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Report on Arbitration Appeals

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SECTION REPORTS TO THE HOUSE OF DELEGATES

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I. Report on Arbitration Appeals

BE IT RESOLVED that the American Bar Association urges the Congress to amend Title 9 of the United States Code (Arbitration) to add a new Section relating to Appeals, or, alternatively, to enact other comparable legislation, which would provide in pertinent part for appeals from interlocutory orders of a trial court either refusing a stay of litigation pending arbitration, or denying an application to compel arbitration, or granting, continuing, or modifying an injunction against an arbitration.

REPORT*

It has long been recognized that the Federal courts of appeals ought to hear appeals from some interlocutory orders entered by the district courts in civil cases. Interlocutory appeals are not allowed from all orders involving injunctions, receiverships, and liability in marine collision cases. 28 U.S.C. § 1292(a). In addition, for more than 25 years, appeals have been authorized under 28 U.S.C. § 1292(b), by certification of the trial judge and leave of the circuit court.

The latter procedure has not, however, been completely satisfactory. There are many interlocutory orders which are not certified by trial judges, but which are nonetheless worthy of early review. *See, e.g., Coastal Steel Corp. v. Tilghman Wheelabrator,* 709 F.2d 190 (3d Cir.), *cert. denied,* 464

*As drafted by the International Commercial Arbitration Committee, Michael Marks Cohen and Francis J. Higgins, Co-Chairmen.

U.S. 938 (1983); *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155 (6th Cir. 1983); *Pitney Bowes v. Mestre*, 701 F.2d 1365 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983). To find jurisdiction to hear such appeals, the courts have resorted to more and more elaborate interpretations of the concepts of "final orders," and "injunctions" from which appeals are authorized as of right. 28 U.S.C. §§ 1291, 1292(a)(1); *see, e.g., Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) [the "*Cohen* doctrine"]; *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935); *but cf. Carson v. American Brands*, 450 U.S. 79, 84 (1981).[1]

This complicated procedural matrix has created chaos in appeals from orders disposing of applications to compel or to stay arbitration, and to stay litigation pending the outcome of arbitration. There have been more than 100 cases raising such appealability issues in the last 10 years, at least a dozen each in 1983, 1984, and 1985 alone. The Seventh Circuit summed up the area as "one of, 'medieval if not Byzantine peculiarities' . . . and a 'source of understandable confusion to the bar' . . . where the law is 'constantly changing.' " *Snyder v. Smith*, 736 F.2d 409, 404 (7th Cir.), *cert. denied*, ____ U.S. ____ (1984). The First Circuit views it as a "Serbonian Bog, where whole cases have sunk from sight." *Hartford Financial Systems v. Florida Software Services*, 712 F.2d 724, 727 (1st Cir. 1983).

Motion to Stay Litigation (9 U.S.C. § 3)

An appeal to a circuit court from the grant or denial of a motion to stay an action pending arbitration under 9 U.S.C. § 3 does not lie as an appeal from a "final decision" under the *Cohen* doctrine. *See Baltimore Contractors v. Bodinger*, 348 U.S. 176 (1955); *U S M Corp. v. G K N Fasteners*, 574 F.2d 17, 18-19 (1st Cir. 1978). However, an interlocutory appeal may be taken, as from an order pertaining to an "injunction," if, half a century ago, before adoption of the Federal Rules of Civil Procedure, the suit would have been regarded as one "at law" rather than "in equity." *See Baltimore Contractors v. Bodinger, supra; Smoky Greenhaw Cotton Co. v. Merrill Lynch Pierce Fenner & Smith*, 720 F.2d 1446, 1447 n.1 (5th Cir.

1. At times the circuit courts have had to be almost ingenious to get around the problem of a refusal of a district judge to issue a 1292(b) certificate. *See In re McClelland Engineers*, 742 F.2d 837 (5th Cir. 1984), *cert. denied*, ____ U.S. ____ (1985). When all else fails, the circuit courts may sometimes resort to writ of mandamus as a substitute for appeal. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Colonial Times v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975). However, mandamus is not available in arbitration cases. *Coastal (Bermuda) v. E.W. Saybolt & Co.*, 761 F.2d (5th Cir. 1985); *Timberlake v. Oppenheimer & Co.*, 729 F.2d 515, 519 (7th Cir. 1984); *USM Corp. v. GKN Fasteners*, 574 F.2d 17, 23 (1st Cir. 1978).

1983); *Rhone Mediterranee v. Lauro*, 712 F.2d 50 (3d Cir. 1983); *U S M Corp. v. G K N Fasteners, supra*. No interlocutory appeal is permitted if the suit goes forward "in equity" (the so-called *Enelow-Ettelson* rule).[2] *See Baltimore Contractors v. Bodinger, supra; Timberlake v. Oppenheimer*, 729 F.2d 515 (7th Cir. 1984); *Hartford Financial Systems v. Florida Software Serv.*, 712 F.2d 724 (1st Cir. 1983). This doctrine has been characterized as "lacking a rational basis by most of the courts of appeals and even by the Supreme Court itself." *H. C. Lawton v. Truck Drivers, Chauffeurs & Helpers Local Union 384*, 755 F.2d 324, 327 n.2 (3d Cir. 1985).

Moreover, for reasons "more historical than logical" (*Texaco v. American Trading & Transp. Co.*, 644 F.2d 1152 (5th Cir. 1981)), an interlocutory appeal relating to an injunction is not authorized in a maritime case because, in older days, admiralty courts lacked the power to issue injunctions. *Schoenamsgruber v. Hamburg America Line*, 294 U.S. 454 (1935); *Coastal (Bermuda) v. E.W. Saybolt & Co.*, 761 F.2d 198 (5th Cir. 1985); *Gave Shipping Co. v. Parcel Tankers*, 634 F.2d 1156 (9th Cir. 1980); *but cf. Rhone Mediterranee v. Lauro, supra*.[3]

MOTIONS TO COMPEL ARBITRATION (9 U.S.C. §§ 4, 206)

If a party commences an action to compel another party to proceed to arbitration under 9 U.S.C. § 4, an order granting or denying the application is a final appealable order, regardless of whether the suit goes forward at law, in equity or in admiralty. *Americana Fabrics v. L & L Textiles*, 754 F.2d 1524 (9th Cir. 1985); *County of Durham v. Richards*, 742 F.2d 811 (4th Cir. 1984).[4] If the district court neither grants nor denies the appli-

2. *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). Where a complaint contains both legal and equitable claims to which arbitration is raised as a defense, the appealability of the order granting or denying a stay pending the outcome of arbitration depends on whether the case is predominantly an action at law, *Mediterranean Enterprises v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979); *Lee v. Ply Gem Indus.*, 593 F.2d 1266 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979) or whether the equitable relief sought is merely incidental, *Oasis Oil & Ref. Corp. v. Armada Transp. & Ref. Co.*, 719 F.2d 124 (5th Cir. 1983); *Langley v. Colonial Leasing Co.*, 707 F.2d 1 (1st Cir. 1983); *Poriss v. AAACON Auto Transp.*, 685 F.2d 56 (2d Cir. 1982), or whether the equitable claim is frivolous. *Mellon Bank v. Pritchard—Kean Mfg. Corp.*, 651 F.2d 1244 (8th Cir. 1981).

3. Some circuit courts have held that the district courts sitting in admiralty now have power to issue injunctions. *See, e.g., Compania Anonima Venezolana de Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir. 1962). That has not, however, affected non-appealability under the decision in the *Schoenamsgruber* case. *Coastal (Bermuda) v. E.W. Saybolt & Co., supra*.

4. There is an exception. An appeal is not allowed if the denial of the petition was on the ground that trial was required to resolve a factual dispute about whether an agreement to arbitrate existed. *John Thompson Beacon Windows v. Ferro*, 232 F.2d 366 (D.C. Cir. 1956); *cf. Matterhorn v. NCR Corp.*, 727 F.2d 629 (7th Cir. 1984).

cation, but instead stays the suit, thereby suspending both litigation and arbitration, such an order itself is appealable as a final order. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *but cf. Acton Corp. v. Borden*, 670 F.2d 377 (1st Cir. 1982) [stay pending outcome of parallel Federal suit].

There is a conflict among the circuits about the appealability of an order in an ordinary civil suit granting or denying a motion under 9 U.S.C. § 4 to compel arbitration of one or more claims sued on. *Compare Matterhorn v. NCR Corp.*, 763 F.2d 866 (7th Cir. 1985) [not appealable] *with Howard Elec. & Mech. Co. v. Frank Briscoe Co.*, 754 F.2d 847 (9th Cir. 1985); *Sweater Bee v. Manhattan Indus.*, 754 F.2d 457 (2d Cir.), *cert. denied*, ____U.S. ____ (1985); *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155 (6th Cir. 1983); *City of Naples v. Prepakt Concrete*, 494 F.2d 511, 512 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974) [appealable]. Such an order is not appealable in admiralty. *Tradax v. M.V. Holendrecht*, 550 F.2d 1337 (2d Cir. 1977).

However, recently the Fifth Circuit held in an admiralty case that the denial of a motion to compel arbitration is appealable when the order is made under 9 U.S.C. § 206, a special statute which was enacted to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Sedco v. Petroleos Mexicanos*, 767 F.2d 1140 (5th Cir. 1985).

Stay of Arbitration

The circuits are in conflict over whether an order granting or denying a motion to stay arbitration constitutes an injunction for purposes of interlocutory appeal. *Compare Alascom v. ITT North Elec. Co.*, 727 F.2d 1419 (9th Cir. 1984); *City of Meridian v. Algernon Blair*, 721 F.2d 525 (5th Cir. 1983); *Buffler v. Electronic Computer Programming Institute*, 466 F.2d 694 (6th Cir. 1972) [appealable]; *with Stateside Mach. Co. v. Alperin*, 526 F.2d 480 (3d Cir. 1975); *Diematic Mfg. Corp. v. Packaging Indus.*, 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975) [not appealable]. Two circuits have ruled, in support of a policy favoring arbitration, that an order staying arbitration is appealable, but an order refusing such a stay is not appealable. *North Supply Co. v. Greater Dev. & Serv. Corp.*, 728 F.2d 363 (6th Cir. 1984); *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 1983 (1st Cir. 1972); *see also Alascom v. ITT North Elec. Co., supra; Diematic Mfg. Corp. v. Packaging Indus., supra; cf. Carson v. American Brands*, 450 U.S. 79 (1981).[5]

5. Appealability issues have likewise arisen in other arbitration matters such as applications to consolidate arbitrations (*compare Weyerhauser v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, ____ U.S. ____ (1984); *Gavlik Constr. Co. v. H.F.*

POLICY CONSIDERATIONS

The Supreme Court has noted the "incongruity" of having appealability of orders affecting arbitration turn on "outmoded procedural differentiations" but the Court has left it up to Congress to deal with the problem. *Baltimore Contractors v. Bodinger, supra,* at 184-85.

Arbitration usually avoids lengthy and expensive discovery, leading to a quick, cheap decision on the merits by knowledgeable experts. The principle behind the growing experiments in compulsory court-annexed arbitration is that a decision on the merits, even if nonbinding, often brings a matter to an end, with concomitant savings in time and money. The same may be expected of an order mistakenly sending parties to arbitration. This advantage would be lost if such an order was subject to early appellate review.

However, when a district judge mistakenly obstructs arbitration, by refusing to stay litigation or refusing to compel arbitration or perhaps by enjoining the arbitration itself, the parties stand to lose completely all benefits of arbitration. They often face the prospect of protracted, expensive litigation, with a potential great waste of economic as well as judicial resources, unless the order may be promptly appealed. These, then, are the real problem areas for which remedial legislation is needed to regulate appeals.

They are adequately dealt with in Section 19A of the Uniform Arbitration Act which authorizes appeals only from orders interfering with the arbitral process. But even if Federal legislation took a different form, and regardless of whether appeals are allowed in other cases too, by right or by certiorari, as long as the problem areas are covered, the bar should support it. As things now stand, the constant litigation over appealability is a colossal waste of litigants' money and judicial time.

Respectfully submitted,
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Chairman

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Campbell Co., 526 F.2d 777 (3d Cir. 1975) [appealable] *with Limbach Co. v. Gevyn Constr. Corp.*, 544 F.2d 1104 (1st Cir. 1976), *cert. denied*, 430 U.S. 916 (1977) [not appealable]); a refusal to confirm an award (*Shearson Loeb Rhoades v. Much*, 754 F.2d 773 (7th Cir. 1985) [final award vacated and matter remanded to the arbitrator]; *Sentry Life Ins. Co. v. Borad*, 759 F.2d 695 (9th Cir. 1985) [final award vacated and case set down for trial]; *Liberian Vertex Transp. v. Association Bulk Carriers*, 738 F.2d 85 (2d Cir. 1984) [partial final award]); and efforts to compel arbitration in bankruptcy proceedings. *Zimmerman v. Continental Airlines*, 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984); *Coastal Steel Corp. v. Tilghman Wheelabrator*, 709 F.2d 190 (3d Cir. 1983).