

leged, *inter alia*, breach of a loan contract. As here, the banks' loans to the debtors had been specifically addressed as allowed claims in the respective bankruptcies. As here, the debtors' lender liability claims had not been scheduled as assets of the estate. The court noted in *Hower*, as we do here, that "[t]he loan transaction at the heart of the present litigation was also the source of [the bank's] claim against the estate." *Hower*, 913 F.2d at 1144. As such, both the *Hower* and *Eubanks* courts held the lender liability claims to be the "same" as the bankruptcies for purposes of *res judicata*.

The Second Circuit also reached the same conclusion in the Chapter 11 context in *Sure-Snap Corp.*, which relies in large part on our court's decisions in *Matter of Howe*, *Southmark Properties*, and *Hendrick v. Avent*, and which is discussed at length in our recent decision in *Eubanks*, 977 F.2d at 171-72. The *Sure-Snap* debtor brought lender liability claims against two creditor banks one year after confirmation of the reorganization plan, and the claims were held barred by *res judicata*.

Like the Baudoins, the *Sure-Snap* debtor attempted to distinguish the bankruptcy judgment as a decision addressing only the creditors' right to be paid. Calling this characterization "excessively narrow", the Second Circuit held that the bankruptcy proceeding encompasses the entire debtor-creditor relationship: not only the creation of that relationship through the initial loan but also the bank's actions in calling that loan early—the act which the debtor claimed "forced" him into bankruptcy. *Sure-Snap*, 948 F.2d at 874-75. Thus, the debtor's "very allegation that the banks' ... conduct negatively influenced their business's health, makes it hard-pressed to explain how the two causes of action—the plan of reorganization and the lender liability claims—did not comprise the same essential matter". *Id.* at 875. Likewise, the Baudoins are "hard pressed" to distinguish their lender liability claim from the prior judgments of the bankruptcy court. In fact, they have been unable to do so; and we hold that their current claim is identical

to those disposed of in the prior bankruptcies.

### III.

All elements for application of *res judicata* having been established, the Baudoins' lender liability claim is barred by that doctrine. Accordingly, the judgment is REVERSED and, instead, RENDERED for the Bank; and this case is REMANDED to the district court for entry of the appropriate injunctive or other relief.

REVERSED, RENDERED, and REMANDED.



#### McDERMOTT INTERNATIONAL, INC., Plaintiff-Appellant,

v.

UNDERWRITERS AT LLOYDS SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207, Defendant-Appellee.

No. 92-3622.

United States Court of Appeals,  
Fifth Circuit.

Jan. 6, 1993.

Following insurer's denial of coverage for damage to property of insured's subsidiary, insured filed state court actions for contract damages and for declaratory judgment to block arbitration. Insurer removed both actions, which were consolidated and, subsequently, were consolidated with three additional related actions. The United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., entered orders compelling arbitration and staying litigation pending arbitration. Insured appealed and, alternatively, applied for writ of mandamus. The Court of Appeals, Barksdale, Circuit Judge, held that (1) orders compelling arbitration and stay

CI 981 F.2d 744 (5th Cir. 1993)

ing litigation were "interlocutory" and, thus, Federal Arbitration Act prohibited appeal, and (2) insured was not entitled to mandamus relief.

Appeal dismissed; application for writ of mandamus denied.

#### I. Arbitration ¶23.20

Generally, if only issue before court is dispute's arbitrability, action is considered independent and court's decision on that issue is "final" for purposes of Federal Arbitration Act's prohibition of appeals from interlocutory orders; however, if case includes other claims for relief, arbitrability ruling does not end litigation on merits, but is considered "interlocutory" only. 9 U.S.C.A. § 16(b)(1), 3).

See publication Words and Phrases for other judicial constructions and definitions.

#### I. Arbitration ¶23.20

District court orders staying litigation and compelling arbitration of insurance dispute were "interlocutory," not "final," for purposes of Federal Arbitration Act's prohibition on appeals from interlocutory orders, in light of state law claims raised in original suit and other suits that were later consolidated with it, notwithstanding that sole jurisdictional basis for original suit's removal to federal court was arbitrability question; when cases were consolidated, they became single judicial unit, and finality of arbitration decision depended upon present posture of case. 9 U.S.C.A. § 16(b)(1), 3).

#### 1. Mandamus ¶168(4)

Burden of demonstrating clear and indisputable right to mandamus relief was particularly heavy on insured challenging district court orders compelling arbitration of dispute with insurer, in light of Federal Arbitration Act's express limitation on interlocutory review of district court decision on arbitration. 9 U.S.C.A. § 16(b)(1), 3).

#### 1. Mandamus ¶4(4), 53

Insured was not entitled to mandamus relief from district court orders staying

1. District judge for the Eastern District of Texas,

litigation and compelling arbitration of insurance dispute, as district court did not clearly overstep its authority in entering orders, and there was no apparent reason why issues presented in insured's appeal could not be raised in appeal after arbitration was completed and final judgment entered.

Arden J. Lea, Joseph P. Tynan, Lea, Plavnický & Moseley, John V. Baus, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA, for plaintiff-appellant.

John E. Galloway, Robert C. Corn, Galloway, Johnson, Tompkins & Burr, New Orleans, LA, for amicus curiae.

Luther T. Munford, Phelps Dunbar, Jackson, MS, Harry S. Redmon, Jr., Gerardo R. Barrios, Danny Shaw, James H. Roussel, Phelps Dunbar, New Orleans, LA, for Underwriters.

Donald Hoffman, Ann Marie LeBlanc, Paul J. Politz, Hoffman, Sutterfield, Ensensat & Bankston, New Orleans, LA, for Maxon Young.

George W. Renaudin, William Harrison, Griggs & Harrison, Houston, TX, for Certain Underwriters.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and BARKSDALE, Circuit Judges, and JUSTICE,<sup>1</sup> District Judge.

BARKSDALE, Circuit Judge:

The determinative starting point for this appeal by McDermott International, Inc., is whether the district court orders compelling arbitration of McDermott's dispute with certain Underwriters at Lloyds and staying litigation pending arbitration are interlocutory, not final. Because we hold that they are the former, and because § 16 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits appeal from our

we DISMISS for lack of jurisdiction.   
 sitting by designation.

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wise, we DENY the alternative application for a writ of mandamus.

## I.

McDermott, a Panamanian corporation headquartered in Orleans Parish, had an insurance policy with Underwriters that covered the operations of one of McDermott's subsidiaries. The policy required arbitration of "[a]ll differences arising out of this contract". In 1989, the subsidiary's property was damaged; and McDermott submitted a policy claim. Maxson Young Associates, Inc., was retained to adjust the loss. Underwriters denied coverage, and this litigation ensued.

Beginning in late 1990, McDermott filed two actions in Louisiana state court against Underwriters: one for contract damages; the other for a declaratory judgment to block arbitration sought by Underwriters. Invoking the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.*, Underwriters removed both actions to federal district court, where they were consolidated.

The district court remanded the cases to state court, holding that a service-of-suit clause in the policy waived Underwriters' removal rights; but this court vacated that order. *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir.1991). Three additional actions were consolidated into the action; a state court suit, removed through diversity, by McDermott against the adjuster, Young, alleging that an unauthorized coverage letter contractually obligated Young to pay for the loss; and two diversity actions by

## 2. Section 16 provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title;

(B) denying a petition under section 4 of this title to order arbitration to proceed;

(C) denying an application under section 206 of this title to compel arbitration;

(D) confirming or denying confirmation of an award or partial award; or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

Underwriters against Young, seeking indemnification for any damages awarded McDermott against Underwriters.

Underwriters' motion to compel arbitration and stay litigation pending arbitration was granted in February 1992. The stay extended not only to the parties to the arbitration agreement, but also to those parties and claims not subject to arbitration.

## II.

## A.

Because this appeal turns on jurisdiction, we do not reach the issues raised by McDermott—essentially, whether compelling arbitration was erroneous. Underwriters contends that we lack jurisdiction, maintaining that appeal from the district court's orders is barred by § 16 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* That section, 9 U.S.C. § 16, governs appellate jurisdiction over orders affecting arbitration, whether issued under the FAA or the Convention.<sup>1</sup> See 9 U.S.C. § 208.

The FAA manifests a "liberal federal policy favoring arbitration". *Gilmer v. Interstate-Johnson Lane Corp.*, — U.S. —, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Section 16 promotes this policy "by permitting interlocutory appeals of orders favoring litigation over arbitration and precluding review of interlocutory or-

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16.

Cite as 981 F.2d 746 (5th Cir. 1992)

ders that favor arbitration." *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020 (5th Cir.1990). It "does not solely favor the arbitration process; [however,] because appeals may still be taken from final judgments concerning arbitration or pursuant to a 28 U.S.C. § 1292(b) certificate." *Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir.1989); 9 U.S.C. §§ 16(a)(3) & (b).<sup>2</sup>

The orders staying the litigation and compelling arbitration, if interlocutory, clearly fall under § 16(b), which prohibits appeals from orders "granting a stay of any action under section 3 of this title" and "compelling arbitration under section 206 of this title". 9 U.S.C. §§ 16(b)(1) & (b)(3). As noted, if final, § 16(a)(3) allows appeal. Therefore, at issue is whether the orders are interlocutory or final.

[1] An order is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coffin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).<sup>3</sup> In determining whether an order affecting arbitration is final or interlocutory, most courts distinguish between arbitration actions that are "independent" and those that are "embedded" among other claims. Generally, if the only issue before the court is the dispute's arbitrability, the action is considered independent and a court's decision on that issue constitutes a final decision. See, e.g., *Matter of Chung and President Enters. Corp.*, 943 F.2d 225, 228 (2d Cir.1991). If, however, the case includes other claims for relief, an arbitrability ruling does not "end the litigation on the merits", but is considered interlocutory only. See, e.g., *Construction Laborers Pension Trust v. Cen-*

*Vi-Ro Concrete Pipe & Prods. Co., Inc.*, 776 F.2d 1416, 1420 n. 5 (9th Cir.1985); *Wilson Wear, Inc. v. United Merchants & Mfrs., Inc.*, 713 F.2d 324, 326 (7th Cir.1983); *Langley v. Colonial Leasing Co. of New England*, 707 F.2d 1, 4 (1st Cir.1983). Although this circuit has never been called upon to apply the distinction, it has acknowledged its existence. See *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402, 405 & n. 3 (5th Cir.) *supplemented*, 867 F.2d 891 (5th Cir.1989).

[2] McDermott maintains that the decision was final in its own "judicial context",<sup>4</sup> because the only jurisdictional basis for the original suit's removal to federal court was the question of arbitrability under the Convention. It denies the relevance of both the state law claims raised in the original suit and the other suits that were later consolidated with it. On the other hand, Underwriters asserts that because the arbitrability issue is embedded among other claims, the district court's decision cannot be deemed to have ended the litigation on the merits.

We agree with Underwriters. When the cases were consolidated pursuant to Fed. R.Civ.P. 42(a), they became a single judicial unit, as described in *Road Sprinkler Fitters Local Union v. Continental Sprinkler Co.*, 967 F.2d 145, 151 (5th Cir.1992). The consolidation orders broadly indicated that the cases were being consolidated "for disposition" because they grew out of the same factual situation. As in *Road Sprinkler*, "[t]here is no indication that the district court consolidated the cases only for limited purposes." *Id.* Furthermore, at least some of the suits could have been brought as a single action originally, and all are "based largely on the same operative facts." See *id.*

1. Permissive § 1292(b) jurisdiction is not before us. The district court declined to so certify this matter.

2. Because § 16 does not define "interlocutory" and "final", we look for guidance in cases interpreting those terms in the context of 28 U.S.C. § 1291. See, e.g., *Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir. 1989) (relying on the finality determination by "a slightly different path" in a

pre-§ 16 case, *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402 (5th Cir.), *supplemented*, 867 F.2d 891 (5th Cir.1989)).

3. In support of its finality determination, McDermott quotes *Siegl, Appeal from Arbitrability Determinations Under the Federal Arbitration Act*, 126 F.R.D. 589, 591 (1989). (Section 16 was formerly 15.)

Because the interpretation urged by McDermott ignores the broad scope of the consolidation orders, we hold that the finality of the arbitration decision depends upon the present posture of the case, not on the narrow context in which the arbitrability question first arose. *Accord, Middleby Corp. v. Husman Corp.*, 962 F.2d 614, 615 (7th Cir.1992) (stating that where two suits were consolidated for all purposes under Fed.R.Civ.P. 42(a), only a "final decision on the full proceeding" is considered final under 28 U.S.C. § 1291). Therefore, we do not address whether the orders would have been considered final absent the consolidation.

Fifth Circuit precedent firmly establishes that, in pending, nonindependent suits, an order compelling arbitration accompanied by a stay of the proceedings pending arbitration is not a final decision for purposes of § 16(a)(3). See *Turboff*, 867 F.2d at 1520-21; *Purdy v. Monex Int'l, Ltd.*, 867 F.2d 1521, 1523 (5th Cir.), cert. denied, 493 U.S. 863, 110 S.Ct. 180, 107 L.Ed.2d 136 (1989). Although presently stayed, the indemnification claims between Underwriters and Young remain pending before the district court, and will have to be addressed following arbitration. And, McDermott's claim against Young, based on the alleged unauthorized coverage letter, also awaits resolution. Additionally, further proceedings between McDermott and Underwriters will be required not only to confirm an arbitral award, but also to determine the effect of arbitration on McDermott's original contract claims against Underwriters. See *Jolley*, 864 F.2d at 405. With these matters still pending, the district court's orders clearly did not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Coffin*, 324 U.S. at 213, 65 S.Ct. at 633.

Because the district court's orders were interlocutory, not final, appeal is barred by § 16(b).

8. A separate petition for the writ (No. 92-3621) was denied by a motions panel of this court on July 28, 1992. That panel noted, however, that the alternative request for mandamus contained

## B.

[3] Alternatively, McDermott urges us to review the orders under an application for a writ of mandamus.<sup>8</sup> This court has recognized that such review may be available. See *Turboff*, 867 F.2d at 1520 n. 5. But, needless to say, the writ is an extraordinary remedy, reserved for extraordinary situations. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S.Ct. 1133, 1143, 99 L.Ed.2d 296 (1988). Traditionally, federal courts have exercised their mandamus power only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* at 289, 108 S.Ct. at 1143 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943)). The party seeking mandamus has the burden of demonstrating a "clear and indisputable" right to it. See *Gulfstream*, 485 U.S. at 289, 108 S.Ct. at 1143 (quoting *Bankers Life & Cos. Co. v. Holland*, 316 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953)). Here, that burden is particularly heavy, because Congress has expressly limited interlocutory review of a district court decision on arbitration.

[4] McDermott has failed to satisfy this most demanding standard. The district court did not clearly overstep its authority when it granted the order compelling arbitration and stayed further proceedings pending that arbitration. Moreover, it is more than well settled that a writ of mandamus is not to be used as a substitute for appeal, see *In re Cajun Elec. Power Co.-Op., Inc.*, 791 F.2d 353, 365-66 (5th Cir. 1986); and we see no reason why all issues presented in this appeal cannot be raised in an appeal after the arbitration is completed and a final judgment entered.

## III.

Congress has forbidden the appeal of interlocutory orders favoring arbitration, intending that the parties first submit to

in McDermott's appellate brief would be considered with the appeal. We now consider that request.

arbitration. Accordingly, this appeal is DISMISSED and the application for a writ of mandamus DENIED.



WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG), Plaintiff-Appellee,

v.

AMERICAN MARINE CORPORATION, et al., Defendants-Appellants.

IN RE AMERICAN MARINE CORPORATION, American Marine Holding Company, Oil Transport Company, Inc., Louisiana Materials Co., Inc., Cajun Crane Company, Aggregate Barges, Inc., Bayou Fleet, Inc., Frere Company, Modern Barge Company, Leslie B. Durant, Grand Marine Seneca Barge Company, Inc., Oisescu Brothers Audubon Company, Durow Corporation, Dumur Corporation and Noe Barge Company, Petitioners.

Nos. 92-3244, 92-3724.

United States Court of Appeals,  
Fifth Circuit.

Jan. 6, 1993.

State and federal proceedings concerning arbitration of dispute over timeliness of premium payments by foreign insurance association participant were consolidated, arbitration was ordered, and litigation was stayed pending arbitration by the United States District Court for the Eastern District of Louisiana, A.J. McNamara, J. Appeal was taken. The Court of Appeals, Barksdale, Circuit Judge, held that: (1) arbitration orders were interlocutory and not appealable under Federal Arbitration Act, and (2) orders did not warrant mandamus.

Appeal dismissed and writ denied.

1. District Judge in Eastern District of Tex.

## 1. Arbitration ¶=23.20

Orders compelling arbitration of dispute concerning whether participant in foreign insurance association timely paid premiums, consolidating proceedings, and staying litigation pending arbitration were interlocutory rather than final and, thus, not appealable under Federal Arbitration Act. 9 U.S.C.A. §§ 16, 16(a), (a)(3).

## 2. Federal Courts ¶=578

Order granting stay of litigations concerning dispute about whether foreign insurance association participant timely paid premiums pending arbitration was not appealable under collateral order doctrine; orders could be reviewed on appeal from final judgment. 9 U.S.C.A. §§ 16, 16(b); 28 U.S.C.A. § 1291.

## 3. Mandamus ¶=53

District court's orders compelling arbitration of dispute concerning timeliness of premium payment by participant in foreign insurance association, consolidating litigations, and staying litigation pending arbitration, were not reviewable by writ of mandamus.

## 4. Federal Courts ¶=611

Court of Appeals generally need not address issue presented for first time on appeal.

Neal Douglas Holston, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, LA, for defendants-appellants.

Janet Wessler Marshall, John A. Bolles, Terriberry, Carroll & Yancey, A.J. McNamara, U.S. Dept. of Justice, New Orleans, LA, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana.

Before JONES and [redacted] Circuit Judges, and [redacted] District Judge.

as, sitting by designation.