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. Hussman 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." *Catlin*, 324 U.S. at 233, 65 S.Ct. at 633.

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

B.

[13] Alternatively, McDermott urges us to review the orders under an application for a writ of mandamus.[6] 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 & Cas. Co. v. Holland*, 346 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.

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

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

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., Oiseau 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 for the Eastern District of Texas, sitting by designation.

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 Hobson, 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 BARKSDALE, Circuit Judges, and [illegible] District Judge.

BARKSDALE, Circuit Judge:

As in *McDermott Int'l v. Underwriter's at Lloyds*, 981 F.2d 744 (5th Cir.1993), decided contemporaneously with this case, the principal issue at hand is the appealability *vel non* of an order compelling arbitration. American Marine Corporation and others (collectively, "Oil Transport") appeal from district court orders compelling arbitration of a dispute with West of England Ship Owners Mutual Insurance Association (Luxembourg) ("Association"), pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201 *et seq.*, and staying litigation pending arbitration. In the alternative, Oil Transport seeks a writ of mandamus. We hold that the arbitration orders are interlocutory, not final. Because § 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, provides that such orders are not appealable, and because this case does not warrant mandamus, we DISMISS the appeal and DENY the writ.

I.

From 1986 to 1990, Oil Transport entered the Association, a foreign insurance association, to insure its vessels. Participants in the Association are governed by its rules, one of which requires arbitration in London of all disputes.[2] A dispute arose when the Association charged that Oil Transport had not timely paid calls (premiums).

The Association notified Oil Transport in July 1991 that it wished to arbitrate the dispute. Instead, Oil Transport filed suit in Louisiana state court against the Association and three related parties, asserting claims under Louisiana law, and seeking declaratory and injunctive relief against arbitration. The Association then sued in federal district court to compel arbitration, and removed the state action to that court. In October[3] 1991, the district court consolidated the two actions.

Oil Transport filed a number of motions, seeking to remand the state case, vacate the consolidation, dismiss the Association's complaint for lack of jurisdiction, and enjoin the Association from pursuing proceedings it had filed in England.[4] The Association moved to compel arbitration pursuant to the Convention. In February 1992, the district court denied Oil Transport's motions, issued an order compelling arbitration, and stayed the proceeding as to all defendants, including those not subject to the arbitration agreement.

II.

For review of the arbitration orders, Oil Transport advances three alternative bases for our jurisdiction.[5] As hereinafter discussed, we lack jurisdiction; therefore, we do not reach the merits of the district court's ruling.[6]

A.

[1] First, Oil Transport contends that the orders are appealable under § 16(a) of the FAA, which allows appeals, *inter alia*, from "a final decision with respect to an arbitration". 9 U.S.C. § 16(a)(3). It asserts that the orders are final in the context of the Association's district court action to compel arbitration, as originally filed, because they dispose of the only issue presented in that action—arbitrability.[7]

The Association responds that the orders are interlocutory, not final, because the consolidated claims that are pending present additional unresolved issues. It asserts that appeal is therefore barred by § 16(b) of the FAA, which applies to interlocutory orders compelling arbitration and staying litigation in cases subject to the FAA or the Convention. *See* 9 U.S.C. § 16(b); *McDermott Int'l v. Underwriters at Lloyds*, 981 F.2d 744 (5th Cir.1993).

In *McDermott*, we held that where consolidation of an independent proceeding to compel arbitration with one or more actions rendered the cases a single judicial unit, orders compelling arbitration and staying litigation were considered interlocutory, not final, for § 16 purposes. The consolidation orders in this case are identical to those we addressed in *McDermott;* we find it controlling.[8] Accordingly, the orders were interlocutory, and appeal is barred by § 16(b). *See id.*

B.

[2] Second, Oil Transport attempts to invoke jurisdiction under the collateral order doctrine. (That doctrine is discussed in note 9, *infra*.) This court, however, has rejected application of that doctrine in cases such as this. *See Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 n. 5 (5th Cir.1989); *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402, 404 (5th Cir.), *supplemented*, 867 F.2d 891 (5th Cir.1989); *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171-72 (5th Cir.1988).[9]

C.

[3] Finally, Oil Transport contends that this court may review the district court's decision under an application for a writ of mandamus. For the reasons stated in *McDermott*, 981 F.2d at 748, this case does not justify that extraordinary remedy.

III.

[4] We find no merit in the other issues raised by Oil Transport touching on jurisdiction.[9] For the foregoing reasons, the appeal is DISMISSED, and the application for a writ of mandamus is DENIED.

2. Rule 62 ("Arbitration") requires arbitration of "any difference or dispute ... arising out of any contract between the Member ... and the Association as to the rights or obligations of the Association or the Member ... or as to any other matter whatsoever".

3. In November 1991, the Association had commenced an action in London to appoint an arbitrator.

4. Permissive 28 U.S.C. § 1292(b) jurisdiction is not asserted.

5. One of those issues is the interplay between § 16 of the FAA, discussed *infra*, and the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* (regulation of the business of insurance for the States). *See* 15 U.S.C. § 1012(b). Pursuant to this authority, Louisiana has prohibited arbitration clauses in insurance policies. *See* La. Rev.Stat. 22:629; *Doucet v. Dental Health Plan Management Corp.*, 412 So.2d 1383, 1384 (La. 1982).

6. Oil Transport's notice of appeal references only the Association's arbitration action, and does not include the removed state action consolidated with it. Obviously, this has no effect on whether the arbitration order is appealable.

7. Here, as in *McDermott*, the cases were broadly consolidated "for disposition" because they "[grew] out of the same factual situation".

8. It may well be that, because § 16(b) expressly bars appeal, the collateral order doctrine would not apply even if its requirements were satisfied; the doctrine falls under § 1291 jurisprudence, while § 16 jurisdiction does not. However, we need not consider this question.

9. First, because there has been no final order in the case, we cannot address Oil Transport's separate challenge to the district court's interlocutory order denying its motion to dismiss for lack of jurisdiction. *See* 28 U.S.C. § 1291. Because the Association failed to do so, we address this jurisdictional point *sua sponte*. *See England v. Federal Deposit Insurance Corp.*, 975 F.2d 1168, 1171 (5th Cir.1992).

Furthermore, the denial does not place this case within that "very narrow class of cases" in which interlocutory appeal is permissible under the collateral order doctrine, because it is not "effectively unreviewable on appeal from a final judgment". *United States v. Hashagen*, 716 F.2d 1454, 1454-55 (5th Cir.1983) (holding denial of motion to dismiss indictment for lack of jurisdiction in the district court not reviewable under § 1291); *see also Louisiana Ice Cream Distributors, Inc. v. Carvel Corp.*, 821 F.2d 1031, 1032-33 (5th Cir.1987) (holding denial of motion to dismiss for improper venue not reviewable under § 1291).

Likewise, Oil Transport asserts that the Association's federal action should be dismissed because it should have been brought as a compulsory counterclaim in state court. Oil Transport devotes only two paragraphs to the argument in support of this contention, and we find its sparse legal authority unpersuasive. In any event, this issue was not presented to the district court; and, no authority exists for our not addressing it on appeal for the first time.