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Appealability of Interlocutory Orders Enjoining or Refusing To Enjoin Commercial Arbitration

By Timothy B. Dyk*

INTRODUCTION

Among former Supreme Court Justice Stanley Reed's many interests during his tenure in the federal executive and judicial branches were issues of federal court jurisdiction. *Baltimore Contractors, Inc. v. Bodinger,* one of Justice Reed's opinions in the area of federal jurisdiction, is closely related to a continuing controversy concerning federal court jurisdiction to hear appeals from orders granting or denying injunctions barring arbitration. The courts of appeals are split on the right of appeal in these arbitration cases, and the Supreme Court has yet to resolve the issue. The issue of appealability is of considerable importance in view of the increasing utilization of arbitration proceedings as a method of dispute resolution and because of the likelihood that the issue will have an impact on the willingness of parties to enter into contracts providing for resolution of disputes through arbitration. This article suggests that the reasons for allowing appeals to be taken from these interlocutory orders are more persuasive than are the countervailing arguments.

I. THE STATUTORY FRAMEWORK—THE UNITED STATES ARBITRATION ACT

In the federal courts, most questions concerning arbitra-

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The author notes that he is not without personal experience in this area, being counsel in a pending arbitration and having unsuccessfully sought to appeal an order declining to enjoin arbitration in the case referred to in footnote 38. The opinions expressed are those of the author only who wishes to express great appreciation for the assistance rendered by Jonathan Becker in the preparation of this article.

tion arise under the United States Arbitration Act (USAA). The statute, enacted in 1925, provides for federal judicial enforcement and effectuation of written arbitration provisions contained in contracts involving interstate commerce or admiralty. The purpose of the law is “to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.”

The need for a statutory enactment arose from the historic refusal of the common law to provide specific enforcement of agreements to arbitrate on the ground that such enforcement would oust the courts from their jurisdiction. The USAA rejects this theory of judicial monopoly. Instead, the Act provides methods for ensuring that all parties to an arbitration agreement submit to arbitration, provides that arbitrators be selected if no procedure for their selection is established by contract, grants arbitrators authority to compel the attendance of witnesses, and grants the federal courts authority to review, modify, set aside or enforce an arbitration award.

Additionally, under the USAA, the federal courts are charged with resolving the threshold issue of arbitrability, which is present regardless of the form of arbitration clause

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2 9 U.S.C. §§ 1-14 (1976). Occasional questions of arbitrability under state arbitration acts may arise in a federal court. For example, where the court has diversity jurisdiction and the contract involves purely intrastate commerce, the federal court must decide the issue under state law. See Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956).


4 H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). The latter part of this statement concerning contracts “which may be the subject of litigation in Federal courts” is not entirely accurate. See note 2 supra for a discussion of the role of the state arbitration acts.

5 Id. at 1-2. See also Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. (1924).

6 Id.


chosen by the contracting parties. Because the Supreme Court has expansively construed the so-called "standard" or "broad" arbitration clauses,¹¹ issues of arbitrability under such clauses primarily involve the question of whether rights asserted under other federal statutes, such as the antitrust or securities laws, are arbitrable.¹² If the contracting parties do not adopt the broad form of arbitration clause and instead contract to make certain controversies arbitrable and others nonarbitrable, these limited arbitration clauses create controversies as to what issues are arbitrable. Thus, whether a broad or narrow clause is employed by the parties, the court will often be called upon to decide questions of arbitrability.¹³

The USAA provides that an arbitration award will not be enforced and will be set aside if the arbitrators have decided nonarbitrable matters.¹⁴ The USAA also recognizes, however, that questions of arbitrability might have to be resolved in advance of arbitration and apparently contemplates two mechanisms for the resolution of arbitrability disputes. First,

¹¹ See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 564, 584-85 (1960). In that case the Court held: "In the absence of any provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." Id.

¹² See, e.g., Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831 (7th Cir. 1977); Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973), rev'd on other grounds, 417 U.S. 506 (1974); Buffler v. Electronic Computer Programming Inst., Inc., 466 F.2d 694 (6th Cir. 1972); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970); Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968).

It has been generally held that an agreement to arbitrate such claims is not enforceable. See, e.g., Wilko v. Swan, 346 U.S. 427 (1953). In Wilko the Court held that an agreement for arbitration of any controversy arising in the future between the parties was void under § 14 of the Securities Act of 1933, notwithstanding the provisions of the United States Arbitration Act.


¹⁴ Section 10 of the Act provides that the district court "may make an order vacating the award upon the application of any party to the arbitration . . . (d) Where the arbitrators exceed their powers . . . ." 9 U.S.C. § 10 (1976).

if a claimant believes that a controversy is arbitrable, he can proceed under section 4 of the Act to compel the other party to arbitrate.\textsuperscript{15} Second, if the party seeking arbitration is a party resisting claims being asserted in a court proceeding, that party may seek under section 3 of the Act to stay court proceedings pending the outcome of arbitration.\textsuperscript{16}

The framers of the USAA, however, apparently did not contemplate arbitration rules, like the current rules adopted by the American Arbitration Association, which provide that an arbitration may proceed \textit{ex parte} if the respondent declines to participate.\textsuperscript{17} These provisions for \textit{ex parte} arbitration have made motions by claimants to compel arbitration virtually unnecessary. Instead, the burden has been shifted to respondents who believe that the controversy is not arbitrable. Facing the possibility of an \textit{ex parte} arbitration, respondents have sought injunctive relief in the federal courts barring arbitration;\textsuperscript{18} they assert that irreparable injury will result if they are forced to choose between allowing the arbitration to go forward \textit{ex parte} and participating in a lengthy and expensive arbitration that they believe to involve nonarbitrable matters. In view of the alleged irreparable injury, the district courts generally have held that respondents can secure injunctive relief against arbitration if they can show that the matter sought to be arbitrated is nonarbitrable.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item 9 U.S.C. § 3 (1976).
\item See Commercial Arbitration Rules of the American Arbitration Association §§ 12, 29 (1979) [hereinafter cited as AAA Rules].
\item As a practical matter, however, the distinction between claimants and parties claimed against does not exist. In many, if not most, cases one party seeks to commence a judicial proceeding while the other party seeks to commence an arbitration. Under these circumstances, the party seeking arbitration will usually make a motion to stay the judicial proceedings, while the other moves to enjoin the arbitration. This appears to have been true in many of the cases cited infra in notes 30-37.
\end{enumerate}
\end{footnotesize}
II. THE APPEALABILITY OF INTERLOCUTORY ORDERS IN ARBITRATION CASES

The existence of procedures for raising issues of arbitrability before the commencement of arbitration proceedings created the issue of the appealability of district court orders to stay judicial proceedings, to compel arbitration, and to bar arbitration.

One branch of the appealability question, the appealability of orders staying or refusing to stay judicial proceedings, was addressed in Justice Reed's opinion for the Court in Baltimore Contractors, Inc. v. Bodinger. In Baltimore Contractors, the district court, acting under section 3 of the USAA, had denied a stay of an action for an equitable accounting, pending arbitration. The defendant sought to appeal, relying in part on what is now section 1292(a)(1) of the Judicial Code, which generally permits appeals from "interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." The court of appeals dismissed the appeal in a per curiam decision and, on certiorari, the Supreme Court held that the denial of the stay was not appealable.

The Court found that the order's appealability under section 1292(a)(1) depended on whether the district court's refusal to grant the stay was the refusal of an "injunction" under the statute. The Court viewed section 1292(a)(1) as a Congressional modification of the finality rule that "seem[ed] plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." In refusing to extend the scope of the provision, however, the Court followed what is known as the Enelow-Ettelson doctrine and held that since the under-

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20 348 U.S. at 176.
21 Defendant also asserted that the judgment was final and thus appealable under § 1291 of the Judicial Code. The Supreme Court rejected this argument. Id. at 179.
22 Id. at 180.
23 Id. at 181 (footnote omitted).
24 See Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); Enelow v. New
lying court action was equitable rather than legal in nature, the lower court's ruling was a mere step in controlling the litigation, rather than a refusal of an interlocutory injunction.

The Court recognized that the "incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations," but concluded that "it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper." As the Court recognized in Baltimore Contractors, the law/equity distinction created by Enelow-Ettelson is difficult to support in terms of policy; it can only be understood as an historical anomaly.

In motions to compel arbitration, however, the courts uniformly have recognized that the grant or denial of the motion represents a final judgment in a special statutory proceeding and therefore is appealable under section 1291. Thus, where

York Life Ins. Co., 293 U.S. 379 (1935). The Enelow-Ettelson doctrine, succinctly stated, provides that:

An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some equitable defense or counterclaim.

Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir. 1962) (footnote omitted).

The theory behind the doctrine is that the stay of a legal action in order to try first an equitable claim is, in effect, an injunction issued by a chancellor, while the stay of an equitable proceeding by the chancellor is simply a ruling as to the manner in which he will try one issue in a civil action pending before him. See City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257-58 (1949). For purposes of the Enelow-Ettelson doctrine, a claim that the dispute is arbitrable is considered an equitable defense. See Shanferoke Coal & Supply Co. v. Westchester Service Corp., 293 U.S. 449 (1935).


[26] Id. at 185.

an order is issued compelling or refusing to compel proceedings in the arbitration forum or where an order is issued "enjoining" or refusing to "enjoin" a separate action at law pending arbitration, an immediate appeal is available.\footnote{28}

With respect to efforts to enjoin arbitration, the clear language of section 1292(a)(1) appears to make the grant or denial of all interlocutory injunctions appealable, and the appealability of orders granting or denying injunctions against arbitration should be uncontroverted.\footnote{29} This, however, has not proved to be the case.

Eight federal circuits have considered the appealability

\footnote{933 (2d Cir. 1971).}

The Act itself specifically bars interlocutory orders compelling arbitration. Section 4 of the Act carefully spells out that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue" the court must proceed to the trial of these issues before it may order the parties to submit to arbitration. 9 U.S.C. § 4 (1976).

\footnote{28} These decisions appear to be consistent with the general rule that grants or denials of injunctions against proceedings in other forums fall within § 1292(a)(1) and are appealable. \textit{See}, e.g., Codex Corp. v. Milgo Electronic Corp., 553 F.2d 735 (1st Cir. 1977) (federal district court); \textit{In re W.F. Hurley, Inc.}, 553 F.2d 1096 (8th Cir. 1976) (federal district court); \textit{In re Glenn W. Turner Enterprises Litigation}, 521 F.2d 755 (3d Cir. 1975) (state court); \textit{Sayers v. Forsyth Bldg. Corp.}, 417 F.2d 65 (5th Cir. 1969) (state and federal district courts).

\footnote{29} In practice, if the question of arbitrability is to be resolved before arbitration occurs, it must be resolved expeditiously. Accordingly, the issue of arbitrability at this stage generally comes before the district court in the form of a motion for preliminary injunction, the appealability of which is governed by § 1292(a)(1) of the Judicial Code.

It is at least theoretically possible that the district court might enter a final order granting or denying injunctive relief. Such an order would be appealable under § 1291 of the Judicial Code if it were the only relief sought in the litigation or if the district court were to enter a final judgment as to that particular claim under Rule 54(b) of the Federal Rules of Civil Procedure.

In addition, it may be possible to set aside an erroneous district court order, granting or denying an injunction, by mandamus, but decisions make clear that this remedy will only be available in a rare case. \textit{See}, e.g., \textit{Lummus Co. v. Commonwealth Oil Refining Co.}, 297 F.2d 80 (2d Cir. 1961), \textit{cert. denied sub nom. Dawson v. Lummus Co.}, 363 U.S. 986 (1962).

The grant of an injunction against arbitration may also sometimes be appealed by moving for a stay of judicial proceedings and appealing from the denial of that stay, rather than appealing from the grant of the preliminary injunction. This is possible only where the \textit{Enelow-Ettelson} standard is satisfied. At least one court has recognized this means of avoiding the rule of nonappealability. \textit{See} \textit{New England Power Co. v. Asiatic Petroleum Corp.}, 456 F.2d 183 (1st Cir. 1972). For a discussion of the \textit{Enelow-Ettelson} standard, see note 24 \textit{supra}. 
under section 1292(a)(1) of orders granting or denying injunctions barring arbitration. The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have held such orders appealable. The Second and Third Circuits have held these orders nonappealable. The First Circuit and, apparently, the District of Columbia Circuit, have held that the grant of an injunction barring arbitration is appealable, while the denial of such an injunction is not. The commentators also are divided as to the appealability of these injunctive orders.

The basic rationale for appealability of these orders was first enunciated by the Ninth Circuit in A. & E. Plastik Pak Co. v. Monsanto Co. In that case, the district court had denied appellant's motion to enjoin appellee from proceeding with arbitration. The court of appeals distinguished this type of decision from one involving a court's staying or refusing to

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22 Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d at 831; Alberto-Culver Co. v. Scherk, 484 F.2d at 611.
23 Power Replacements, Inc. v. Air Preheater Co., 426 F.2d at 980; A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d at 710.
24 Medical Development Corp. v. Industrial Modeling Corp., 479 F.2d 345 (10th Cir. 1973).
25 Diematic Mfg. Corp. v. Packaging Indus., Inc., 516 F.2d 975 (2d Cir. 1975); Aaacon Auto Transport, Inc. v. Nino, 490 F.2d 83 (2d Cir. 1974); Greater Continental Corp. v. Schechter, 422 F.2d at 1100; Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d at 80.
29 Compare 9 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 110.20 [4.-1], at 249 (2d ed. 1980) (nothing can be more destructive of the congressional policy of fostering arbitration than to permit preliminary skirmishing over arbitration agreements in the form of a lawsuit and an appeal) with 16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE AND PROCEDURE § 3923, at 58-60 (1977) (most courts have adopted the obvious conclusion that an order prohibiting arbitration is an injunction, whose grant or denial is subject to interlocutory appeal).
30 396 F.2d at 710.
stay its own hand in deference to proceedings going forward in another forum. The court of appeals found that:

Here the court was asked (and declined) affirmatively to interfere with proceedings in another forum; to exercise its equity powers to halt action of its litigants outside of its own court proceedings — the classic form of injunction. That arbitration is not a mere extension of court proceedings but involves a separate tribunal seems clear ... .41

Because the lower court’s order was one refusing an “injunction,” it was appealable under section 1292(a)(1).42 The approach taken by the First, Second and Third Circuits in reaching an opposite determination has been quite different. These courts have rejected a literal reading of the language of section 1292(a)(1) and have looked to see whether interlocutory orders granting or denying injunctions against arbitration ought, on policy grounds, to be treated as appealable; in so doing, they have concluded that such appeals should not be allowed. Whether this conclusion is sound, however, is open to question.

III. The Policies Behind the Split in the Courts of Appeals

Two grounds have been advanced for nonappealability. First, the courts have stated that the potential prejudice flowing from an incorrect ruling by the trial court — useless judicial or arbitration proceedings — is not the sort of serious consequence that section 1292(a)(1) was intended to avoid.43 Accordingly, the courts have noted that since arbitration does not produce an enforceable result without further judicial action, an erroneous ruling is not likely to have any other harm-

41 Id. at 713. See note 28 supra for cases applying the general rule that grants or denials of injunctions against proceedings in other forums are appealable under § 1291(a)(1).
42 Id. Also, it has been said that the practical result of such an order is to terminate recourse to arbitration and, as such, the order qualifies as an injunction within the meaning of § 1292(a)(1). See, e.g., Alberto-Culver Co. v. Scherk, 484 F.2d at 611.
43 Stateside Mach. Co., Ltd. v. Alpeun, 526 F.2d at 483-84; Greater Continental Corp. v. Schechter, 422 F.2d at 1103; Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d at 85-86.
ful consequences. Relying on *Baltimore Contractors*, these courts have found that orders enjoining or declining to enjoin arbitration are not "orders of serious, perhaps irreparable, consequence" within the language of the *Baltimore Contractors* opinion and, thus, are not the type of ruling that Congress intended to include within the purview of section 1292(a)(1).

Second, the courts have stated that allowing an appeal from a denial of a stay of arbitration would further delay those proceedings and thereby would eliminate one of the primary purposes of arbitration — speed and economy in proceeding.\(^4\)

These rationales are difficult to defend. The first justification relied on by the courts for denying an appeal — the supposed lack of irreparable injury — is unpersuasive. The existence of irreparable injury is not a criterion for appeal under section 1292(a)(1). Nothing in the language or legislative history of section 1292(a)(1) suggests any intention to limit the types of injunctive orders that would be appealable. Additionally, reliance on the *Baltimore Contractors* opinion is misplaced. The language of the opinion, in referring to "orders of serious, perhaps irreparable, consequence," clearly appeared to be a description of the congressional purpose in enacting section 1292(a)(1), rather than a definition of the category of cases in which such appeals would be allowed.\(^5\)

When Congress originally enacted the predecessor to section 1292(a)(1), allowing appeals of interlocutory injunctive orders, the section was enacted as part of a broader statute creating the modern federal system of trial and intermediate appellate courts.\(^6\) Congress did not focus much attention on the provision dealing with the appealability of these orders.\(^7\) The primary purposes of the statute were to ease the docket of an overburdened Supreme Court and to put an end to "judicial despotism" and the lack of "evenhanded justice" arising

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\(^4\) 422 F.2d at 1102; 297 F.2d at 85-86.
\(^5\) 348 U.S. at 181.
\(^6\) Ch. 517, 26 Stat. 828 (1891).
\(^7\) See 21 CONG. REC. 10222 (1890).
from the absence of review of trial court judgments. Nothing in the legislative history indicates that Congress intended to create an irreparable injury test in appeals of orders granting or denying injunctions.

Moreover, irreparable injury is, in fact, present where an injunction against arbitration is granted or denied. The consequences of the grant or denial of injunctive orders are far from trivial, as the remedies of arbitration proceedings and court trials may differ dramatically. As the Supreme Court has noted:

The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment . . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceed-

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48 21 CONG. REC. 3404 (1890). It was noted:

The right to review the judgments of a trial court upon the record before another tribunal is as dear to freemen as liberty itself, and in a free country should not be denied or seriously abridged.

If this measure becomes law, this invaluable right will be secured in all cases, civil and criminal, except the lowest grades of misdemeanors. The fact that such a system of jurisprudence has been so long maintained and upheld is not just a criticism upon the Constitution. The provisions of the Constitution in respect of the judicial power of the United States and the establishment of courts were framed with the consummate skill and a wonderful appreciation of the possibilities of the Government and country.

Id.

Id. Moreover, Congress has amended the statute several times to expand the scope of appealable injunctive orders. The 1891 legislation provided for appeals only from the grant or continuation of an interlocutory injunction. In 1895, orders refusing to grant or dissolving or refusing to dissolve injunctions were also made appealable. Ch. 96, 28 Stat. 666 (1895).

In 1900, Congress amended the statute to provide additionally for interlocutory appeals from orders appointing receivers. Ch. 803, 31 Stat. 660 (1900). In so doing, Congress deleted the language added by 28 Stat. 666 (1895). This deletion was clearly inadvertent and the language of the 1895 Act was restored by Ch. 231, 36 Stat. 1134 (1911). See 33 CONG. REC. 5501, 6757, 6802-03 (1900); S. REP. No. 388, 61st Cong., 2d Sess. 53 (1910). In 1925, the statute was once again broadened to include orders modifying or refusing to modify injunctions. Ch. 229, 43 Stat. 937 (1925). See also Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829-30 (2d Cir. 1963) (Friendly, J., dissenting), cert. denied, 376 U.S. 944 (1964).
ings is not as complete as it is in a court trial; and the judicial review of an award is more limited than judicial review of a trial.\textsuperscript{50}

Additionally, arbitration usually has no established procedures for discovery.\textsuperscript{51} Consequently, the question of the appropriate forum in which to resolve disputes is clearly more than academic.

The second justification for nonappealability, to further the speed and economy interests inherent in the arbitration proceeding,\textsuperscript{52} is not persuasive in view of the delay and expense that results from useless proceedings. While the parties in arbitration generally do not have the large discovery costs that are incurred in judicial proceedings, in complex proceedings the parties generally must pay arbitrators' fees under the rules of the American Arbitration Association and other arbitration tribunals.\textsuperscript{53} In a lengthy arbitration, the fees may amount to hundreds of thousands of dollars.\textsuperscript{54} Moreover, a party who is compelled to go forward with arbitration may not have the resources at the conclusion of the arbitration to pursue the issue of arbitrability in order to vindicate his right to judicial resolution and to prosecute his claims in court if he is successful. Similarly, a party who is improperly deprived of an arbitration remedy and who is compelled to litigate his claims in court also will incur substantial costs.

The district courts in granting or denying injunctions

\textsuperscript{50} Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. at 203.

\textsuperscript{51} See AAA Rules §§ 28, 30-32 for rules governing the order of proceedings, the presentation of evidence and the right of the Arbitrator to make an investigation.

\textsuperscript{52} See, e.g., Stateside Mach. Co., Ltd. v. Alperin, 526 F.2d at 484 n.13. The Third Circuit observed:

Since the relative speed and economy of arbitration are generally regarded as major incentives to the election of that form of conflict resolution as an alternative to judicial proceedings, we do not believe that the sums occasionally wasted on arbitration are likely to prove of sufficient magnitude to cause irreparable harm.

\textit{Id.}

\textsuperscript{53} See AAA Rules § 50 for a discussion of the Arbitrator's fee rule.

\textsuperscript{54} In addition, under the AAA Rules the claimant must make a payment to the association that is graduated according to the size of the claim. See AAA Rules § 47 for a discussion of the administrative fee schedule. Where a large claim is involved, the required payment may be very substantial.
against arbitration have recognized the potential irreparable injury from compelling a party to litigate in the wrong forum.\textsuperscript{55} If there is sufficient irreparable injury for a district court injunction, there should be sufficient irreparable injury to allow an appeal. Indeed, some state statutes have recognized the importance of resolving the question of arbitrability before arbitration or court proceedings by providing that the parties served with a demand for arbitration must move for a stay of arbitration and must raise any issue of arbitrability at that time.\textsuperscript{56}

Although the policies of other federal statutes may have a bearing on the question of appealability,\textsuperscript{57} the USAA offers no clearly articulated policy against appealability of decisions granting or denying injunctions against arbitration. As noted earlier, Congress probably did not even consider the existence of the \textit{ex parte} arbitration rules that led to the necessity for injunctive relief; instead, Congress apparently contemplated that a party resisting arbitration would not be required to arbitrate until the party seeking arbitration had successfully secured an order compelling arbitration — an order that would be appealable.

Significantly, the courts of appeals that have held that injunctive orders respecting arbitration are not appealable have focused their attention on the appealability of those orders that have refused to enjoin arbitration.\textsuperscript{58} But where an injunction against arbitration is erroneously granted, the very remedy which the USAA is designed to preserve will be denied improperly, and the parties may have to go through a district court trial and appeal before the arbitration remedy becomes available.

Even where an order denying an injunction is involved, the policies of the USAA favoring prompt and inexpensive

\textsuperscript{55} See Playboy Clubs Int'l, Inc. v. Hotel & Restaurant Employees & Bartenders Union, AFL-CIO, 321 F. Supp. at 707.

\textsuperscript{56} See, e.g., N.Y. [CPLR] Law § 7503 (McKinney 1980).


\textsuperscript{58} See, e.g., Stateside Mach. Co., Ltd. v. Alperin, 526 F.2d at 480; Greater Continental Corp. v. Schechter, 422 F.2d at 1100; Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d at 80.
resolution of controversies are frustrated by a decision declining to review orders denying injunctions, since the parties may be compelled to complete a lengthy and costly arbitration proceeding only to discover that the merits are not in fact arbitrable.\textsuperscript{59} Further, where the potentially arbitrable claim arises under the federal antitrust or securities laws, the case for appealability is even stronger. These statutes reflect a policy against compelling arbitration which would be frustrated if an injunction were improperly denied, and the parties were compelled to go forward in arbitration.

Finally, whether an injunction is granted or denied, the rule of nonappealability may make arbitration clauses far less attractive to contracting parties, since they will be unable to determine finally, in advance of lengthy court or arbitration proceedings, whether the matters are arbitrable or are reserved for judicial resolution. This potential discouragement of arbitration is inconsistent with federal policies designed to encourage utilization of the remedy.\textsuperscript{60}

CONCLUSION

In summary, whatever policy arguments may exist for authorizing or refusing to authorize appeals from injunctive orders, the failure of section 1292(a)(1) to create an exception for injunctive orders barring arbitration should foreclose a holding of nonappealability. In determining the policy of appealability, the courts that have refused appeals have asserted an inappropriate policy-making role.\textsuperscript{61} The dangers of such ju-

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\textsuperscript{59} As noted earlier, despite the general purpose of arbitration to secure a speedy and economical result, many commercial arbitrations involve complex issues that require lengthy and expensive proceedings to resolve.

\textsuperscript{60} While federal policy favors arbitrating arbitrable disputes, there is no such policy with respect to submitting disputes to arbitration that have not been made arbitrable by contract. Nonetheless, in at least one circuit, and possibly two, orders granting an injunction are appealable while those denying an injunction are not. See notes 37-38 supra and accompanying text for a discussion of the distinction in the appealability of these orders. This particular distinction seems almost impossible to defend under § 1292(a)(1) and may cause arbitration of issues made nonarbitrable by contract.

\textsuperscript{61} Cf. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). In \textit{Risjord} the United States Supreme Court vacated and remanded an Eighth Circuit decision that held district court orders denying disqualification of counsel motions to be non-
dicial intrusion are evidenced by the fact that the courts declining to entertain appeals have misread the policies of the USAA, have ignored the serious consequences of denying the right to appeal, and have created an unjustified distinction between injunctive orders compelling arbitration and injunctive orders barring (or refusing to bar) arbitration.

Perhaps the most serious consequence of court decisions holding nonappealable district court orders granting or denying injunctions against arbitration, however, is that the question of whether these orders were properly or improperly issued, as a practical matter, will never be reviewed by a court of appeals since these injunctive claims rarely go to final judgment. Consequently, in circuits where the orders are held nonappealable, no uniform rule exists to govern whether district courts may or may not enjoin the arbitration, and contracting parties similarly are left with little guidance.