Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law

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The Federal Arbitration Act,¹ enacted in 1925 and not substantively amended to date,² overturned a long-standing common law doctrine that promises to arbitrate were revocable at will. The Act made such promises "valid, irrevocable, and enforceable."³ This comment addresses two questions arising under the Act: Do courts have the power to grant injunctive relief to maintain the status quo prior to arbitration? And if courts have such power, when should courts exercise it?⁴

The facts of *Teradyne v. Mostek*⁵ illustrate the problem which this comment addresses. In 1985, Mostek Corporation, a semiconductor components manufacturer, cancelled orders it had placed with Teradyne Incorporated, an electronic memory repair systems supplier. Teradyne demanded cancellation charges assessed at 70 percent of the original purchase price. When Mostek refused to pay, Teradyne filed a demand for arbitration pursuant to an arbitration clause in the contract. Meanwhile, Mostek announced that it was selling all of its assets and closing shop. The proceeds of the

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¹ 9 U.S.C. §§ 1-14 (1982)(hereafter "Arbitration Act" or "Act").

² The Act has been amended twice. Section 1 of Pub.L.No. 282, 61 Stat. 669 (1947), codified and enacted into positive law Title 9 of the United States Code. Before 1947, the text of Title 9 of the Code had been "merely prima facie evidence of the law." According to the Senate report accompanying the bill, the Code was passed into law "without any material change[s]" and with "[n]o attempt . . . to make amendments in existing law." Codify and Enact into Positive Law, Title 9 of the United States Code, Entitled "Arbitration," Sen.Rep.No. 664, 80th Cong., 1st Sess. 1 (1947). In 1970, an amendment to Title 9 divided the Title into two chapters and added the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Chapter 2. See Pub.L.No. 91-368, 84 Stat. 693 (1970).

³ 9 U.S.C. § 2.

⁴ Other commentators have addressed these issues. See Note, The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute, 66 B.U.L.Rev. 1041 (1986); Gregory D. Pike, The Federal Arbitration Act: A Threat to Injunctive Relief, 21 Willamette L.Rev. 674 (1985); Note, Availability of Provisional Remedies in Arbitration Proceedings, 17 N.Y.U.L.Q.Rev. 638 (1940).

⁵ 797 F.2d 43 (1st Cir. 1986).

sale were deposited in a bank account and dedicated to the payment of the claims of Mostek's creditors. Prompted by this change in Mostek's status, Teradyne commenced an action in federal district court seeking an injunction requiring Mostek to set aside sufficient funds to satisfy an arbitral judgment in favor of Teradyne.

This comment addresses the legal issues attendant upon Teradyne's motion to seek an injunction. Some courts have held that courts have no power under the Federal Arbitration Act to issue such an injunction. Others have concluded that courts have the power, but that an injunction would be appropriate only if the contract contained a provision for injunctive relief pending arbitration. Others would grant injunctive relief only if the plaintiff had a substantial likelihood of winning its dispute before the arbitrators. And still others have concluded that injunctive relief would be appropriate only if there was a good chance that other creditors, without injunctive relief, would consume so large a chunk of the proceeds from the sale of assets that there would be an insufficient amount to satisfy any possible arbitral award in the case.

Part I of this comment reviews the disparate case law on provisional injunctive relief under the Act. Part II argues that courts have the power to grant injunctive relief pending arbitration. Part III argues that (1) unless a specific contractual provision to the contrary exists, courts should imply a status quo maintenance provision into arbitration agreements where breach of the status quo would constitute bad faith; and (2) courts should enforce a status quo provision where the party seeking arbitration satisfies the traditional standards for specific performance of a contract.

I. THE CASE LAW ON INJUNCTIVE RELIEF UNDER THE ACT

The structure of the Arbitration Act is straightforward. Section 2 states that a written provision for arbitration contained in any maritime or commercial contract "shall be valid, irrevocable, and enforceable," except upon the grounds for which any contract may be revoked.⁶

Sections 3 and 4 provide courts with remedies to effect the purpose of the Act set out in § 2. Section 3 comes into play if a party brings suit upon an issue subject to arbitration. It provides that if such a suit is brought the court, after satisfying itself that

⁶ 9 U.S.C. § 2. Section 1 defines "maritime transactions" as all matters embraced by admiralty jurisdiction and "commerce" as all commerce (excluding employment contracts) within the scope of federal power over interstate commerce. 9 U.S.C. § 1.

the issue is referable to arbitration under the agreement, "shall on application of one of the parties, stay the trial of the action" until the arbitration is completed.⁷ Section 4 concerns a party's refusal to submit to arbitration. It instructs the court first to make sure that both the "making of the agreement to arbitrate" and "the failure to comply therewith" are not in issue and then, if these are undisputed, to order the recalcitrant party "to proceed to arbitration in accordance with the terms of the agreement."⁸ The Act thus precludes a court from settling issues that the parties agreed to settle by arbitration (it must "stay the trial of the action") and mandates that courts specifically enforce agreements to arbitrate.⁹

Courts have taken widely divergent positions on when a district court should issue an injunction to maintain the status quo pending arbitration pursuant to the Arbitration Act. For purposes of exposition, these may be grouped into five approaches:

A. Injunctive Relief Never Appropriate

The most unsympathetic approach towards issuance of an injunction pending arbitration holds that the Act forbids such injunctions in all cases. Several district courts have adopted this position, although it has not yet been adopted by any appellate court.¹⁰

⁷ 9 U.S.C. § 3.

⁸ 9 U.S.C. § 4.

⁹ Other provisions of the Act are as follows: Section 5 provides that the court shall appoint an arbitrator if the parties cannot agree on one. Section 6 sets out the procedures the court is to follow in hearing motions. Section 7 gives power to the arbitrators to secure the attendance of witnesses and the production of necessary documents. Section 8 provides that if the basis for the court's jurisdiction is admiralty, then the party allegedly aggrieved may begin the proceeding "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings," and that the court shall then have jurisdiction "to direct the parties to proceed with the arbitration" and "to enter its decree upon the award." Section 9 provides that upon the application of one of the parties, the court must, if the agreement between the parties so specifies, enter the award of the arbitrator as the judgment of the court, unless the award is vacated or modified. Sections 10 and 11 state that a court may vacate or modify an award only if the award was procured by corruption or fraud; if the arbitrators were guilty of misconduct, exceeded their powers or failed to make a definite award; or if there was an evident material miscalculation or mistake in description of any person, thing, or property referred to in the award. Sections 12 and 13 prescribe the procedures for moving to vacate or modify an award. Section 14 states that the Act shall not apply to contracts made before January 1, 1926. 9 U.S.C. §§ 5-14. Before the Act was amended in 1947, § 15 stated that "all Acts and parts of Acts inconsistent with this Act are hereby repealed." See 43 Stat. 886 (1925).

¹⁰ In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, No. 83-1480, slip op. (10th Cir. May 12, 1983), however, the Tenth Circuit vacated a preliminary injunction which the district court had granted pending arbitration. Because this order was without formal writ-

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson*,¹¹ Merrill Lynch sought preliminary injunctions pending arbitration to prevent three former account executives, who had resigned their positions at Merrill Lynch to join another brokerage firm, from using confidential information concerning Merrill Lynch's clients. The executives allegedly used the information to solicit Merrill Lynch customers in an attempt to have those customers switch their accounts to the employees' new brokerage firm. Merrill Lynch claimed that by using this confidential information, its former employees violated their employment contracts. Despite contract language stating that "any controversy" between Merrill Lynch and its employees "shall be settled by arbitration," Merrill Lynch entreated the court to enjoin its former employees from continuing to violate their employment contracts until and while arbitration proceeded. Merrill Lynch argued that it had demonstrated both that its employees were breaching the contract and that it would be irreparably harmed if the court did not grant an injunction. The court in *Thomson*, however, refused to reach either the merits of the dispute or the equitable considerations governing the appropriateness of injunctive relief. The court instead held that the language and purposes of the Arbitration Act prevented it from issuing an injunction under any circumstance.

Thomson's textual argument relied on § 3 of the Act, which provides that if the court is satisfied that the dispute is referable to arbitration, "the court . . . shall, on the application of one of the parties, stay the trial of the action until such arbitration has been had."¹² The court quoted this language, italicized the word "shall," and concluded that this stay clause "is stated in mandatory terms."¹³ The court then reasoned that "issuing an injunction, even a preliminary injunction, would require a time consuming exploration of the merits" and that "the plain meaning" of the Act is that "once a stay under § 3 is issued, the court cannot concern itself with the merits of the dispute until arbitration has

ten opinion, it is not possible to know the basis on which the Tenth Circuit based its order. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) is frequently cited as standing for the proposition that injunctive relief is never available. Part I.D. of this comment argues that this is a misreading of *Hovey*. For cases which have so interpreted *Hovey*, see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127, 1129 (1985) (White dissenting from denial of certiorari); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 48-49 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith v. Bradley*, 756 F.2d 1048, 1051 (4th Cir. 1985).

¹¹ 574 F.Supp. 1472 (E.D.Mo. 1983).

¹² 9 U.S.C. § 3.

¹³ *Thompson*, 574 F.Supp. at 1478.

been had."¹⁴

Thomson's argument from congressional purposes relied on pronouncements made in two Supreme Court opinions construing the Arbitration Act. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Court stated, in language quoted by Thomson, that "the unmistakably clear Congressional purpose [behind the Act was] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."¹⁵ Similarly, in *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, the Court stated, in language also quoted by Thomson, that "Congress's clear intent . . . [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" and, consequently, the Act calls "for an expeditious and summary hearing, with only restricted inquiry into factual issues."¹⁶

Relying on this Court-identified "expediting" purpose, Thomson concluded that "[e]ven though at this stage of the proceedings granting a preliminary injunction pending arbitration would not involve inordinate delay, it would establish a precedent that would eviscerate the policy of the Arbitration Act" because "[p]roceeding on Merrill Lynch's preliminary injunction motion would deeply involve the Court in the factual issues of the case." A party seeking an injunction could, therefore, "delay arbitration and divert its opponent's attention and resources away from expeditiously presenting the substance of the controversy to the arbitrators."¹⁷

¹⁴ *Id.* Accord *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson*, 575 F.Supp. 978, 979 (N.D.Fla. 1983) ("the language of Section 3 mandates the issuance of a stay and prohibits evidentiary proceedings that would be required before this court could consider any preliminary injunction"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604, 608 (Tex.App. 14 Dist. 1984) (since the "statute's terms are mandatory . . . the trial court is obliged to conduct a very narrow two step inquiry[:] . . . [f]irst, it must determine whether a written agreement to arbitrate the subject matter of the present dispute exists between the parties . . . [s]econd, if such an agreement exists, the court then addresses the question of whether the agreement has been breached"); *Jab Industries, Inc. v. Silex S.P.A.*, 601 F.Supp. 971, 979 (S.D.N.Y. 1985) ("[g]enerally . . . provisional remedies such as attachments or compulsory bonds are not available in arbitration").

¹⁵ 388 U.S. 395, 404 (1967) (in passing upon an application for a stay of arbitration under § 3 of the Act, a federal court may consider only the issues relating to the making and performance of the agreement to arbitrate).

¹⁶ 460 U.S. 1, 22 (1983) (since there was no showing of requisite exceptional circumstances, district court abused its discretion in issuing a stay, pending resolution of a state court suit, of action to seek order compelling arbitration).

¹⁷ Thomson, 574 F.Supp. at 1478-79. See generally *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert*, 577 F.Supp. 406, 407 (M.D.Fla. 1983) (at least where a court must rule on major issues subject to arbitration, an adjudication of the claim for preliminary injunctive relief would disserve the public interest in arbitration because "the inquiry neces-

B. The Hollow Formality Test

The Fourth Circuit, in *Merrill Lynch, Pierce, Fenner & Smith v. Bradley*,¹⁸ has taken the most sympathetic position towards issuance of an injunction pending arbitration. That court held that the Act did not prohibit issuance of an injunction, that the court need not consider which party is most likely to win on the merits of the controversy to be decided by the arbitrators, and that issuance of an injunction was appropriate when the enjoined conduct would render the arbitral process a "hollow formality."¹⁹ Merrill Lynch brought action against Bradley promptly after Bradley left his position with Merrill Lynch to join another brokerage firm. Merrill Lynch sought to enjoin Bradley from using Merrill Lynch's records to solicit its clients in violation of Bradley's employment contract. Like the employment contract in *Thomson*, Bradley's contract with Merrill Lynch stated that "any controversy" between Bradley and Merrill Lynch "shall be settled by arbitration."²⁰ After a hearing, the district court granted Merrill Lynch a preliminary injunction and ordered expedited arbitration of the dispute. On appeal, the Fourth Circuit affirmed the district court's injunction pending arbitration.

The *Bradley* court first resolved the issue of whether the Act absolutely precluded a district court from granting a preliminary injunction to preserve the status quo pending arbitration. After quoting the language of § 3 of the Act, the court concluded that § 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 . . . [because] § 3 states only that the court shall stay the 'trial of the action;' it does not mention preliminary injunctions or other pre-trial proceedings."²¹ Furthermore, the court reasoned that since there was nothing in the statute's legislative history to the contrary, the word "trial" in "stay the trial of the action" should be given its "common and ordinary usage: the ultimate resolution of the dispute on the merits."²² Since the district court, in adjudicating the motion for a preliminary injunction, had not provided an ultimate resolution of the

sary to make such an adjudication would clearly be inconsistent with the purpose of the Arbitration Act to unburden the court system").

¹⁸ 756 F.2d 1048 (4th Cir. 1985).

¹⁹ *Id.* at 1053-54.

²⁰ *Id.* at 1050.

²¹ *Id.* at 1052.

²² *Id.* at 1052.

dispute between Merrill Lynch and Bradley, the court had not violated the statute's command to "stay the trial of the action." Moving beyond the language of the statute, the *Bradley* court expressed its belief that "Congress would [not] 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."²³

Bradley then resolved the question of what approach it should take in determining whether the district court had abused its discretion in granting a preliminary injunction pending arbitration. The court reasoned that in passing the Arbitration Act, Congress acted to preserve "a meaningful arbitration process"; hence, preliminary injunctive relief pending arbitration furthered rather than frustrated congressional policy when such relief was necessary to prevent the arbitration process from becoming a "hollow formality."²⁴ Explicating this conclusion, the court held that the "arbitration process would be a hollow formality where 'the arbitral award when rendered could not return the parties substantially to the *status quo ante*.'" ²⁵ *Bradley*'s "hollow formality" standard did not require the court to weigh the ultimate merits of the dispute to be presented to the arbitrators.²⁶

Applying this standard to the facts in *Bradley*, the court reasoned that the district court acted properly in issuing the preliminary injunction because *Bradley*'s conduct might render the arbitration process a hollow formality:

²³ *Id.* at 1052. *Bradley* also distinguished *Prima Paint Corp.*, 388 U.S. 395, and *Moses H. Cone*, 460 U.S. 1, the two Supreme Court cases relied on by the *Thomson* court, as well as *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) (anti-injunction provision of the Norris-LaGuardia Act precludes a court from granting a preliminary injunction where the labor strike, in violation of a "no strike" clause, was not over an issue subject to arbitration), on the basis that none of these cases directly addressed the issue of whether § 3 of the Federal Arbitration Act precluded a district court from granting a preliminary injunction to preserve the status quo pending arbitration. 756 F.2d at 1052-54.

²⁴ 756 F.2d at 1053-54.

²⁵ *Id.* at 1053-54, quoting *Lever Brothers Co. v. International Chemical Workers Union*, 554 F.2d 115, 123 (4th Cir. 1976) (adopting "hollow formality" standard for issuance of preliminary injunctions under the Norris-La Guardia Act, which, unlike the Federal Arbitration Act, appears expressly to forbid injunctive relief).

²⁶ *Bradley* rejects the Fourth Circuit's standard four-factor preliminary injunction test, of which one factor is whether the plaintiff is likely to succeed on the merits of its position. Because the district court in *Bradley* had relied on this standard test, *Bradley* affirmed the district court's issuance of the injunction only after finding that the district court had "implicitly found that arbitration of this dispute would be a hollow formality absent preliminary relief." 756 F.2d at 1054-55.

When an account executive breaches his employment contract by soliciting his former employer's customers, a nonsolicitation clause requires immediate application to have any effect. An injunction even a few days after solicitation has begun is unsatisfactory because the damage is done. The customers cannot be "unsolicited." It may be impossible for the arbitral award to return the parties substantially to the status quo ante because the prevailing party's damages may be too speculative.²⁷

C. The Preliminary Injunction Test

Another solicitous approach towards the issuance of an injunction pending arbitration allows an injunction whenever the requirements of a preliminary injunction test are satisfied. While the precise formulation of the test varies among the circuits, all of the tests involve consideration of the enjoining party's likelihood of success on the merits. Decisions in the First, Second, Seventh, and Eighth Circuits have taken this approach.²⁸

In *Teradyne, Inc. v. Mostek Corp.*, for example, the First Circuit held that the Act did not preclude injunctive relief to preserve the status quo pending arbitration. The court relied on the circuit's four-part test for issuance of a preliminary injunction in determining the appropriateness of injunctive relief.²⁹

The *Teradyne* court first analyzed the effect of the Arbitration Act on the power of the district court to grant preliminary injunctive relief. The court acknowledged *Prima Paint*³⁰ and *Moses H. Cone*,³¹ in which the Supreme Court noted congressional desire for

²⁷ 756 F.2d at 1054.

²⁸ See *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe K.G. v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589 (8th Cir. 1984).

Of these four cases, only *Teradyne* discusses the question of whether the Arbitration Act might prevent the court from granting injunctive relief pending arbitration; each of the other cases simply assumes that injunctive relief is appropriate whenever the circuit's standard test for the issuance of preliminary injunctions is satisfied. Even more surprising, the law is still unsettled in the Second and Eighth Circuits. The Second Circuit case cited above represents a different approach from that taken by an earlier Second Circuit panel. The earlier opinion was not even cited in the later decision. Compare *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980) with *Roso-Lino*, 749 F.2d 124. A similar pattern occurs in the Eighth Circuit. Compare *Merrill Lynch, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) with *Ferry-Morse Seed Co.*, 729 F.2d 589.

²⁹ 797 F.2d at 51.

³⁰ 388 U.S. 395, 404 (1967).

³¹ 460 U.S. 1, 22 (1983).

a speedy arbitration process, but distinguished these two cases by relying on *Dean Witter Reynolds v. Byrd*.³² In *Byrd*, the Supreme Court reoriented its approach and held that "passage of the Act was motivated first and foremost by a congressional desire to enforce [arbitration] agreements into which parties had entered."³³

Hence, the *Teradyne* court is able to argue that courts have the power to issue a preliminary injunction if the exercise of that power enhances the enforcement of arbitration agreements, even if that exercise slows the path to arbitration. The *Teradyne* decision concludes, much like *Bradley*, by noting that "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process."³⁴

Unlike the Fourth Circuit in *Bradley*, however, the First Circuit in *Teradyne* held that the appropriate test for injunctive relief is not merely the inability of arbitration to return the parties to the status quo ante. Rather, the First Circuit applied its full-blown four-part test for preliminary injunctive relief:

The court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.³⁵

The first part of the test ("irreparable injury") is similar to *Bradley*'s "hollow formality" test, but the next three parts of the test in *Teradyne* go substantially beyond *Bradley*. In particular, the third part of the *Teradyne* test forces the court to enter into a discussion of the relative merits of the litigants' legal arguments,³⁶ which makes it necessary for district courts to conduct a "mini-trial" on the merits of the controversy before issuing injunctive relief.

³² 470 U.S. 213 (1985) (Enforcement of the parties' contract rather than speedy and efficient adjudication was the "preeminent" concern of Congress in passing the Arbitration Act. In a suit containing both arbitrable and nonarbitrable claims, a court must send the arbitrable claims to arbitration even though they are intertwined with the nonarbitrable claims and the ensuing bifurcated proceedings will result in double litigation of certain issues.).

³³ *Id.* at 220.

³⁴ *Teradyne*, 797 F.2d at 51.

³⁵ *Id.* at 51-52.

³⁶ See, for example, *id.* at 53-57.

D. The Contractual Language Test

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*,³⁷ the Eighth Circuit took a less solicitous approach towards the issuance of an injunction than the *Teradyne* court. In a fact pattern similar to that of *Thomson and Bradley*, *Hovey* held that "where the Arbitration Act is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief."³⁸ Hence, the Eighth Circuit overturned the district court's grant of an injunction in *Hovey* because the party seeking the injunction never had "alleged that the contract provides for or contemplates injunctive relief along the lines granted."³⁹ *Hovey* thus refused to grant a preliminary injunction because the parties did not provide specifically for this relief in their contract.⁴⁰ Since *Hovey* did not involve a case in which the contract explicitly contemplated injunctive relief, the court did not explicate the test to be used in granting injunctive relief.

In coming to this conclusion, *Hovey* relied on *Prima Paint*⁴¹ and *Moses H. Cone*,⁴² and further reasoned that "the judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator."⁴³ Finally, *Hovey* also relied on

³⁷ 726 F.2d 1286 (8th Cir. 1984). Whether *Hovey* is still good law in the Eighth Circuit is an open question. See note 28. Despite a later Eighth Circuit case employing a different analysis, *Hovey* is still frequently cited as stating that circuit's position. See McCollum, 469 U.S. at 1129 (White dissenting from denial of certiorari); *Teradyne*, 797 F.2d at 48-49; *Bradley*, 756 F.2d at 1051; *Protane Gas Co. of Puerto Rico, Inc. v. Sony Consumer Products Co.*, 613 F.Supp. 215, 218 (D.P.R. 1985).

³⁸ 726 F.2d at 1292.

³⁹ *Id.* at 1291.

⁴⁰ Faced with all of the legal uncertainty and litigation created by the disparate treatment of its arbitration agreements in the courts, *Merrill Lynch* recently changed its Account Executive Agreement to provide expressly for a preliminary injunction pending arbitration. *Bradley*, 756 F.2d at 1051 n.1. Another interesting angle on this fact pattern is the effect of the New York Stock Exchange's arbitration provision in its constitution. The normal background assumption is that parties start out with the right to go to court and can then bargain to include an arbitration provision in the contract. New York Stock Exchange Rule 347 reverses this presumption by stating that parties have the right to demand arbitration. See 2 CCH NYSE Guide ¶ 2347 (1986).

⁴¹ 388 U.S. 395 (1967).

⁴² 460 U.S. 1 (1983).

⁴³ *Hovey*, 726 F.2d at 1292. One can thus infer that were the *Hovey* court to decide a case in which the contract expressly provided for injunctive relief, it would nevertheless inquire into the merits of the underlying dispute between the parties.

*Buffalo Forge Co. v. United Steelworkers*⁴⁴ in which the Court, construing the Norris-LaGuardia Act, refused to enjoin a strike pending arbitration where the strike was not over an issue subject to arbitration. *Hovey* cited language in *Buffalo Forge Co.* asserting that "the parties' agreement . . . to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage."⁴⁵

E. The Contractual Term and Inadequacy at Law Test

In *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*,⁴⁶ the Second Circuit interpreted the Act to permit injunctive relief pending arbitration only if two conditions obtain. First, the contract must envision maintenance of the status quo pending arbitration, and second, this status quo term of the contract must satisfy the traditional equitable standards for specific performance.

The facts of *Guinness-Harp* were as follows: Guinness-Harp entered into a contract with Schlitz to distribute Schlitz's beer throughout most of New York City. The contract contained a status quo provision by which Schlitz agreed to submit any dispute between it and Guinness-Harp to arbitration prior to the termination of Guinness-Harp's distributorship. The contract also contained a provision stating that "it is understood that arbitration shall be the sole remedy of either party against the other." Schlitz became dissatisfied with the sales performance of Guinness-Harp and stated that it planned to terminate the agreement. Guinness-Harp responded by demanding that Schlitz arbitrate their dispute and by bringing suit to enjoin Schlitz from terminating the distributorship until arbitration had been concluded.

The Second Circuit in *Guinness-Harp* had little trouble concluding that it had the power to issue an injunction under the Arbitration Act. The court reasoned that the federal policy of enforcement of a duty to arbitrate entitles a federal court to "adjudicate 'issues relating to the making and performance of the

⁴⁴ 428 U.S. 397 (1976).

⁴⁵ *Id.* at 412.

⁴⁶ 613 F.2d 468 (2d Cir. 1980) (Newman, joined by Friendly and Oakes). Whether this case is still good law in the Second Circuit is an open question. See note 28. In *Roso-Lino*, 749 F.2d 124 (2d Cir. 1984)(per curiam)(Kaufman, Timbers, and Pratt), a different panel of the Second Circuit adopted the preliminary injunction test described in Part I.C. of this comment without citing *Guinness-Harp*. For an attempt to harmonize these two cases, see *Givenchy S.A. v. William Stuart Industries (Far East) Ltd.*, No. 85-9911, slip op. (S.D.N.Y. March 10, 1986).

agreement to arbitrate,' ” and that “[h]ere maintenance of the status quo pending arbitration relates in a substantial way to the performance of the agreement.”⁴⁷

In determining the appropriate test for issuing an injunction, the court in *Guinness-Harp* took care to narrow the issues before it. The court stressed that it should not, as in a motion for a preliminary injunction, evaluate the probable success of Guinness-Harp's claim on the merits. Instead, the court should focus on whether the agreement provides for maintenance of the status quo during the arbitration.

Judge Newman reasoned that the suit before the court was unlike a “normal” suit to obtain immediate injunctive relief because it was not “preliminary to a plenary judicial hearing on the merits of the lawsuit.” Since “the merits of their fundamental dispute—whether grounds exist for ultimate termination of the distributorship—is [*sic*] a matter for arbitration, not for the court[,] . . . [t]he ‘merits’ of their lawsuit [in court] concern only whether there can be termination in the interval prior to completion of arbitration.” The court thus argued that a preliminary injunction analysis is analytically incorrect:

[T]he injunction issued by the District Court is for all practical purposes a final injunction; it maintains the distributorship pending arbitration, and that is the relief for which Guinness brought this lawsuit. . . . Hence what comes to us for review labeled a preliminary injunction is in substance a final injunction, albeit one of limited duration.⁴⁸

Recognition of the final nature of the injunction sought by Guinness-Harp allowed the court to jettison the onerous and arbitrarily intrusive task of evaluating the relative merits of the dispute between the parties. Because the enjoining party is seeking a final rather than a preliminary injunction, it must show only that the agreement provides for maintenance of the status quo.⁴⁹ The party need not demonstrate its probable success on the merits of the ultimate controversy.

Interpreting the arguably conflicting “status quo” and “arbitration sole remedy” provisions of the beer distributorship contract

⁴⁷ 613 F.2d at 472, quoting *Prima Paint Corp.*, 388 U.S. at 404 (emphasis added in *Guinness-Harp*). See also *Albatross S.S. Co. v. Mannin Bros., Inc.*, 95 F.Supp. 459, 463 (S.D.N.Y. 1951) (power to issue an injunction is “an incident of the power to enforce the agreement to arbitrate”).

⁴⁸ *Guinness-Harp*, 613 F.2d at 471.

⁴⁹ 613 F.2d at 471.

to require maintenance of the status quo pending arbitration, the court then considered whether Guinness-Harp was entitled to specific performance of that term of the contract. After noting that the district court's "assessment of the equities—that the risk of irreparable injury to Guinness without an injunction substantially outweighed any hardship to Schlitz if an injunction were issued—is amply supported by the record," the court of appeals affirmed the district court's grant of injunctive relief.⁵⁰

The *Guinness-Harp* approach is similar to the Eighth Circuit's approach in *Hovey* in that it is contractually oriented. Under *Hovey*, the enjoining party must show that the language of the contract contemplates injunctive relief along the lines requested. Under *Guinness-Harp*, the enjoining party must show that the contract, although perhaps not by its language alone, envisions maintenance of the status quo prior to arbitration. But the *Guinness-Harp* approach differs from that of *Hovey* (and *Teradyne*) and is similar to that of *Bradley* in that the court need not inquire into the enjoining party's probable success on the ultimate merits of the controversy. Once the court determines that the contract envisioned maintenance of the status quo, the court need only find that the traditional standards for granting specific performance are satisfied, i.e. the party has no adequate remedy at law or, in the arbitration context, the party has no adequate remedy through arbitration.⁵¹ Thus, once the enjoining party shows that the contract

⁵⁰ Id. at 473. Judge Newman refined this analysis in *Holt v. Continental Group, Inc.*, 708 F.2d 87 (2d Cir. 1983). An employee had filed a complaint with a state agency alleging that her employer had discriminated against her because of her race and sex. The employee also sought to enjoin her employer from retaliatory conduct pending the outcome of the state administrative proceeding. On the employee's appeal from the district court's refusal to grant injunctive relief, Judge Newman categorized the suit as one for traditional preliminary injunctive relief pending a judicial trial on the merits rather than a final injunction of limited duration pending the state administrative proceedings. Judge Newman distinguished this case from *Guinness-Harp*, because, unlike the plaintiff in a suit under the Arbitration Act, the plaintiff in a Title VII suit is entitled to district court review on the merits after exhausting state administrative remedies. Id. at 89. Judge Newman thus maintains that, in the arbitration context, a suit to enforce the status quo prior to arbitration should be categorized as a suit for a final injunction of limited duration because the trial court in affirming the arbitral award may not review the merits of the dispute. See also *Manning v. Energy Conversion Devices, Inc.*, No. 87-7799, slip op. at 231-33 (2d Cir. Nov. 20, 1987) (Newman) (holding order compelling arbitration under the Arbitration Act a final injunction of limited duration); *Local 553, Transport Workers v. Eastern Air Lines*, 695 F.2d 668, 676 n.6 (2d Cir. 1982) (Newman) (discussing these issues in the context of a preliminary injunction pending adjudication of the merits of a final injunction of limited duration under the Railway Labor Act).

⁵¹ On enforcement of contracts by specific performance and injunction generally, see E. Allan Farnsworth, *Contracts* §§ 12.4-12.7 (1984).

envisioned maintenance of the status quo prior to arbitration (which the *Bradley* approach assumes), the *Guinness-Harp* test is essentially identical to the *Bradley* approach since the essence of *Guinness-Harp*'s "inadequacy at law" test is captured by *Bradley*'s "hollow formality" test.

II. POWER OF COURTS TO ISSUE AN INJUNCTION

Part II of this comment argues that district courts may issue injunctions to maintain the status quo pending arbitration if the arbitration contract contemplates such action. This section also critically analyzes the way the cases discussed in Part I have resolved this issue.

A. Nothing in the Language, Legislative History, or Supreme Court Construction of the Act Bars Issuance of an Injunction

1. *The Language of the Act.* The argument, exemplified in the *Thomson* case, that the language of § 3 strips a district court of its equitable power to issue an injunction is a poor one.⁵² Section 3 states that "if any suit" is brought "upon any issue referable to arbitration . . . the court . . . upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such agreement shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."⁵³

The statutory language implies that the court must not decide issues that the parties have left to arbitrators. If a contract further envisions maintenance of the status quo while arbitration proceeds and envisions that the parties shall have the right to enforce this status quo provision in a court prior to arbitration, then it is evident that the court will not be insuring that "arbitration has been had in accordance with the terms of the agreement" if it refuses to issue an injunction.⁵⁴ That the Act uses the mandatory term "shall" can only mean that the court must stay the trial of those issues that the contract leaves for the arbitrator to determine.

⁵² Part I.A. of this comment discusses cases holding that the language of section 3 bars issuance of injunctions.

⁵³ 9 U.S.C. § 3.

⁵⁴ This is not to argue that the court must grant an injunction whenever such relief is in accordance with the terms of the contract. Courts often refuse specific enforcement if the aggrieved party has an adequate damage remedy. Rather, it does suggest that nothing in the Act should prevent the court from issuing injunctive relief pending arbitration if the contract contemplates maintenance of the status quo.

Rather than stripping the courts of the power to issue injunctions, the language of § 3 suggests that the court is to stay the trial of the action only to the extent that such a stay is consistent with arbitration according to the terms of the agreement. Thus the terms of the agreement should control whether the court should consider granting injunctive relief.⁵⁵

Section 3 is not the only source of textual arguments relevant to the question at issue here. While courts have ignored § 8 of the Act in determining whether the Act permits injunctive relief, this section gives rise to a set of initially plausible but ultimately unsuccessfully arguments against issuance of injunctions to preserve the status quo. Section 8, like § 4,⁵⁶ makes a certain remedy explicitly available to a party seeking arbitration. Section 8 provides that "if the basis of jurisdiction . . . [is] admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel . . . according to the usual course of admiralty proceedings."⁵⁷ If one analogizes an arrest or attachment in admiralty to the issuance of an injunction to maintain the status quo prior to adjudication in equity,⁵⁸ then the "notwithstanding anything herein to the contrary" clause seems to imply that some other part

⁵⁵ This constitutes the holding of *Guinness-Harp* discussed in Part I.E. of this comment.

⁵⁶ Section 4 authorizes the court to order a recalcitrant party to arbitrate in appropriate cases. See text accompanying note 8.

⁵⁷ 9 U.S.C. § 8.

⁵⁸ Maritime attachment proceedings in personam and arrest proceedings in rem bear certain similarities to preliminary injunctions in equity. An arrest of the vessel ensures that the court does not lose its jurisdiction through the physical removal of the vessel or other maritime property from the district. In an action in personam, the attachment proceeding ensures that the defendant cannot make himself judgment-proof by removing property subject to execution from the jurisdiction. See *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904, 910-12 (4th Cir. 1981) (upholding constitutionality of arrest proceedings); Robert G. McCreary, Jr., *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 Ohio St.L.J. 19 (1967); John S. Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 Tulane L.Rev. 767 (1973). The analogy to injunctive relief to maintain the status quo prior to adjudication is strengthened by the historical inability of admiralty courts to grant injunctive relief. *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 457-58 (1935); *United States v. Cornell Steamboat Co.*, 202 U.S. 184, 194 (1906); *The Eclipse*, 135 U.S. 599, 608 (1890). Thus, while admiralty courts may have authority to grant equitable relief today—compare *Pino v. Protection Maritime Ins. Co.*, 599 F.2d 10, 16 (1st Cir. 1979) (court departed from traditional rule, holding that admiralty court may issue injunctive relief where an injunction would be appropriate on land) with *Eddie SS Co. v. P.T. Karana Line*, 739 F.2d 37, 39 (2d Cir. 1984) (court refused to depart from traditional principle that admiralty court lacked power to grant injunctive relief)—the arrest and attachment proceedings can naturally be viewed as provisional relief procedures in admiralty analogous to the provisional relief available to plaintiffs in equity when the Arbitration Act was passed in 1925.

of the statute prohibits a district court in equity from issuing a status quo injunction. What might this other part of the statute be?

The analyses of district courts hostile to injunctive relief suggest § 3. But if one accepts the analogy between arrest or attachment of a vessel in admiralty and injunctions in equity, Supreme Court precedent construing the "notwithstanding" clause strongly implies that § 3 does not bar the issuance of injunctions. In *Anaconda v. American Sugar Refining Co.*, an admiralty case reviewing a district court's refusal to issue an attachment against the defendant's barge, the Court stated that § 3 "obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law."⁵⁹ The *Anaconda* Court's reasoning thus not only holds that § 3 does not explain § 8's "notwithstanding" clause, but also suggests that § 3 does not constitute an independent barrier to injunctive relief.

Since it refused to read § 3 of the Act as a bar to arrest or attachment, the *Anaconda* Court had to look elsewhere to explain the "notwithstanding" clause. The Court argued that the clause was inserted to counter the possible *expressio unius*⁶⁰ inference that because § 4 (giving plaintiffs the right to seek a court order compelling arbitration) allows a party to proceed in an admiralty case without the customary libel and seizure, the statute might be read not to allow a libel and seizure.⁶¹ The drafters of the Act thus may have thought that § 4 created an inference that other remedies were not available against defendants who refused to arbitrate. This reasoning might lead to the conclusion that §§ 4 and 8 together bar injunctive preservation of the status quo: the *inclusion* of a section giving plaintiffs in admiralty the right to seek what is arguably equivalent to an injunction, coupled with the *omission* of any similarly explicit grant of right to plaintiffs in law and equity, implies that law and equity plaintiffs do not have the right.

Yet the Court has, with respect to other statutes, often held

⁵⁹ 322 U.S. 42, 44-45 (1944) (parties cannot contract around preservation of libel and seizure remedy in § 8 of the Act).

⁶⁰ *Expressio unius est exclusio alterius*. The expression of one thing is the exclusion of another.

⁶¹ 322 U.S. at 45-46.

that they give rise to implied remedies.⁶² Moreover, while *Anaconda* explains the addition of the "notwithstanding" clause to § 8 as countering any implication that the § 4 remedies are exclusive, an equally plausible explanation is that the clause was added to preserve the right of parties to proceed in rem against the vessel in an arrest proceeding despite the language of § 4 ("the court shall make an order directing the parties to proceed to arbitration"), which might have been thought by the drafters of the Act to exclude in rem actions. An order to submit to arbitration ordinarily runs against a person, not a vessel, and requires in personam rather than in rem jurisdiction. Were this the explanation for the "notwithstanding" clause, § 8 strongly suggests that courts have the authority to issue injunctions, if one accepts the analogy between the provisional relief procedures in admiralty and equity. Congress might have felt it necessary to preserve provisional relief explicitly only where the language of the Act created some doubt that such relief would be available.⁶³

Rather than stripping courts of jurisdiction in all cases, as courts such as *Thomson* have claimed, § 3, if read carefully, requires that a court stay the trial only to the extent that a stay is consistent with the arbitration provision of the agreement. Furthermore, if one accepts the analogy between preliminary relief in equity and admiralty, *Anaconda* supports this conclusion that § 3 does not bar injunctive relief. Apart from this § 3 argument, however, reliance on *Anaconda* and the analogy to § 8 has limited interpretive force, for the analogy generates offsetting arguments about whether Congress' inclusion of equitable relief in § 4 implies that courts may not issue injunctions to maintain the status quo. One thus may conclude that the language of the Act does not bar issuance of provisional injunctive relief if such relief is contemplated by the arbitration agreement.

2. *Legislative History, Purposes and Supreme Court Precedent.* Our inquiry into whether the Arbitration Act bars provi-

⁶² This issue is discussed at some length in Part II.B.2. of this comment.

⁶³ Yet another plausible construction of the "notwithstanding" clause holds that it is boilerplate inserted "just to make sure." On this view, the statute's drafters inserted the clause without any real thought that another section of the statute barred the procedure explicitly made available to litigants by § 8. The original § 15's repeal of "all Acts and parts of Acts inconsistent" with the Arbitration Act is an example of such a "make sure" clause. This repeal clause was wholly unnecessary, as the non-enforceability of arbitration agreements rule that the Act abrogated was derived from common law rather than statute. This explanation of the "notwithstanding" clause preserves *Anaconda*'s holding that § 3 does not bar issuance of provisional relief in admiralty, and hence in equity as well, if one accepts the analogy between the procedures.

sional injunctive relief must also examine the purposes of the Act and determine whether the issuance of an injunction in appropriate cases would promote the Act's purposes. The legislative history of the Act and the Act's construction by the Supreme Court show plainly that the preeminent purpose of the Act was to abrogate the long-standing common law doctrine that promises to arbitrate are unenforceable. This purpose, like the Act's language, suggests that courts are not barred from granting preliminary injunctive relief, and that such relief is appropriate in cases where it furthers enforcement of the agreement to arbitrate.

Common law and equity courts had traditionally refused to enforce agreements to arbitrate, even if embodied in otherwise valid contracts. They declined to order a recalcitrant party to submit to arbitration and refused to stay court proceedings in a cause of action over a dispute that the parties had agreed to arbitrate.⁶⁴ Justice Story summarized what logic there was behind this doctrine: "when [courts of equity] are asked . . . to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs."⁶⁵

While courts refused to enforce agreements to arbitrate, they did give some effect to such agreements. If the parties confined the arbitration to determining some set of facts in dispute, left the general question of liability to judicial decision, and made such arbitral determination a condition precedent to any litigation, the court would not entertain the cause of action of a plaintiff who refused to arbitrate.⁶⁶ But if the defendant refused to submit to such arbitration, the court nevertheless would allow the cause of

⁶⁴ See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-22 (1924) (describing the pre-existing state of the law before holding constitutional New York's arbitration act, passed in 1920). For an exhaustive study of the common law's aversion to arbitration agreements, see Julius Henry Cohen, *Commercial Arbitration and the Law* (1918).

⁶⁵ *Tobey v. County of Bristol*, 23 F.Cas. 1313, 1320-21 (No. 14065), 3 Story 800, 821 (C.C.Mass. 1845). Justice Story elaborates in 1 *Commentaries on Equity Jurisprudence* § 670 (1836): "The regular administration of justice might be greatly impeded or interfered with by such stipulations [agreements to arbitrate] if they were specifically enforced. And at all events courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than any mere private arbitrators, as well from their superior knowledge as their superior means of sifting the controversy to the very bottom."

⁶⁶ *Red Cross Line*, 264 U.S. at 121; *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U.S. 242, 255 (1890).

action to proceed unimpeded and would itself determine the factual issues which the parties had contracted to have settled by arbitration.⁶⁷ The breach of the agreement to arbitrate supported a separate action by the suing party. If arbitration had not actually begun, however, no arbitral expenses were incurred, and the plaintiff could recover only nominal damages. Plaintiffs were thus left uncompensated for the extra expense of litigating the disputed facts in court rather than settling them by arbitration.⁶⁸ While these doctrines afforded little incentive for an arbitration-hostile defendant to submit to arbitration, courts would give full effect to an arbitral award if the parties did arbitrate their dispute.⁶⁹

The question of whether a court could issue an injunction to maintain the status pending arbitration thus did not arise under the common law, where agreements to arbitrate were not enforceable. This question arose only after passage of the Arbitration Act.

The legislative history of the Act reflects an intent to escape the common law's hostility to enforcement of arbitration agreements. The House Report accompanying the bill summarizes "the need for the law" as follows: "[it] arises from an anachronism of our American law. Some centuries ago . . . English courts . . . refused to enforce . . . agreements to arbitrate . . . [Contemporary] courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it."⁷⁰ According to this Report, "The purpose of . . . [the Act] is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction . . . [of] admiralty, or which may be the subject of litigation in the Federal courts."⁷¹

⁶⁷ *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 385-86 (1890).

⁶⁸ *Atlantic Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924); *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 250 F. 935, 937 (2d Cir. 1918), *aff'd* 252 U.S. 313 (1920); *Munson v. Straits of Dover S.S. Co.*, 102 F. 926, 928 (2d Cir. 1900).

⁶⁹ *Red Cross Line*, 264 U.S. at 121; *Burchell v. Marsh*, 58 U.S. 344, 349 (1854); *Karthauss v. Ferrer*, 26 U.S. 222, 228 (1828). Courts would review the award, however, to ensure that it was within the scope of the submission to the arbitrators and not tainted by fraud or lack of good faith by the arbitrators. *Burchell*, 58 U.S. at 350-52; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 399-400, 404-06 (1875); *Curtis v. Gokey*, 68 N.Y. 300, 305 (1877).

⁷⁰ *To Validate Certain Agreements for Arbitration*, H.R.Rep.No. 96, 68th Cong., 1st Sess. 1-2 (1924).

⁷¹ *Id.* at 1. See also *To Make Valid and Enforceable Certain Agreements for Arbitration*, S.Rep.No. 536, 68th Cong., 1st Sess. 2 (1924) ("The purpose of the bill is clearly set forth in section 2," the section which makes agreements to arbitrate "valid, irrevocable, and

The motivation behind making these agreements enforceable was freedom of contract: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs."⁷² The legislative history also makes clear that Congress believed the reason that parties enter into arbitration agreements is "to avoid the delay and expense of litigation."⁷³

Supreme Court decisions establish three guidelines for construing the Act. First, in *Dean Witter Reynolds, Inc. v. Byrd*, the Court held that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered."⁷⁴ In *Byrd*, the Court faced the following dilemma: An investor had sued his broker-dealer alleging that a series of financial transactions (which had resulted in a substantial decline in the investor's account) had violated the investor's rights under both the Securities Exchange Act of 1934 and state law. Although the parties had signed a written agreement to arbitrate any disputes that might arise out of the account, the broker-dealer sought an order compelling arbitration only of the state law claims because it had assumed that the federal claims were not arbitrable. The district court, affirmed by the Court of Appeals for the Ninth Circuit,⁷⁵ denied the motion to compel arbitration on the ground that such an order would cause bifurcated proceedings on intertwined claims, resulting in inefficient double litigation.

In reviewing the district court's refusal to order arbitration,

enforceable"); 65 Cong.Rec. 1931 (Feb. 5, 1924) (Rep. Graham, a sponsor of H.R. 646, stating that the Arbitration Act "creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts").

⁷² H.R.Rep.No. 96 at 1 (cited in note 70). See also *Arbitration of Interstate Commercial Disputes*, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. 14 (1924) (testimony of Julius Henry Cohen) ("I think everybody today feels very strongly that the right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion").

⁷³ S.Rep.No. 536 at 3 (cited in note 71). See also H.R.Rep.No. 96 at 2 (cited in note 70) ("It is . . . appropriate that . . . [the Act should be passed] at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable"); Joint Hearings at 1-41 (cited in note 72) (testimony of business and American Bar Association representatives supporting passage of the Act).

⁷⁴ 470 U.S. 213, 221 (1985).

⁷⁵ The Ninth Circuit's decision in *Byrd* is reported at 726 F.2d 552 (9th Cir. 1984).

the Court in *Byrd* thus was faced with choosing between enforcing an agreement to arbitrate and preventing a result that would arguably frustrate speedy and efficient decision making. The Court held that the Act required enforcement of the arbitration agreement despite the possibly inefficient maintenance of separate proceedings in different forums: "[Although] Congress was [not] blind to the potential benefit of the legislation for expedited resolution of disputes[,] . . . passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation."⁷⁶

Second, the Court has held that in structuring the Act as it did, Congress evinced a "clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."⁷⁷ So declaring in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, the Court held that since there was no showing of exceptional circumstances, the district court had abused its discretion in issuing a stay, pending a resolution of a state court suit, of an action to seek an order compelling arbitration.⁷⁸ The Court reasoned that the stay was an abuse of discretion because it frustrated the "statutory policy of rapid and unobstructed enforcement of arbitration agreements" by delaying commencement of arbitration.⁷⁹ The Court inferred this policy from the structure of the Act, noting that both §§ 3 and 4 of the Act

⁷⁶ *Byrd*, 470 U.S. at 220. The Court confirmed this construction of the preeminent purpose of the Act in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985) (despite the importance of the private damages remedy in enforcing antitrust laws and the complexity of antitrust claims, such claims are arbitrable under the Arbitration Act).

⁷⁷ *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 22 (1983).

⁷⁸ The district court had granted a stay because the state suit involved an identical issue of arbitrability. The court of appeals reversed the district court's stay and remanded the case with instructions to enter an order to arbitrate. The Supreme Court's affirmance of this order requiring enforcement of the arbitration agreement thus resulted in bifurcated proceedings, a misfortune made necessary because the Act "requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20 (emphasis in original).

⁷⁹ *Id.* at 23. See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (in passing upon an application for a stay of arbitration under § 3, a federal court may not consider a claim of fraud in the inducement of the contract generally but may consider only "the issues relating to the making and performance of the agreement to arbitrate," thus honoring the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

"call for an expeditious and summary hearing, with only restricted inquiry into factual issues."⁸⁰

Third, the Court has held that the Arbitration Act establishes that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."⁸¹ The justification given for this rule of contract construction is that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."⁸²

Nothing in the legislative history or Supreme Court construction of the Act precludes issuance of injunctive relief to maintain the status quo prior to arbitration. Both sources clearly imply that injunctive relief is appropriate if it serves to enforce the terms of the parties' arbitration agreement. The legislative history of the Act indicates that its purpose was, in the language of § 2, to make arbitration agreements "valid, irrevocable, and enforceable." And while the Supreme Court has held that §§ 3 and 4 of the Act "call for an expeditious and summary hearing, with only restricted inquiry into factual issues," the Court has also stated that the "pre-eminent" purpose of the Act is to "enforce private agreements into which parties had entered." Indeed the Court in both *Byrd* and *Moses H. Cone* countenanced the perpetuation of an inefficient bifurcated proceeding in order to enforce the terms of the parties' arbitration agreement. This analysis establishes that neither the Act's legislative history nor Supreme Court decisions construing the Act support the conclusion that the Act forbids injunctive relief because of the possibility that injunction proceedings will undermine the purposes of the Act.⁸³

B. Ample Authority Exists for a Court to Issue an Injunction When the Arbitration Agreement Contemplates Maintenance of the Status Quo

⁸⁰ *Moses H. Cone*, 460 U.S. at 22.

⁸¹ *Id.* at 24-25. *Accord Mitsubishi Motors Corp.*, 473 U.S. at 626; *Byrd*, 470 U.S. at 221.

⁸² *Moses H. Cone*, 460 U.S. at 24.

⁸³ One should note that the three guidelines identified by the Court, while supporting the power of courts to grant injunctive relief in appropriate cases, also imply an answer to the question of when such relief is appropriate. These implications are discussed more fully in Part III of this comment. It is apropos to point out here that while the first two guidelines—that courts should enforce the terms of the agreement and expedite commencement of arbitration—are well grounded in the legislative history and structure of the Act, the third—that doubts concerning the scope of matter to be arbitrated should be resolved in favor of arbitrability—is without foundation in these sources.

The preceding analysis of the language and purposes of the Arbitration Act indicates not only that the Act does not bar provisional injunctive relief, but also that such a remedy would promote the purposes behind the Act in cases where maintenance of the status quo would further enforcement of the arbitration agreement.

Nevertheless, it is still important to ask where courts find the authority to issue such injunctions. There are three possibilities: first, some provision of the Act might authorize explicitly the issuance of such injunctions; second, courts might imply an injunctive remedy from the statute; and third, the All Writs Act⁸⁴ might provide the basis for such injunctions. This comment argues that courts may properly find authority from each of these three sources to issue injunctions that maintain the status quo prior to arbitration if the arbitration contract contemplates, explicitly or implicitly, such a result.

1. *Language of the Act.* The leading candidate in the search for an explicit provision of the Act supporting the issuance of an injunction is § 4. This section extends a remedy to plaintiffs seeking to enforce arbitration agreements. It states that "the court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."⁸⁵

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

This analysis suggests that the real question facing a court in deciding whether to issue an injunction is what the terms of the agreement are, since if the agreement does not contemplate maintenance of the status quo, the court does not have the power (at

⁸⁴ 28 U.S.C. § 1651(a)(1982).

⁸⁵ 9 U.S.C. § 4.

least under § 4) to issue an injunction. Divining the terms of the agreement becomes more difficult if the court is willing to entertain such notions as implied terms of fair dealing.⁸⁶ The only court opinion to support an injunction with this statutory argument is Judge Newman's in *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*,⁸⁷ a situation in which the arbitration agreement contained a specific status quo provision.⁸⁸ While not relying explicitly on § 4, 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," a court is entitled to order specific performance of arbitration agreements, including status quo provisions.⁸⁹

The Supreme Court's ruling in *Mitchell v. Robert DeMario Jewelry, Inc.*⁹⁰ further supports a broad construction of § 4's grant of equitable power. *DeMario Jewelry* established a rule of statutory construction that a grant of equitable power to enforce a statute will be construed broadly in light of statutory purposes. There, the Court held that jurisdiction conferred by the Fair Labor Standards Act (FLSA) on district courts "to restrain" certain violations of the Act should be construed as a grant of broad equitable power to provide complete relief in furtherance of the purpose of the Act.⁹¹ Section 15(a)(3) of the FLSA makes it unlawful for an employer covered by the Act "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint" related to the Act.⁹² Section 17 gives district courts jurisdiction "for cause shown, to restrain violations of § 15, . . . [p]rovided, [t]hat no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation . . . in such action."⁹³

⁸⁶ See Part III.A. of this comment.

⁸⁷ 613 F.2d 468 (2d Cir. 1980). *Guinness-Harp* is discussed more fully in Part I.E. of this comment.

⁸⁸ That so few court opinions rest on this basis reflects the tendency of courts simply to skip over the question of whether they have the power to issue an injunction.

⁸⁹ 613 F.2d at 472, quoting *Prima Paint Corp.*, 388 U.S. at 404 (applying the language of § 4 to § 3 to hold that courts should adopt the same standard for staying court proceedings as § 4 specifies for orders to arbitrate)(emphasis added by *Guinness-Harp*).

⁹⁰ 361 U.S. 288 (1960).

⁹¹ *Id.* at 291-92.

⁹² *Id.* at 289; see 52 Stat. 1068, 29 U.S.C. § 215(a)(3)(1982).

⁹³ 361 U.S. at 289 (footnote and emphasis omitted); 52 Stat. 1069, as amended, 29 U.S.C. § 217 (1982).

In an action brought by the Secretary of Labor to enjoin violations of § 15(a)(3), the Court held that § 17 empowered a district court to order reimbursement for lost wages caused by an unlawful discharge or other discrimination, a remedy that certainly went beyond mere "restraint" of violations. The Court reasoned that when "Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."⁹⁴ The Court went on to weigh the policy of the Fair Labor Standards Act and to conclude that reimbursement of lost wages would further those statutory purposes.⁹⁵ If one applies *DeMario Jewelry* to the Arbitration Act, then a court is justified in construing the grant of remedial equitable authority in § 4 broadly to include the power to issue an injunction to maintain the status quo in cases in which such relief furthers the statutory purpose of enforcement of agreements to arbitrate.

2. *Injunctive Relief as an Implied Remedy.* Another possible basis for the power of a court to issue an injunction to maintain the status quo prior to arbitration is that the Arbitration Act implies a right of injunctive action to parties given substantive rights under the Act. The Act gives parties who signed an agreement to arbitrate the legal right to have that agreement enforced. If a party wanting to arbitrate its dispute according to the terms of its agreement is powerless to enjoin the other party from irredeemably altering the status quo in violation of the arbitration agreement, the arbitration-seeking party has a right without a remedy. To enforce the rights guaranteed by the Act, the law may imply a remedy in such cases.

The notion that an adequate private remedy existed for every statutory wrong was authoritatively enunciated in no less an authority than Chief Justice Marshall's opinion in *Marbury v. Madison*.⁹⁶ Marshall held that Marbury had a judicial remedy for

⁹⁴ 361 U.S. at 291-92. Justice Harlan quoted equally sweeping language from *Porter v. Warner Co.*, 328 U.S. 395, 397-98 (1946): "[T]he jurisdiction of the District Court to enjoin acts and practices made illegal by the Act . . . is an equitable one. . . . [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

⁹⁵ For a more recent application of this doctrine, see *F.T.C. v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-18 (5th Cir. 1982) (broadly construing the scope of equitable relief under the Federal Trade Commission Act).

⁹⁶ 5 U.S. 137 (1803).

the deprivation of his right to a commission as justice of the peace, even though the underlying statute did not explicitly create any such remedy: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . '[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.' . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."⁹⁷

Despite the weight of Marshall's opinion, the Supreme Court has undertaken a prolonged retreat from the idea that rights must always be implied to remedy otherwise unremedied statutory wrongs.⁹⁸ Current Supreme Court doctrine is that "unless . . . Congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist."⁹⁹ The essence of this principle is that a remedy is no longer implied in law to right a statutory wrong but is "implied in the legislative facts. It rest[s] upon affirmative legislative intentions that Congress ha[s] somehow failed to express in the legislative text. Absent affirmative intentions, express or implied, the private remedy simply d[oes] not exist."¹⁰⁰ Because nothing about the structure of the statute or its statutory history could justify the implication of a remedy not extended by the language of the statute itself, current Supreme Court doctrine would not allow the implication of a remedy by law not expressed by the language of the Act—if the Act had been passed in 1987.

⁹⁷ *Id.* at 163, quoting William Blackstone, 3 Commentaries **23 (1768). See also *Kendall v. United States*, 37 U.S. 524, 624 (1838) (a right without a remedy would represent "a monstrous absurdity in a well organized government").

⁹⁸ See generally, H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 Cornell L.Rev. 501 (1986).

⁹⁹ *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985), quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981). See also *California v. Sierra Club*, 451 U.S. 287, 293 (1981) ("ultimate issue is whether Congress intended to create private right of action"); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("what must ultimately be determined is whether Congress intended to create the private remedy asserted"); *Middlesex Cty. Sewerage Auth. v. See Clammers*, 453 U.S. 1, 13, 15 (1981) ("key to the inquiry is the intent of the [l]egislature[;] . . . [i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

¹⁰⁰ Foy, 71 Cornell L.Rev. at 565 (cited in note 98). Part II.B.1. of this comment discusses implications inherent in the language of the Act.

As this caveat suggests, the possibility that the doctrine of implied remedy in law can supply authority for courts to issue injunctions to maintain the status quo pending arbitration lies in the fact that Congress passed the Arbitration Act in 1925. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, the Court held that its evaluation of congressional action in passing a statute must "take into account its contemporary legal context."¹⁰¹ Hence, "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted."¹⁰² This doctrine makes good sense; legislative intentions best can be divined in light of the assumptions that the legislature likely would have made about the implications of its legislation. "[I]f legislation was enacted at a time when a right of action would normally result from the legislation by implication of law, then the legislature may well have intended to create the right, even though it made no mention of the right in the relevant legislative materials."¹⁰³

Furthermore, there is an important distinction between the issue in *Curran* and the question whether injunctive relief is appropriate under the Arbitration Act: *Curran* involved the implication of a *cause of action* while the implication of injunctive relief involves only the creation of an implied *remedy*. The latter is a less drastic step for a court to take.

The question, then, is what was the law with respect to implied remedies when the Arbitration Act was passed in 1925? As few as nine years before the passage of the Act, the Court held in *Texas & Pacific Ry. Co. v. Rigsby* that if a statute was enacted for the benefit of a class, the law normally implied a remedy for members of that class.¹⁰⁴ The Court's language strongly echoed Marshall's thoughts of more than a century earlier: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law

¹⁰¹ 456 U.S. 353, 379 (1982)(when Congress undertook a comprehensive reexamination and amendment of the Commodity Exchange Act, its decision to leave intact the provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy), quoting *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979).

¹⁰² 456 U.S. at 378.

¹⁰³ Foy, 71 Cornell L.Rev. at 521-22 n.63 (cited in note 98).

¹⁰⁴ 241 U.S. 33 (1916)(federal private right of action under the Safety Appliance Act).

. . . . This is but an application of the maxim, *Ubi jus ibi remedium*."¹⁰⁵ Although *Moore v. Chesapeake & Ohio Railroad Co.* effectively overturned *Rigsby* in 1934,¹⁰⁶ *Rigsby* was good law at the time the Arbitration Act was enacted.

In fact, just two years after the passage of the Arbitration Act, the Court held in *Kinney-Coastal Oil Co. v. Kieffer* that a 1920 Act allowing persons to lease public oil and gas lands created an implied private action for equitable relief against private persons who interfered with their leases.¹⁰⁷ This case dealt with a close analogy to the problem presented by the Arbitration Act; it also raised the question whether a statute extending certain contractual rights implies a right to obtain injunctive relief to vindicate those rights.

One can thus conclude that at the time Congress passed the Arbitration Act the Court readily would have implied a remedy to vindicate a party's right to arbitrate in accordance with the terms of an agreement. Under the "contemporary legal context" doctrine explicated by the Court in *Curran*, courts today should thus conclude that Congress intended to create such an implied right of action.¹⁰⁸

¹⁰⁵ Id. at 39-40.

¹⁰⁶ 291 U.S. 205 (1934) (no federal private right of action under the Safety Appliance Act). The notion that every right has a remedy was never again accepted by the Court, although lower court opinions still clung to the notion. See, e.g., *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947)(Hand)("[a]lthough the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specific class, as creating a civil right in members of the class, although the only express sanctions are criminal"). The next significant development in Supreme Court doctrine on implied remedies after *Rigsby* was explicated in *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944). In *Tunstall*, the Court adopted a more flexible doctrine of executing statutory policies: "The extent and nature of the legal consequences of this condemnation [of union's racially discriminatory bargaining representation], though left by the statute [Railway Labor Act] to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." Id. at 213, quoting *Deitrick v. Greaney*, 309 U.S. 190, 200-1 (1940).

¹⁰⁷ 277 U.S. 488, 506 (1928). The Court disposed of this issue in a single, two sentence paragraph without citation.

¹⁰⁸ A possible counterargument to this inference of intent is that the Uniform Arbitration Act, adopted by the National Conference of Commissioners of Uniform State Law on July 2, 1924 (six months before passage of the Federal Arbitration Act), contains an explicit right to injunctive relief. Section 12 of the Uniform Arbitration Act states that "At any time before final determination of the arbitration the court may upon application of a party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award." See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-fourth Annual Meeting 371 (1924). One might infer from this explicit provision in the Uniform Arbitration Act that Congress's failure to include a similar provision in

3. *The All Writs Act*. The third possible basis for the power of a district court to issue an injunction to maintain the status quo pending arbitration is the All Writs Act. The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹⁰⁹

In *United States v. New York Telephone Co.*, the Court held that the All Writs Act gives a federal court "the power . . . to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."¹¹⁰ The All Writs Act thus empowers a district court to issue an injunction to maintain the status quo if such an injunction is necessary or appropriate to prevent the frustration of the district court's order, pursuant to § 4 of the Arbitration Act, to proceed to arbitration in accordance with the terms of the agreement.

An injunction therefore would be appropriate if a change in the status quo would deleteriously affect the arbitration process envisioned in the parties' agreement and in the court's own order to arbitrate. Thus, even if one does not construe § 4 to authorize

the Federal Arbitration Act means that Congress thought about the issue of injunctive relief and decided that it was inappropriate.

No court, however, has ever asserted such an argument, and the reason for this is easy to understand. Because discussion of the Uniform Arbitration Act's provisions appears nowhere in the legislative history of the Federal Arbitration Act, this type of inference amounts to unsubstantiated speculation. There is no evidence that Congress ever thought about the differences between its Act and the Uniform Arbitration Act. While it makes sense to assume, as the court did in *Curran*, that Congress is aware of the way the judiciary construes its legislative acts, it is unreasonable to assume that Congress is aware of everything.

¹⁰⁹ 28 U.S.C. § 1651(a)(1982). The purpose of § 1651 is to effectuate the established jurisdiction of the court. "All writs" includes injunctions. See generally James Wm. Moore, et. al., 7B Moore's Federal Practice § 1651 (2d ed. 1987); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1358-61 (1978). With respect to writs issued by district courts, see 9 Moore's Federal Practice ¶ 110.29 (2d ed. 1987) ("Section 1651 gives the district court power to enjoin action that improperly hinders or defeats the jurisdiction which it is validly exercising").

¹¹⁰ 434 U.S. 159, 172 (1977) (Fed.R.Crim.Proc. 41 gives a district court the power to authorize the installation of pen registers; All Writs Act gives a district court the power to compel New York Telephone to assist in installation of the registers). See also *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (district court can issue discovery order in connection with a habeas corpus proceeding pending before it despite the absence of any specific statutory authorization, reasoning that All Writs Act has served since its inclusion in the original Judiciary Act, as a "legislatively approved source of procedural instruments designed to achieve the 'rational ends of law'"), quoting *Price v. Johnson*, 334 U.S. 266, 282 (1948), and *Adams v. United States*, 317 U.S. 269, 273 (1942).

the issuance of injunctions, the All Writs Act supplies the authority to issue such relief in cases where such action is necessary to maintain the meaningfulness of the court's order to arbitrate. The flip side of this analysis is that the All Writs Act cannot justify an injunction not contemplated by the terms of the agreement. Such an injunction could not preserve the court's order, authorized by § 4, to proceed to arbitration in accordance with the terms of the agreement.

Reliance on the All Writs Act is strengthened by the Supreme Court's application of that Act in contexts similar to status quo injunctions under the Arbitration Act. These cases also show that the All Writs Act has broader application than maintaining the effectiveness of prior court orders.

In *Scripps-Howard Radio, Inc. v. F.C.C.*, the Court held that because "an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong," the All Writs Act empowered a federal court to preserve the status quo and stay the enforcement of a Federal Communications Commission judgment pending the outcome of an appeal.¹¹¹ The court of appeals was held to have this power despite the absence of any specific authorization to stay enforcement of FCC judgments under the section of the Communications Act of 1934 authorizing the courts to review those judgments.¹¹²

Analogously, a district court should be able to prevent irreparable injury to a party from an alleged breach of contractual obligations that the arbitrator later might find to have been wrongful. Note, however, that this use of the All Writs Act also limits its application to cases in which the contract expressly or impliedly contemplates maintenance of the status quo prior to arbitration. If the agreement does not contemplate this, then the defendant's persistence in disputed activity prior to arbitration is not premature in the same sense that the FCC judgment in *Scripps-Howard Radio* might have been. The question of whether or not such activity is premature, and hence whether or not an injunction may issue,

¹¹¹ 316 U.S. 4, 9-10 (1942).

¹¹² In often quoted language, the Court, per Justice Frankfurter, remarked: "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating out notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b) [of the Communications Act of 1934]. But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." 316 U.S. at 11.

depends entirely upon the reasonable expectations of the parties as contained in their agreement to arbitrate.

In *F.T.C. v. Dean Foods Co.*,¹¹³ the Court also held that the All Writs Act authorized an injunction to maintain the status quo despite the absence of specific statutory authorization. In a case in which the Federal Trade Commission (FTC) was reviewing the legality of a pending merger under the Clayton Act, the Court held that the court of appeals, on application of the Commission, had authority under the All Writs Act to issue an injunction to maintain the status quo until the FTC determined the legality of the merger.¹¹⁴ The FTC argued that an injunction to maintain the status quo was necessary because once consummated, the merged entity would not have been subject to a manageable dissolution if the FTC subsequently invalidated the merger. The Court held that the exercise of power under the All Writs Act extends "to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected" and that the judicial power to maintain the status quo by injunction pending review of the agency's action is "merely incidental to the court's jurisdiction to review final agency action."¹¹⁵ The power to grant injunctive relief was necessary to preserve the appellate jurisdiction of the court to enter a meaningful final decree of divestiture. Applying this reasoning to cases arising under the Arbitration Act, a district court is deprived of its power to vacate or modify the arbitral award¹¹⁶ if a party is able, through unilateral action prior to arbitration, to alter irreversibly the status quo and deprive the other party of a meaningful arbitration process.

Note again, however, that if the arbitration agreement does not contemplate maintenance of the status quo prior to arbitration, then any resulting disability on the part of the arbitrators to provide complete relief would be consistent with the terms of the agreement. The district court therefore would not be deprived of its power to review the arbitral award, since this reviewing power could not extend to modifying the award in a manner inconsistent with the agreement to arbitrate. Consequently, *Dean Foods* sup-

¹¹³ 384 U.S. 597 (1966).

¹¹⁴ The grant of jurisdiction in § 11(c) of the Clayton Act authorizing courts of appeals to review final orders of the FTC against illegal mergers does not specifically authorize the court of appeals to enjoin the consummation of a merger that is under attack before the Commission. *Id.* at 612-14 (Fortas dissenting).

¹¹⁵ 384 U.S. at 603-04, quoting *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963).

¹¹⁶ See 9 U.S.C. §§ 10-11, explained in note 9.

ports reliance on the All Writs Act only in cases where the agreement to arbitrate contemplates maintenance of the status quo prior to arbitration.

The All Writs Act thus supports the issuance of an injunction to preserve the status quo in order to "prevent the frustration" of the district court's order to arbitrate according to the terms of the agreement,¹¹⁷ to "prevent irreparable injury to the parties . . . from the premature" breach of contract "which may later be found to have been wrong,"¹¹⁸ and to preserve the court's jurisdiction "to enter a meaningful final order of its own" with respect to its review of the arbitrator's award.¹¹⁹

To summarize this discussion of whether the courts have the power to issue an injunction to maintain the status quo pending arbitration, neither the language nor purposes of the Federal Arbitration Act bar the issuance of an injunction to maintain the status quo pending arbitration. Where the arbitration agreement contemplates maintenance of the status quo pending arbitration, the court's power to issue such an injunction can be found in the language of § 4, through implication of law, and under the All Writs Act. Section 4 gives a court the power to order the parties "to proceed to arbitration in accordance with the terms of the agreement;" if the agreement contemplates maintenance of the status quo prior to arbitration, the court has the authority to put this term of the arbitration agreement into effect. A court may also create an implied remedy in law to vindicate the statutory right to have a dispute settled according to the terms of an arbitration agreement. Finally, the All Writs Act allows a court to issue orders which further the exercise of its authority under § 4 to order arbitration in accordance with the terms of an agreement and, under §§ 10 and 11, to vacate or modify an arbitral award if it is inconsistent with the agreement.

III. WHEN INJUNCTIVE RELIEF IS APPROPRIATE

The scope of authority to grant relief under the Federal Arbitration Act leaves a court with a choice of approaches in granting equitable relief. A court should adopt the approach which best serves the purposes of the Act.

These purposes suggest that a court should approach equita-

¹¹⁷ *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

¹¹⁸ *Scripps-Howard Radio.*, 316 U.S. at 9.

¹¹⁹ *Dean Foods*, 384 U.S. at 600.

ble relief as it would any other question of contract interpretation and enforcement. If the arbitration agreement contains a provision which makes it clear that the parties intended to have the status quo maintained pending arbitration, then the courts should enforce this provision, provided the party seeking the injunction can satisfy the traditional equitable standards for specific performance of a contract. If the parties have neglected to include an explicit provision on this matter, then the court should apply normal "gap filling" contract law principles. The court therefore should establish a background rule with respect to maintenance of the status quo pending arbitration that captures the intentions of most parties who enter into arbitration agreements.

As this comment has discussed, the statutory history and Supreme Court interpretation of the Arbitration Act support this contract law perspective in construing the Act. The legislative history of the Act makes clear that Congress intended to abrogate the common law rule that an agreement to arbitrate was unenforceable and to place such an agreement to arbitrate "upon the same footing as other contracts, where it belongs."¹²⁰ While the Court has recognized that arbitration is attractive to contracting parties because of the expectation of reduced cost and delay compared to litigation, the Court has concluded that the Arbitration Act was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."¹²¹

A court analyzing this question from a contract law perspective must face two questions: First, does the contract envision maintenance of the status quo prior to arbitration? Second, if so, what test should the court use to determine when to specifically enforce this contractual provision?

A. Determining Whether a Contract Contemplates Maintenance of the Status Quo Prior to Arbitration

In answering this first question, a court may choose from three options: (1) it may hold that contracts provide for maintenance of the status quo only if they contain a specific status quo provision; (2) it may hold that contracts always provide for maintenance of

¹²⁰ H.R.Rep.No. 96 at 1 (cited in note 70). Note, however that this "upon the same footing" language is not entirely accurate. Courts grant specific performance of ordinary contracts only if, on the balance of equities, specific performance is deemed appropriate. The Arbitration Act, however, mandates that courts grant specific performance of agreements to arbitrate regardless of the balance of equities.

¹²¹ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

the status quo prior to arbitration; or (3) it may imply a status quo provision in situations where breach of the status quo would constitute bad faith. This comment argues that courts should adopt the third approach because it best serves the legitimate expectations of the contracting parties.

Judge Learned Hand's comment that "in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves" exemplifies the "language of the contract" approach.¹²² Its principal advantage is that it is easy to administer; the court need only look to the language of the contract to determine its terms. Its principal disadvantage is that it may fail to protect the legitimate expectations of the parties to the contract. Parties routinely enter into agreements in which they do not provide for every conceivable contingency; to do so would be costly and not worth the effort for contingencies that are thought unlikely, such as a serious breach of the contract. Furthermore, since the law often protects a party from bad faith business conduct, parties may assume it unnecessary to include contractual terms to protect themselves against bad faith. For instance, on the facts of *Teradyne*, presented in the introduction, it seems highly unlikely that Teradyne and Mostek would have agreed ahead of time that one of the parties could make itself judgment-proof by liquidation without providing any recourse to the other party to preserve contract remedies. The strict construction approach, adopted by the Eighth Circuit in *Hovey*,¹²³ thus seems unattractive.

The second approach, that a promise to maintain the status quo will always be implied, also is insensitive to the legitimate expectations of the parties. Parties cannot legitimately expect the implication of a term in their contract that they never would have included had they negotiated over it. For instance, in an installment contract for the sale of non-unique, widely available goods, there is little reason to think that the parties would ever agree to bind the seller to deliver the goods in a situation where the seller would prefer to breach the contract and pay money damages to the buyer. Parties would agree on such a term only if it were mutually beneficial. In this example, such mutual advantage would be unlikely.¹²⁴ The buyer would be willing to pay very little for such a

¹²² *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933).

¹²³ 726 F.2d 1286 (8th Cir. 1984). *Hovey* is discussed in Part I.D. of this comment.

¹²⁴ Cooperating bargainers ideally include only those contract terms which maximize their joint benefits minus their joint costs; one party of a contract with such terms cannot be

term; its cover costs in such a market are low and easily calculable. The seller, on the other hand, would be hesitant to agree to such a provision were the provision to require it to forego taking advantage of alternative offers that would be profitable to the seller even after paying monetary damages to the buyer. The seller's breach of the status quo prior to arbitration would not interfere with the ability of the arbitrators to grant the buyer full relief. Hence, the buyer could not argue that the breach was inconsistent with the seller's promise to arbitrate disputes arising out of the agreement.

In such a situation, an implied status quo provision would be inconsistent with the expectation of the parties. Much worse would be a holding that injunctive relief is appropriate even when the contract explicitly provides that the parties do not promise to maintain the status quo prior to arbitration. Thus the approaches of the courts in *Bradley* and in *Teradyne* seem unattractive since their tests for injunctive relief, at least as articulated, are indifferent to the terms of the arbitration agreement itself.¹²⁵

Since the third approach—directing courts to imply a status quo provision in contracts where the absence of such a provision would permit bad faith conduct by one of the parties—is likely to be most faithful to the expectations of the parties, the courts should embrace this view. Were the parties to negotiate over each term in the contract and provide for all contingencies, it seems unlikely that they would agree to provisions contemplating bad faith.

The bad faith approach has the advantage of integrating the court's approach to the problem with general contract law, in consonance with the Act's purpose of putting arbitration agreements upon the same footing as other contract provisions. Both the Second Restatement of Contracts and the Uniform Commercial Code impose a duty of good faith and fair dealing on contracting parties.¹²⁶ The Restatement defines good faith as follows: "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. . . . Subterfuges and evasions violate the obligation of good faith in performance even though the

made better off without making the other party worse off.

¹²⁵ *Bradley* and *Teradyne* are discussed extensively in Parts I.B. and I.C. of this comment.

¹²⁶ See Restatement of Contracts 2d § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"); Uniform Commercial Code § 1-203 (1978) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement").

actor believes his conduct to be justified.”¹²⁷

In the arbitration context, a court may hold, for example, that parties have impliedly promised not to undertake any action that would undermine the arbitration process; such action would constitute bad faith performance of the promise to arbitrate. While *Guinness-Harp* does not explicitly establish a good faith solution (or any other solution) to solve the problem of when a court might imply a status quo provision in a contract, this third approach is consonant with that court’s holding that, on its facts, the “maintenance of the status quo pending arbitration relates in a substantial way to the performance of the agreement [to arbitrate].”¹²⁸

B. The Test for Injunctive Relief

Once a court determines that the contract contemplates maintenance of the status quo prior to arbitration, a court must decide whether to grant equitable relief to enforce this contractual provision. The courts have approached this issue through two distinct doctrinal pigeonholes: preliminary and final injunctions. *Teradyne* held that an injunction to maintain the status quo prior to arbitration constituted a preliminary injunction and was, therefore, ap-

¹²⁷ Restatement of Contracts 2d § 205 comments a, d.

¹²⁸ 613 F.2d at 472. See Part I.E. of this comment. There are two plausible arguments against this good faith approach. The first has already been suggested: it will increase litigation costs by requiring the court to ask whether a failure to maintain the status quo would be consistent with the requirement of good faith. Whenever courts create an exception to a legal rule, they must weigh the burdens of determining whether a given fact situation fits the exception against the gains from suspending the operation of the general rule. Under the approach suggested here, however, courts are not forced to make this inquiry on an ad hoc basis; they need only rely on established contract doctrine that bad faith constitutes breach of contract. Whether this general rule is an appropriate one is beyond the scope of this comment.

The second argument arises from a possible implication of the Supreme Court’s pronouncement that because “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . [t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone*, 460 U.S. at 24-25. If one takes this language seriously, one might argue that courts should allow the arbitrators to deal with problems of bad faith breach of the status quo prior to arbitration. There are, however, two problems with such reasoning. First, this Supreme Court language is not supported by anything in the structure of the Act or anything substantial in the Act’s legislative history. The preeminent purpose of the Act is to enforce agreements to arbitrate, not to encourage the arbitration of contract terms that the parties did not intend to have arbitrated. See note 83 and accompanying text. More fundamentally, the purpose of court ordered injunctive relief in this context is to maintain the integrity of the arbitral process itself, a purpose hardly inconsistent with a healthy regard for the federal policy favoring arbitration.

propriate if that court's test for preliminary injunctions was satisfied. In contrast, *Guinness-Harp* held that an injunction to maintain the status quo constituted a final injunction and therefore was appropriate if the traditional standard for specific performance of a contract was satisfied. This comment argues that *Guinness-Harp's* final injunction approach is doctrinally sound and, more importantly, consistent with both the purposes of the Act and the impetus for arbitration agreements—to reduce the costs of adjudicating disputes arising out of the contract.

Teradyne held that injunctive relief is appropriate if (1) the plaintiff will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) the plaintiff has exhibited a likelihood of success on the merits; and (4) the public interest will not be adversely affected by the granting of the injunction.¹²⁹ The basic problem with this test is its consideration of the likelihood of success on the merits. As the lengthy discussion of the merits in *Teradyne* suggests, this part of the test will involve a mini-trial on the merits of the dispute which must eventually be retried before the arbitrators. This process would seem to undermine almost completely the point of entering into arbitration agreements. Such a test is thus inconsistent with § 4's command to order the parties to arbitration in accordance with the terms of the agreement. Furthermore, this test is inconsistent with Supreme Court decisions holding that the structure of §§ 3 and 4 of the Act evince a clear congressional intent to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."¹³⁰

Since the merits of the underlying dispute are for the arbitrators rather than the court to adjudicate, an injunction in this context is not preliminary to a plenary judicial hearing on the merits of the lawsuit.¹³¹ The suit before the court concerns only whether there can be a breach in the status quo provision of the contract prior to completion of arbitration. Hence, the injunction issued by the court should be thought of as a final injunction of limited duration rather than a preliminary injunction.

The final injunction test suggested in *Guinness-Harp* is the traditional standard for specific performance of a contract: that, on the balance of the equities, the party seeking the injunction is enti-

¹²⁹ 797 F.2d at 51-52.

¹³⁰ *Moses H. Cone*, 460 U.S. at 22. See discussion at note 77 and accompanying text.

¹³¹ *Guinness-Harp*, 613 F.2d at 471.

tled to such relief.¹³² Without maintenance of the status quo, arbitration may be incapable of providing adequate relief to the party seeking the injunction. The innocent party therefore may suffer irreparable injury because of the unilateral breach of the contract prior to arbitration. The key factor in this balance of equities test is whether the risk of irreparable injury to the party seeking the injunction substantially outweighs any hardship to the enjoined party if an injunction is issued.

By narrowing the issues properly before the court on the motion for injunctive relief, *Guinness-Harp* proves sensitive to the reason parties enter into arbitration agreements in the first place—to reduce the expense and delay of litigation. On such motion, the court need only determine whether the agreement provides for maintenance of the status quo pending arbitration and whether the party seeking the injunction satisfies the traditional standard for an order of specific performance. Most importantly, the parties need not undertake a mini-trial of the issue which the parties agreed to settle by arbitration: namely, which party is correct on the ultimate merits of the dispute.

IV. CONCLUSION

This comment suggests a two-step process for determining when injunctive relief is appropriate under the Federal Arbitration Act. First, a court should determine whether a contract contemplates maintenance of the status quo prior to arbitration. Second, a court should determine whether injunctive relief is appropriate to enforce the status quo provision. While these two steps are analytically distinct, the question is simpler in practice than it sounds, because both steps urge the court to ask the same question: does the conduct that the court is being asked to enjoin constitute bad faith—i.e., is the party to be enjoined attempting to undermine the arbitration agreement by risking irreparable harm to the other party?

The approach suggested by this comment has the advantage of reducing the injunction issue to one of contract law. With this perspective, courts have available to them an entire body of law with which they can analyze the appropriateness of injunctive relief.

¹³² Note that an order of specific performance of a duty of forbearance, such as a status quo provision, is different only in name from the issuance of an injunction to refrain from breaching the status quo. The Restatement of Contracts 2d has adopted the same standard for relief for these two equitable remedies with respect to a duty of forbearance. See § 357 and comments.