Interlocutory Appeal of Orders Granting or Denying Stays of Arbitration

Michigan Law Review
Interlocutory Appeal of Orders Granting or Denying Stays of Arbitration

When parties to a contract containing an arbitration clause cannot agree whether to arbitrate or litigate a dispute that arises between them, the party favoring litigation may seek a court order staying arbitration. If he has already initiated a court action, he may ask the court to stay arbitration pending its resolution, regardless of whether arbitration proceedings have commenced. Alternatively, a party receiving notice of the other's intention to arbitrate may request a stay in a court action brought solely for that purpose.

Since the court's order on a motion to stay determines whether the parties will initially litigate or arbitrate their dispute, the order can substantially affect their interests. A court that grants a motion to stay deprives one party of his right to resolve contract disputes without the contentiousness, expense, and delay of litigation. And a court that refuses to stay arbitration may deny the other party, at

---


3. For a general discussion of the enforceability of arbitration agreements in both state and federal courts, see Sonderby, Commercial Arbitration: Enforcement of an Agreement to Arbitrate Future Disputes, 5 J. MAR. J. PRAc. & PROC. 72 (1971).

4. For example, suppose that X and Y are parties to a contract containing an arbitration agreement. A dispute arises, and X commences proceedings under the arbitration clause. Y seeks relief on the contract in a court action and asks the court to stay arbitration pending completion of court proceedings. X pleads the arbitration agreement as a defense to Y's court action and moves under § 3 of the Arbitration Act for a stay of court proceedings pending arbitration. Alternatively, X may present evidence of Y's refusal to arbitrate and request the court to compel arbitration under § 4 of the Act. This Note is concerned with the interlocutory appealability of the court's order on Y's motion to stay arbitration.


6. See text at notes 53-64 infra.
least temporarily, his right to have the dispute adjudicated. To

7. Motions to stay arbitration typically assert one or both of two principal grounds: (1) the arbitration clause in the contract fails to cover the matter in dispute, or is unenforceable; and (2) the subject matter of the dispute is not arbitrable because of statutory preemption or public policy. Aksen, What You Need to Know About Arbitration Law — A Triality of Research, 10 FORUM 793, 797 (1975).

A party seeking to stay arbitration on contractual grounds may argue that the parties never agreed to arbitrate, that the arbitration agreement between the parties does not cover the dispute in question, or that the opposing party has lost the right to arbitrate through conduct amounting to waiver, laches, or default. Arbitration under the Federal Arbitration Act is a matter of contract, 9 U.S.C. § 2 (1976), and a party cannot be compelled to arbitrate a matter that he has not agreed to arbitrate. E.g., Hussey Metal Div. of Copper Range Co. v. Lectromelt Furnace Div., McGraw-Edison Co., 471 F.2d 556, 557 (3d Cir. 1972); Lea Tai Textile Co. v. Manning Fabrics, Inc., 411 F.Supp. 1404, 1407 (S.D.N.Y. 1975). Accordingly, the federal courts have power to stay arbitration “where an agreement therefor is absent.” American Broadcasting Cos. v. American Fedn. of Television & Radio Artists, 412 F. Supp. 1077, 1082 (S.D.N.Y. 1976).

In evaluating a motion to stay arbitration on contractual grounds, the court will consider only matters specifically pertaining to the making or performance of the agreement to arbitrate. The enforceability of the contract embodying the parties’ arbitration agreement, and the merits of the dispute arising under the contract, will not be considered. This rule is an application of the doctrine of “separability” adopted by the Supreme Court in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). Under the doctrine of separability, the enforceability of an arbitration agreement is not dependent upon the validity of the embodying contract. The arbitration agreement is not rendered unenforceable by circumstances making the rest of the contract unenforceable. See M. Domke, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 8.01 (1968). See generally, Note, Federal Arbitration Act and Application of the “Separability Doctrine” in Federal Courts, 1968 DUKE L.J. 588.

A party seeking to stay arbitration on public policy grounds will argue that the matters in dispute involve issues so important that a judicial, rather than an arbitral, hearing is required. Courts and commentators agree that arbitration is primarily adopted to settle ordinary business disputes, and is unsuited to the resolution of important public questions:


avoid these consequences, parties may seek interlocutory review\(^8\) of district court orders granting or refusing stays of arbitration.

Three conflicting responses to such requests have emerged in the courts of appeals.\(^9\) Some courts permit interlocutory appeals of both grants and denials of stays, one reviews only grants, and another takes interlocutory appeals of neither grants nor denials.\(^10\) This Note attempts to resolve the conflict among the courts of appeals by examining the interests affected by orders granting and denying stays of arbitration. Part I considers the appealability of such orders under the collateral order doctrine developed by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*\(^11\) This doctrine permits interlocutory appeal of final orders adjudicating an important right that is collateral to the merits of the case and effectively unreviewable in a final judgment appeal. Part II considers whether orders on motions for stays of arbitration are reviewable as orders granting or refusing injunctions under section 1292(a)(1) of the Judicial Code.\(^12\) Both Parts conclude that orders staying arbitration are immediately appealable,\(^13\) but that courts should reject interlocutory appeals of orders refusing stays.

I

The fundamental limitation upon federal appellate jurisdiction is the concept of "finality." The final judgment rule, currently embodied in section 1291 of the Judicial Code,\(^14\) permits appeal only from...
a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Underlying the rule is the sound conclusion that immediate review of every order ultimately subject to reversal would waste judicial resources. Interlocutory appeals increase litigants' costs, burden an already "sorely overworked judiciary," and may delay the litigation. Such appeals are particularly wasteful where a continuation of the trial proceedings might render the challenged order immaterial.

"Overly rigid insistence upon a 'final decision' for appeal," however, may seriously and needlessly injure the litigants. Without interlocutory review, rights for which the court of appeals can fashion no adequate remedy in a final judgment appeal may be lost. The policies implicated by the final judgment rule thus require that a balance be struck between judicial efficiency and justice in individual cases.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.


17. Interlocutory appeal does not necessarily delay litigation. See note 65 infra.

18. Rulings may become moot in a number of ways. The trial judge himself may reverse the ruling. The parties may settle, or the party seeking to appeal may win the case at trial. The ruling may have no impact to require reversal. Denying interlocutory review of orders which later become moot saves the time of the appellate court and smooths proceedings at trial. See 15 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3907, at 431 (1976).

A number of other considerations support the final judgment rule. The court of appeals can appraise important issues on the basis of a full rather than a partial record. The rule helps to avoid the loss of evidence which could result from repeated interruptions of the trial process. It also prevents the party with greater resources from harassing his opponent with repeated interlocutory appeals. See 9 J. MOORE FEDERAL PRACTICE ¶ 110.07 (2d ed. 1980); 15 C. WRIGHT, A. MILLER, & E. COOPER, supra, at § 3907. See also Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981).


20. See, e.g., Carson v. American Brands, Inc., 450 U.S. 79, 88-89 (1981) (district court's refusal to enter consent decree providing for injunctive relief against employer could result in serious, perhaps irreparable injury to plaintiffs through lost job opportunities and training); Chappell & Co. v. Frankel, 367 F.2d 197, 202 (2d Cir. 1966) (en banc): If the grant or denial of a preliminary injunction was reviewable only after a "final decision" had been entered below it would frequently be too late for the courts of appeals to undo the harm caused by an erroneous ruling below and recreate a state of affairs in which meaningful relief could be granted to the party entitled to prevail.

21. Among "the considerations that always compete in the question of appealability, the most important . . . are the inconvenience and cost of piecemeal review on the one hand and
ance by creating statutory\textsuperscript{22} and judicial exceptions that authorize appeal of certain interlocutory orders. Where failure to review the trial court's order immediately could irreparably injure either party,\textsuperscript{23} courts may take interlocutory appeals under the judicially created collateral order doctrine.

The Supreme Court outlined the collateral order doctrine in \textit{Cohen v. Beneficial Industrial Loan Corp.},\textsuperscript{24} which involved a shareholder's derivative action brought in diversity jurisdiction. The defendant demanded that the plaintiff post bond under a statute that made unsuccessful derivative plaintiffs liable for expenses and attorneys' fees.\textsuperscript{25} The district court denied the defendant's motion, and held that the statute did not apply in diversity actions. The court of appeals reversed,\textsuperscript{26} and was affirmed by the Supreme Court. Before addressing the merits, the Court held that the order denying the request for security was appealable as a final decision, although the case itself had not been concluded. The order, said the Court, fell within a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the danger of denying justice by delay on the other." Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

\begin{itemize}
\item \textsuperscript{22} \textit{See}, e.g., 28 U.S.C. § 1292(a)(1) (1976), discussed in Part II infra.
\item \textsuperscript{23} \textit{See}, e.g., Abney v. United States, 431 U.S. 651 (1977) (district court order denying defendant's motion to dismiss on double jeopardy grounds is immediately appealable because delayed review could result in irretrievable loss of defendant's rights under the double jeopardy clause).
\item \textsuperscript{24} 337 U.S. 541 (1949). Because stay orders are cast in injunctive terms, courts generally consider the appealability of an order staying or refusing to stay proceedings to be governed by § 1292(a)(1). But at least two circuits have permitted appeal under \textit{Cohen} of orders staying trial proceedings pending administrative determinations. \textit{See} Litton Systems, Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418 (5th Cir. 1976); Hines v. D'Artois, 531 F.2d 726 (5th Cir. 1976); CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1973).
\end{itemize}

The converse of an arbitration stay order, an order entered under § 3 of the Arbitration Act staying or refusing to stay trial proceedings pending arbitration, cannot be appealed as a collateral order. \textit{See} Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 179 (1955), where the Supreme Court stated that a district court order refusing a § 3 stay "could not be called a final decision under § 1291." Accord, New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 186 (1st Cir. 1972) (grant of § 3 stay); Hart v. Orion Ins. Co., 427 F.2d 528, 529 (10th Cir. 1970) (grant); Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304, 306 (2d Cir. 1967) (grant). \textit{See also} Shanferoke Coal & Supply Co. v. Westchester Serv. Corp., 293 U.S. 449, 451 (1935) (district court order denying a stay under § 3 of the Arbitration Act is not a final judgment). \textit{Baltimore Contractors} and subsequent court of appeals decisions have established that § 3 orders are appealable, if at all, under 28 U.S.C. § 1292(a)(1) and not as collateral orders. The same rule, however, is not applicable to arbitration stay orders. \textit{Baltimore Contractors'} construction of § 1292(a)(1) relative to § 3 orders is not binding upon the court of appeals in arbitration stay order cases. \textit{See} Stateside Mach. Co. v. Alperin, 526 F.2d 480, 483 (3d Cir. 1975). Similarly, courts' application of § 1291 to § 3 orders should not control the appealability of arbitration stay orders as collateral orders.

\begin{itemize}
\item \textsuperscript{25} 337 U.S. at 543-45.
\item \textsuperscript{26} Beneficial Indus. Loan Corp. v. Cohen, 170 F.2d 44 (3d Cir. 1948), \textit{reversing} 7 F.R.D. 352 (D.N.J. 1947).
\end{itemize}
whole case is adjudicated."\(^27\)

Implicit in this conclusion are four prerequisites to applying the *Cohen* doctrine.\(^28\) First, the order must be collateral to, or separable from, the merits of the case before the trial court.\(^29\) Second, the order must constitute the trial court's final disposition of the matter in question, and cannot be "tentative, informal or incomplete."\(^30\) Third, the order must involve an "important" right, and not simply a minor exercise of the trial court's discretion.\(^31\) Finally, there must be a risk that the appellant will irretrievably lose a substantive right if the court denies interlocutory appeal.\(^32\) When made in the course of an ongoing proceeding,\(^33\) a motion to stay arbitration is collateral to the merits because it can be adjudicated without reference to the underlying contract dispute.\(^34\) And since the district court's order on a motion to stay constitutes its last word on the availability of the relief requested, the order is "final."\(^35\) The interlocutory appealability of orders granting or denying stays of arbitration, therefore, turns on

\(^27\) 337 U.S. at 546.


\(^29\) 337 U.S. at 546.

\(^30\) 337 U.S. at 546.

\(^31\) 337 U.S. at 546. *Cohen* says that the right must be "too important" to be denied review; the opinion does not talk in terms of trial court discretion.

\(^32\) 337 U.S. at 546.

\(^33\) The court's order in an action brought for the sole purpose of staying arbitration will not be appealable under *Cohen*. The order in this situation disposes of the principal issue of the case and hence is not collateral to the merits. However, unless cast in preliminary terms, the order will be appealable as a final decision under § 1291.

\(^34\) See Justice Black's dissent in Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 185 (1955) ("[C]ertainly decision of whether a judicial rather than an arbitration tribunal shall hear and determine this accounting controversy is logically and practically severable from the factual and legal issues crucial to determination of the merits of the controversy."); Local 771, Int'l Alliance of Theatrical State Employees v. RKO Gen., Inc., 546 F.2d 1107, 1112 (2d Cir. 1977) (labor arbitration) ("The interpretation of the arbitration provisions of the collective bargaining agreement presents an issue that is separable from and collateral to the main issue in the case, which is whether the employees who are members of Local 771 are entitled to be assigned to newsgathering and editing functions . . . "). A claim that a dispute is nonarbitrable for reasons of public policy, however, may require the court to examine the facts of the case. In cases of this kind the requirement that the order be collateral to the merits may not be satisfied. *Cf. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (order denying class certification is not collateral to the merits because it is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (quoting Mercantile Natl. Bank v. Langdeau, 371 U.S. 555, 558 (1963)).

\(^35\) Although the district court retains power to reverse an order once entered, in most cases an order on a motion to stay will not be reconsidered. *See* 15 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 18, § 3911, at 470: "The bare fact that the court has power to change its ruling, however, does not preclude review. It is enough that no further consideration is contemplated." *Accord, In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1118 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).
whether the appellant satisfies the last two requirements of the collateral order doctrine.

Conflicting judicial interpretations of the importance requirement make it difficult to predict whether a particular right is "important." The paucity of litigation testing the appealability of orders granting or denying stays of arbitration further confounds analysis. Some courts permit appeal only of questions of general significance, the resolution of which "will settle the matter not simply for the case in hand, but for many others." Other courts, interpreting the requirement less restrictively, deny appeal only of orders clearly within the trial court's discretion. In circuits that take the more restrictive approach, routine interlocutory orders, such as stays of arbitration, may not be appealable under Cohen because they do not present an issue of broad significance. Courts that interpret the importance requirement liberally, however, will usually find it satisfied by orders staying arbitration.

If he satisfies Cohen's importance requirement, an appellant seeking review of an order granting or denying a stay of arbitration must demonstrate that he will be irreparably injured absent an immediate appeal. Irreparable injury would result from a ruling that denies a substantive right and could not be corrected on a final judgment appeal. No court of appeals has yet considered the applicability of Cohen to such an order.

36. The two most recent Supreme Court decisions applying the Cohen collateral order doctrine shed little light on the proper interpretation of this requirement. In Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), the Court stated that to be appealable under Cohen, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Accord, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981). In neither of these cases did the Supreme Court indicate what factors make an interlocutory order sufficiently important to be appealable under Cohen. Instead, the Court's holding in both cases was grounded in other elements of the Cohen doctrine. The courts of appeal thus remain free to interpret the word "important" largely as they see fit.


38. United States v. Wilshire Apts., Inc., 590 F.2d 876, 883 n.5 (10th Cir. 1979). See also In re Combs Distributorship Antitrust Litigation, 532 F.2d 64, 67 (8th Cir. 1976) (order of special importance to the parties is appealable even if it does not present any issue of general significance).

39. This Note does not take a position on whether appeal under Cohen should be restricted to orders of general significance. It only argues that if appealability is not restricted, orders granting stays of arbitration will frequently qualify as appealable collateral orders. Because importance is irrelevant to the statutory analysis in Part II, however, even courts that interpret the collateral order doctrine narrowly should reach the result suggested by this Note.

40. Comment, Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule, 51 Nw. U. L. Rev. 746, 750 (1957):

An erroneous interlocutory order does not cause irreparable injury simply because it may
bility of the collateral order doctrine to an order granting a stay of arbitration.\(^{41}\) but two have held that a trial court’s inappropriate denial of a stay of arbitration does not cause irreparable injury.\(^{42}\) This Note, therefore, considers a pair of Supreme Court cases that discuss the irreparable injury requirement. These cases illustrate that a trial court order threatens to do irreparable injury only if its effects upon a substantive right cannot be corrected in a final judgment appeal.

_Cohen_ itself provides a good starting point. Underlying the bondposting statute at issue in that case was a fear that plaintiffs’ personal resources might be insufficient to cover defendants’ expenses. Allowing the plaintiff to proceed without posting bond, said the Court, had a potentially irreparable impact on the defendant’s ability to obtain reimbursement for its litigation expenses.\(^{43}\) A declaration in a final judgment appeal that the district court should have required the plaintiff to post bond could not restore the defendant’s right to guaranteed reimbursement. Only immediate appellate review, the Court concluded, could avoid the irreparable injury that an erroneous trial court ruling might cause.

One year after _Cohen_, in _Swift & Co. Packers v. Compania Colom-
bianca Del Caribe, the Court permitted interlocutory appeal of a lower court order vacating the attachment of a vessel that was being held pending the outcome of a suit. Because the vessel apparently provided the only means of satisfying a judgment for the plaintiff, the order could cause irreparable injury by defeating its ability to recover from the defendant. The Court held the order appealable under Cohen because a final judgment review "would be an empty rite after the vessel had been released and the restoration of the attachment [was] only theoretically possible." It suggested, however, that an order upholding an attachment might not be immediately appealable. This distinction seems sound. The attachment could be vacated upon the entry of a final judgment for the defendant or upon a final judgment appeal of a decision for the plaintiff, and, therefore, would not cause irreparable injury.

Tested against the principles developed in these cases, orders granting or denying stays of arbitration appear, upon first consideration, unlikely to satisfy the irreparable injury requirement. If a stay is improperly granted, the party seeking arbitration can litigate the claim to final judgment, take a final judgment appeal, and obtain an order from the court of appeals vacating the judgment below and ordering arbitration. If a stay is improperly denied, the party seeking to litigate can urge error in subsequent proceedings to enforce the arbitration award, or in a final judgment appeal from an order

45. 339 U.S. at 689.
46. After holding the order vacating the attachment to be appealable, the Court stated: "The situation is quite different where an attachment is upheld pending determination of the principle claim . . . . In such a situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds." 339 U.S. at 684.
47. Thus it is commonly held that an interlocutory order denying a writ of attachment, sequestration, or replevin, or vacating a previously issued order, is appealable under Cohen. See, e.g., Lowe v. Pate Stevedoring Co., 595 F.2d 256, 257 (5th Cir. 1979); American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970). An order granting a writ, or refusing to vacate an existing order, however, may not be appealed. See, e.g., United States v. Estate of Pearce, 496 F.2d 847, 849-50 (3d Cir. 1974); Financial Servs., Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973). See also 15 C. WRIGHT, A. MILLER, & E. COOPER, supra note 18, § 3911, at 491-94.
48. Although there is voluntary compliance with the arbitration award in approximately 90% of the cases, M. DOMKE, COMMERCIAL ARBITRATION 94 (1965), an award is not enforceable against a recalcitrant party unless confirmed by a court. Section 9 of the Arbitration Act authorizes the district court to enter judgment upon an arbitration award unless the award is vacated under § 10, or corrected or modified under § 11. See 9 U.S.C. § 9 (1976). Section 10 allows the court to vacate the award if the arbitrators "exceeded their powers." See 9 U.S.C. § 10 (1976). Because arbitrators derive their authority from the parties' arbitration agreement, they exceed their powers if they decide matters outside the scope of the agreement. See, e.g., J.P. Greathouse Steel Erectors, Inc. v. Blount Bros. Constr. Co., 374 (D.C. Cir.), cert. denied, 389 U.S. 847 (1967). It follows, then, that a party who seeks but is denied a stay of arbitration on contractual or public policy grounds can urge those same grounds as reason to vacate the arbitration award under § 10. The party can seek a § 10 order either in an independent action or in opposition to § 9 proceedings brought by the other party. Since interlocutory orders are not res judicata, see G. & C. Merriam Co. v. Saalfeld, 241 U.S. 22, 28 (1916); Sterling Drug,
confirming the award.\textsuperscript{49} The district court's order on a motion to stay arbitration does not preclude either party from litigating or arbitrating his claim.\textsuperscript{50} Instead, the court of appeals has the power, in a final judgment appeal, to order arbitration or litigation where either has been erroneously denied.\textsuperscript{51} Erroneous orders granting or denying stays will, of course, subject the parties to needless trial or arbitration proceedings. But most courts consider the time and expense of participating in purposeless proceedings insufficient justification for appeal of an interlocutory order.\textsuperscript{52}

Closer examination of the reasons that parties enter arbitration agreements, however, belies this initial observation and supports a distinction between grants and denials of stays. Although its proponents believe that arbitration offers a legion of advantages over litigation,\textsuperscript{53} no single advantage is more important to most contracting parties than the speed with which proceedings can be concluded.\textsuperscript{54}

Inc. v. Weinberger, 509 F.2d 1236, 1240 (2d Cir. 1975); McDonnell v. United States, 455 F.2d 91, 96-97 (8th Cir. 1972), cert. denied, 412 U.S. 942 (1973); United States v. Stonehill, 420 F. Supp. 46, 52 (C.D. Cal. 1976), the trial court's original conclusion that the dispute was arbitrable will not be binding upon either it or any other court in which confirmation is sought. If, however, judgment is entered upon the award, a final judgment appeal may be taken under § 1291. At the same time, it should not be forgotten that a party unwillingly sent to arbitration (or litigation) may be satisfied with the results and never appeal.

\textsuperscript{49} See note 48 supra and Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1249 (8th Cir. 1981) ("[I]f a decision to . . . deny a stay of arbitration has a prejudicial effect on the rights of a party, that decision may be appealed after a final order has issued.").

\textsuperscript{50} Similarly, an order entered under § 3 of the Arbitration Act staying judicial proceedings pending arbitration does not conclusively preclude litigation of the dispute. As in the case where a stay of arbitration is denied, the stay can be urged as error in § 9 proceedings to confirm the award or in a § 1291 appeal of the judgment entered on the award. It has thus been stated that a § 3 stay does not constitute a "final determination" of any of the parties' rights. Hussain v. Bache & Co., 562 F.2d 1287, 1288 (D.C. Cir. 1977).


\textsuperscript{52} See note 40 supra.

\textsuperscript{53} Among the advantages often attributed to arbitration are (1) inexpensiveness; (2) the use of business experts to resolve questions of business fact and trade usage; (3) an ability to provide a "friendlier" forum than litigation; (4) less strict adherence to technical rules of evidence; and (5) avoidance of the publicity that may attend court proceedings. See S. Lazardus, supra note 1, at 47-56; Note, Restraining Effects of the Final Judgment Rule on the Arbitration Process, 66 Yale L.J. 293, 293 n.2 (1956); See also Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957); M. Domke, supra note 7, at § 1.02.

\textsuperscript{54} Business disputes disrupt the smooth operation of a concern and divert resources from their most efficient uses. Businessmen therefore attempt to settle most disputes as expeditiously as possible. S. Lazardus, supra note 1, at 65. Ninety percent of the businessmen responding to one survey considered speed to be an important positive attribute of arbitration. Id. at 46. Parties may consider other attributes of arbitration equally important. See, e.g., Committee on Commerce, Trade, and Commercial Law, supra note 7, at 155-56, stating that arbitration is directed at the three evils of delay, expense, and the inability of the courts to reach results consistent with business standards. In fact, to some parties, speed may be of secondary importance. See Association of the Bar of City of New York, Report, in Selected Articles on Commercial Arbitration 13 (D. Bloomfield ed. 1927), stating that the "chief argument" for arbitration lies in the submission of business disputes to persons knowledgeable
Parties arbitrate largely because they wish to resolve disputes expeditiously. Litigation may take years to resolve, but commercial arbitration proceedings, from their inception to the rendering of a final award, seldom last more than sixty to ninety days. The time saved reduces the likelihood that the debtor will become insolvent by the time an award is rendered, and minimizes the time that businessmen must spend resolving disputes. This suggests that the parties to a valid arbitration agreement have, between themselves, a substantive contractual right to resolve disputes quickly and inexpensively. To protect this right, courts should permit immediate appeal of orders that threaten significantly to delay parties in the exercise of an arbitration agreement.

An order staying arbitration, if not reviewed immediately, will significantly delay arbitration. The order forces the party seeking arbitration to proceed with a potentially lengthy trial, and, if dissatisfied with the results, to take a final judgment appeal. By the time that the court of appeals overturns the district court's stay and orders arbitration, the value of the right to arbitrate will have been substantially impaired. Because the delay and expense of litigation diminish the subsequent value of arbitration, a final judgment appeal cannot correct the damage caused by an erroneous order staying arbitration.

in the trade. This Note stresses the importance of speedy resolution of disputes because, unlike some other advantages of arbitration, this advantage will be irretrievably lost if orders granting stays are held unappealable.

55. See, e.g., H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924): "[T]here is so much agitation against the costliness and delay of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."; 66 Cong. Rec. 984 (1924) (remarks of Sen. Walsh): "The business interests of the country find so much delay attending the trial of lawsuits in courts that there is a very general demand for a revision of the law in this regard."; Joint Hearings, supra note 7, at 26 (statement of Alexander Rose).

The federal courts have recognized that the "basic purpose" of commercial arbitration is the speedy resolution of disputes without the expense and delay of extended court proceedings. See, e.g., Aerojet-General Corp. v. American Arbitration Assn., 478 F.2d 248, 251 (9th Cir. 1973); Office of Supply, Govt. of the Republic of Korea v. New York Nav. Co., 469 F.2d 377, 379 (2d Cir. 1972); Saxis S.S. Co. v. Multiface Intl. Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967). The motivation behind most arbitration agreements is the parties' desire to resolve their disputes quickly and inexpensively. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) ("The unmistakably clear congressional purpose [is] that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts."); United Aircraft Intl., Inc. v. Greenlandair, Inc., 298 F. Supp. 1329, 1332 (D.C. Conn.), affd per curiam, 410 F.2d 762 (2d Cir. 1969).

56. See M. Domke, supra note 48, at 8-9; S. Lazarus, supra note 1, at 48.


58. See notes 53-55 supra and accompanying text.

59. Many of the advantages of arbitration (i.e., submission of disputes to persons knowledgeable in the trade and informal rules of evidence) are not lost if arbitration is delayed. Nonappealability, therefore, would not in all cases render the right to arbitrate totally worthless. But because arbitrating parties place great emphasis on avoiding expense and delay, nonappealability would often have precisely that effect.
The threat of irreparable injury\(^60\) posed by such orders, however, can be avoided by permitting interlocutory appeal under the collateral order doctrine.\(^61\) Parties to a valid arbitration agreement have contractually established a right to resolve their disputes quickly and expeditiously.\(^62\) To protect that right, courts should permit immediate appeal of stays of arbitration, stays which threaten to destroy the very purpose for which the parties entered into the agreement.\(^63\) A rule of immediate appealability thus helps to guarantee that parties realize the objectives of their contracts. In so doing, the rule would also further the judicial policy of encouraging the use of arbitration.\(^64\)

\(^60\). At least one court has recognized that a party to an arbitration agreement suffers irreparable injury within the meaning of \textit{Cohen} if it is erroneously put to the expense and delay of litigation. \textit{Local 771, Intl. Alliance of Theatrical State Employees v. RKO Gen., Inc.}, 546 F.2d 1107, 1112 (2d Cir. 1977) (held that in a labor arbitration, an order ruling the parties' arbitration agreement to be nonexclusive and permitting litigation to proceed could be appealed under \textit{Cohen}).

\(^61\). The median time for the disposition of a normal civil case terminated by trial was 18 months in fiscal year 1976-1977. \textit{[1977] JUDICIAL CONFERENCE OF THE UNITED STATES ANN. REP.} 337. The total elapsed time from the initiation of an arbitration proceeding to award is approximately 60 to 90 days. \textit{See note 56 supra.} The median time from the filing of a complete record to the final disposition of a civil case submitted to the federal courts of appeals in 1976-1977 was 7.7 months. \textit{JUDICIAL CONFERENCE OF THE UNITED STATES ANN. REP., supra,} at 309. Therefore, where appeal is allowed from an order staying arbitration and the appellate court finds the order erroneous, the total proceeding from initiation of the motion to stay arbitration through the appeal and subsequent arbitration will be somewhat over 10 months. If appeal is not allowed, an additional 18 months will be spent in trial proceedings. Holding orders granting stays to be unappealable, therefore, would more than double the time parties must spend resolving their dispute. Where an order denying a stay is unappealable and erroneous, the loss of time will amount to the two months or so spent in the arbitration proceedings.

\(^62\). "An appellant who seeks arbitration has gained his right not to have to suffer the costs and delays of trial through contract negotiations." \textit{United States Tour Operators Assn. v. Trans World Airlines, Inc.}, 556 F.2d 126, 130 (2d Cir. 1977). In \textit{U.S. Tour Operators}, the court dismissed the defendant's appeal from an order denying its motion for a stay of trial proceedings on grounds of primary administrative jurisdiction. The court stated that the defendant, unlike a party to an arbitration agreement, had not bargained to have its case heard in a different forum and hence had "no . . . contractual right" to avoid trial proceedings. 556 F.2d at 130.

\(^63\). It is arguable that any recourse to the courts, even to appeal an order staying arbitration, is inconsistent with the policies behind arbitration. One commentator stated:

A handicap is imposed on commercial arbitration when the parties resort to the courts either before or during and after the arbitration. Here the various advantages of arbitration — speed, economy, and privacy — are lost when the validity of the arbitration clause and its binding effect is tested in court, when the arbitrability of the issue is challenged, when the qualification of an arbitrator is questioned, and when these court determinations may be further appealed in lengthy and expensive court proceedings. This resort to court action also eliminates the friendliness in the parties' relations which arbitration tries to maintain.

M. Domke, \textit{supra} note 48, at 15. The policies of arbitration would be thwarted to a greater extent, however, by a rule denying interlocutory appeal of orders granting stays. If the order was erroneous, interlocutory appeal will return the dispute to arbitration in the shortest time possible, and enable the parties to avoid a trial and final judgment appeal.

\(^64\). While the historical underpinnings of the position are subject to question, see \textit{Note}, \textit{Incorporation of State Law Under the Federal Arbitration Act, 78 MICH. L. REV.} 1391, 1403-04 (1980), the federal judiciary is now firmly of the belief that federal policy favors arbitration.
An order denying a stay of arbitration, in contrast, does not threaten irreparable harm. Because the order permits arbitration to proceed without delay, it does not impair the rights of the party who wishes to arbitrate. The party who wishes to litigate may suffer the expense and inconvenience of a needless arbitration proceeding, but this injury is not irreparable. A party seeking to litigate, unlike one seeking to arbitrate, is not claiming a contractual right to quick resolution of his disputes. An order denying a stay, therefore, does not impair the value of any contractual right. A dispute erroneously sent to arbitration, moreover, can be returned to litigation in a relatively short time. For these reasons, orders denying stays do not threaten the irreparable injury that is a prerequisite to interlocutory appealability under Cohen.


65. However, if an order denying a stay is held appealable, the trial court may exercise its authority under Rule 62(e) of the Federal Rules of Civil Procedure to stay arbitration during the pendency of the appeal. Arbitration might also be stayed by the court of appeals under rule 62(g), or by either court under rule 8(a) of the Federal Rules of Appellate Procedure. Because an appeal from an order denying a stay is unlikely to be decided before arbitration is completed, the trial court may well grant the stay to save the parties the expense of a possibly needless arbitration proceeding. In light of the federal policy favoring the use of arbitration as a quick and inexpensive means of resolving disputes, the possibility that arbitration will be stayed during the pendency of an appeal from the denial of a stay is another factor supporting a rule of nonappealability. Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1249 (8th Cir. 1981) (restricting interlocutory review of orders that permit arbitration to proceed will “afford parties to arbitration agreements fewer opportunities to delay or forestall arbitration proceedings, thus ensuring that arbitration remains a rapid and efficient means to resolve disputes.”).

Permitting interlocutory appeal of orders granting stays will not necessarily delay trial proceedings. District courts have authority to proceed with other aspects of the case during the pendency of an appeal under § 1292(a)(1). See, e.g., DePinto v. Provident Security Life Ins. Co., 374 F.2d 50, 51 n.2 (9th Cir.), cert. denied, 389 U.S. 822 (1967); Nalco Chem. Co. v. Hall, 347 F.2d 90, 92 (5th Cir. 1965); Janousek v. Doyle, 313 F.2d 916, 921 (8th Cir. 1963). Although there is little authority on the subject, there is no reason to apply a different rule to collateral order appeals. See 15 C. WRIGHT, A. MILLER, & E. COOPER, supra note 18, § 3911, at 497.

66. See note 61 supra.

67. In 1958, nine years after the decision in Cohen, Congress enacted 28 U.S.C. § 1292(b): When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order.
Cohen's irreparable harm requirement, therefore, enables courts to distinguish between orders granting and denying stays of arbitration. Courts applying the collateral order doctrine should permit immediate appeal of orders staying arbitration, but not of orders refusing stays. This suggested approach adequately protects the interests of both the parties and the judicial system. The proposed Some courts believe that the collateral order doctrine should be narrowly construed because of the availability of § 1292(b) review. See, e.g., Armstrong v. McAlpin, 625 F.2d 433, 439 n.12 (2d Cir. 1980); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543 (3d Cir. 1977). These cases argue that the judicial system is best served by a general rule of nonappealability and that § 1292(b) may be invoked in the exceptional case where interlocutory appeal is merited. See 9 J. MOORE, supra note 18, ¶ 110.10.

Section 1292(b) would not often allow the interlocutory appeal of arbitration stay orders because it permits certification of questions of law, while many arbitration stay orders turn on questions of fact. Even where the stay order involves a question of law, it is unlikely to concern an issue sufficiently substantial to justify certification. But see Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980) (substantial question existed concerning the scope of the district court's authority to hear the appellee's time-bar defense to arbitration).

Section 1292(b) would not often allow the interlocutory appeal of arbitration stay orders because it permits certification of questions of law, while many arbitration stay orders turn on questions of fact. Even where the stay order involves a question of law, it is unlikely to concern an issue sufficiently substantial to justify certification. But see Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980) (substantial question existed concerning the scope of the district court's authority to hear the appellee's time-bar defense to arbitration).

A further practical consideration supports the proposed distinction between orders granting stays and orders denying stays. A motion to stay arbitration can, of course, be made upon any grounds, no matter how frivolous. If orders denying stays were appealable, a party wishing to delay arbitration could enter a meritless motion to stay and appeal from its denial. If the trial court stayed arbitration during the pendency of the appeal, arbitration would be delayed. Holding orders denying stays unappealable thus tends to discourage purely frivolous or tactical appeals. In contrast, an order granting a stay of arbitration will generally constitute reliable evidence that a substantial question is involved. Given the tendency of the federal courts to "resolve all doubts in favor of arbitration," see, e.g., Hanes Corp. v. Millard, 531 F.2d 585, 597 (D.C. Cir. 1976); Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 385 (2d Cir. 1961); Paul Allison, Inc. v. Minikin Storage of Omaha, Inc., 486 F. Supp. 1, 3 (D. Neb. 1979), a district court is unlikely to stay arbitration unless a serious question exists concerning the validity or scope of the agreement to arbitrate. If the party seeking arbitration is making a claim which on its face is covered by the arbitration agreement, the agreement should be enforced. See, e.g., National R.R. Passenger Corp. v. Missouri Pac. R.R., 501 F.2d 423, 427 (8th Cir. 1974); Hamilton Life Ins. Co. of N.Y. v. Republic Natl. Life Ins. Co., 408 F.2d 606, 609 (2d Cir. 1969); Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967). Permitting appeal of orders granting stays would thus provide for the immediate review of orders involving substantial issues and having potentially irreparable impact. The proposed distinction between grants and denials indeed seems to conform quite nicely to the policies behind both the final judgment rule and the Cohen collateral order doctrine.

An objection can be raised, however, that the proposed rule would permit appeal of grants in some cases where there is no threat of irreparable injury, and would refuse appeal of denials in other cases where a threat does exist. This flaw in the rule cannot be denied. However, any rule that makes appealability turn on classes of orders will be flawed in this manner. To avoid this problem, it has been suggested that the courts of appeals employ a "balancing" process in deciding questions of appealability. Instead of holding broad classes of orders appealable, and others unappealable, the appellate courts would decide each petition for interlocutory review individually. The need for immediate review in the particular case would be weighed against the judicial system's interest in avoiding piecemeal review. See generally Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 COLUM. L. REV. 89 (1975). Although the balancing approach would enable the courts to avoid injustice in particular cases, it is not a practical alternative. The need to review individually each petition for appeal would place an intolerable burden upon the circuit courts. Other disadvantages also counsel rejection of this proposal. See Armstrong v. McAlpin, 625 F.2d 433, 440 n.13 (2d Cir. 1980).

For the contrary conclusion that neither the grant nor the denial of a motion to stay arbitration is likely to cause irreparable harm, see MatTy, The Appealability of District Court Orders Staying Court Proceedings Pending Arbitration, 65 MARQ. L. REV. 34, 66 (1979); Note,
rule thus constitutes a first step toward rationalizing the confused rules that currently control the interlocutory appealability of orders determining whether disputes should be arbitrated or litigated. 71

II

Because the collateral order doctrine is not sufficiently broad to guarantee a right to appeal immediately all stays of arbitration, a second step is also necessary. Some orders staying arbitration are not collateral to the merits of the case, 72 and thus do not satisfy Cohen’s first requirement. 73 And appeal under the collateral order doctrine is discretionary. Particularly in circuits that strictly apply Cohen’s importance requirement, 74 some parties stayed from arbitrating may be unable to convince the court to accept their interlocutory appeal. This Part takes that second step, arguing that section 1292(a)(1) of the Judicial Code 75 provides a right to appeal orders staying arbitration. As did Part I, however, this Part distinguishes between orders granting and denying stays and concludes that the latter are not immediately appealable. 76

Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 373 (1961); Comment, Arbitration or Litigation? United States District Court Orders Resolving the Issue Should be Appealable under 28 U.S.C. § 1292, 1973 U. ILL. L.F. 338, 347. The Illinois Comment concludes that both grants and denials should be held appealable under § 1292(a)(1), and another commentator argues that all interlocutory orders determining arbitrability should be appealable. Note, supra note 53, at 295.

71. Complex and seemingly inconsistent rules govern the area of interlocutory appeals of orders requesting stays of court proceedings. The grant of a motion under § 3 of the Arbitration Act for a stay of trial proceedings pending arbitration has substantially the same effect as the denial of a motion to stay arbitration. In either case the party who loses on the motion will be under substantial pressure to arbitrate. See New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 186 (1st Cir. 1972). Since the results of the two orders are the same, it follows that they should be governed by the same rules of appealability. But in fact, the appealability of a grant of a § 3 stay under 28 U.S.C. § 1292(a)(1) depends upon whether the claim sought to be litigated was legal or equitable in nature. This curious result is caused by application of the Enelow-Ettelson rule to orders requesting a stay of a court’s own proceedings. See note 88 infra. Thus, even in circuits that deny interlocutory appeal of orders refusing stays of arbitration, the grant of a stay under § 3 will sometimes be appealable. As the First Circuit stated, there are “medieval if not Byzantine peculiarities [in] this area of the law.” New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 189 (1st Cir. 1972).

72. See note 34 supra.

73. See note 29 supra.

74. See notes 36-39 supra and accompanying text.


76. If orders granting stays are held appealable under § 1292(a)(1), parties will not need to invoke Cohen. Recognition of a right to appeal under § 1292(a)(1) would make the appealability of arbitration stay orders under Cohen irrelevant. Nonetheless, this Note has discussed Cohen for two reasons. First, irreparable harm is a prerequisite to appealability under both Cohen and § 1292(a)(1). Cases interpreting § 1292(a)(1) frequently misapply the irreparable harm standard or neglect it altogether. A prior review of the concept of irreparable harm, as developed in the collateral order cases, may help the reader to understand the sometimes confusing decisions applying § 1292(a)(1). Second, holding the grant of a motion appealable and its denial unappealable poses no problem under Cohen. A grant/denial distinction of this kind, however, may conflict with the statutory language of § 1292(a)(1). Courts that adopt the Sec-
Section 1292(a)(1), which authorizes interlocutory appeal of district court orders "granting, continuing, modifying, refusing, or dissolving injunctions," has created interpretative problems. Courts of appeals, unable to agree on the scope of the section, have adopted several conflicting positions concerning the appealability of rulings on motions to stay arbitration. Two circuits permit section 1292(a)(1) appeals of both grants and denials of stays; one holds that neither grants nor denials of stays are immediately appealable; and another allows interlocutory appeal of grants but not denials of stays. But this conflict is not irreconcilable. Tested against the standards that the Supreme Court has read into section 1292(a)(1), all but one of these interpretations fail.

The Court set out the applicable standards most recently in *Carson v. American Brands, Inc.*, which held appealable an interlocutory appeal of the First Circuit's interpretation of § 1292(a)(1), see text at notes 104-05 infra, can still adopt the proposal in Part I of this Note.

77. 28 U.S.C. § 1292(a)(1) (1976). See note 12 supra. The statutory exception to the final judgment rule embodied in § 1292(a)(1) was first established by the Evarts Act of 1891, ch. 517, § 7, 26 Stat. 826, 828, which authorized interlocutory appeals "where . . . an injunction shall be granted or continued by interlocutory order or decree." The various changes the statute has undergone since that time are recounted in Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829-30 (2d Cir. 1963) (Friendly, J., dissenting), cert. denied, 376 U.S. 944 (1964).

78. See Texaco, Inc., v. American Trading Transp. Co., 644 F.2d 1152 (5th Cir. 1981); Petroleum Helicopters, Inc. v. Boeing-Vertol Co., 606 F.2d 114 (5th Cir. 1979); Shinto Shipping Co. v. Fibre & Shipping Co., 572 F.2d 1328 (9th Cir. 1978); Wicks Corp. v. Industrial Financial Corp., 493 F.2d 1173 (5th Cir. 1974); Aerojet-General Corp. v. American Arbitration Assn., 478 F.2d 248 (9th Cir. 1973); Firestone Tire & Rubber Co. v. International Union of United Rubber Workers, 476 F.2d 603 (5th Cir. 1973); Power Replacements, Inc., v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968); Eastern Marine Corp. v. Fukuya Trading Co., 364 F.2d 80 (5th Cir.), cert. denied, 385 U.S. 971 (1966).


Several circuits that have considered only one aspect of the problem hold that grants of stays are appealable, Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831 (7th Cir. 1977); Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973), revd. on other grounds, 417 U.S. 506 (1974); Buffer v. Electronic Computer Programming Inst., Inc. 466 F.2d 694 (6th Cir. 1972); Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345 (10th Cir. 1973) (decision limited to facts of case), or that denials are not, Stateside Mach. Co. v. Alperin, 526 F.2d 480 (3d Cir. 1975); Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244 (8th Cir. 1981); Helfenbein v. International Indus., Inc., 438 F.2d 1068 (8th Cir.), cert. denied, 404 U.S. 872 (1971). The Fourth Circuit took an appeal from an order granting a stay without giving explicit consideration to the issue of appealability. Leeson Corp. v. Cotwool Mfg., 315 F.2d 538 (4th Cir. 1963).

81. 450 U.S. 79 (1981). *Carson* is the Court's most cogent statement of the standards of appealability under § 1292(a)(1). Other leading Supreme Court cases interpreting § 1292(a)(1) include Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); Switzerland Cheese
tory order of a district court that had refused to enter a consent decree providing for both preliminary and permanent injunctive relief. Briefly reviewing section 1292(a)(1)'s legislative history and its own prior decisions, the Court stated that the section creates "a limited exception to the final-judgment rule," and concluded that only "orders of serious, perhaps irreparable, consequence" are immediately appealable. Despite the section's sweeping language, therefore, it does not authorize interlocutory appeal of every order granting or refusing injunctive relief.

To hold an order on a motion to stay arbitration appealable


82. Carson involved a class action under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. The plaintiffs represented a class of present and former black employees who had worked for or applied for work with the defendant tobacco company. Alleging that the company had discriminated against the class in hiring, promotion, transfer, and training opportunities, the plaintiffs sought a declaratory judgment, preliminary and permanent injunctive relief, and money damages. The parties negotiated a settlement prior to trial and jointly moved that the District Court approve and enter the proposed consent decree. 450 U.S. at 80-81.

83. 450 U.S. at 84.

84. 450 U.S. at 84 (quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)).

85. The Court found that the order denying approval of the consent decree in Carson posed two threats of serious or irreparable harm. First, refusal to enter the proposed consent decree would force the parties to go through "the time, expense, and inevitable risk of litigation." See note 95 infra. Second, plaintiffs had sought a preliminary injunction to restructure the defendant's transfer and promotional policies. They asserted that without such immediate relief they would suffer irreparable harm. The district court's order thus threatened to cause the plaintiffs serious or irreparable harm by delaying the entry of preliminary injunctive relief. 450 U.S. at 86-90.

86. See note 12 supra.

87. Judicial definitions of an "injunction," outside the § 1292(a)(1) context, are surprisingly scarce, and the Court in Carson failed to supply one. Generally, however, an "injunction" is a court order that commands or restrains conduct of the parties outside of the court proceedings. See, e.g., United Bonding Ins. Co. v. Stein, 410 F.2d 483, 486 (3d Cir. 1969) ("An injunction is a prohibitive writ issued by a court of equity forbidding a party-defendant from certain action, or in the case of mandatory injunction, commanding positive action."); Western Union Tel. Co. v. Electrical Workers, Local 134, 133 F.2d 955, 957 (7th Cir. 1943) ("An injunction protects civil rights from irreparable injury, either by commanding acts to be done, or preventing their commission . . .").

Carson emphasizes that an order does not qualify as a § 1292(a)(1) "injunction" merely because it commands or prohibits conduct outside of the court proceedings. In consequence, many orders that grant or refuse relief of an unquestionably injunctive character are not appealable as "injunctions" under § 1292(a)(1). Orders granting or refusing temporary restraining orders are perhaps the best-known example. A motion for a temporary restraining order requests the court to prohibit or command conduct outside of the court proceedings. However, the short duration of the orders lessens the likelihood that an order granting or refusing a temporary restraining order will cause irreparable harm. Immediate appeal of such orders might also impair the district court's ability to proceed promptly to an expanded hearing on the request for a preliminary injunction. Accordingly, orders granting or refusing temporary restraining orders are generally held unappealable. See, e.g., Sampson v. Murray, 415 U.S. 61, 86 n.58 (1974); Sohappy v. Smith, 529 F.2d 570, 572 (9th Cir. 1976); Drudge v. McKennon, 482 F.2d 1375, 1376 (4th Cir. 1973). Where the order on the motion for a temporary restraining order poses an unusual threat of irreparable harm, however, interlocutory
under the *Carson* interpretation of section 1292(a)(1), a court must find that the order grants or refuses injunctive relief, and that it threatens serious injury that cannot be corrected on a final judgment appeal. 88 The order need not, however, grant or refuse an injunction in express terms. 89 A motion to stay arbitration constitutes a request


88. It is important to distinguish between stays of arbitration under § 1292(a)(1) and the *Enelow-Etelson* rule, which was developed by the Supreme Court in *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935). The rule has been summarized as follows:

An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some equitable defense or counterclaim. Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.) (emphasis in original) (footnote omitted), cert. denied, 371 U.S. 891 (1962). “The theory is that the stay, if sought of a law action, is analogous to a chancellor enjoining proceedings in the law court, a separate forum, whereas a stay of an equitable action represents merely an ordering of judicial business in a single proceeding in equity.” Travel Consultants, Inc. v. Travel Management Corp., 367 F.2d 334, 337 (D.C. Cir. 1966), cert. denied, 386 U.S. 912 (1967). The Supreme Court reaffirmed the rule in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942), and in *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), even though the basis for the rule was destroyed in 1938 when adoption of the Federal Rules of Civil Procedure merged law and equity.

The rule fails to reflect existing realities and produces anomalous results. Arbitration is an equitable defense for purposes of the rule. Shanferoke Coal & Supply Co. v. Westchester Serv. Corp., 293 U.S. 449, 452 (1935). Therefore, while a motion to stay a legal action pending arbitration results in an interlocutory order appealable as the grant or refusal of an injunction, a motion for the stay of an equitable action pending arbitration does not give rise to an appealable order. Stateside Mach. Co. v. Alperin, 526 F.2d 480, 483 (3d Cir. 1975). In either case, however, the grant or refusal of the stay has the same effect upon the parties’ interests. Given such results, it is not surprising that the *Enelow-Etelson* rule has few friends. For judicial criticism of the rule, see *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1269 (D.C. Cir.), cert. denied, 441 U.S. 967 (1979); *Chapman v. International Ladies’ Garment Workers’ Union*, 401 F.2d 626, 628 (4th Cir. 1968). One court has boldly asserted that “[t]he demise of [the] rule cannot be far away,” *Hussain v. Bache & Co.*, 562 F.2d 1287, 1291 (D.C. Cir. 1977), but that seems to be an overstatement. For further criticism of the rule, see 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, supra note 87, at § 3923.

The courts of appeal have generally not applied the rule to orders granting or refusing stays of arbitration. Stateside Mach. Co. v. Alperin, 526 F.2d 480, 483 (3d Cir. 1975). But see *Whyte v. T.Hinc Consulting Group Intl.*, 659 F.2d 817, 819 (7th Cir. 1981). At least one commentator is under the misapprehension that the rule should apply to arbitration stay orders. See *Mathy, supra note 70*, at 55-60.

89. It is sufficient if the order has the practical effect of refusing the injunction. Carson v. American Brands, Inc., 450 U.S. at 83. Although the Court had approved the “practical” or “substantial effect” test many years earlier, see General Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430, 433 (1932), speculation that the Court would abandon the test followed its decision in *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). See Note, *The Limits of Section 1292(a)(1) Redefined?: Appealability of the Class Determination as an Order "Refusing an Injunction,"* 9 U. Tol. L. Rev. 488, 511-14 (1978).

The practical effect test is relevant in connection with the *Enelow-Etelson* rule. See note 88 supra. Where a court’s stay of its own proceedings has the practical effect of denying a request for a preliminary injunction, the stay order will be appealable independent of the *Enelow-Etelson* rule. See, e.g., *Gray Line Motor Tours, Inc. v. City of New Orleans*, 496 F.2d 293, 298 (5th Cir. 1974); *Glen Oaks Utils., Inc. v. City of Houston*, 280 F.2d 330, 333 (5th Cir. 1960). Thus were a district court to grant a § 3 stay of its own proceedings, while at the same time failing to rule on the opposing party’s request for a stay of arbitration, the stay order would be appealable as the refusal of an injunction, if orders denying stays of arbitration were otherwise held appealable under § 1292(a)(1).
for injunctive relief because it asks the trial court to award substantive relief involving an order of restraint.\footnote{90} Motions to stay do not seek a mere practice order regulating the course of the court's own proceedings;\footnote{91} rather, they ask the court "to exercise its equity powers to halt action of its litigants outside of its own court proceedings — the classic form of injunction."\footnote{92} Both grants and denials of stays thus rule on a request for an injunction, and satisfy the first prerequisite to appealability under section 1292(a)(1).

Although the injunction requirement affords no ground for distinguishing between orders granting and denying stays, only orders staying arbitration threaten "serious, perhaps irreparable," harm that cannot be avoided in a final judgment appeal. As Part I documented, parties incorporate arbitration clauses in their contracts primarily to avoid the expense and delay of litigation.\footnote{93} An order staying arbitration undermines a party's contractual right to resolve disputes quickly and inexpensively, and thus may cause irreparable injury.\footnote{94} A court of appeals can, in a final judgment appeal, vacate


Many cases emphasize that an order must grant or refuse substantive relief to qualify as an "injunction" under § 1292(a)(1). An order regulating matters of procedure, though cast in injunctive terms, is not an "injunction." See International Prods. Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963); 9 J. MOORE, supra note 18, at § 110.10(1). Cf. Rodgers v. United States Steel Corp., 541 F.2d 365, 373 (3d Cir. 1976) ("An order incidental to a pending action that does not grant all or part of the ultimate injunctive relief sought by the claimant, that is unrelated to the substantive issues in the action and that merely continues the case is not appealable under section 1292(a)(1).").

Because an order staying arbitration grants injunctive relief \textit{and} is related to substantive issues, it is appealable under this definition.

One treatise defines § 1292(a)(1) "injunctions" as "orders that are directed to a party, enforceable by contempt, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than preliminary fashion." 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, supra note 87, § 3922, at 29. Orders staying arbitration are directed at parties and are enforceable by contempt. They also afford relief "in more than preliminary fashion." The orders, therefore, qualify as injunctions under this second proposed definition.

91. Whatever may once have been the attitude of the federal courts, it now seems settled that an arbitration panel constitutes a separate forum independent of the court itself. See Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202 (1956), disapproving Judge Learned Hand's statement in Murray Oil Prods. Co. v. Mitsui & Co., 146 F.2d 381, 383 (2d Cir. 1944), that "[a]rbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law." In contrast, orders that merely control the conduct of litigation as a matter of procedure are generally held unappealable under § 1292(a)(1). Orders commanding discovery, or regulating class action communications, for example, are not appealable. These orders do not grant any part of the substantive relief sought in the complaint, nor will they often pose a threat of harm sufficiently serious to justify a departure from the final judgment rule. See 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, supra note 87, § 3922, at 38-42.

92. A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 713 (9th Cir. 1968).

93. See text at notes 53-51 supra.

an erroneous stay and return to arbitration a dispute originally litigated, but it cannot restore to the objecting party the time and money that he has expended to litigate the case. Serious impairment of the contractual rights of the party seeking to arbitrate can be avoided only by recognizing a right to appeal orders granting stays of arbitration immediately.\(^95\) An order denying a stay, however, does not threaten irreparable injury to the party desiring arbitration because arbitration proceeds without delay. Erroneous denial of a stay forces the party desiring litigation to incur some expense and delay, but does not infringe on any of his contractual rights. In light of the general rule that expense and delay, without more, do not constitute irreparable injury,\(^96\) it follows that the burden of participating in purposeless arbitration proceedings does not justify interlocutory appeal of orders denying stays.\(^97\)

This conclusion is at odds with the opinions of most of the courts of appeals that have considered the issue, but it is compelled by \textit{Carson}'s two-part inquiry. The Ninth Circuit's conclusion that orders denying stays of arbitration are immediately appealable under section 1292(a)(1),\(^98\) for example, seems incorrect because the court did not consider whether the denial of a stay threatened serious or irreparable harm that could not be corrected in a final judgment appeal.\(^99\)

\(^95\). \textit{Carson} itself supports this conclusion. To explain why the district court's refusal to enter a consent decree might have "serious, perhaps irreparable consequence[s]," \textit{450 U.S. at 84} (quoting Baltimore Contractors, Inc. \textit{v. Bodinger}, \textit{348 U.S. 176, 181} (1955)), the Court observed: "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation." \textit{450 U.S at 86-87} (quoting \textit{United States v. Armour & Co.}, \textit{402 U.S. 673, 681} (1971)) (emphasis added). Parties waive their right to litigate and enter into arbitration agreements for the same reasons that the parties in \textit{Carson} agreed to a consent decree — to avoid the expense and delay of litigation. There are, however, several differences between the consent decree and arbitration agreement situations. First, the right to enter into a consent decree can be irretrievably lost through a denial of interlocutory review, but the right to arbitrate cannot be lost permanently. This difference is insignificant. Although the right to arbitrate cannot be irretrievably lost, postponement of arbitration can eliminate most of the value of arbitration (\textit{i.e.}, minimization of delay and expense). Second, parties who enter into consent decrees know with certainty what their respective rights and liabilities will be when the court confirms the decree. In the arbitration context, however, the dispute usually has not yet arisen when the agreement is reached, and the parties do not know in advance how the arbitrator will adjust their rights. But it is hard to see the relevance of the added certainty to the question whether a party is irreparably injured.\(^100\)

\(^96\). \textit{See} note 40 \textit{supra}.

\(^97\). In the words of the First Circuit:

A decision to stay impending arbitration may well be an injunction in the "classic" sense since it effectively deprives at least one of the parties to the dispute of one of the principal objects for which he has contracted — that is, a relatively expeditious and inexpensive preliminary resolution of any controversy. . . . A refusal to stay arbitration, on the other hand, has no such potentially adverse impact on the ultimate rights of the parties. \textit{New England Power Co. v. Asiatic Petroleum Corp.}, \textit{456 F.2d 183, 186} (1st Cir. 1972) (footnote omitted).

\(^98\). \textit{See}, \textit{e.g.}, \textit{A. & E. Plastik Pak Co. v. Monsanto Co.}, \textit{396 F.2d 710, 713} (9th Cir. 1968).
The Fifth Circuit's identical conclusion is also based on an incomplete application of section 1292(a)(1)'s standard of appealability.

The Second Circuit's position that neither grants nor denials of motions to stay are appealable under section 1292(a)(1) is similarly suspect. To justify its position, the court argues that arbitration differs from court proceedings because it cannot produce an enforceable judgment without further judicial action. The court may be suggesting that orders denying stays do not threaten irreparable injury because arbitration awards can be judicially reviewed and reversed when confirmation is sought. This argument, however, only explains why orders denying stays are unappealable: By their nature, erroneous orders granting stays are not correctable on a final judgment appeal. The court's conclusion that interlocutory appeal of orders denying stays would delay arbitration proceedings, correct by itself, also does not justify rejecting appeals of orders granting stays.

To reinforce these arguments, the Second Circuit claims that section 1292(a)(1) requires similar treatment of grants and denials of stays. Although the statutory language supports this reading, the court's approach conflicts with the policies underlying the section.

101. Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d at 86. The decision in Lummus has been criticized for the court's reliance on the Enelow-Ettelson rule. See Buffler v. Electronic Computer Programming Inst., 466 F.2d 694, 697 n.4 (6th Cir. 1972); Comment, supra note 70, at 342-44. The Second Circuit has since expressly disavowed application of the Enelow-Ettelson rule to arbitration stay orders. Greater Continental Corp. v. Schechter, 422 F.2d 1100, 1102 (2d Cir. 1970).
102. Buffler v. Electronic Computer Programming Inst., Inc., 466 F.2d 694, 699 (6th Cir. 1972): If there are delays in arbitration which may accompany an appeal from an order denying a stay of arbitration, they do not appear to be as significant as the delays in arbitration which can result from the inability to appeal from an order granting a stay of arbitration. The District Court's order presently on appeal grants a preliminary injunction against arbitration which . . . could remain in effect through a trial on the merits of Buffler's antitrust, breach of contract, and breach of fiduciary duty claims. Needless to say, we do not find that the delays in arbitration which may result from appeals from orders denying stays of arbitration warrant a rule that bars appeals from orders granting or denying such stays. (emphasis in original).
103. Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d at 86.
104. Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d at 86.
105. Section 1292(a)(1) authorizes interlocutory appeal of orders granting or refusing injunctions, see note 12 supra, and provides no basis for distinguishing between orders granting and denying injunctions. It follows that the First Circuit's treatment of arbitration stay orders conflicts with a literal reading of the statutory language. See Buffler v. Electronic Computer Programming Inst., 466 F.2d 694, 699 (6th Cir. 1972). Indeed, one commentator states that "[t]he First Circuit's position can hardly be deemed a logical construction of the statute." Comment, supra note 70, at
Congress did not enact section 1292(a)(1) to override the policies of the final judgment rule. Rather, the section authorizes interlocutory appeal only of orders that threaten serious or irreparable harm that cannot be corrected in a final judgment appeal. Because only grants of stays threaten such harm, courts can effectuate the section's purpose by permitting appeal of grants, but not denials, of stays. It is significant, moreover, that while the courts have yet to establish a grant/denial distinction concerning any particular type of substantive relief, they have done so for at least one kind of procedural motion.

346. Nonetheless, an insistence upon reading the statute literally in the present context would defeat the policies that § 1292(a)(1) seeks to promote. See text at notes 106-07 infra.

The courts can in fact be rather dogmatic in stating that grants and denials must be treated equivalently. See, e.g., United States v. City of Alexandria, 614 F.2d 1358, 1361 n.5 (5th Cir. 1980) (“Since an order granting approval of a consent decree is one ‘granting’ an injunction for purposes of § 1292(a)(1), an order refusing approval of a consent decree is necessarily one ‘refusing’ an injunction for purposes of § 1292(a)(1), and is therefore appealable.”).


107. It seems obvious that courts will be truer to the congressional intent behind § 1292(a)(1) if they interpret it with an eye to the policies behind it. As one court stated, when faced with a different issue of § 1292(a)(1) appealability, “It is . . . with reference to the policy underlying section 1292(a)(1) that this issue must be resolved.” Chappel & Co. v. Frankel, 367 F.2d 197, 202 (2d Cir. 1966) (en banc).

The argument that the effects of a grant are not equivalent to the effects of a denial has also been made with respect to orders granting or refusing class certification. See Note, Interlocutory Appeal Under 28 U.S.C. § 1292(a)(1) of Orders Denying Class Action Certification, 58 B.U. L. Rev. 61, 75-76 (1978), contending that orders refusing but not orders granting class certification should be appealable under § 1292(a)(1). The Supreme Court has since held that an order denying class certification is not itself appealable. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978). However, if the application for class certification is coupled with a request for a preliminary injunction, the denial of class status may be reviewed when interlocutory appeal is taken of the ruling on the preliminary injunction. See Marcera v. Chinlund, 595 F.2d 1231, 1236 n.8 (2d Cir. 1979), vacated on other grounds sub nom. Lombard, Sheriff v. Marcera, 442 U.S. 915 (1979).

108. Of course, the First Circuit's position on arbitration stay orders is a start in that direction.

109. A grant/denial distinction made by the courts in the context of certain motions for summary judgment successfully implements the policies underlying § 1292(a)(1). A review of the leading decision, Switzerland Cheese Assn. v. E. Horne's Market, Inc., 385 U.S. 23 (1966), makes this fact clear. In Switzerland Cheese, the Supreme Court held that the denial of a plaintiff’s motion for summary judgment in an action for solely permanent injunctive relief cannot be appealed as the refusal of an injunction under § 1292(a)(1). Section 1292(a)(1), said the Court, is not intended to permit appeal of pretrial orders which decide nothing about the merits of the petitioner's claim. The rationale of the Court's decision is not difficult to see: When a trial court denies a plaintiff's motion for summary judgment, it does not finally deny the relief sought but instead only indicates that the claim must go to trial. The injunction the plaintiff seeks may well be granted when a final judgment is entered. The refusal to grant summary judgment therefore does not finally "refuse" the relief sought. Cf. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) (order denying class certification in action seeking solely permanent injunctive relief is not appealable under § 1292(a)(1) because, among other factors, the order could be reviewed and reversed by the district court during trial proceedings). Equally important, a delay in granting permanent injunctive relief is unlikely to cause irreparable harm to the plaintiff. Permanent injunctive relief is generally issued only after a full trial on the merits. Chappel & Co. v. Frankel, 367 F.2d 197, 204 (2d Cir. 1966) (en banc). Thus, the plaintiff who requests only permanent, and not preliminary, injunctive relief is saying, in effect, that the right he seeks to assert will not be lost or impaired if relief is denied
to orders staying arbitration when to do so would point them toward a more rational approach to the interlocutory appealability of these orders.

CONCLUSION

The federal judicial system protects the important policies reflected in the final judgment rule by restricting interlocutory appeal to orders threatening irreparable harm. Orders staying arbitration threaten irreparable harm because the expense and delay of litigation may frustrate a party's contractual right to arbitrate. A refusal to stay arbitration, however, poses no comparable threat of injury. Courts should, therefore, permit interlocutory appeal of grants but not refusals of stays of arbitration under either the collateral order doctrine or section 1292(a)(1).

until the trial is concluded. For these reasons, the denial of a summary judgment motion such as that in Switzerland Cheese does not pose the "serious, perhaps irreparable" consequences that would make it appealable. In contrast, where the trial court grants the summary judgment motion, the permanent injunction becomes immediately operative. Delaying appeal of the grant of summary judgment could, therefore, cause the enjoined party to suffer "serious, perhaps irreparable" harm for the duration of the trial. Accordingly, interlocutory orders granting a plaintiff's summary judgment motion for a permanent injunction are appealable. See, e.g., Guse v. J.C. Penney Co., 562 F.2d 6, 7 (7th Cir. 1977); Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037, 1038 (3d Cir. 1973). See generally, 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, supra note 87, at § 3924.

The Switzerland Cheese summary judgment rule is not directly analogous to the problem of arbitration stay orders. As discussed above, an order denying a plaintiff's summary judgment motion for a permanent injunction does not constitute the district court's final determination of the relief requested. The order is, therefore, not one "refusing" an injunction. An order granting the motion, however, is a final determination and qualifies as an order "granting" an injunction. The ultimate issue of appealability, in other words, turns on the finality of the order involved. The problem of finality, however, does not arise in connection with arbitration stay orders. The order on a motion to stay arbitration undeniably is a final determination and thus constitutes an order "granting" or "refusing" relief. Instead, the central question is whether the relief granted or refused is an "injunction" within the meaning of the statute. The premise of this Note that a motion to stay arbitration is an "injunction" when granted, but not when refused, is thus distinguishable from the problem addressed in Switzerland Cheese. Nonetheless, Switzerland Cheese usefully illustrates that in certain contexts a grant/denial distinction effectuates the policies behind § 1292(a)(1).