve the status quo. Without the protection of a preliminary injunction, the arbitration process would be rendered a hollow formality in many situations.[129] For example, if the opposing party irredeemably alters the status quo, then the party seeking arbitration will be left a right without a remedy.

D. The Judicial Policy and Precedents Arguments

In *Merrill Lynch v. Thomson*,[130] the Federal District Court for the Eastern District of Missouri held that a federal court's grant of preliminary injunctive relief would be inefficient, resulting in unnecessary duplication between the arbitrators and the courts.[131] The court stated that the "parties should direct their efforts toward presenting the merits of their dispute to the arbitrator rather than diverting their energies and resources to prosecuting and defending a preliminary injunction motion in district court."[132] Although this argument has some merit, inefficient duplication is not necessarily the obvious result. First, a preliminary injunction hearing is not on the merits.[133] In fact, it is inappropriate for a court to give a final judgment on the merits at the preliminary stage.[134] The petitioning party's likelihood of success on the merits is only a factor in the court's determination: it is not case dispositive.[135] Irreparable injury is also a prerequisite for injunctive relief.[136] However, if arbitration is imminent, the chance of irreparable harm is greatly diminished. Second, in a traditional preliminary injunction hearing, the court issues the injunction pending its own final determination on the merits.[137] With an injunction pending arbitration, the process is less duplicative than the traditional process because the arbitrators, not the court, make a final determination on the merits.

The court in *Thomson* stated that injunctive relief was inappropriate because there was an adequate remedy at law.[138] "The law gives Merrill Lynch the very remedy for which it contracted: arbitration under the arbitration rules of the New York Stock Exchange."[139] Again, this reasoning is misplaced because arbitration is not a "remedy" but a contractual agreement. The very fact that arbitration is based on contract principles limits its applicability to the subject matter of the agreement. Frequently, arbitration agreements do not have provisions for injunctive relief. The power of arbitrators to grant equitable, provisional or

129. *Bradley*, 756 F.2d at 1053.
130. 574 F. Supp. 1472.
131. *Id.* at 1479.
132. *Id.*
133. *See* D. DOBBS, *supra* note 113, at 106.
134. University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).
135. Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984).
136. *Id.* at 386.
137. *Id.* at 389.
138. *Thomson*, 574 F. Supp. at 1478.
139. *Id.* at 1479.

extraordinary remedies in a contractual dispute derives from the language of the arbitration agreement.[140] Furthermore, even if the arbitration agreement provides for equitable remedies, a judicial preliminary injunction may be necessary to preserve the status quo so that the arbitration is not a hollow formality.[141]

The damage has already been done if one party may irreversibly alter the status quo, rendering the arbitration process which the parties bargained for meaningless. If the court determines that the arbitrator has the power to resolve the dispute before the alteration of the status quo, then under traditional preliminary injunction analysis the injunction should not be granted because there would be an adequate remedy at law or lack of irreparable harm.

Finally, the court in *Thomson* stated that if injunctive relief were granted, every recalcitrant party to a dispute will file a motion for preliminary injunctive relief in an attempt to delay arbitration.[142] The court's pessimistic perception of lawyering antics can be remedied quickly by the court itself. If arbitration is close at hand, then perhaps there is an adequate remedy at law and the chances for irreparable injury are drastically reduced; therefore, the motion for injunctive relief should be denied. There is also no basis for arbitration to be stayed pending the outcome of a preliminary injunction adjudication. One of the fundamental prerequisites for a preliminary injunction is the finding of irreparable injury before an arbitrator is able to make a determination on the merits.[143] If the motion is simply a delay tactic, it should be dismissed if there is no cause of action. Additionally, there is no more risk of delay tactics in a normal injunction proceeding than in an situation of an injunction pending arbitration.

IV. THE INSTANT DECISION

In *Blumenthal*, the court rejected the plaintiff's statutory argument that the language of section 4 of the FAA strips the judiciary of all equitable jurisdiction over a dispute covered by an arbitration agreement.[144] The court pointed out decisions which gave explicit and broad recognition to a district court's power to grant a preliminary injunction pending arbitration.[145] One such decision was *Roso-Lino Beverage Distributors v. Coca-Cola Bottling Co.*,[146] in which the court stated:

> We reverse the denial of the preliminary injunction because it appears, from the record before us, that the district court believed its decision to refer the dispute to arbitration stripped the court of power to grant

140. Bedell & Ebling, *supra* note 48, at 41-42.
141. *Bradley*, 756 F.2d at 1053.
142. *Thomson*, 574 F. Supp. at 1479.
143. *Roland Machinery*, 749 F.2d at 386.
144. *Blumenthal*, 910 F.2d at 1052.
145. *Id.*
146. 749 F.2d 124 (2d Cir. 1984).

injunctive relief. The fact that a dispute is to be arbitrated, however, does not absolve the court of its obligation to consider the merits of a requested preliminary injunction.[147]

The *Blumenthal* court also rejected the plaintiff's argument that a district court's injunction pending arbitration abrogates the agreed-upon role of the arbitrators as adjudicators of the dispute and the strong federal policy favoring arbitration of disputes.[148] The court reasoned that pro-arbitration policies are furthered, not weakened, by permitting the court "to preserve the meaningfulness of arbitration through a preliminary injunction."[149] The court stated that "issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate."[150]

Although the court denied the plaintiff's recovery for damages on the bond under the lack of jurisdiction argument, it allowed recovery based on the wrongfulness of the injunction.[151] The court stated that a party has been wrongfully enjoined under Federal Rules of Civil Procedure 65(c) if it is found that the enjoined party had always had the right to do the enjoined act.[152] The focus is on whether, in hindsight, and in light of the ultimate decision on the merits, the injunction should not have been issued in the first instance. In *Blumenthal*, the arbitrators determined that Merrill Lynch was not entitled to an injunction and that Blumenthal had at all times the right to do business with the Merrill Lynch client.[153] Finally, because the claim for liability on the bond could not arise except upon a favorable ruling to Blumenthal, it is not barred by claim preclusion. A motion for wrongful injunction under Federal Rules of Civil Procedure 65(c) is a separate and distinct claim from the merits underlying the controversy.[154]

V. CONCLUSION

Arbitration is a contractual process; therefore, problems relating to provisional relief and various remedies may be avoided by good draftsmanship. Although practitioners may and should use unequivocal language in arbitration agreements that addresses preliminary injunctive relief pending arbitration, the courts should not construe broad arbitration clauses to preclude the judiciary of equitable jurisdiction. Denying judicial injunctive relief is inconsistent with congressional intent. The FAA was enacted to ensure that arbitration agreements be given full

147. *Id.* at 125; *Blumenthal*, 910 F.2d at 1052.
148. *Blumenthal*, 910 F.2d at 1052.
149. *Id.* at 1053.
150. *Id.* at 1054.
151. *Id.* at 1056.
152. *Id.* at 1054.
153. *Id.* at 1055.
154. *Id.* at 1056.

effect. If the courts are not vested with the power to issue preliminary injunctive relief pending arbitration, then in some situations the entire spirit of the Act is crushed. A party should not be allowed to irredeemably alter the status quo in such a manner that would render the arbitrator's ultimate decision meaningless.

ELIZABETH PHILLIPS