Towards a Sensible Rule Governing Stays Pending Appeals of Denials of Arbitration

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When parties to a commercial contract agree that a dispute that arises under the contract will be resolved through arbitration, their agreement is enforceable in federal court.[1] This means that a district court judge must refer any suit on the contract to arbitration after the judge makes a threshold finding that the dispute is arbitrable. If the judge finds that it is not arbitrable—for example, because the contract does not in fact provide for arbitration in the situation that has arisen—then litigation may proceed in federal court. Pursuant to 9 USC § 16, however, the party seeking arbitration has a right to appeal the district court's denial of arbitration.

The statute does not specify whether proceedings in the district court may, or should, be stayed pending resolution of the arbitrability appeal. A circuit split has developed on the issue, with some circuits holding that such stays should issue automatically and others holding that the district judges have unfettered discretion over the question.

The issuance or denial of a stay may have serious consequences for litigants. On the one hand, the party seeking arbitration may have included the arbitration clause in the contract in order to avoid the costs and burdens of discovery, which would begin immediately in the district court absent the issuance of a stay. A major purpose of arbitration clauses is the avoidance of discovery, so a favorable appellate ruling on the arbitrability question, which might take several months to issue, might ultimately be unhelpful if discovery has already begun. On the other hand, the litigant opposing the stay may be suffering an ongoing injury that grows worse by the day, as in the case of a copyright infringement. In such situations, courts recognize that parties may have an entitlement to litigate without delay.

After concluding that existing approaches to stays pending appeals of denials of arbitration are unsatisfactory, this Comment proposes a new approach to govern issuance of the stays. This Comment's approach is modeled on the framework that generally governs stays of district court orders pending appeal. It proposes adopting that frame-

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1 See generally 9 USC §§ 1–16 (2000).

work to govern stays pending appeals of denials of arbitration as well. The proposed framework consists of a four-factor test that district court judges apply to determine whether stays should issue. The test provides no bright line rule dictating when the stays will issue; rather the district judge has discretion within the framework of the four-part test to issue or withhold stays when appropriate. No circuits currently employ this approach or acknowledge that it might be applicable.

The proposed framework has the advantages of being an extension of existing law to the arbitrability context and of providing needed flexibility so that judges can take the interests of all parties into account as appropriate. It is possible to make some predictions as to how the analysis will come out under each prong in a given jurisdiction, and this Comment attempts to do so. Part I provides background on arbitration, the statutory scheme and the circuit split. Part II reviews approaches to stays pending arbitrability appeals and their rationales. Part III presents the proposed approach and explores its advantages and disadvantages.

I. BACKGROUND

A. Purposes of Arbitration and the Enactment of the Federal Arbitration Act

Arbitration was already practiced widely in the United States before the 1925 enactment of the United States Arbitration Act, later renamed the Federal Arbitration Act[2] (FAA). Arbitration is the nonjudicial resolution of disputes—typically contractual ones in the commercial setting—by a third party chosen by the parties to the contract and whose award is binding and subject to very limited review.[3] The manifold advantages of arbitration include reduced expense and time, informal discovery, evidentiary rules that can be tailored to the dispute at hand, privacy, and arbitrator expertise.[4] Yet prior to the enact-

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2 Pub L No 25-401, 43 Stat 883 (1925), codified at 9 USC §§ 1–16. The United States Arbitration Act was renamed the Federal Arbitration Act (FAA) in 1947 by Pub L No 80-282, 61 Stat 669 (1947). For a history of commercial arbitration in the United States, see Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 15 (Oxford 1992) ("Once upon a time, say, at the turn of the century, arbitration was neither a new nor an uncommon practice in the United States, particularly in such great commercial and financial centers as New York and Chicago.").

3 See Macneil, *American Arbitration Law* at 7 (cited in note 2).

4 See Michael L. Taviss, Comment, *Adventures in Arbitration: The Appealability Amendment to the Federal Arbitration Act*, 59 U Cin L Rev 559, 565 (1990) (noting that "complex issues make [arbitrator expertise] especially pertinent"). See also Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* 14–15 (Harper 1941) ("Among the many reasons advanced for the use of arbitration are the usual ones of speed, economy and privacy. To these may be added the belief that arbitration maintains good will and preserves

ment of the FAA, many members of the federal judiciary were hostile to arbitration and viewed contractual arbitration clauses as attempts to divest the courts of jurisdiction.[5]

The passage of the FAA represented a significant victory for the proponents of arbitration.[6] The FAA requires federal judges to honor contractual arbitration clauses.[7] Its purpose was to move arbitrable disputes out of court and into arbitration as quickly as possible.[8] Yet the original act did not include a provision governing appeals of courts' determinations of whether a given dispute is subject to arbitration.

B. Arbitrability Appeals before 1988: Pressure for Change

Dissatisfaction with the existing system for appealing arbitrability decisions led to pressure for reform and eventually to the passage of 9 USC § 16, the section of the FAA governing appeals. Prior to the enactment of 9 USC § 16, the issuance of stays pending appeal of a denial of arbitration was governed by the arcane and complex court-made *Enelow-Ettelson* doctrine.[9] This doctrine held that orders granting the stays were immediately appealable as injunctions if two conditions were met:

> First, the action in which the order is entered must be an action that, before the merger of law and equity, was by its nature an action at law. Second, the order must arise from or be based on

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business friendships."); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 Minn L Rev 240, 240 (1928):

> A substitute for litigation has been developed in commercial arbitration, the purposes of which are to eliminate the expense of litigation, to save delays in legal proceedings, to improve business relations between men in an industry and between them and their customers, to help establish trade customs, and to substitute the decisions of practical business men for those of juries.

5 See Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 Tulane L Rev 1945, 1949 (1996). See also Mette H. Kurth, Comment, *An Unstoppable Mandate and an Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide*, 43 UCLA L Rev 999, 1005 (1996) (noting that "the common law refused to enforce arbitration contracts governing future disputes").

6 See Kurth, Comment, 43 UCLA L Rev at 1005–06 (cited in note 5) (describing heavy lobbying by commercial interests, legal scholars, and the ABA leading to passage of the FAA).

7 See 9 USC §§ 1–15.

8 See *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 22 (1983).

9 See Richard J. Medalie, *The New Appeals Amendment: A Step Forward for Arbitration*, 44 Arbitration J 22, 24–27 (June 1989) (detailing the court-made doctrine governing appeals prior to the enactment of § 16). See also *Enelow v New York Life Insurance Co*, 293 US 379 (1935) (holding that no stay was to issue, as the injunctive relief sought was not in equity), overruled by *Gulfstream Aerospace Corp v Mayacamas Corp*, 485 US 271, 287 (1988); *Ettelson v Metropolitan Life Insurance Co*, 317 US 188, 191–92 (1942) ("As in the *Enelow* case, so here, the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action."), overruled by *Mayacamas*, 485 US at 287.

some matter that would then have been considered an equitable defense or counterclaim.[10]

In 1988, just prior to the enactment of 9 USC § 16, the Supreme Court overruled the *Enelow-Ettelson* doctrine in *Gulfstream Aerospace Corp v Mayacamas Corp*,[11] calling it "unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals,"[12] as well as "divorced from any rational or coherent appeals policy."[13] The Court held that stays pending appeal of denials of arbitration were no longer appealable as injunctions.[14]

Widespread dissatisfaction with the doctrine had already led to concerted efforts for congressional action before *Mayacamas*. Starting in the mid-1980s, the Arbitration Committee of the American Bar Association drafted a proposed new section of the FAA to govern the appeals process and lobbied heavily for its enactment.[15] These efforts culminated in 1988 with congressional passage of § 16.

C. The New Statute: Its Purpose and Context

Section 16 allows litigants to immediately appeal orders inimical to arbitration, but not orders favorable to arbitration.[16] Congress enacted § 16 as part of the Judicial Improvements and Access to Justice Act.[17] Congress's purpose in passing § 16 was related to the Arbitration Act's overall purpose: it was meant to ensure that the process of appealing arbitrability determinations does not delay the entry into arbitration.[18] In keeping with this purpose, § 16 provides for immediate appeal of denials of arbitration but not of grants of arbitration.[19]

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10 *Mayacamas*, 485 US at 280–81.

11 485 US 217 (1988).

12 Id at 283.

13 Id at 285 (internal quotation marks omitted).

14 Id at 287 ("We therefore overturn the cases establishing the *Enelow-Ettelson* rule and hold that orders granting or denying stays of 'legal' proceedings on 'equitable' grounds are not automatically appealable under § 1292(a)(1).").

15 See Medalie, 44 Arbitration J at 22–24 (cited in note 9) ("Passage of the arbitration appeals amendment was the culmination of years of effort.").

16 9 USC § 16.

17 Pub L No 100-702, 102 Stat 4642 (1988), codified in several titles of the US Code including 9 USC § 15 (1988). Section 15 was later renumbered as § 16 by Pub L No 101-650, 104 Stat 5089 (1990).

18 See David D. Siegel, *Appeals from Arbitrability Determinations under the New § 15 of the U.S. Arbitration Act*, 126 FRD 589, 589 (1989) ("Section 15 [later renumbered § 16] is a proarbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of arbitration."). See also Medalie, 44 Arbitration J at 27 (cited in note 9) ("[Section 16] further recognizes that the purpose of an order to compel arbitration is to permit arbitration to go forward.").

19 See Medalie, 44 Arbitration J at 27 (cited in note 9).

The passage of § 16 did not resolve all issues surrounding arbitrability appeals. Section 16 applies to only those arbitrations that are covered by the FAA.[20] Section 16 provides only one of several possible avenues to appeal a denial of arbitration. Depending on the context, litigants may choose to pursue an appeal pursuant to 28 USC § 1292(b), mandamus certification, or the doctrine of pendent appellate jurisdiction.[21] Senate floor debates on the proposed § 16 made clear that these other avenues remained open.[22]

D. The Circuit Split

Section 16 provides for appeals of denials of arbitration, but does not address whether litigation in a district court must be stayed pending such appeals. Circuit courts are split on this question. The Ninth Circuit addressed the question first and ruled that district court judges did not have to stay proceedings,[23] and the Second Circuit has followed suit.[24] Other circuits have ruled that stays of district court proceedings should issue automatically pending resolution of the appeal on arbitrability.[25]

1. The Ninth and Second circuits.

The first two circuits to examine the question of stays pending arbitrability appeals held that stays did not have to issue, but they gave the issue cursory treatment and did not always articulate clear rationales. In 1990, the Ninth Circuit held that stays did not need to

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20 See Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 15B *Federal Practice and Procedure* § 3914.17 at 7 (West 2d ed 1992 & Supp 2004) ("Section 16 applies only to orders with respect to arbitration under the United States Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitration issues arising from agreements governed by state law will remain covered by general appeal doctrine.").

21 See Mark I. Levy, *Arbitration Appeals II*, Natl L J 12 (Aug 16, 2004).

22 See Section-by-Section Analysis on the Judicial Improvements and Access to Justice Act, S 1482, 100th Cong, 2d Sess, in 134 Cong Rec S 31065 (Oct 14, 1988) (Sen. Heflin) (stressing that § 16 is but one avenue of appeal):

> [Section 16] appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court. Orders of any type can be appealed under 28 U.S.C. § 1292(b), preserving the opportunity for immediate review whenever the district court and court of appeals concur that this course is desirable.

23 See *Britton v Co-Op Banking Group*, 916 F2d 1405 (9th Cir 1990).

24 See *Motorola Credit Corp v Uzan*, 388 F3d 39 (2d Cir 2004); *In re Salomon Inc Shareholders' Derivative Litigation 91*, 68 F3d 554 (2d Cir 1995).

25 See *Bradford-Scott Data Corp, Inc v Physician Computer Network, Inc*, 128 F3d 504 (7th Cir 1997). See also *McCauley v Halliburton Energy Services, Inc*, 413 F3d 1158 (10th Cir 2005); *Blinco v Green Tree Servicing, LLC*, 366 F3d 1249 (11th Cir 2004); *Bombardier Corp v National Railroad Passenger Corp*, 2002 US App LEXIS 25858 (DC Cir) (per curiam) (unpublished opinion).

issue pending appeal of a denial of arbitration.[26] The court acknowledged the "general rule that the filing of a notice of appeal divests the district court of jurisdiction," but also pointed out that "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal."[27] The court reasoned that the issue on appeal, arbitrability, was distinct from the merits, and thus the appeal sought review of a collateral order and did not deprive the district court of jurisdiction to proceed with the underlying action.[28] The Ninth Circuit also noted a concern that if stays issued automatically, parties would file frivolous appeals to delay proceedings.[29]

The Ninth Circuit's approach vests district court judges with broad discretion over issuance of stays. It establishes only that district courts *may* proceed with the merits; it does not provide a standard to guide the district court in deciding when it might be appropriate to issue stays. Thus the Ninth Circuit's holding leaves ample room for a new framework, which would give the trial judge discretion to issue a stay within certain guidelines. The new framework that this Comment proposes in Part III imports the four-factor test that generally governs issuance of stays of district court orders into the arbitrability context. Even though the Ninth Circuit does not mention or endorse this approach, the proposed framework is consistent with the Ninth Circuit's approach.

The Second Circuit twice joined the Ninth Circuit in holding that stays should not issue automatically. In 1995, the Second Circuit refused to grant a stay but provided scant reasoning.[30] In 2004, the Second Circuit held—for reasons stated by the Ninth Circuit—that the district court was not divested of jurisdiction by the appeal.[31] But again the Second Circuit did not articulate a rationale beyond that provided by the Ninth Circuit. Thus, among federal appellate courts, only the

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26 See *Britton*, 916 F2d at 1412 (holding that, absent an appellate stay, the trial court retains jurisdiction over elements of a case not on appeal).

27 Id at 1411 (internal quotation marks omitted).

28 Id at 1412, citing *Moses H. Cone*, 460 US at 21 (holding that arbitrability is severable from the merits of the underlying dispute and permitting concurrent litigation on the issue of arbitrability).

29 *Britton*, 916 F2d at 1412.

30 *Salomon*, 68 F3d at 557, 561 ("[T]he arbitration agreements here required that any arbitration be before the NYSE, and not before any other arbitral forum. Accordingly, we will not disturb [the lower court's] decision to proceed to trial.").

31 *Motorola Credit*, 388 F3d at 54 (following *In re Salomon Brothers*, and adopting "the Ninth Circuit's position that further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court").

Ninth Circuit provides reasoning in support of the position that stays should not issue automatically, and that reasoning is not extensive.[32]

2. The Seventh Circuit.

In 1997, the Seventh Circuit concluded that stays should issue automatically upon the filing of an appeal. In *Bradford-Scott Data Corp, Inc v Physician Computer Network, Inc*,[33] the defendants requested a stay of litigation pending arbitration. The district court judge concluded the dispute was not arbitrable. The defendants appealed the order pursuant to 9 USC § 16 and moved for a stay of discovery in the district court pending appeal. The judge refused to stay discovery, and the defendants asked the appeals court for that relief.[34]

The Seventh Circuit listed several reasons in support of its holding that stays should automatically issue. The court first rejected the standard that the parties used in their briefs to evaluate whether a stay should issue. That standard required the appellants to establish irreparable harm and a significant probability of success on the merits.[35] The court noted that "[j]udged by this standard, [the] appellants' request would fail at the outset, for the costs of litigation are not irreparable injury."[36]

The court then held that the parties' proposed standard ignored the real question: whether the district court had jurisdiction to proceed at all while the appeal was pending.[37] The court held that the filing of a notice of appeal "is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."[38] The court reasoned that despite the Supreme Court's holding

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32 See *Britton*, 916 F2d at 1411–12.

33 128 F3d 504 (7th Cir 1997) (holding that, unless certified as frivolous, an arbitrability appeal deprives the trial court of jurisdiction, and hence a stay issues automatically).

34 Id at 504–05.

35 Id. One commentator believes that the parties were referencing the standard four-prong test governing the issuance of stays in district courts (which is also the proposed approach discussed in Part III). James R. Foley, *Recent Developments:* Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 13 Ohio St J on Disp Resol 1071, 1078 (1998) ("This reference to the parties' apparent briefing of the four-prong test (which is, in fact, also used to evaluate requests for stays of injunctions) was followed by a quick dismissal of appellant's chances of success on that standard."). For more discussion on this point, see text accompanying note 112.

36 *Bradford-Scott*, 128 F3d at 505.

37 Id.

38 Id, citing *Griggs v Provident Consumer Discount Co*, 459 US 56, 58 (1982), superseded by statute. See *Schroeder v McDonald*, 55 F3d 454, 458 (9th Cir 1995) ("Rule 4(a)(4) was amended, effective December 1, 1993, to provide that when a notice is prematurely filed, it shall be in abeyance and become effective upon the date of entry of an order disposing of the Rule 59(e) motion.").

in *Moses H. Cone Memorial Hospital v Mercury Construction Corp*[39] that arbitrability is severable from the merits,[40] the question on appeal—whether the dispute should be litigated—affects proceedings in the district court. Therefore, proceeding with the underlying district court litigation would be inimical to the parties' preference for arbitration,[41] would risk eroding the benefits of arbitration—which may be faster and cheaper than judicial proceedings—and would "create [ ] a risk of inconsistent handling of the case by two tribunals."[42]

The Seventh Circuit also responded to the Ninth Circuit's concern that the automatic issuance of stays in this context would encourage frivolous appeals. The court adopted an existing Seventh Circuit framework according to which the district court may carry on with the case if the district court or the appeals court finds that the appeal is frivolous.[43] This framework was derived from Supreme Court and Seventh Circuit case law on double jeopardy and from Seventh Circuit case law on qualified immunity.[44] The Seventh Circuit stated that the Supreme Court's pronouncements in the double jeopardy setting provide an answer to the Ninth Circuit's concern with dilatory appeals.[45]

3. Other circuits concurring with the Seventh Circuit's approach.

In expressing concern that the benefits of arbitration might be eroded by failure to issue a stay, the Seventh Circuit implicitly found that the federal policy favoring arbitration supports issuing automatic stays.[46] The Eleventh Circuit subsequently expanded upon this point[47] and reasoned that automatically issuing stays was consistent with Congress's acknowledgment when it passed § 16 that "one of the principal benefits of arbitration, avoiding the high costs and time involved

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39 460 US 1 (1983).

40 Id at 12–13.

41 See *Bradford-Scott*, 128 F3d at 505–06.

42 Id at 505.

43 Id at 506, citing *Goshtasby v University of Illinois*, 123 F3d 427, 429 (7th Cir 1997) ("Because the University's appeal is not frivolous, proceedings in the district court are stayed until this appeal has been resolved on the merits."); *Apostol v Gallion*, 870 F2d 1335 (7th Cir 1989) (holding that sovereign immunity appeals need not be accompanied by stays if the district court certifies frivolity). The court also cited *Abney v United States*, 431 US 651, 662 n 8 (1977), for the proposition that "the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Bradford-Scott*, 128 F3d at 506.

44 See *Bradford-Scott*, 128 F3d at 506.

45 Id.

46 See id.

47 See *Blinco*, 366 F3d at 1253 ("When a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration, the district court should stay the litigation so long as the appeal is non-frivolous.").

in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums."[48]

Two more courts have concurred with the Seventh Circuit's opinion.[49] The D.C. Circuit did so in an unpublished per curiam order that provided little explanation,[50] and the Tenth Circuit did so recently in a longer opinion.[51] The Tenth Circuit concurred with the Seventh Circuit's reasoning and further grounded its reasoning in Tenth Circuit precedent mandating automatic issuance of stays pending appeal of denials of qualified immunity claims.[52]

II. ANALYSIS OF CURRENT APPROACHES

This Part discusses and analyzes the arguments that courts on both sides of the circuit split have made in defending their respective rules. There are three central issues that courts address when considering whether to issue a stay pending appeal from a denial of arbitration.

The first issue concerns the question of jurisdiction. The Seventh, Tenth, and Eleventh circuits, which hold that stays should issue automatically, find that the district court is divested of jurisdiction by the filing of the arbitrability appeal. On the other hand, courts that do not mandate the issuance of stays hold that the question of arbitrability is separate from the merits and that this fact implies that the district and appellate courts can proceed in parallel. Part II.A agrees that arbitrability is separate from the merits and that automatic stays are not appropriate.

Second, circuits adopting a rule of automatic stays ground their approach in the law of double jeopardy and immunity. The viability of the automatic stays rule espoused by those circuits is linked with the viability of the analogy between double jeopardy or immunity and the

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48 Id at 1251.

49 No courts of appeals other than the ones mentioned in this section have addressed the issue of stays pending arbitrability appeals.

50 *Bombardier Corp*, 2002 US App LEXIS 25858 (holding that a stay was unnecessary "because a non-frivolous appeal from the district court's order divests the district court of jurisdiction over those aspects of the case on appeal . . . and the district court may not proceed until the appeal is resolved").

51 *McCauley*, 413 F3d at 1160 ("[W]e are persuaded by the reasoning of the [Seventh and Eleventh] circuits that upon the filing of a non-frivolous § 16(a) appeal, the district court is divested of jurisdiction until the appeal is resolved on the merits.").

52 See id at 1161, quoting *Stewart v Donges*, 915 F2d 572, 575–76 (10th Cir 1990) (holding that, absent a certification of frivolity, a district court is automatically divested of jurisdiction on appeal of qualified immunity). The court reasoned that § 16(a) appeals are similar to appeals from the denial of qualified immunity because "the failure to grant a stay pending either type of appeal results in a denial or impairment of the appellant's ability to obtain its legal entitlement to avoidance of litigation, either the constitutional entitlement to qualified immunity or the contractual entitlement to arbitration." *McCauley*, 413 F3d at 1162.

arbitration context. If the contexts are found to be dissimilar, then importing the framework from one to the other may be inappropriate and is, at the very least, not compelled. Part II.B argues that the analogy between double jeopardy or immunity and arbitration is ultimately problematic, although there are viable arguments on both sides.

Finally, several courts on both sides of the circuit split invoke the text and purpose of § 16 and claim that it supports their rule. Part II.C examines the text and purpose of the statute and concludes that a rule mandating automatic issuance of the stays is devoid of textual support and not supported by the policy of § 16.

A. Evaluation of the Argument that the District Court Is Divested of Jurisdiction

The Seventh Circuit and other circuits that concur with its reasoning have found that filing an appeal of a denial of arbitration divests the district court of jurisdiction because, although the Supreme Court has ruled that arbitrability is severable from the merits, the appellate court's determination of arbitrability affects the underlying proceeding on the merits.[53] The Ninth and Second circuits hold otherwise.[54] This Part considers the jurisdictional question in detail and concludes that the Ninth and Second circuits are more faithful to the Supreme Court's ruling that arbitrability is separable from the merits.

1. Background on jurisdiction and appeals.

Generally, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously."[55] Underpinning this rule is a concern about a "potential conflict" where two courts—in this instance, trial and appellate—would have the power to modify the same judgment.[56]

Notwithstanding this rule, in a limited number of situations parties can appeal an issue while proceedings in the district court are underway. Sometimes statutes or federal rules provide for the appeals,[57]

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53 See, for example, *Bradford-Scott*, 128 F3d at 505 ("Whether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A) [ ]; it is the mirror image of the question presented on appeal.").

54 See *Motorola Credit Corp v Uzan*, 388 F3d 39 (2d Cir 2004); *Britton v Co-Op Banking Group*, 916 F2d 1405, 1412 (9th Cir 1990) ("Since the issue of arbitrability was the only substantive issue presented in this appeal, the district court was not divested of jurisdiction to proceed with the case on the merits.").

55 *Griggs v Provident Consumer Discount Co*, 459 US 56, 58 (1982), superseded by statute (see note 38).

56 Id at 59–60.

57 For example, appeals pursuant to 28 USC § 1292(b) (2000) (allowing a district court judge to certify an appeal from an order that involves an uncertain question of law whose resolu-

and sometimes interlocutory appeals are allowed pursuant to court-made doctrines like the *Forgay* doctrine[58] or the collateral order doctrine,[59] among others.[60]

As both the Seventh and Ninth circuits recognize in their discussions of stays pending appeal of denials of arbitration, and as a matter of black letter law, the filing of interlocutory appeals does not ordinarily divest the district court of jurisdiction to proceed with matters not involved in the appeal.[61] Thus it is crucial to determine when matters are considered not involved in the appeal.

2. The collateral order doctrine and its standard for divestiture of jurisdiction.

In the context of the collateral order doctrine, the Supreme Court has provided guidance concerning when matters are considered not involved in an appeal. Although the collateral order doctrine is not at issue in this Comment, several Supreme Court holdings in the context of the doctrine bear directly on arbitrability appeals. This is so, first, because the Supreme Court has addressed the issue of arbitrability in the context of the collateral order doctrine, and this Comment argues that its pronouncements apply to arbitrability generally. Second, it is in the context of the collateral order doctrine that the Court has explained what it means for matters to be not involved in an appeal—the very question that must be resolved to determine whether the district court has jurisdiction to proceed pending appeal.

The collateral order doctrine allows interlocutory appeal from an order that: (1) conclusively determines the issue and is not subject to revision, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal

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tion would materially advance the termination of the litigation), FRCP 54(b) certifications (allowing interlocutory appeals of certain claims in multiclaim actions), FRCP 23 orders (allowing interlocutory appeals of class certification orders), 28 USC § 1291(a) (2000) appeals (allowing interlocutory appeals of injunctions), appeals pursuant to 9 USC § 16, and appeals undertaken by filing writs of mandamus pursuant to the All Writs Act, 28 USC § 1651 (2000) may proceed alongside district court proceedings.

58 *Forgay v Conrad*, 47 US (6 How) 201, 204 (1848) (permitting immediate appeal from an order setting aside deeds and directing the immediate delivery of property).

59 See *Cohen v Beneficial Industrial Loan Corp*, 337 US 541, 546 (1949).

60 Another example is the short-lived death knell doctrine. Recognized by several circuits in the 1960s and 1970s, the doctrine allowed immediate appeal when an order effectively terminated the litigation. See Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L Rev 175, 194 (2001) (noting that the Supreme Court rejected the doctrine in 1978). For an exhaustive list and discussion of possible avenues for interlocutory appeals, see id at 185–201.

61 See *Bradford-Scott*, 128 F3d at 505; *Britton*, 916 F2d at 1411. See also generally James W. Moore, 20 *Moore's Federal Practice* § 303.32(2) at 303–83 (Matthew Bender 3d ed 1997).

from the final judgment.[62] In the context of the collateral order doctrine, the Supreme Court has held that an interlocutory appeal does not divest the district court of jurisdiction over the case.[63] For example, when examining a district court's denial of immunity from trial, the Supreme Court reasoned that the appeal was collateral because "there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune."[64] The Court stressed that the district court "need not consider the correctness of the plaintiff's version of the facts" to proceed, and that even an issue that was outcome-determinative—as a decision on immunity surely was—could still be collateral as long as the district court had issued its final determination on the issue.[65]

When it specifically considered collateral order doctrine appeals concerning arbitrability, the Court held that the issue on appeal—arbitrability—was clearly separate from the remaining issues at the district court level, namely the merits of the case.[66] The Court also rejected the notion that because the district court judge could always reopen his order on arbitrability, this implied that the question of arbitrability was not conclusively determined.[67] The Court noted that a decision on arbitrability was not a step towards final judgment, but a refusal to proceed at all, and thus appellate review of a decision on arbitrability did not run afoul of the "principle that there should not be piecemeal review of 'steps towards final judgment in which they will merge.'"[68]

3. Aptitude of the analogy between the arbitration context and the collateral order doctrine.

Although the right to appeal denials of arbitration is statutory (pursuant to 9 USC § 16) and thus is not conferred by the collateral order doctrine, reasoning by analogy to the collateral order doctrine can be instructive for two reasons. First, what is "not involved in the appeal"[69] in the context of appeals of denials of arbitration is every-

62 See *Cohen*, 337 US at 546. See also *Moses H. Cone*, 460 US at 11–13 & n 13.

63 *Moses H. Cone*, 460 US at 12.

64 *Mitchell v Forsyth*, 472 US 511, 527 (1985).

65 Id at 528, 529 n 10.

66 *Moses H. Cone*, 460 US at 12 ("An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits.").

67 Id at 12–13 (explaining that although it is technically true that "every order short of a final decree is subject to reopening at the discretion of the district judge," there was "no basis to suppose that the [district court] contemplated any reconsideration of [its] decision to defer to the parallel state court").

68 Id at 12 n 13, quoting *Cohen*, 337 US at 546.

69 See generally Moore, 20 *Moore's Federal Practice* § 303.32 at 303–83 (cited in note 61).

thing except the issue of arbitrability; that is, the entire action itself, separated from the question of whether it can go forward outside of arbitration. Otherwise put, the merits of the case are not involved in the appeal, and thus the Supreme Court's pronouncements on what it means for an issue to be separate from the merits are relevant.

Second, the Supreme Court has held that the issue of arbitrability is separate from the merits in the context of the collateral order doctrine. It is logical to take the Supreme Court's assertion that arbitrability is severable from the merits to imply that the district court retains jurisdiction over aspects of the case other than arbitrability, although the Seventh Circuit concluded otherwise in *Bradford-Scott*.[70] The conclusion follows logically because the appellate court acquires jurisdiction only over the issue presented in the appeal,[71] and the district court retains jurisdiction over other matters.[72]

In the Seventh Circuit's view, although the issue of arbitrability is separate from the merits, it still affects the proceedings in the district court because the issue will determine whether those proceedings go forward at all.[73] But this "affects the litigation" standard seems inconsistent with the Supreme Court's admonition that a claim can be collateral and separate from the merits, and yet "necessarily directly controlling of the question whether the defendant will ultimately be liable."[74] The Supreme Court has explained that "the fact that an issue is outcome determinative does not mean that it is not 'collateral.'"[75] This statement applies in the context of arbitrability: an appellate determination on arbitrability affects whether the district court litigation can happen at all—it is outcome determinative in that sense—but it is nevertheless collateral to that litigation because the district court will not consider the issue of arbitrability again. Furthermore, a determination of arbitrability is separate from the merits of the case. Thus the district

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70 128 F3d at 505 ("Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.").

71 See *Mitchell*, 472 US at 530 (upholding the appeals court's assertion of jurisdiction only over the qualified immunity claim pursuant to the collateral order doctrine).

72 See generally Moore, 20 *Moore's Federal Practice* § 303.32 at 303–83 (cited in note 61). See also *Abney v United States*, 431 US 651, 662–63 (1977) ("In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well."); Wright, Miller, and Cooper, 15A *Federal Practice and Procedure* § 3911 at 363 n 82 (cited in note 20), citing *New York State National Organization for Women v Terry*, 704 F Supp 1247, 1255 (SD NY 1989) ("It is well settled that an appeal from an interlocutory order granting or denying preliminary injunctive relief does not strip the district court of jurisdiction to hear the merits.").

73 *Bradford-Scott*, 128 F3d at 506.

74 *Mitchell*, 472 US at 529 n 10.

75 Id.

and appeals courts can proceed in parallel. This Part concludes that the view more consistent with Supreme Court precedent holds that the district court is not divested of jurisdiction by the filing of an appeal of a denial of arbitration.

Unlike the Seventh Circuit's approach, this Comment's proposed approach grants the district court judge discretion to issue stays pending arbitrability appeals but does not compel issuance of those stays. It is thus consistent with the view that the district court retains jurisdiction over the case while an arbitrability appeal is pending. The view that the district court retains jurisdiction indeed might be seen strongly to suggest that district court judges should determine whether stays issue, because the overall management of the case is still under their responsibility. Having examined the question of the district court's jurisdiction to proceed pending appeal, this Comment now turns to a central feature of the reasoning of circuits defending an automatic stay rule: the analogy between stays pending arbitrability appeals and stays pending appeals on the questions of double jeopardy and immunity.

B. The Analogy to Double Jeopardy and Immunity

The second major difference in analysis between courts in the circuit split is that courts endorsing an automatic stay rule borrow the framework that governs stays in the double jeopardy and immunity contexts,[76] whereas other courts do not. This Part concludes that borrowing that framework runs afoul of the Supreme Court's holding that rights not to stand trial should be construed narrowly, although there are colorable arguments on both sides of the question.

1. Issuance of stays pending appeal of rejections of double jeopardy and immunity claims.

When a litigant appeals a district court's rejection of the claim that the trial should not proceed because of the constitutional protection against double jeopardy, the trial is stayed while the appeal proceeds. The Supreme Court has held that for the Fifth Amendment protection against double jeopardy to be meaningful, appellate review of a trial court's denial of a double jeopardy claim must take place before the trial actually occurs.[77] In *Abney v United States*,[78] the Court held that the Fifth Amendment prohibition against double jeopardy "is not against being twice punished, but against being twice put in jeopardy" and thus that merely reversing a judgment after final judg-

76 See, for example, *Bradford-Scott*, 128 F3d at 506.

77 *Abney*, 431 US at 659.

78 431 US 651 (1977).

ment has been rendered cannot compensate for the "personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[79]

Accordingly, circuits facing appeals from denials of double jeopardy claims generally mandate automatic issuance of stays of trial-level proceedings unless the appeal is found to be frivolous.[80] The rule is not ironclad, however: one case allowed the district court to proceed after finding merely that the interlocutory appeal lacked a colorable foundation,[81] and another permitted a writ of mandamus to delay trial when a stay had not issued.[82]

The situation is not as clear-cut in the context of appeals from trial court rejections of immunity claims. The Supreme Court has held that immunity is "in fact an entitlement not to stand trial under certain circumstances," and thus the right "is effectively lost if a case is erroneously permitted to go to trial."[83] The similarity of this language with language the Supreme Court has used in the double jeopardy context[84] might lead one to surmise that automatic stays issue upon the filing of a collateral appeal from a denial of an immunity claim. However, this is far from the case. Two circuits have adopted a rule, similar to the rule prevalent in the double jeopardy context, that provides for automatic stays pending appeal,[85] but other circuits have not followed suit.[86] Thus it seems improper to argue that a stay should automatically issue whenever the appeal involves the question of whether the trial should go forward, because stays do not always issue automatically in the immunity context.

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79 Id at 661 (internal quotation marks and citations omitted).

80 See, for example, *United States v Leppo*, 634 F2d 101, 105 (3d Cir 1980) ("[I]n the absence of a finding that the motion is frivolous, the trial court must suspend its proceedings once a notice of appeal [from the denial of a double jeopardy motion] is filed.").

81 See *United States v Montgomery*, 262 F3d 233, 241 n 3 (4th Cir 2001), citing *United States v Lanci*, 669 F2d 391, 394 (6th Cir 1982) (holding that, without colorable foundation, appeals of double jeopardy claims do not deprive trial courts of jurisdiction under the dual sovereignty principle).

82 See *Montgomery*, 262 F3d at 241 n 3, citing *Leppo*, 634 F2d at 105.

83 *Mitchell*, 472 US at 525–26.

84 See *Abney*, 431 US at 662 ("[I]f a criminal defendant is to avoid *exposure* to double jeopardy . . . his . . . challenge to the indictment must be reviewable before that subsequent exposure occurs.").

85 See *Goshtasby v University of Illinois*, 123 F3d 427, 428 (7th Cir 1997); *Stewart v Donges*, 915 F2d 572, 574–79 (10th Cir 1990); *Apostol v Gallion*, 870 F2d 1335, 1339 (7th Cir 1989).

86 See, for example, *McSurely v McClellan*, 697 F2d 309, 317 (DC Cir 1982) (using a four-prong test to evaluate whether a stay should issue pending resolution of a collateral order doctrine appeal from a rejection of an immunity claim, and concluding that a stay should not issue). See *Hilton v Braunskill*, 481 US 770, 776 (1987), for a discussion of the four-prong test. See also *Summit Medical Associates v James*, 998 F Supp 1339, 1342 (MD Ala 1998) (noting that the Seventh Circuit is the only court of appeals to have addressed the question of automatic stays pending appeal on the immunity question).

2. Contractual rights as compared to double jeopardy and immunity rights.

The Supreme Court has held the right not to stand trial conferred by double jeopardy or other constitutional provisions and rights conferred by contract are not comparable. In *Digital Equipment Corp, Inc v Desktop Direct, Inc*,[87] the Supreme Court unanimously rejected the argument that a contractual settlement agreement conferred a right not to stand trial of such magnitude that an appeal from a refusal to dismiss suit should be accompanied by a stay of trial proceedings.[88]

First, the Court warned that purported rights not to stand trial should be viewed with skepticism.[89] It cautioned against allowing "a party's agility in [ ] characterizing the right asserted"[90] to control the jurisdiction of the court of appeals because doing so would lead to erosion of the general rule prohibiting appeals from nonfinal judgments.[91]

Next, the Court held that contractual rights in particular do not confer a right not to stand trial comparable to that conferred by the constitutional protection against double jeopardy. Referring to contractual rights as a whole, the Court held that "such [rights] by agreement [do] not rise to the level of importance needed" and thus do not qualify for interlocutory review.[92] The Court explained that "there are surely sound reasons for treating [contractual] rights differently from those originating in the Constitution or statutes," and that the parties' desire to avoid "the burden, expense, and perhaps embarrassment of . . . trials" did not change matters.[93] The Court rejected an argument that the "public policy favoring voluntary resolution of disputes" favored granting review[94] because "contractual right[s] [are] far removed from those . . . rights more deeply rooted in public policy."[95]

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87 511 US 863 (1994).

88 Id at 884:

> [D]enying effect to the . . . contractual right asserted here is far removed from those immediately appealable decisions involving rights more deeply rooted in public policy, and the rights [the plaintiff] asserts may, in the main, be vindicated through means less disruptive to the orderly administration of justice than immediate, mandatory appeal.

89 Id at 873.

90 Id at 872.

91 See id at 868 ("[W]e have [ ] repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule."). The Court noted that if this were allowed to happen, "Congress's final decision rule would end up a pretty puny one." Id at 872.

92 Id at 877–78.

93 Id at 879–80.

94 Id at 881.

95 Id at 884.

3. Aptitude of the analogy between the double jeopardy and immunity contexts and the arbitration context.

It is problematic to import the framework governing stays that evolved in the lower courts as a response to *Abney* into the arbitration context because the Supreme Court has held that the reason for the rule in the double jeopardy context does not apply to the contractual context. Arbitration clauses are contractual and thus seem at first glance to be covered by the Supreme Court's pronouncements in *Digital Equipment*. Moreover, the rationale behind issuance of automatic stays, à la *Abney*, in the arbitration context involves a characterization of arbitration clauses as rights not to stand trial. This characterization is implicit in the Seventh Circuit's "benefit of the bargain" reasoning—that the benefits of arbitration are lost if trial proceeds[96]—but it is problematic given the Supreme Court's restrictive view of rights not to stand trial.

A compelling response to this *Digital Equipment* analysis is that arbitration clauses should not be analyzed in the same manner as garden-variety contractual rights because there is a strong federal policy favoring arbitration. The FAA is a testament to the strong legislative desire to see arbitration implemented effectively and to enable arbitrable issues to move quickly from court into arbitration.[97] Furthermore, the Supreme Court, in *Moses H. Cone*, articulated a federal policy favoring arbitration.[98] Thus one can argue that rights conferred by arbitration clauses are backed by strong public policy and that they should be treated more like the rights conferred by the Fifth Amendment's double jeopardy clause.

This Part argues that, although this view is plausible, the more convincing view holds that employing the *Abney* framework to govern stays in the arbitration context is foreclosed by *Digital Equipment*. The strong federal policy favoring arbitration may be sufficient to distinguish an arbitration clause from a standard contract, but the policy seems hardly sufficient to elevate arbitration to the level of a constitutional right. Moreover, the Supreme Court has refused to recognize a right not to stand trial in FRCrP 6(e), which details the right to a grand jury and provides for dismissal of charges if the right is violated, because the "text of Rule 6(e) contains no hint that a governmental

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96 *Bradford-Scott*, 128 F3d at 505–06. See also Foley, 13 Ohio St J on Disp Resol at 1079 (cited in note 35) ("Judge Easterbrook also noted the loss of the movant's 'benefit of the bargain' if the movant is forced to go through a trial only to prevail on the arbitrability issue at the appellate level and then have to go through arbitration.").

97 See text accompanying note 18.

98 460 US at 22 (noting Congress's "clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

violation of its prescriptions gives rise to a right not to stand trial."[99] Given this precedent and the fact that there is a constitutional right to a grand jury,[100] it is hard to imagine that the Court would recognize a right not to stand trial in an arbitration clause.

Furthermore, a characterization of arbitration rights as rights not to stand trial is problematic in itself. Arbitration has other benefits, such as specialized arbitrator expertise and tailored rules of evidence, which are not destroyed by going to trial before the arbitration.[101] As long as the dispute eventually ends up in arbitration, those benefits will be realized.

Moreover, the party who opposes arbitration may have a strong interest in litigating the dispute without further delay, especially if the party is suffering ongoing harm, as occurs with a copyright infringement. One district court recognized that the party opposing arbitration had an entitlement to litigate.[102] Somewhere in the equation of harms and benefits from denial of a stay pending appeal on arbitrability, the interest of the party favoring litigation must be factored in.

Having called into question the reasoning of circuits defending an automatic stay rule on two key issues—jurisdiction and the analogy to double jeopardy and immunity—this Comment will examine the text and policy of § 16, which both sides claim support their positions.

C. The Text and Purpose of § 16

The third issue that courts discuss when considering stays pending arbitrability appeals is whether issuance of the stays is faithful to the text of § 16 and furthers its purpose. This Part considers this question and concludes that a rule mandating automatic issuance of stays is devoid of textual support and does not further the purpose of § 16.

Despite the fact that Congress has authorized automatic stays in at least one other context,[103] § 16 does not contain any language concerning stays pending appeal. At a time when Congress was focused on arbitration, judicial efficiency, and arbitrability appeals,[104] it did not ad-

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99 *Midland Asphalt Corp v United States*, 489 US 794 (1989) (holding that a right to have charges dismissed is different in kind from a right not to be tried).

100 US Const Amend V.

101 See Jones, 12 Minn L Rev at 240 (cited in note 4). See also Taviss, Comment, 59 U Cin L Rev at 565 (cited in note 4).

102 See *Desktop Images, Inc v Ames*, 930 F Supp 1450, 1452 (D Colo 1996) (noting that, without a firm basis for requiring arbitration, parties opposed to arbitration may be entitled to litigation without delay).

103 See 11 USC § 362(a) (2000) (providing for automatic stays of all judicial actions against the debtor upon the filing of a bankruptcy petition).

104 See Siegel, 126 FRD at 591 (cited in note 19) (deploring the apparent omission by § 16's drafters of language authorizing appeals from denials of arbitration in independent proceedings

dress the question. Thus a position that stays should issue automatically upon the filing of an arbitrability appeal is devoid of textual support.

The Supreme Court has unequivocally characterized § 16 as an exception to the general rule, and one that is justified only because an "express congressional judgment" allows interlocutory appeals based on contractual rights in this case.[105] The Court cautioned lower courts not to make "similar judgments" for themselves.[106] This suggests that courts should read § 16's provisions narrowly and not go beyond its express mandate.

Courts that mandate automatic stays pending appeal of denials of arbitration have invoked the purpose behind § 16 as a rationale supporting automatic issuance of stays.[107] Yet issuing automatic stays pending appeal of denials of arbitration does not necessarily further § 16's purpose of moving disputes into arbitration as quickly as possible. In the cases in question, each district court has found the dispute nonarbitrable and only a favorable appellate ruling will result in the dispute ever entering arbitration. Thus it is what happens in the appeals court, not the district court, that results in delay in arbitrating the dispute during the pendency of the appeal. Issuing a stay of district court proceedings will do nothing to move the dispute into arbitration more quickly; only expediting the appeal could have that effect. Consequently issuing automatic stays pending appeal does not further the policy of ensuring that arbitrable disputes move out of the federal court system and into arbitration as quickly as possible.

Furthermore, given that § 16 provides only one avenue to appeal denials of arbitration, and that others are available,[108] it seems unwise to issue automatic stays in the context of § 16 appeals when stays do not otherwise issue automatically under other avenues of appeal. Instead, under these other avenues, stays issue pursuant to a four-factor test that contemplates an individualized determination. In fact, issuing stays automatically might even encourage opportunistic behavior by parties because they might choose to appeal denials of arbitration by

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and noting that "[i]n the Judicial Improvements Act, Congress's attention was focused on federal jurisdiction and practice more intensely than it had been for a long time").

105 *Digital Equipment*, 511 US at 880 n 7 ("That courts must give full effect to th[e] express congressional judgment [in § 16] that particular policies require that private rights be vindicable immediately, however, by no means suggests that they should now be more ready to make similar judgments for themselves.").

106 Id.

107 See, for example, *Blinco v Green Tree Servicing, LLC*, 366 F3d 1249, 1251 (11th Cir 2004) ("By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums.").

108 See note 21 and accompanying text.

invoking § 16 rather than a different means of appeal solely because § 16 appeals carry the added bonus of a stay.

Additionally, an examination of § 16 in the larger context of appeals jurisprudence reveals that it is a narrow exception to an area of law that is already in a confused state. The area of law governing appeals has been described as an "unacceptable morass," a "kind of crazy quilt of legislation and judicial decisions."[109] To issue stays automatically for arbitrability appeals, when they do not normally issue automatically, adds to the existing confusion in the area of appellate law.[110]

An analysis of current approaches to stays pending arbitrability appeals reveals that both approaches currently employed are unsatisfactory and that a new approach is needed. The approach favoring automatic issuance of stays is predicated on the questionable assumption that the district court is divested of jurisdiction by filing of the appeal; it relies on doubtful parallels between stays in the context of arbitration and in the contexts of double jeopardy and immunity, and it does not further the policy underlying § 16. On the other hand, the Ninth Circuit's approach does not provide any guidance for district courts to determine when stays should actually issue; indeed, it does not address the question at all.[111] In Part III this Comment proposes a new approach that vests the district court judge with discretion to issue stays and provides a standard to guide that discretion.

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[109] Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L & Contemp Probs 171, 172 (Summer 1984) ("Entirely too much of the appellate courts' energy is absorbed in deciding whether they are entitled under the finality principle and its exceptions to hear cases brought before them—and in explaining why or why not."). See also Howard B. Eisenberg and Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J App Prac & Process 285, 291 (1999) (describing "widespread dissatisfaction with the present state of the law regarding appeals from non-final orders"); Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L & Contemp Probs 165, 165–66 (Summer 1984).

[110] The concern with consistency in the law governing stays pending appeal provides an additional argument against automatic stays. Although a direct treatment of stays as injunctions is foreclosed by the Supreme Court's jurisprudence in *Mayacamas*, 485 US at 287 (see text accompanying note 14), § 16's provision for appeals of injunctions of arbitration supplies an additional argument against automatic stays. See 9 USC § 16(a)(2). Because issuance of stays in § 16(a)(2) appeals of injunctions is undeniably governed by FRCP 62(c) (governing stays of injunctions) and the four-prong test governing stays of district court orders generally, which is discussed in Part III, it seems logical to read the other provisions of the statute in pari materia and to use the same standards to govern stays for appeals under all subsections of § 16. Of course, the four-prong test should apply to § 16(a)(1) appeals regardless, because it controls stays in the civil context generally. See text accompanying note 112.

[111] See Part I.D.1.

III. PROPOSED APPROACH: THE FRAMEWORK GOVERNING STAYS OF DISTRICT COURT ORDERS GENERALLY

This Comment proposes that the existing four-factor test that generally governs stays of district court orders pending appeal be adopted to govern the issuance of stays pending appeals of denials of arbitration. This approach has the advantage of affording judges sufficient flexibility to allow them to take into account the interests of both parties as appropriate. It is also consistent with the general law of stays.

When evaluating an application for a stay of a district court order, courts employ a four-factor test. Courts consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.[112]

This test originated in the context of administrative law,[113] but it has come to govern the issuance of stays of district court orders generally[114] and has been endorsed in that capacity by the Supreme Court.[115]

Several courts have provided guidance on how the test should be applied in practice. Generally, the first factor is the most important, but strength in the latter three factors can compensate for weakness in the first.[116] Importantly, the Supreme Court has stressed that the test contemplates individualized judgments and that "the formula cannot be reduced to a set of rigid rules."[117] The test should thus allow district courts flexibility to exercise discretion when evaluating a stay applica-

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112 See *Hilton v Braunskill*, 481 US 770, 776 (1987). For a detailed explication of each of the four factors, see John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 Baylor L Rev 809, 826 (1993) (advocating the use of a "two-tier sliding scale test" to weigh the factors).

113 See *Virginia Petroleum Jobbers Association v Federal Power Commission*, 259 F2d 921, 925 (DC Cir 1958).

114 See *Washington Metropolitan Area Transit Commission v Holiday Tours, Inc*, 559 F2d 841, 842 n 1 (DC Cir 1977) ("Although *Virginia Petroleum Jobbers* involved a motion to stay an administrative order, the factors enumerated therein also apply to motions for preliminary injunctions and motions for stays of district court orders pending appeal.").

115 See *Hilton*, 481 US at 777 (referring to the four factors as "the factors traditionally considered in deciding whether to stay a judgment in a civil case"). See also Gotanda, 45 Baylor L Rev at 812 (cited in note 112).

116 See, for example, *Garcia-Mir v Meese*, 781 F2d 1450, 1453 (11th Cir 1986) (noting that although the first factor is normally the most important, "the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of the equities . . . weighs heavily in favor of granting the stay") (internal quotation marks and citations omitted).

117 *Hilton*, 481 US at 777. See also FRAP 8(a) (setting forth a system whereby, if the stay application is first denied in district court, the appellate court may consider a motion for stay including facts relied on and supporting affidavits).

tion.[118] When examining the second factor—irreparable injury—courts stress that the injury must be truly irreparable, and that the costs of litigation do not generally rise to the level of irreparable injury.[119] The fourth factor—public interest—is also a stringent one: courts look for interests like national security, public health and safety, or the government's interest,[120] not a mere assertion that some public interest would be vindicated by granting a stay.

The proposed approach, using the four-part test generally governing issuance of stays in the arbitration context, is preferable to existing rules because it allows stays to issue when appropriate and thus preserves the federal policy favoring arbitration. The approach does not rely on questionable constitutional rights not to stand trial, nor does it disregard the interests of litigants opposing arbitration.

There are strong interests at play in the decision whether to issue a stay. On the one hand, the party opposing arbitration may be suffering an ongoing harm, and courts have recognized that that party may have something approaching an entitlement to litigate in these circumstances.[121] On the other hand, when this is not the case and the court is convinced that the party favoring arbitration drafted the arbitration clause for the predominant purpose of avoiding discovery, the court should strive to vindicate that party's interests. This Comment's approach allows the district court judge to weigh competing considerations; it is a flexible framework that can take all parties' interests into account as appropriate. Moreover, this Comment's approach is an extension of already-existing law to the arbitrability context, not a new rule crafted by piecing together an analogy to the double jeopardy context—grounded in a questionable constitutional right not to stand trial—with a determination that jurisdiction is lacking to proceed with the merits pending appeal—a jurisdictional point that is quite possibly unfaithful to the Supreme Court's pronouncements in the context of the collateral order doctrine.

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118 See Gotanda, 45 Baylor L Rev at 822 (cited in note 112).

119 *Virginia Petroleum*, 259 F2d at 925 (emphasis added):

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

120 See Gotanda, 45 Baylor L Rev at 819 (cited in note 112).

121 See *Denney v Jenkens & Gilchrist*, 340 F Supp 2d 348, 349 (SD NY 2004) ("[I]t would be inappropriate to grant the stay without first considering the scope of the agreement because the potential prejudice to plaintiffs is too great."); *Desktop Images, Inc v Ames*, 930 F Supp 1450, 1452 (D Colo 1996) (noting that the plaintiff had an "an entitlement to litigate and resolve its claims without further delay").

Applying the proposed framework to stays pending arbitrability appeals does have the disadvantage of increasing uncertainty for litigants, but it should be possible to make predictions in a given jurisdiction as to how each prong will come out. In particular, because the proposed framework is fact-based, unlike the Seventh, Tenth, and Eleventh circuits' rule of automatic issuance of the stays, it exhibits the familiar shortcomings of open-ended discretionary standards. In a jurisdiction where stays issue automatically pending arbitrability appeals, litigants know where they stand, and parties drafting a contractual arbitration clause can rest assured ex ante that discovery will occur under no circumstances unless and until both a district court and a court of appeals have ruled that a dispute is not arbitrable. By contrast, parties drafting an arbitration clause in a jurisdiction governed by the proposed approach will not be able to predict with absolute certainty whether they will get one bite at the apple in the district court or two bites at the apple—district level and appellate—before they are forced to endure the dreaded discovery process if the dispute is held not arbitrable.

Yet this problem is not insurmountable. The hypothetical value assigned to arbitration clauses by the party that prefers arbitration will be lower ex ante in jurisdictions where the proposed approach governs than in those where stays issue automatically, where it is certain that courts will protect the advantages of the arbitration clause exhaustively in all cases. In other words, the uncertainty inherent in a fact-based decision on whether to issue a stay will be factored into the assignment of value to an arbitration clause. Because arbitration clauses will be, in a sense, worth less in jurisdictions employing the four-factor test, one would expect the price of the contract overall to be higher because it must factor in the increased probability of enduring discovery, which certainly has direct financial consequences on a company. Thus, in the end the party favoring arbitration—often a corporation—will pass on the increased cost due to the uncertainty on the stay issue to the party favoring litigation—typically a consumer—by raising the price of the contract, even in cases when they shouldn't because the dispute will be found arbitrable on appeal.

It is important, however, to keep this phenomenon in perspective. It is only when the district court finds a dispute nonarbitrable and a circuit court reverses that finding that a net loss can occur from the point of view of the party favoring arbitration, for it is only then that that party will be subjected to unnecessary discovery. Because this is only one of several possible outcomes at the trial level and on appeal, the net effect on contract prices will be reduced accordingly. Moreover, if the inquiry under the four-factor test becomes somewhat pre-

dictable in a given circuit, then the uncertainty decreases and so does its associated cost.

It seems likely that the four-factor test will yield predictable results when applied. Although the balancing of the four factors can ultimately be made only with reference to the specific facts of a given case, it is possible to predict likely outcomes, at least for some of the factors.

The first factor, likelihood of success on the merits—"the merits" in this context means whether the dispute is arbitrable—seems perhaps the most unpredictable factor ex ante because it depends entirely on the facts of the case. Yet it is likely that, in a given circuit, a body of precedent will develop that will make it possible to predict rather well which disputes will be held arbitrable and which will not. As long as courts have well-defined ways of reading contractual arbitration clauses, parties should be able to predict with some certainty which disputes will be held arbitrable, and this will decrease the uncertainty inherent in the four-factor test and its first factor.

One can also make predictions about likely outcomes under the second and third factors. The loss resulting from nonissuance of a stay is the burden of discovery and its associated costs. Yet courts recognize that the costs of litigation generally do not rise to the level of irreparable injury under the second prong.[122] Particularly in cases where the party opposing arbitration is injured by nonissuance of a stay under the third prong—as could happen with a copyright infringement case where the injury is ongoing and grows larger by the day—it seems hard to imagine that the costs of litigation incurred by the party favoring arbitration could rise to the level of irreparable injury. At the

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122 See *Bradford-Scott*, 128 F3d at 505 ("[T]he costs of litigation are not irreparable injury."), citing *FTC v Standard Oil Co*, 449 US 232, 244 (1980) ("[W]e do not doubt that the burden of defending this proceeding will be substantial. But expense and annoyance of litigation is part of the social burden of living under government.") (internal quotation marks and citations omitted); *Renegotiation Board v Bannercraft Clothing Co, Inc*, 415 US 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Petroleum Exploration, Inc v Public Service Commission*, 304 US 209, 222 (1938) (finding that preparation costs necessary for a hearing did not rise to the level required for equitable relief). See also *McSurely v McClellan*, 697 F2d 309, 318 n 13 (DC Cir 1982) ("Litigation costs, standing alone, do not rise to the level of irreparable injury."); Foley, 13 Ohio St J on Disp Resol 1079–80 (cited in note 35) (explaining that when the Seventh Circuit reasons that forcing the movant to go through a trial only to find that the dispute is arbitrable amounts to a loss of the "benefit of the bargain," it assumes, "at least implicitly, that the costs of litigation—both financial and strategic—would in essence constitute irreparable harm," and concluding that the Seventh Circuit's holding cannot be grounded in the "benefit of the bargain" argument); Gotanda, 45 Baylor L Rev at 816 (cited in note 112) ("In determining whether the claimed injury is irreparable, the focus of the inquiry should not be on whether the injury is economic in nature, but whether the harm suffered during the course of the litigation could be rectified by the court's final decision.").

same time, perhaps when the party opposing arbitration is not injured by the delay and where the predominant purpose of the arbitration clause was to avoid discovery, it is possible that the costs of litigation might begin to approach the level of irreparable injury, as one district court has held.[123] What is clear, though, is that such a situation would be exceptional and that in the vast majority of cases, the second factor would not support issuing a stay because costs of litigation do not rise to the level of irreparable injury.

The outcome under the fourth prong—public policy—is somewhat uncertain. Courts typically look for interests like national security, public health and safety, or the government's interest under this prong, and at first glance, the policy of favoring arbitration might not be seen as sufficient.[124] Nevertheless, there is a strong federal policy favoring arbitration that the Supreme Court articulated in *Moses H. Cone*,[125] and it is possible that courts would find this sufficient under the fourth prong. Parties should know the answer to this question in jurisdictions that adopt the proposed approach because the public policy prong is not fact-based: courts will decide that the federal policy favoring arbitration does, or does not, satisfy the fourth prong and, thereafter, parties will know where they stand when they draft contracts.

The picture that emerges from all this is as follows: although the four-factor test is fact-based and thus its results will be unpredictable to some degree, it is nevertheless possible to make some predictions as to whether stays will issue in a given jurisdiction. Because the costs of litigation generally do not rise to the level of irreparable injury, the second prong will not be satisfied in all but the most exceptional cases. Parties will know ex ante whether the third prong is in play as well. Courts should develop a body of precedent that allows parties to predict with some degree of confidence their chances of success on the merits of the arbitrability question under the first prong. And finally, there will be an answer in each jurisdiction to the question of whether the federal policy favoring arbitration satisfies the fourth prong because that question is not fact-based. Thus, although the proposed approach does entail some uncertainty as compared with a rule favoring

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123 *C.B.S. Employees Federal Credit Union v Donaldson, Lufkin & Jenrette Securities Corp*, 716 F Supp 307, 310 (WD Tenn 1989) (applying the four-part test to stays pending arbitrability appeals and arguing that although "monetary expenses incurred in litigation are normally not considered irreparable . . . the time and expense of litigation [ ] constitute irreparable harm *in this instance*," because "[t]he main purpose for defendants' appeal is to avoid the expense of litigation") (emphasis added).

124 See Gotanda, 45 Baylor L Rev at 819 (cited in note 112).

125 460 US at 22.

automatic issuance of stays, it will nevertheless be possible to achieve a reasonable degree of predictability once courts rule on a few cases under the proposed approach.

CONCLUSION

The two approaches that circuit courts currently use to evaluate stays pending appeals of denials of arbitration are both problematic, and a new approach is needed. Courts should have discretion whether to issue stays and should employ the four-part test governing stays of district court orders generally to inform their discretion. This proposed framework has the advantages of extending existing law to the arbitrability context and of providing needed flexibility so that judges can take the interests of all parties into account as appropriate. Because the four-part test is fact-intensive, it will be more difficult for parties to predict whether a stay will issue ex ante than if the stays issued automatically. Nevertheless, once a body of precedent develops in a given jurisdiction using the proposed approach, parties should be able to make reasonably accurate predictions about whether a stay will issue pending an arbitrability appeal in a given case.