



Articles

An Analysis of an Order to Compel Arbitration: To Dismiss or Stay?

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I. INTRODUCTION

In recent years, arbitration has become an increasingly used form of alternative dispute resolution employed to adjudicate matters between disputing parties outside of a traditional courtroom setting. In arbitration, parties who have contracted to arbitrate submit their disputes to a neutral decision-maker rather than subjecting their claims to judicial resolution.¹ Arbitration is often favored over traditional litigation for many reasons, including the less formal atmosphere, the possibility of avoiding delay, lower expense, and relieving congested dockets in courts.²

Although there is a strong public policy favoring arbitration and enforcement of agreements to arbitrate,³ sometimes a party to a purported arbitration agreement believes the agreement does not cover a particular dispute, or that there was no agreement to arbitrate at all.⁴ That party may sue in court for relief on the underlying dispute. The other party, if it prefers to arbitrate rather than litigate, typically will file a motion to stay or dismiss the court action pending arbitration, and courts favor resolving the issue with deference toward the public policy of enforcing arbitration,⁵ often construing arbitration provisions generously.⁶ The Federal Arbitration Act (FAA) governs arbitration agreements concerning potential disputes grounded in interstate or foreign commerce.⁷ Section 3 of the FAA directs a court to stay the litigation

1. See *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (finding that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”); *Gold Coast Mall, Inc. v. Larmar Corp.*, 468 A.2d 91, 95 (Md. 1983).

2. See *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 365 (Ark. 2000); *Anthony v. Kaplan*, 918 S.W.2d 174, 177 (Ark. 1996); *Birkey Design Group, Inc. v. Egle Nursing Home, Inc.*, 687 A.2d 256, 258 (Md. Ct. Spec. App. 1997).

3. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

4. See *Motor City Drive, L.L.C. v. Brennan Beer Gorman Monk Architects and Interiors, P.L.L.C.*, 890 A.2d 233 (D.C. 2006).

5. See *Southland*, 465 U.S. at 10.

6. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

7. Federal Arbitration Act, 9 U.S.C. § 2 (2006).

proceedings if it determines that the parties have agreed to arbitrate a claim brought before it and that the issue is in fact arbitrable.⁸

Section 3 of the FAA states that upon determining that an issue before a court falls within an arbitration agreement between the parties, the court “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”⁹ However, the FAA’s use of the phrase “the trial of the action” has created a split among the federal circuit courts.¹⁰ When an order to arbitrate has been issued for all claims brought before a court, courts are split on whether the filed action should be dismissed or stayed pending the outcome of the arbitration.¹¹

One group of courts adopted the “Must Stay Approach,” holding that the litigation must be stayed until the resolution of the arbitrable claims.¹² These courts reason that the language of the FAA, the need for judicial assistance during arbitration, and the need to avoid immediate appealability of an order to arbitrate require an issuing judge to retain jurisdiction over the litigation by issuing a stay.¹³ Another group of courts has adopted the “May Dismiss Approach.”¹⁴ These courts hold that the language of the FAA requires that a stay be issued only when some claims fall outside the arbitration agreement.¹⁵ If all claims fall within the arbitration agreement between the two parties, these courts reason that dismissal may be appropriate.¹⁶

The issue has arisen in courts again and again, and arises quite often.¹⁷ However, very little has been written on the subject; the most detailed analysis of the subject is found in a student Note published in 2005.¹⁸ The author of that Note concluded that courts should always stay a case pending arbitration.¹⁹

8. *Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000).

9. Federal Arbitration Act, 9 U.S.C. § 3 (2006).

10. *See infra* Part III.

11. *Compare* *Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001), *and* *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992), *and* *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635 (9th Cir. 1988), *with* *Lloyd v. Hovensa, LLC*, 369 F.3d 263 (3d Cir. 2004), *and* *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994).

12. *See infra* Part III.A.

13. *See infra* Part III.A.

14. *See infra* Part III.B.

15. *See infra* Part III.B.

16. *See infra* Part III.B.

17. Westlaw search using terms “arbitration & stay /s dismiss” in District Court cases.

18. *See* Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dissmissal Dichotomy of FAA Section 3*, 34 HOFSTRA L. REV. 565 (2005).

19. *See id.* at 592-93.

This article, conversely, argues that courts should stay a case only when some points of dispute between the parties fall outside the arbitration agreement and cannot be resolved by the arbitrator. If all issues between the parties fall within the arbitration provision, the court should, in its discretion, dismiss the action and leave the parties to the decision of the arbitrator, pursuant to the parties' contractual agreement.

Part II of this paper will address the background surrounding both arbitration and the FAA, including a history of the Supreme Court's expansion of arbitrable claims, which now encompasses almost any claim that may be brought.²⁰ Part III will focus on the circuit split: circuits holding that the courts should stay the litigation and circuits holding that the courts should dismiss the litigation, and their respective arguments for their positions.²¹ Part IV will discuss why dismissal should be allowed when all claims are arbitrable.²²

II. BACKGROUND

A. *Federal Arbitration Act Section 3*

In 1925, Congress enacted the Federal Arbitration Act²³ to govern arbitration for conflicts in interstate or foreign commerce.²⁴ In Section 3 of the FAA, Congress demonstrated its confidence in the arbitral process and presented direction for courts when compelling arbitration.²⁵ Section 3 of the FAA states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.²⁶

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

24. *Id.* at § 2.

25. *Id.* at § 3.

26. *Id.*

In this section, Congress directs courts to order arbitration when arbitration is proper.²⁷ Section 3 includes no exception to this rule, and Congress gives courts authority to review only the applicability of the arbitration provision itself.²⁸

However, it is important to note that the FAA directs courts to stay the action only when there will be a “trial of the action.”²⁹ The statutory language fails to consider what courts should do if all claims are submitted to arbitration and there can be no future “trial of the action.”³⁰ There is no clear prohibition in the FAA against dismissing claims when there is nothing left for the court to consider, *e.g.*, when there is nothing left to make a “trial of the action.”³¹

Although the FAA governs arbitration arising under interstate or foreign commerce,³² arbitration agreements have also been found valid under common law principles.³³ The Supreme Court of the United States has, in the past twenty-five years, been extraordinarily deferential toward the arbitral forum. As the Supreme Court shifted its position on the arbitrability of statutory claims, it showed a growing trust and reliance in arbitration.³⁴ The Court’s growing reliance in the arbitral process is telling. It demonstrates a trend toward a more independent forum in arbitration. In following this trend, some courts have adopted a stance favoring more limited judicial supervision and review.³⁵

B. Supreme Court Cases Construing Arbitration and Arbitrable Claims

The Supreme Court of the United States has long favored arbitration for limited subjects, but has only recently begun increasing the range of claims that are considered arbitrable.³⁶ Although arbitration is now highly favored by the Court, in 1953 the Court decided in *Wilko v. Swan* that claims brought under the Securities Act of 1933 were non-

27. *Id.*

28. *See id.*

29. Federal Arbitration Act, 9 U.S.C. § 3 (2006).

30. *See id.*

31. *Id.*

32. *See id.* at §§ 1-2.

33. *See Murray v. U.S. Fid. & Guar. Co.*, 460 S.W.2d 212, 214 (Tex. App. 1970).

34. *Compare Wilko v. Swan*, 346 U.S. 427 (1953), *with Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

35. *See infra* Part IV.B.

36. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating its policy of interpreting the FAA in favor of a “national policy favoring arbitration”); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1458 (2009) (holding that “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law”).

arbitrable.³⁷ Wilko sued the partners of a securities brokerage firm (Swan, d/b/a Hayden, Stone & Co.) under the Securities Act, alleging that he was induced to purchase stock by the firm's partners' false representations, resulting in his financial loss.³⁸ Swan filed a motion to stay the trial until after arbitration, claiming that Wilko had signed an agreement containing a provision subjecting claims to arbitration.³⁹ In denying the stay, the district court held that the arbitration agreement "deprived [Wilko] of the advantageous court remedy afforded by the Securities Act."⁴⁰ Swan petitioned the Supreme Court, raising the issue of whether the agreement to arbitrate a future claim arising from the Securities Act was void.⁴¹

The Court stated that the Securities Act created a special right to recover for plaintiffs which was enforceable "in any court of competent jurisdiction."⁴² The Court conceded that arbitration was desirable for avoiding the delay and expense of traditional litigation and that Congress favors arbitration for claims based on statutes.⁴³ However, the Court concluded that arbitration in this instance would not adequately protect the buyers of securities.⁴⁴ Although Swan conceded that arbitration, as a "form of trial," would not relieve the sellers of their responsibilities and liabilities found within the Securities Act,⁴⁵ the Court, however, found that "[e]ven though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings."⁴⁶ Citing the need for subjective findings of the applicability of the Act and the limited nature of review from arbitration, the Court concluded that the intentions of Congress in the Securities Act were better protected by allowing such claims to remain in the judicial forum.⁴⁷ Therefore, the Court held that the federal securities claim invalidated the arbitration agreement.⁴⁸

The Court began its shift toward a more comprehensive view of arbitrable claims in *Dean Witter Reynolds, Inc. v. Byrd*.⁴⁹ There, Byrd invested \$160,000 in securities through a securities broker-dealer, Dean

37. *Wilko*, 346 U.S. at 438.

38. *Id.* at 428-29.

39. *Id.* at 429.

40. *Id.* at 430.

41. *Id.*

42. *Id.* at 431.

43. *Id.* at 431-32.

44. *Id.* at 435-38.

45. *Id.* at 433.

46. *Id.* at 435.

47. *Id.* at 435-36, 438.

48. *Id.* at 438.

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

Witter Reynolds.⁵⁰ After the value of Byrd's stocks declined by over \$100,000, he sued, alleging violations of provisions of the Securities Exchange Act of 1934.⁵¹ Dean Witter moved to sever the state claims from the federal securities claims, and to compel arbitration of the state claims pursuant to a Customer's Agreement arbitration provision signed by Byrd.⁵² Dean Witter did not attempt to compel arbitration of the federal securities claim, assuming that it was not subject to arbitration.⁵³

Upon granting certiorari, the Supreme Court addressed a circuit split regarding whether a court could refuse to order arbitration of state claims that were dependent on the federal securities claims and order all claims to remain in the court.⁵⁴ The Ninth, Fifth, and Eleventh Circuits had relied on "the doctrine of intertwining," holding that "[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court."⁵⁵ These courts cited among their justifications for application of this rule the need for efficiency and for courts to preserve their exclusive federal jurisdiction.⁵⁶ However, the Sixth, Seventh, and Eighth Circuits had concluded that under the Arbitration Act, district courts have no discretion to deny arbitration and instead must compel arbitration, even in cases which contain both arbitrable and nonarbitrable claims.⁵⁷ The Supreme Court sided with the latter position, holding that an agreement to arbitrate must be enforced, regardless of its relation to nonarbitrable claims or the inefficiency created by resolving the issues separately.⁵⁸

The Court further expanded the reach of arbitration agreements in *Mitsubishi Motor Corporation v. Soler Chrysler-Plymouth, Inc.*⁵⁹ Mitsubishi, in a joint venture with Chrysler International, S.A., contracted with Soler Chrysler-Plymouth, an automobile dealership located in Puerto Rico, to provide Soler with automobiles for sale.⁶⁰ Soler's initial business proved so successful that, by the terms of the agreement between the parties, Soler's minimum sales volume

50. *Id.* at 214.

51. *Id.*

52. *Id.* at 215.

53. *Id.*

54. *Id.* at 214.

55. *Byrd*, 470 U.S. at 216-17.

56. *Id.* at 217.

57. *Id.*

58. *Id.*

59. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

60. *Id.* at 616-17.

significantly increased for the 1981 year.⁶¹ Unable to sell the increased number of automobiles, Soler requested that Mitsubishi delay or cancel remaining shipments of automobiles to Puerto Rico.⁶² Soler also attempted to transfer some of the shipments it had already received to locations within the continental United States and Latin America.⁶³ However, Mitsubishi refused to allow the transfer of the automobiles to the other locations for several reasons, including the absence of heaters and defoggers in the automobiles, not necessary in Puerto Rico but required elsewhere.⁶⁴ Eventually Mitsubishi withheld shipment of some 966 automobiles and sued Soler requesting an order to compel arbitration, pursuant to its Distributor Agreement and Sales Procedure Agreement.⁶⁵ Soler counterclaimed, asserting breaches of the Sales Agreement and violations of the Sherman Act, among other claims.⁶⁶ The district court ordered arbitration, and the First Circuit affirmed.⁶⁷

Upon the Supreme Court's granting of certiorari, Soler argued that its claims were not arbitrable and that arbitration could not be compelled for statutory claims not specifically named within the agreement to arbitrate.⁶⁸ The Court disagreed, stating that there was no prohibition against arbitrating statutory claims.⁶⁹ With regard to the Federal Arbitration Act, the Court said that the primary goal of passing the Act was "'to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'"⁷⁰ Focusing on the policy of resolving issues in favor of arbitration and on the intentions of the parties in drafting arbitration agreements, the Court stated that no different outcome should result when parties to an arbitration agreement raise statutory claims.⁷¹ The Court cited *Wilko v. Swan*, highlighting its desire in *Wilko* that arbitration would one day encompass claims based in statutes, concluding that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute

61. *Id.* at 617.

62. *Id.*

63. *Id.* at 617-18.

64. *Id.* at 618, 620.

65. *Id.* at 618-19.

66. *Id.* at 619-20.

67. *Id.* at 620-21.

68. *Id.* at 624-25.

69. *Id.* at 625.

70. *Id.* at 625-26 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

71. *Id.* at 626.

resolution.”⁷² The Court found that absent such contractual defenses as fraud or compulsion, statutory claims are arbitrable.⁷³

Although the general presumption is that statutory claims are arbitrable, the Court did recognize situations in which statutory claims should not be subjected to the arbitration forum.⁷⁴ However, in those instances, congressional intent to preclude arbitration of the claims must be found in the statute itself.⁷⁵ The Court found that parties do not forgo substantive rights provided by statute by agreeing to arbitrate.⁷⁶ Rather, those rights are merely submitted to a different forum.⁷⁷ Therefore, in *Mitsubishi* the Court established the presumption that statutory claims, absent congressional instruction to the contrary, are arbitrable.⁷⁸

The Supreme Court has shown a strong move toward favoring arbitration, and Section 3 of the FAA demonstrates Congress’s policy paralleling that of the Supreme Court.⁷⁹ Thus, courts should read the language of the FAA with the same policy of liberal interpretation that the Court has afforded to arbitration in other contexts, such as the increasing arbitrability of claims.

III. CIRCUIT SPLIT

When ordering a motion to compel arbitration, courts have split regarding whether the pending litigation should be stayed or dismissed.⁸⁰ One group of courts, those favoring the “Must Stay Approach,” holds that it is proper for the issuing court to retain jurisdiction of the case by issuing a stay.⁸¹ A second group of courts, proponents of the “May Dismiss Approach,” hold that after ordering arbitration, it is proper for a court to dismiss the case if it finds that all issues before it are arbitrable.⁸² Placing these two approaches side by side highlights the differences in arguments set forth by proponents of each: the “Must Stay Approach” focuses mostly on interpreting the language of the FAA and the traditional judicial role in dispute resolution, while the “May Dismiss

72. *Id.* at 626-27; see *Wilko v. Swan*, 346 U.S. 427, 432 (1953).

73. *Mitsubishi*, 473 U.S. at 627.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 628.

78. *Id.* at 627-28.

79. See *supra* Part II.B.

80. As a preliminary note, it is important to note that none of the circuits favoring the dismissal approach hold that dismissal is mandatory. As discussed later, these courts merely hold that dismissal is proper within the discretion of the judge. See, e.g., *Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001).

81. See *infra* Part III.A.

82. See *infra* Part III.B.

Approach” focuses mostly on the underlying policies set forth by the Supreme Court and Congress favoring arbitration.⁸³

A. *The “Must Stay Approach”*

Among the stay-dismiss split, one group of courts holds that the proper action for a court is to stay the case until after resolution of the arbitration.⁸⁴ Several Circuits, including the Third and Tenth, hold that when parties are ordered to arbitrate, the ordering court must stay the pending litigation until the arbitration is resolved.⁸⁵

For example, in *Lloyd v. Hovensa, LLC*, the Third Circuit held that it was reversible error for the trial court to dismiss rather than stay.⁸⁶ For over twelve years, Bruno Lloyd worked as an employee with various contractors at the Hovensa refinery in St. Croix, Virgin Islands.⁸⁷ In 2001, while Jacobs/IMC was the contractor for maintenance, Hovensa awarded a new contract directing that Wyatt take over the contracting work then performed by Jacobs/IMC.⁸⁸ Jacobs/IMC informed Lloyd that when its contract expired at the end of the 2001 year, Lloyd would be laid off.⁸⁹ When Wyatt took over the contracting work, it filled upper management positions with employees of its parent corporation, whom Lloyd claimed were predominantly white.⁹⁰ In the beginning of 2002, Wyatt began accepting applications for employment from people in the Virgin Islands, a condition of which was signing a Dispute Resolution Agreement (DRA) which provided that any dispute arising between the applicant and Wyatt in any way related to the application, terms and conditions of employment, or any final employment relationship would be submitted to final and binding arbitration.⁹¹ When Wyatt denied Lloyd’s reapplication, Lloyd filed suit against both Wyatt and Hovensa in the district court, alleging violations of the Federal Civil Rights Act of 1964, violation of provisions of the Virgin Islands Code, wrongful

83. Compare *Lloyd v. Hovensa, LLC*, 369 F.3d 263 (3d Cir. 2004) (focusing on the language of the FAA and the traditional role of the judiciary in dispute resolution), with *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992) (focusing on the policy considerations favoring dispute resolution).

84. See Petti, *supra* note 18, for a discussion of the opinions of these circuits.

85. *Lloyd*, 369 F.3d at 263; *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994).

86. See *Lloyd*, 369 F.3d at 263.

87. *Id.* at 266.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

discharge, breach of implied contract of good faith and fair dealing, and negligent infliction of emotional distress.⁹²

In response to Lloyd's motion, Wyatt filed a motion requesting the court to compel arbitration as provided by the DRA.⁹³ The district court granted Wyatt's motion, dismissing the complaint with prejudice.⁹⁴ Finding that all claims were arbitrable, the district court reasoned that no claims were left for its adjudication, and thus retaining the case was unnecessary.⁹⁵

On appeal, the Third Circuit concluded that the district court should have stayed the litigation rather than dismissed it, and gave three reasons for its holding.⁹⁶ First, it stated that the plain language of the FAA's text mandated that courts are to stay the litigation during arbitration: "the court . . . *shall* on the application of one of the parties *stay* the trial of the action until such arbitration has been had in accordance with the terms of the agreement."⁹⁷ The court found that by stating that the court "shall" stay the litigation, the FAA precluded dismissal.⁹⁸ Further, the court stated that it is permissible to disregard direct language of Congress only when adhering to the actual language would produce a result that clearly was not within Congress's intent, and that such an exception did not apply to the FAA.⁹⁹

The second reason proffered by the court of appeals for staying the litigation focused on the trial court's assistance during the arbitration process.¹⁰⁰ It stated that the district court plays an important role in arbitration proceedings under the FAA, even when all claims are found to be arbitrable.¹⁰¹ According to the court, parties are permitted to return to the court to resolve disputes about such issues as selecting the arbitrator, seeking court assistance in compelling a witness or punishing for contempt, or enforcement of the arbitrator's final decision.¹⁰² Otherwise, it stated, the parties would be required to file a new action each time such an issue arises.¹⁰³

92. *Id.* at 266-67.

93. *Id.* at 267.

94. *Id.*

95. *Id.*

96. *Id.* at 268-71.

97. *Id.* at 269 (citing Federal Arbitration Act, 9 U.S.C. § 3 (2006)).

98. *Lloyd*, 369 F.3d at 269 ("The directive that the Court 'shall' enter a stay simply cannot be read to say that the Court shall enter a stay in all cases except those in which all claims are arbitrable and the Court finds dismissal to be the preferable approach.").

99. *Id.* at 269-70.

100. *Id.* at 270.

101. *Id.*

102. *Id.*

103. *Id.*

Third, the court of appeals stated that an issue of appealability may arise if the case is dismissed rather than stayed.¹⁰⁴ It reasoned that “[u]nder § 16 of the FAA, whenever a stay is entered under § 3, the party resisting arbitration is expressly denied the right to an immediate appeal.”¹⁰⁵ On the other hand, if the court were to dismiss the action, the parties could take an immediate appeal from the district court’s order, delaying the commencement of arbitration proceedings.¹⁰⁶ The court reasoned that, if an exception to the order to stay the case is found, then the district court is empowered with the ability to confer a new right of immediate appeal, whereas under § 16 of the FAA, interlocutory appeals are not permitted from an order granting a stay.¹⁰⁷

In sum, the Third and Tenth Circuits hold that upon ordering arbitration, the only permissible action for a court to take is to retain jurisdiction of the case by issuing a stay.¹⁰⁸ Angelina Petti made the same arguments in a 1995 Note.¹⁰⁹ Relying on an interpretation of the FAA Section 3 and adhering to the traditional role of a judge in adjudicating disputes between parties, these courts and Petti find no support for allowing a judge the discretion to dismiss the case when all claims are subject to arbitration.¹¹⁰

B. *The “May Dismiss Approach”*

Other Circuits, such as the Fourth, Fifth, and Ninth, take the opposite approach and hold that upon ordering arbitration, the court may dismiss the case before it if all claims are arbitrable.¹¹¹ While these courts would permit dismissal, no court has mandated it, instead concluding that dismissal is discretionary.¹¹²

In *Alford v. Dean Witter Reynolds, Inc.*, the Fifth Circuit affirmed the district court’s dismissal after ordering arbitration, finding that such action fell within the discretion of the court.¹¹³ Joan Chason Alford sued

104. *Id.*

105. *Id.* (citation omitted).

106. *See id.* at 270 n.8.

107. *Id.* at 270 n.8, 271.

108. *Id.* at 263; *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994).

109. *See Petti, supra* note 18.

110. *See Lloyd*, 369 F.3d at 263; *Adair Bus Sales*, 25 F.3d at 953; Petti, *supra* note 18.

111. *Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635 (9th Cir. 1988).

112. *See generally Choice Hotels*, 252 F.3d at 707; *Alford*, 975 F.2d at 1161; *Sparling*, 864 F.2d at 635.

113. *Alford*, 975 F.2d at 1162, 1164.

Dean Witter Reynolds, Inc., alleging employment discrimination in violation of Title VII.¹¹⁴ Dean Witter moved to compel arbitration, claiming that Alford agreed to arbitrate when she signed the broker registration agreements with the New York Stock Exchange and the National Association of Securities Dealers, Inc.¹¹⁵ The district court and the court of appeals both refused to compel arbitration until after the Supreme Court handed down its decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹¹⁶ In *Gilmer*, the Supreme Court held that although arbitration agreements signed by employees are binding contracts only between those employees and the securities exchanges, age discrimination claims are arbitrable.¹¹⁷

After the decision in *Gilmer*, the Fifth Circuit vacated its decision and remanded Alford's claim.¹¹⁸ The district court then granted Dean Witter's Motions to Dismiss and to Compel Arbitration.¹¹⁹ Subsequently, Alford appealed back to the Fifth Circuit, arguing that the district court erred in dismissing her claim in violation of the explicit language of Section 3 of the FAA.¹²⁰ In its opinion, the court of appeals stated that Section 3 mandates a stay "upon a showing that the opposing party has commenced suit 'upon any issue referable to arbitration under an agreement in writing for such arbitration. . . .'"¹²¹ The court, however, found the language of the FAA to mandate the court to stay the action only when *some* of the claims posed in the complaint are arbitrable.¹²² When all claims are subject to an arbitration agreement, the court found that a different outcome may result: "[t]he weight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration."¹²³ The court reasoned that if all issues fell under the arbitration agreement, then retaining jurisdiction served no further purpose.¹²⁴ It stated that any remedies requested by the parties or ordered by the arbitrator after completion of arbitration would not require renewed consideration of the merits of the case, but rather would entail a limited review of the

114. *Id.* at 1162.

115. *Id.*

116. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

117. *See Gilmer*, 500 U.S. at 20, n.2.

118. *Alford*, 975 F.2d at 1163.

119. *Id.*

120. *Id.* at 1164.

121. *Id.*

122. *Id.*

123. *Id.* (emphasis in original).

124. *Alford*, 975 F.2d at 1164.

arbitrator's award as a matter of law.¹²⁵ Finding that all of Alford's claims were arbitrable, the court concluded that dismissal was a permissible action for the district court to take.¹²⁶

The Fourth Circuit has likewise found that dismissal may be proper when all claims fall under a valid agreement to arbitrate.¹²⁷ In *Choice Hotels International, Incorporated v. BSR Tropicana Resort, Incorporated*, the court of appeals stated that the FAA requires judges to stay the pending case involving issues covered by written arbitration agreements, but that dismissal is proper when all of the issues in dispute are subject to the arbitration.¹²⁸ The court found that one of the issues in dispute fell within the arbitration agreement, but that the other fell outside its provisions.¹²⁹ While ordering arbitration on the issue that fell under the arbitration agreement, the court stayed the proceedings related to the other issue during the pendency of the arbitration.¹³⁰ Although the court acknowledged that dismissal may be appropriate for the case if all issues fell within the arbitration agreement, in this case it could not, and ordered the arbitrable claim to proceed to arbitration while ordering a stay of the other issue.¹³¹

The courts that have held dismissal to be proper have found only that it is a permissible action to be taken at the discretion of the court; no court has held that dismissal is the required action.¹³² In sum, courts such as the Fourth, Fifth, and Ninth Circuits have found that dismissal of the underlying claim may be appropriate if all issues before the court fall within the provisions of a valid agreement to arbitrate, and the decision to dismiss the case is within the discretion of the court.¹³³

IV. ANALYSIS

In light of the Supreme Court's trend of validating and increasing the scope of arbitration, courts should follow suit and allow parties who choose arbitration the outcome of that forum. If all of the issues fall

125. *Id.*

126. *Id.*

127. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001).

128. *Id.* at 709-10.

129. *Id.* at 711.

130. *Id.* at 712.

131. *Id.* at 710, 712.

132. *See generally id.* at 707; *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635 (9th Cir. 1988).

133. *See Choice Hotels*, 252 F.3d at 709; *Alford*, 975 F.2d at 1164; *Sparling*, 864 F.2d at 638.

within a valid and binding arbitration agreement, the court should have discretion to dismiss the case and leave the parties to the arbitral forum.

A. *Critique of the “Must Stay Approach”*

Courts and commentators favoring the “Must Stay Approach” rely primarily on three arguments.¹³⁴ For example, both the Third Circuit and Angelina Petti offer the same arguments supporting the view that courts must stay litigation after ordering arbitration.¹³⁵ First, the Third Circuit and Petti argue that the text of the FAA includes a direction to stay the case, and that the statutory text does not include the word “dismiss.”¹³⁶ Second, they argue that the assistance of judges may be required during the arbitration process.¹³⁷ If the case is dismissed, then each time a party requests the court’s assistance in compelling a witness, appointing an arbitrator, or enforcing an arbitration judgment, it would be required to file a new action.¹³⁸ Third, the Third Circuit and Petti argue that allowing courts to issue stays rather than dismissing the action would prevent the possibility of immediate appeal.¹³⁹ Each argument will be addressed in turn. In sum, courts such as the Third Circuit, and commentators such as Petti, reason that denying courts the ability to dismiss the action encourages strict adherence to the carefully drafted language of the statute, creates efficiency in later requests for court assistance, and forecloses the possibility of appeal,¹⁴⁰ thus creating a more efficient overall process.¹⁴¹

1. The FAA Supports Dismissal

The first argument favoring the “Must Stay Approach” is that the plain language of the FAA mandates stay rather than dismissal.¹⁴² The Third Circuit found that upon a court’s decision to order arbitration, the text of the FAA leaves no discretion to the court to dismiss rather than stay the litigation proceeding.¹⁴³ The Third Circuit stated that “[t]he directive that the Court ‘shall’ enter a stay simply cannot be read to say

134. See, e.g., *Lloyd v. Hovensha, LLC*, 369 F.3d 263 (3d Cir. 2004); Petti, *supra* note 18.

135. *Lloyd*, 369 F.3d at 269-70; Petti, *supra* note 18, at 584-92.

136. *Lloyd*, 369 F.3d at 269; Petti, *supra* note 18, at 584-85.

137. *Lloyd*, 369 F.3d at 270; Petti, *supra* note 18, at 585-87.

138. *Lloyd*, 369 F.3d at 270; Petti, *supra* note 18, at 586-88.

139. *Lloyd*, 369 F.3d at 270; Petti, *supra* note 18, at 589-91.

140. See *Lloyd*, 369 F.3d at 269-70; Petti, *supra* note 18, at 584-92.

141. Petti, *supra* note 18, at 584-92.

142. *Lloyd*, 369 F.3d at 269.

143. *Id.* at 269-70.

that the Court shall enter a stay in all cases except those in which all claims are arbitrable and the Court finds dismissal to be the preferable approach.”¹⁴⁴ Petti’s first argument mirrors that of the court, but focuses on different language within section 3 of FAA.¹⁴⁵ While the Third Circuit focused on the presence of the word “shall,”¹⁴⁶ Petti reasons that the statutory language considers situations in which all claims may be subject to arbitration, suggesting that “upon any issue referable to arbitration” encompasses both claims in which some issues are arbitrable and claims in which all issues are arbitrable.¹⁴⁷

These arguments, however, do not take full account of the statutory language within the FAA. Section 3 of FAA provides that “*the court . . . shall on [the] application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . .*”¹⁴⁸ The Third Circuit focuses only on the four italicized words, and ignores the rest of the sentence. The word “stay,” however, is qualified by the underlined language that follows it.¹⁴⁹ The Third Circuit fails to recognize that the court is to stay the action *only* when it will later conduct a trial on that action.

By failing to recognize the “trial of the action” qualifying language, the Third Circuit overlooks certain fundamental aspects of arbitration. Parties who are bound to an arbitration clause have agreed to subject their claims to a neutral third-party arbitrator rather than a courtroom judge.¹⁵⁰ This election to select arbitration as a means of resolution replaces the parties’ rights to judicial recourse; parties may not seek resolution of the same claim through both arbitration and a court.¹⁵¹ Had the Third Circuit read the FAA in a light reflecting its underlying policies and goals, the Third Circuit would have understood that Section 3’s reference to “the trial of the action” cannot relate to those claims already subjected to arbitration; there can be no “trial of the action” if the claim is subject, instead, to binding arbitration. If no claim may be tried to the court, no future trial of the action may occur, and so the provision in the

144. *Id.* at 269.

145. *See* Petti, *supra* note 18, at 584-85.

146. *See* *Lloyd*, 369 F.3d at 269-70.

147. Petti, *supra* note 18, at 585 (quoting Federal Arbitration Act, 9 U.S.C. § 3 (2006)).

148. Federal Arbitration Act, 9 U.S.C. § 3; *see supra* Part II.A.

149. *See* *Lloyd*, 369 F.3d at 268-70.

150. *See* *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *Gold Coast Mall, Inc. v. Larmar Corp.*, 468 A.2d 91, 95 (Md. 1983).

151. *See* *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“[I]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”).

FAA stating that a stay shall be issued in such situations does not speak to the full spectrum of possibilities presented to a court which has issued an order compelling arbitration.

Similarly, Petti overlooks the possibility that section 3 merely suggests that “any issue referable to arbitration” refers to the statute’s applicability to any claim for which arbitration is permissible: tort claims, contract claims, or statutory claims.¹⁵² Section 3 of the FAA simply reinforces the statute’s applicability to all arbitrable claims.¹⁵³

It follows, then, that if all issues between disputing parties fall within the scope of the arbitration provision, there will be nothing left to make a “trial of the action” before a court. The FAA’s plain language does not speak to this situation, and thus does not foreclose the possibility that a court may choose dismissal.¹⁵⁴ The language of the FAA suggests that in some situations, namely those in which all claims are not subject to arbitration, the court must take certain action: it must issue a stay.¹⁵⁵ In situations in which all claims will fall within the arbitration provision, however, there are no remaining issues for a court to try, and thus dismissal becomes a permissible option.¹⁵⁶

2. Judicial Supervision and Review of Arbitration Decisions is Inconsistent with the FAA

The Third Circuit in *Lloyd v. Hovensa, LLC* proffered a second argument: retaining the case by issuance of a stay rather than dismissal enables the courts to more effectively assist the disputing parties in arbitration proceedings.¹⁵⁷ However, interim relief orders such as preliminary injunctions or temporary restraining orders may be issued by the court before ordering arbitration and dismissing the case; alternatively, if judicial assistance were required during the arbitration proceedings, nothing would preclude the parties from filing a separate action, seeking court assistance in the particular matter. Because the parties have agreed to arbitration, that forum should remain the primary setting in which their dispute is resolved.¹⁵⁸ Allowing a court to retain a case during arbitration may encourage parties to file numerous motions

152. See Federal Arbitration Act, 9 U.S.C. § 3; Petti, *supra* note 18, at 584-85.

153. See Federal Arbitration Act, 9 U.S.C. § 3.

154. See *id.*

155. *Id.*

156. See *id.*

157. See *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004); see also Petti, *supra* note 18, at 585-87 (providing that courts may play important roles during arbitration in regard to the arbitration process itself).

158. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

seeking court assistance, thereby attempting to have a judge rule on aspects of the parties' dispute rather than an arbitrator.

Additionally, Petti argues that if a party brings suit to enforce an award granted by an arbitrator, a court may lack subject matter jurisdiction over the claim despite having jurisdiction before dismissal.¹⁵⁹ The court would retain jurisdiction if it instead issued a stay.¹⁶⁰ However, the FAA, while a federal statute, does not itself confer federal jurisdiction, and so any jurisdiction a court had before ordering arbitration and dismissing the claim would still be applicable if subsequent motions were filed.¹⁶¹ Dismissing a case upon ordering arbitration would not deprive a court of jurisdiction during a subsequent motion.¹⁶² Even if a federal court were to lack jurisdiction after dismissing a case, dismissal would not prevent a party from enforcing an arbitration award. The party seeking to enforce the decision would have a different court available to it, such as a state court, because the FAA applies in state courts as well as federal courts.

When the parties have agreed to arbitrate by entering into a valid and binding arbitration provision, judicial involvement should be extremely limited.¹⁶³ Had parties desired the traditional courtroom forum to resolve their disputes, they would not have chosen arbitration as the governing forum. Because arbitration is selected as the forum for resolution of parties' disputes, their desires should be effectuated and arbitration should govern, rather than litigation in a court.¹⁶⁴

3. Appeal of an Order to Arbitrate Would Not Stand in Contrast to the Goals of the FAA

The third argument proffered by the Third Circuit in *Lloyd v. Hovensa LLC* concerns the appealability of an order to arbitrate that has

159. Petti, *supra* note 18, at 588-89.

160. *Id.*

161. *Keating*, 465 U.S. at 16 n.9.

162. *See id.*

163. *See* *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 332 N.E.2d 333, 335 (N.Y. 1975) (“[T]he announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties. ‘One way to encourage the use of the arbitration forum’ we recently noted ‘would be to prevent parties to such agreements from using the courts as a vehicle to protract litigation. This conduct has the effect of frustrating both the initial intent of the parties as well as legislative policy.’ To this end the Legislature has assigned the courts a minimal role in supervising arbitration practice and procedures.”) (citation omitted).

164. *See supra* Part II.B for a discussion of the Supreme Court's trend toward a policy favoring liberal interpretation of arbitration agreements.

been dismissed.¹⁶⁵ The Third Circuit found that the court should stay the action rather than dismiss because dismissal would permit the party opposing the order to arbitrate to appeal the order as a final decision.¹⁶⁶ While it is true that an interlocutory appeal may not be taken if the case is stayed, allowing a party to appeal the order to arbitrate protects that party's interest in the arbitral forum. When a claim is brought before a court, appeal is available as a means of ensuring the correct resolution of its claims or defenses.¹⁶⁷ This same right should be afforded to those who have been ordered by a court to resolve their disputes in a different forum. Just as a district court may incorrectly find in favor of one party in a civil dispute, it may likewise incorrectly find applicable an arbitration provision between the parties. Dismissal, as a court's final decision, will adequately protect the rights of the parties by not subjecting them to the arbitral forum if they should not be bound to do so.

If appeal is allowed, it would not permanently foreclose the arbitration. Instead, it would allow the party to challenge the order itself, and, if the appellate court finds that the order to arbitrate was appropriate, arbitration will still occur. This argument, raised by the Third Circuit, seems inconsistent with its other arguments.¹⁶⁸ In a previous argument against dismissal, the court stressed the need for judicial supervision of the arbitration process.¹⁶⁹ Now, the court claims that an appellate court should play no part in the arbitration determination.¹⁷⁰ Had the court formulated a stronger argument against permitting dismissal, its arguments would have consistently favored the judicial involvement in the arbitration process. Instead, the court fails to recognize that its policy should favor a consistent process for the arbitration forum.

B. Analysis and Proposal of a Uniform Rule Favoring the "May Dismiss Approach"

While proponents of the "Must Stay Approach" focus mostly on statutory interpretation and traditional roles of judges, courts reasoning

165. *Lloyd v. Hovensa*, 369 F.3d 263, 270 (3d Cir. 2004); Petti, *supra* note 18, at 589-91.

166. *Id.* See Petti, *supra* note 18, at 589-91 (stating that the failure of the FAA to define a "final decision" renders a dismissal pursuant to an order to arbitrate subject to immediate appeal, contrary to the FAA's goal of ensuring speedy resolution of disputes).

167. See generally FED. R. APP. P.

168. See *Lloyd*, 369 F.3d at 268.

169. *Id.* at 270.

170. *Id.* at 270 n.8.

that dismissal may be permissible if all issues fall under the arbitration provision rely mostly on the general policy favoring the right to contract for arbitration as a means of dispute resolution.¹⁷¹ By allowing arbitrators to control the resolution of the parties' disputes, courts such as the Fourth and Fifth Circuits place the same reliance in the arbitral forum as the Supreme Court has come to do through cases such as *Byrd* and *Mitsubishi*.¹⁷²

The Fifth Circuit found in *Alford v. Dean Witter Reynolds, Inc.* that once a court compels arbitration, the court serves no further purpose in the resolution of the dispute.¹⁷³ That court reasoned that any further issue that comes before the court which ordered arbitration would consist of a new claim, and would not be dependent on any consideration of the merits contained in the dispute between the parties.¹⁷⁴ This court recognized that arbitration, once selected as the dispute forum between the parties, should be given deference, and court intrusion should remain minimal.¹⁷⁵

In *Choice Hotels International, Incorporated v. BSR Tropicana Resort, Incorporated*, the Fourth Circuit focused on the Supreme Court's liberal policy favoring arbitration.¹⁷⁶ At two different points in its opinion, the court cited cases stating explicitly that hypertechnical interpretation of arbitration provisions should be avoided, finding instead that giving wide deference to agreements to arbitrate is preferable.¹⁷⁷

The case law comprising the background and development of arbitrable claims sheds some light on the stay-dismiss dispute.¹⁷⁸ As the Supreme Court began allowing more types of claims to be arbitrable, it expanded the judicial forum's faith in the efficient and correct outcome of decisions in a different forum.¹⁷⁹ As arbitration becomes a more relied upon setting for dispute resolution, courts should afford the alternative

171. See *Choice Hotels Int'l Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 710 (4th Cir. 2001); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635, 641 (9th Cir. 1988).

172. See *supra* Part II.B.

173. *Alford*, 975 F.2d at 1164.

174. *Id.*

175. See *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (stating that the Court's view is in favor of a strong national policy favoring arbitration); *Choice Hotels*, 252 F.3d at 710.

176. *Choice Hotels*, 252 F.3d at 710.

177. *Id.* at 710-11 (citing *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)).

178. See *supra* Part II.B.

179. Compare *Wilko v. Swan*, 346 U.S. 427 (1953), with *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

forum greater latitude and responsibility in its decision-making. Courts should no longer seek judicial oversight of arbitrators and should leave the parties to their contractually chosen forum for resolution of disputes.

The language of the FAA does not explicitly or impliedly preclude dismissal of cases upon issuance of an order to arbitrate; instead, the language supports dismissal when all claims fall within the arbitration provisions.¹⁸⁰ Judicial supervision of the arbitral process is unnecessary and undermines the authority of the arbitrator. Allowing a party to appeal an order to arbitrate before being relegated to that forum further protects its rights by ensuring that arbitration is, in fact, the correct forum. As the Supreme Court places more faith in the arbitration process, that process should be afforded greater faith by circuit and district courts throughout the United States.¹⁸¹ Courts should begin enforcing a judicial hands-off policy toward arbitration once it has been determined that arbitration is appropriate. By allowing a judge to dismiss a case which falls completely within the arbitration agreement, the arbitration forum is afforded the power and authority that the parties to the dispute have chosen to place in it.¹⁸²

In addition to honoring the federal policy favoring arbitration, there is another strong reason for allowing courts to dismiss a case once it has found all issues before it subject to a valid arbitration agreement. Litigation surrounding arbitration proceedings is common.¹⁸³ When parties to arbitration request a court to remain involved in the arbitration process by issuing motions to compel discovery, for example, the arbitration process is halted and parties are left “standing with one foot in the district court and the other in the arbitrator’s office.”¹⁸⁴ Doing so creates a hybrid judicial-arbitral forum, despite the fact that many courts have found that effective arbitration requires minimal judicial involvement.¹⁸⁵

Therefore, a more flexible and workable rule is required, honoring the federal policy in favor of enforcing private agreements to arbitrate. If all claims or issues in dispute fall under the arbitration agreement, then that contract should govern all issues between the parties, and the underlying action ordinarily should be dismissed. However, courts

180. See Federal Arbitration Act, 9 U.S.C. § 3 (2006).

181. See *supra* Part II.B.

182. See *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) (stating that parties are only required to arbitrate when they have agreed to do so).

183. See, e.g., *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 566 (S.D. Miss. 1976).

184. *Id.* at 564.

185. See *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 332 N.E.2d 333, 335 (N.Y. 1975).

should have the discretion to stay the underlying action if some issues fall outside the arbitration agreement or there is some other compelling reason to stay that particular case rather than to dismiss it. This more flexible rule protects the parties' interests in their underlying claims while honoring their contractually chosen forum and the great reliance the Supreme Court has placed in arbitration.

V. CONCLUSION

Federal circuit courts have split regarding whether a judge may dismiss a case when all issues brought before it by the parties fall within a valid and binding arbitration agreement.¹⁸⁶ While one group has taken the approach that the court is required by the language of the FAA to stay the case pending the outcome of arbitration,¹⁸⁷ another group has found that dismissal is not precluded and that it may be proper in some instances.¹⁸⁸ When juxtaposing the arguments of the two sides of the split within the context of the FAA and Supreme Court jurisprudence of arbitration, it becomes clear that allowing courts the discretion to dismiss a case when all issues are arbitrable better serves the goals, policies, and the parties' expectations of arbitration.

Courts that order arbitration should be given discretion to dismiss claims when all issues are arbitrable, achieving a better and more just result. By foreclosing the possibility of a court intervening and issuing orders in matters that are best delegated to the arbitrator, the parties are required to live up to their contractual promise to arbitrate the issues on point. However, when issues fall outside the arbitration agreement and remain within the jurisdiction of the court, the case may be stayed and the parties are not denied a timely remedy for those issues outside the scope of the arbitration agreement. This approach provides a bright line rule, distinguishing between situations in which dismissal is appropriate and those in which a stay is more proper, focusing upon whether all issues may be determined in arbitration.

This approach does not require that an issuing judge always dismiss the action. When some issues between the parties fall outside the scope of the arbitration agreement, the judge should stay the action. The arbitrable issues can be resolved quickly and effectively in arbitration, and the parties may then result to court for a judicial determination of their remaining issues. This action is supported by the Third Circuit's

186. *See supra* Part III.

187. *See supra* Part III.A.

188. *See supra* Part III.B.

opinion in *Lloyd v. Hovensa LLC*.¹⁸⁹ The court's second reason for holding that a stay is required when arbitration is issued concerned the need for parties to refile a motion before the court if assistance is required.¹⁹⁰ The concerns of the Third Circuit would be protected, however, if disputes that only partially fall within an arbitration order are stayed; once arbitration has concluded, the parties would not need to refile their claims before the court which issued the stay.

Although it would not be appropriate in all situations for a court to dismiss the action upon ordering arbitration, it would remain an appropriate action for a court to take when all issues fall within the arbitration provision. Permitting dismissal in such situations would prevent a waste of judicial resources because issues that do not properly belong before a judge will not remain in the judicial sphere. Should the Supreme Court attempt to resolve this circuit split, it should do so with an eye to its clearly established policy favoring the independence of the arbitral forum.

189. See *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 269 (3d Cir. 2004).

190. *Id.* at 270.