

International Arbitration in Bankruptcy Proceedings: Uncertainty in the Enforcement of Arbitration Agreements

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ARBITRATION agreements are becoming more the norm, especially in international transactions.¹ International arbitration courts like the ICSID and the International Chamber of Commerce have shown a steady, continuing increase in international arbitration cases.² As arbitration clauses become more prevalent in contracts, bankruptcy courts will

often have to determine if to submit a claim in bankruptcy court to arbitration, as arbitration clauses are generally broad, encompassing “all disputes arising out of or in connection with” that contract.³ International transactions can be enormous, even involving states,

¹ Gary Born and Wendy Miles, Global Trends in International Arbitration. Available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/GlobalTrends_InternationalArbitration.pdf.

² 801 requests filed in the ICC in 2015. Statistics, INTERNATIONAL CHAMBER OF COMMERCE. Available at <http://www.http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>;

see also International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics*, available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%20016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%20016-1%20(English)%20final.pdf).

³ International Chamber of Commerce, *Standard ICC Arbitration Clauses*, available at <http://www.iccbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>.

and bankruptcy remains a prevalent issue.⁴

What bankruptcy courts are required to do is still uncertain in the United States. The Supreme Court has not addressed this issue, and there is some variation between circuits. Generally, bankruptcy courts tend to refuse enforcement of an arbitration agreement when arbitration would “inherently conflict” with the purposes of the Bankruptcy Code. But some courts rely heavily on the core/non-core distinction in bankruptcy claims in determining if the arbitration agreement should be enforced, while others only focus on the “inherent conflict” between purposes of the Bankruptcy Code and FAA. The trend by the Supreme Court seems to be in limiting the power of the bankruptcy court under Article III,⁵ while broadly enforcing international arbitration agreements in general, even when the dispute involves statutory rights. International arbitration agreements rely on predictability in resolving the disputes and providing a neutral forum for the dispute, protecting the rights of all parties. This article discusses the increasing trend by courts to

enforce arbitration agreements unless they conflict with the Bankruptcy Code’s purpose, and analyzes new issues that may affect bankruptcy courts’ determinations. In international arbitration agreements, even in the context of bankruptcy proceedings, these agreements should be enforced more rigorously than domestic arbitrations to remain in line with the Supreme Court’s recent jurisprudence and protect the rights of all international parties.

I. Conflicting Purposes

Bankruptcy and arbitration are often at odds in their purpose. “[T]he purposes of the Bankruptcy Code include ‘[c]entralization of disputes concerning a debtor’s legal obligations’ and ‘protect[ing] creditors and reorganizing debtors from piecemeal litigation’”⁶ while arbitration can disrupt this purpose because it can “permit[] an arbitrator to decide a core issue would make debtor-creditor rights ‘contingent upon an arbitrator’s ruling’ rather than the ruling of the bankruptcy judge assigned to hear the debtor’s case.”⁷ In bankruptcy, efficient decisions of claims and

⁴ See Douglas Thomson, *Kazakhstan threatened with ICSID action over bankruptcy*, GLOBAL ARBITRATION REVIEW (21 Dec. 2015), available at <http://globalarbitrationreview.com/news/article/34443/kazakhstan-threatened-icsid-action-bankruptcy/>.

⁵ *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *infra* section III.

⁶ *In re White Mountain Mining*, 403 F.3d 164, 170 (4th Cir. 2005); *Matter of Nat’l Gypsum*, 118 F.3d 1056, 1069 (5th Cir. 1997).

⁷ *In re White Mountain Mining Co.*, 403 F.3d at 169 (concluding that the facts of the case showed the inherent conflict between

conserving of the bankrupt estate's assets are fundamental to the purposes of the Bankruptcy Code.⁸ However, arbitration has the potential to last much longer and can affect the rights of creditors, presenting what many courts view as "legitimate concerns."⁹ The Bankruptcy Code and the FAA may even "present a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."¹⁰ Arbitration may also present piecemeal litigation concerns as well, especially as some courts will distinguish between "core" and "non-core" issues, discussed below.

But, in the context of *international* arbitration, the benefits and purposes of international arbitration may outweigh the costs that arbitration imposes on bankruptcy. Many of the cases discussed below are domestic arbitration cases, but in the context of international arbitration a court should be more willing to compel arbitration. A U.S. bankruptcy court has discretion to

compel or not compel arbitration in either a core or non-core proceeding, but there is a greater tendency to compel arbitration where international arbitration is involved.¹¹

II. Current Law for Compelling International Arbitration in Bankruptcy Cases

Arbitration agreements are usually broadly drafted, frequently stating that "All disputes arising out of or in connection with the present contract shall be finally settled under [arbitration]."¹² This clause would normally encompass any bankruptcy issue, so long as the issue relates to the contract that arbitration was sought to enforce. So why do courts consider the issue whether to let bankruptcy claims go to arbitration?

Since the codification of the New York Convention in the FAA, the Court has moved increasingly in favor of compelling arbitration, even when the matters at issue implicate statutory rights.¹³ *Scherk v. Alberto-Culver*, for example, involved a securities law claim, and the party objecting to arbitration argued that

arbitration and the purposes of the Bankruptcy Code).

⁸ *Matter of Nat'l Gypsum*, 118 F.3d at 1070.

⁹ *Id.*

¹⁰ *Société Nationale Algérienne pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Distrigas Corp.*, 80 B.R. 606, 610 (D. Mass. 1987).

¹¹ *But see In re White Mountain Mining Co.*, 403 F.3d at 169.

¹² International Chamber of Commerce, *Standard ICC Arbitration Clauses*, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>.

¹³ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520-521 (1974).

the dispute was not arbitrable under U.S. policy.¹⁴ The Supreme Court dismissed this claim and held that claims involving securities may be submitted to international arbitration. Because the agreement at issue was strictly an international arbitration agreement, the policies and concerns are different than domestic arbitration. Similarly, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*¹⁵ involved antitrust claims. Even though these were statutory rights, the court held that these claims could still be submitted to arbitration.¹⁶ The Court held broadly that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,”¹⁷ providing a strong presumption of compelling arbitration.

The underlying three-prong test for when a court will compel arbitration was developed in *Shearson/American Express, Inc. v. McMahon*.¹⁸ The Court held that even though there is a strong federal policy under the FAA, the “Act’s mandate may be overridden by a contrary congressional command.”¹⁹ The party seeking to avoid arbitration has the burden of showing that Congress “intended to

preclude a waiver of judicial remedies for the statutory rights at issue,” which comprises the three part test.²⁰ To override the FAA, party must show the congressional intent to prohibit arbitration for a particular claim from: (1) the statute’s text; (2) statute’s legislative history; or (3) an inherent conflict between arbitration and the statute’s underlying purposes.²¹

Courts that have applied *McMahon* to the intersection of bankruptcy and arbitration have found little to no guidance in the Bankruptcy Code’s text or legislative history that would preclude operation of arbitration clauses.²² In 1991, the Third Circuit addressed this question directly in *Hays v. Merrill Lynch*. In *Hays*, the trustee in a Chapter 11 bankruptcy proceeding brought suit against Merrill Lynch, alleging that Merrill Lynch had improperly invested and breached its fiduciary duty. Merrill Lynch filed for arbitration under its arbitration clause in its customer agreement contract.²³ The Third Circuit ultimately held that there were “no provisions in the text of the bankruptcy laws . . . suggesting that arbitration clauses are

¹⁴ *Id.*

¹⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

¹⁶ *Mitsubishi*, 473 U.S. at 625.

¹⁷ *Id.* at 626.

¹⁸ 482 U.S. 220 (1987).

¹⁹ *Id.* at 226.

²⁰ *Id.* at 227.

²¹ *Id.*

²² *See, e.g., Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 (3d Cir. 1989); *see also In re Thorpe Insulation Co.*, 671 F.3d 1011, 1020 (9th Cir. 2012).

²³ *Hays & Co.*, 885 F.2d at 1150.

unenforceable in a non-core adversary proceeding.”²⁴ Because “Hayes [did] not show that it would be substantial enough to override the policy favoring arbitration,” the Court determined the bankruptcy court could not deny enforcement of the arbitration clause.²⁵ Similarly, the Eleventh Circuit determined that there is “no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code.”²⁶ These holdings essentially make the first two prongs of the *McMahon* test irrelevant in the bankruptcy context regarding compelling arbitration.

As a result of this precedent, courts have only focused on the third prong of the *McMahon* test, whether arbitration of the bankruptcy dispute creates an “inherent conflict” with the purpose or policies of the Bankruptcy Code.²⁷ When an arbitration agreement is invoked, a bankruptcy court cannot deny its enforcement unless the party opposing arbitration can show congressional intent to preclude waiver of judicial remedies for the statutory rights at issue.²⁸ In general, bankruptcy courts do not

have discretion to refuse enforcement of arbitration agreement in non-core proceedings.²⁹ But in core proceedings, a bankruptcy court can refuse enforcement of an arbitration agreement when it would create a conflict between the purposes of the Bankruptcy Code and the FAA.³⁰ Increasingly, however, courts have enforced arbitration clauses in the context of core proceedings based on the purposes of the Bankruptcy Code.

a. Core/Non-Core Distinction

“Core proceedings include matters arising under the Code or arising in a case under the Code.”³¹ Section 157(b)(2) of the Bankruptcy Code gives a nonexclusive list of the matters considered core proceedings, including objections to a creditor's proof of claim, preference actions, counterclaims against persons filing claims against the estate, and challenges to the automatic stay or to the discharge of debts.³² Matters that do not raise bankruptcy issues, such as breach of

²⁴ *Id.* at 1157.

²⁵ *Id.* at 1150.

²⁶ *In re Elec. Mach. Enterprises, Inc.*, 479 F.3d 791, 796 (11th Cir. 2007).

²⁷ Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443, 466 (2016).

²⁸ 9 U.S.C.A. § 1 et seq. *In re Mintze*, 434 F.3d 222 (3d Cir. 2006).

²⁹ *In re Crysler/Montenay Energy Co.*, 226 F.3d 160 (2d Cir. 2000).

³⁰ *In re Thorpe Insulation Co.*, 671 F.3d at 1011.

³¹ See 28 U.S.C. § 157(b)(1) (2000) (granting bankruptcy court jurisdiction over “all core proceedings arising under title 11, or arising in a case under title 11”).

³² *Id.*

contract or fraud, are considered non-core.³³

In *Matter of Nat'l Gypsum Co.*,³⁴ the Fifth Circuit declined to rely solely on the core/non-core distinction because it did not accurately reflect the Supreme Court precedent and, while workable, was too broad a test.³⁵ Not all core bankruptcy proceedings conflicted with the FAA, “nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code.”³⁶ Instead of relying on the core/non-core distinction, the court should look to the “nature of proceeding, including whether proceeding derives exclusively from provisions of Bankruptcy Code and, if so, whether arbitration of proceeding would conflict with purposes of Code,” following the third prong of *McMahon*.³⁷ If the arbitration would result in prejudice of creditors and debtor, these may outweigh the FAA’s purposes.³⁸ However, the court noted that many cases did rely on the core/non-core distinction.³⁹

Similarly, the Third Circuit has determined that the core/non-core distinction was not applicable in deciding whether a bankruptcy court could refuse to enforce an arbitration clause.⁴⁰ The Third Circuit held that a bankruptcy court could not refuse enforcement, “unless the party opposing arbitration can establish congressional intent to preclude waiver of judicial remedies for the statutory rights at issue.”⁴¹

While the Ninth Circuit considers the distinction relevant to its inquiry, the core/non-core distinction does not resolve the issue.⁴² “[E]ven in a core proceeding, the *McMahon* standard must be met—that is, a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code.”⁴³ The Ninth Circuit still uses the distinction in its inquiry because the basis for creating the core/non-core distinction is that non-core proceedings “are unlikely to present

³³ Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 504 (2009).

³⁴ 118 F.3d 1056, 1066-1067 (5th Cir. 1997)

³⁵ *Id.* at 1066.

³⁶ *Id.*

³⁷ *Id.* at 1067.

³⁸ *Id.* at 1070 (“efficiency concerns might present a genuine conflict between the Federal Arbitration Act and the Code—for example where substantial arbitration costs or severe delays would prejudice the rights of creditors or the ability of a debtor to

reorganize—they may well represent legitimate considerations.”).

³⁹ *Id.* at 1067 (listing cases).

⁴⁰ *In re Mintze*, 434 F.3d at 229 (“The core/non-core distinction does not [] affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement.”).

⁴¹ *Id.*

⁴² *In re Thorpe Insulation Co.*, 671 F.3d at 1021.

⁴³ *Id.*

a conflict sufficient to override by implication the presumption in favor of arbitration,” but core proceedings “implicate more pressing bankruptcy concerns.”⁴⁴ However, the court held that arbitration in this specific case would conflict with the purposes of the Bankruptcy Act.⁴⁵

While perhaps only a slight difference in language, the Second Circuit also still relies on the core/non-core distinction when determining the enforceability of arbitration agreements, but allows the court to decline to enforce arbitration agreements in non-core claims and does not give the court full discretion to refuse enforcement in core proceedings.⁴⁶ In *In re U.S. Lines*, the Second Circuit noted that the conflict between the Arbitration Act and the Bankruptcy Code “is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration,” but it does not completely eliminate the concerns of the Bankruptcy Code.⁴⁷ Instead, the court must look to whether the purposes of the Bankruptcy Code would be undermined by submitting the case to arbitration.⁴⁸

Even when a matter is a core proceeding, the court could allow arbitration of the claim, using the third prong of the *McMahon* test. In *MBNA Am. Bank, N.A. v. Hill*,⁴⁹ the court held that even though the claim is a core proceeding, arbitration of the core claim would not “seriously jeopardize the objectives of the Bankruptcy Code.”⁵⁰ The specific facts in each case must be analyzed to determine whether arbitration of the claim would conflict with the purposes of the Bankruptcy Code, whether or not it is a core proceeding.

b. Is the *McMahon* test at risk?

A recent Supreme Court case reviewed the conflict between the FAA and the Credit Repair Organizations Act, providing insights that could present implications to the *McMahon* test.⁵¹ The Court in *CompuCredit* held that because the “CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.”⁵² Because the statute did not mention whether the statutory claims could be arbitrated, the Court determined that the

⁴⁴ *Id.*

⁴⁵ *Id.* at 1022.

⁴⁶ *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999).

⁴⁷ *Id.* at 640.

⁴⁸ *Id.* at 640.

⁴⁹ 436 F.3d 104, 110 (2d Cir. 2006).

⁵⁰ *Id.* at 109.

⁵¹ See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012).

⁵² *Id.* at 673.

arbitration agreement should be enforced.⁵³

Already, one bankruptcy court has interpreted *CompuCredit* in a way that overrides the *McMahon* test in order to enforce arbitration agreements in bankruptcy.⁵⁴ The court compared the Bankruptcy Code to the CROA and determined there was no need to use the *McMahon* test because, like the CROA in *CompuCredit*, “the Bankruptcy Code is silent on whether claims under the Act can proceed in an arbitrable forum.”⁵⁵

This line of reasoning potentially has the potential to make a strong impact on the way that courts view the application of the Bankruptcy Code in arbitration agreements, but so far, other courts have not taken up this issue.⁵⁶ Instead, the *McMahon* test still seems alive and well. Courts that have discussed the impact of *CompuCredit* have determined that “*CompuCredit* did not involve the interplay between the FAA and the Bankruptcy Code.”⁵⁷ One court

stated that “*CompuCredit* cannot be read as impliedly overruling *McMahon*, particularly given that *CompuCredit* cites *McMahon* for the proposition that the FAA may be ‘overridden by a contrary congressional command.’”⁵⁸ And even in citing *CompuCredit* and compelling arbitration, the bankruptcy court in *In re Ames* still applied the “inherent conflict” test to determine whether arbitration in this case would conflict with the purposes of the Bankruptcy Code.⁵⁹

But the Supreme Court has not answered this question and leaves these ambiguities to be determined by the lower courts. Instead, the Court has declined to decide how an arbitration agreement would be enforced in the bankruptcy context by refusing certiorari for a case that would have put this question squarely before them.⁶⁰

⁵³ *Id.*

⁵⁴ *Blackburn v. Capital Transaction Grp., Inc.*, No. 2:13-CV-98, 2014 WL 923316, at *4 (E.D. Tenn. Mar. 10, 2014).

⁵⁵ *Id.* at *4.

⁵⁶ See *Campos v. Bluestem Brands, Inc.*, No. 3:15-CV-00629-SI, 2016 WL 297429, at *10-11 (D. Ore. Jan. 22, 2016) (continuing to “whether arbitration of a claim would inherently conflict with the underlying purposes of the Bankruptcy Code.”); *Rich v. Cantilo & Bennett, L.L.P.*, No. 03-15-00408-CV, 2016 WL 611804, at *4 (Tex. App. Feb. 9, 2016) (same).

⁵⁷ *In re Huffman*, 486 B.R. 343, 356-357 (Bankr. S.D. Miss. 2013).

⁵⁸ *In re Belton*, No. 15 CV 1934 VB, 2015 WL 6163083, at *5 (S.D.N.Y. Oct. 14, 2015) motion to certify appeal denied, No. 15 CV 1934 (VB), 2016 WL 164620 (S.D.N.Y. Jan. 12, 2016).

⁵⁹ *In re Ames*, 525 B.R. 866, 871 (Bankr. D. Mass. 2015).

⁶⁰ See *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir.), cert. denied, --- U.S. ---, 133 S.Ct. 119, 184 L.Ed.2d 26 (2012).

III. Recent Restrictions on Bankruptcy Courts' Authority

Most recently, the Supreme Court has begun to define the limits that are placed on the bankruptcy courts by Article III, and this also may have an impact on how bankruptcy courts view compelling arbitration. In *Stern v. Marshall*,⁶¹ the Court found that the bankruptcy court did not have the constitutional authority “to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.”⁶² The bankruptcy court was adjudicating a counterclaim of tortious interference, and because the claim was a claim of common law between private parties, it could not be finally determined by the bankruptcy court.⁶³

This holding in *Stern* has led to what are now known as *Stern* claims, or “proceedings that are defined as ‘core’ under § 157(b) but may not, as a constitutional matter, be adjudicated as such.”⁶⁴ In 2014, the Supreme Court upheld *Stern* and determined that while a bankruptcy court cannot make a final judgment on *Stern* claims, “the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be

reviewed de novo by the district court.”⁶⁵ The Court decided the issue of *how* the bankruptcy courts should hear *Stern* claims. *Stern* claims were to proceed as if they were non-core claims, and if they are *Stern* claims or non-core, “[t]he bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment,”⁶⁶ consistent with § 157(c)(1).⁶⁷

Last year, the Court continued this line of cases with *Wellness Int'l Network, Ltd. v. Sharif*.⁶⁸ Sharif tried to discharge a debt he owed to Wellness International Network in his bankruptcy claim, and the bankruptcy court submitted a judgment against Sharif. The Supreme Court “held that Article III permits bankruptcy courts to adjudicate *Stern* claims” with the parties’ “knowing and voluntary consent.”⁶⁹

While *Stern* and its progeny only directly relate to a certain class of cases, these holdings may have implications on the power of bankruptcy courts over arbitration claims. The trend in the Supreme Court is to limit the power of the bankruptcy courts over claims only relating to “core” claims, and only allowing the bankruptcy court to

⁶¹ *Stern*, 131 S. Ct. 2594.

⁶² *Id.* at 2620.

⁶³ *Id.*

⁶⁴ *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172 (2014).

⁶⁵ *Id.*

⁶⁶ *Id.* at 2173.

⁶⁷ 28 U.S.C. § 157(c)(1).

⁶⁸ 135 S. Ct. 1932 (2015).

⁶⁹ *Id.* at 1939.

submit findings of fact and law to the District Court for judgment. How should a bankruptcy court determine an arbitration clause, when this is a decision only related to the bankruptcy claim? This subject remains uncertain, but some commentators argue that bankruptcy courts have not changed their proceedings significantly in practice.⁷⁰ It seems however, that these holdings may incline courts to compel arbitration when the claim is not necessarily core or does not directly conflict with the purposes of the Bankruptcy Code, leaning in favor of arbitration.

The issues under *Stern* and *Wellness* have already shown their application in compelling arbitration, but more in the issue of consent to adjudication under the bankruptcy court's jurisdiction. The court in *In re Allegro* held that because the party had filed a counterclaim, he impliedly consented to the court's

adjudication, and the court had jurisdiction over both the core and non-core claims.⁷¹

IV. Recent Bankruptcy Cases Deciding Arbitration Agreements

Proceedings that are only "related to" a bankruptcy case, such as a breach of contract action, are considered non-core proceedings. Bankruptcy courts have typically refused to enforce arbitration agreements when bankruptcy policy would conflict with the FAA. But the law governing non-core proceedings is more uncertain, particularly in international arbitration cases. "Because of this jurisdictional structure [core and non-core proceedings], both district courts and bankruptcy courts face questions about the enforceability of arbitration clauses and awards in bankruptcy."⁷²

⁷⁰ Keith Sharfman & G. Ray Warner, *Bankruptcy Court Jurisdiction After Executive Benefits Insurance Agency v. Arkison*, 22 AM. BANKR. INST. L. REV. 539, 539 (2014) ("Since *Stern* was decided, bankruptcy courts and the litigants who appear before them cannot be confident that it is constitutional for non-Article III bankruptcy judges to adjudicate various matters over which there is clear statutory jurisdiction, such as avoidance actions against third party transferees who are not otherwise involved or participating in the bankruptcy case. . . . Nevertheless, despite the long shadow that *Stern* has cast, bankruptcy courts around the country have

continued to operate as they did before, if for no other reason than simply because 'the show must go on.'").

⁷¹ *In re Allegro Law LLC*, No. 10-30631-WRS, 2016 WL 633661, at *17, 16 (Bankr. M.D. Ala. Feb. 16, 2016); see also *In re Thelen LLP*, No. 09-15631 (MEW), 2015 WL 4999972, at *3 (Bankr. S.D.N.Y. Aug. 21, 2015) ("The Court need not resolve disputes as to whether the claims asserted here are *Stern* Claims or whether they are claims that are merely "related to" the *Thelen* bankruptcy case, because Fontana unequivocally consented to the final adjudication of the claims in this Court.").

⁷² Kirgis, 17 AM. BANKR. INST. L. REV. at 510.

In contrast to the trend of limiting bankruptcy courts' powers under Article III, the Supreme Court is increasingly favoring compelling arbitration more generally, even when statutory rights are at stake, including arbitration of claims under "securities, anti-trust, and RICO law . . . [but] has not yet addressed enforcement of an arbitration agreement in the context of a bankruptcy proceeding."⁷³

There is still some inconsistency on this trend in lower courts. Some have continued to rely on the core/non-core distinction in deciding whether to compel arbitration, but others require the application of the "inherent conflict" test even when the claim is core.

In *Moses v. CashCall, Inc.*,⁷⁴ the district court denied Cashcall's motion to compel arbitration of Moses' claim for statutory damages, and the Fourth Circuit affirmed in part and reversed in part.⁷⁵ The Fourth Circuit affirmed the district court's discretion to deny arbitration of the constitutionally "core" claim of declaratory relief, but held that the lower court erred in denying enforcement of the arbitration agreement for the statutory damages.⁷⁶ The court

cited *Stern* in finding that it was constitutionally core, even though both claims "in Moses' complaint in the adversary proceeding are statutorily core claims, only the first claim is constitutionally core."⁷⁷ Based on the facts of the case, the court applied the "inherent conflict" test put forth in *McMahon* and determined that arbitration of the "constitutionally core claim would inherently conflict with the purposes of the Bankruptcy Code."⁷⁸

Another district court case from the Second Circuit has interpreted *MBNA* to hold that "generally courts compel arbitration where 'arbitration would not interfere with or affect the distribution of the estate,' but deny arbitration where the 'resolution of the arbitration claims directly implicated matters central to the purposes and policies of the Bankruptcy Code.'"⁷⁹ This case determined that there were severe "inherent" conflicts based on the facts of the case, and denied the motion to compel arbitration.⁸⁰ This case was recently upheld in the Second Circuit, which used the "inherent conflict" test to determine

⁷³ Lindsay Biesterfeld, *Parties to International Commercial Arbitration Agreements Beware: Bankruptcy Trumps Supreme Court Precedent Favoring Arbitration of International Disputes*, 2006 J. DISP. RESOL. 273 (2006).

⁷⁴ 781 F.3d 63, 66 (4th Cir. 2015).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 71.

⁷⁸ *Id.* at 73.

⁷⁹ *In re Lehman Bros. Holdings, Inc.*, No. 14 CIV. 7643 ER, 2015 WL 5729645, at *9 (S.D.N.Y. Sept. 30, 2015) (quoting *MBNA*, 436 F.3d at 110).

⁸⁰ *Id.* *1.

that the district court did not abuse its discretion.⁸¹

Similarly, a bankruptcy court in New York relied on the core/non-core distinction to hold that non-core claims would be referred to arbitration, but the bankruptcy court could stay the arbitration while the bankruptcy court adjudicated the claims within its “core” jurisdiction.⁸² However, even when relying on the core/non-core distinction, the court must still apply the “inherent conflict” test to determine whether the:

facts and circumstances of the case before the court reveal that there is ‘an inherent conflict between arbitration and the [Bankruptcy Code]’s underlying purposes’ and that ‘[a]rbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights ‘contingent upon an arbitrator’s ruling’ rather than the ruling of the

bankruptcy judge assigned to hear the debtor’s case.’⁸³

However, courts have also retained jurisdiction in some cases when the non-core claim would directly affect the bankruptcy proceedings. Even if a claim is not core, bankruptcy courts review the facts of the specific case to determine if the claims are so intertwined or directly affect the core bankruptcy proceedings. There are some claims on which the courts agree where the claims were integral to or directly affected the bankruptcy proceedings, including the “order of priority of creditor claims against a debtor,” or control of the property by the court for “equal distribution among the creditors.”⁸⁴

In issues of dischargeability of debt, “[b]ecause the discharge is a critical, if not the central, objective of an individual’s bankruptcy filing, arbitration of issues relating to dischargeability inherently conflicts with bankruptcy law” some courts argue that a bankruptcy court should not enforce an arbitration agreement over that claim.⁸⁵ If the issues of the bankruptcy were so “inextricably intertwined,” then the

⁸¹ *In re Lehman Bros. Holdings, Inc.*, No. 15-3480 (2nd Cir. Oct. 6, 2016) (“we conclude that arbitration would have ‘seriously jeopardize[d]’ the objectives of the Bankruptcy Code”).

⁸² *In re S.W. Bach & Co.*, 425 B.R. 78 (Bankr. S.D.N.Y. 2010).

⁸³ *In re Barker*, 510 B.R. 771 (Bankr. W.D.N.C. 2014) (quoting *White Mountain*, 403 F.3d at 169).

⁸⁴ *In re U.S. Lines, Inc.*, 197 F.3d at 637.

⁸⁵ *In re Koper*, 516 B.R. 707, 720 (Bankr. E.D.N.Y. 2014) (quoting *In re Zimmerman*, 341 B.R. 77, 80 (Bankr. N.D. Ga. 2006)).

court could refuse arbitration even if they were not core.⁸⁶

Another bankruptcy court held that even if the claim was “core,” this assessment would not automatically allow the court to stay arbitration, and the court must determine whether arbitration would “severely conflict” with the Bankruptcy Code.⁸⁷ Because the preference claims in the case were integral to the bankruptcy proceedings, and the facts in hundreds of other similar cases involving the same prosecuting party would control the adjudication of this case, the court denied arbitration of the claims.⁸⁸ Here, uniformity of the applicable facts was necessary to determine the case, and uniformity is furthered by courts, not arbitration.

But there are some claims on which the courts do not agree. For

example, in *In re Barker*, the bankruptcy court held that the twelve causes of actions brought by the debtor,⁸⁹ including violation of the state’s laws prohibiting practices by collection agencies, could all be submitted to arbitration. However, in *In re Harrelson*, the bankruptcy court held that a claim of violating debt relief agency restrictions could not be submitted to arbitration because it directly affected the core proceedings.⁹⁰ “Proceedings can be core by virtue of their nature if . . . the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings”⁹¹

While the circuit courts seem to be in agreement about using the third prong of the *McMahon* test to determine whether the court should compel arbitration or if the arbitration in that case would

⁸⁶ See *In re Eber*, 687 F.3d 1123, 1130-1131 (9th Cir. 2012) (“allowing an arbitrator to decide issues that are so closely intertwined with dischargeability would ‘conflict with the underlying purposes of the Bankruptcy Code.’”).

⁸⁷ *In re Bethlehem Steel Corp.*, 390 B.R. 784 (Bankr. S.D.N.Y. 2008).

⁸⁸ *Id.* at 794-795 (“Uniformity in application of the law to the facts in these federal statutory claims is furthered by federal court litigation and not arbitration.”).

⁸⁹ (1) breach of contract against Fox Den and Bryant; (2) unfair and deceptive acts and practices in violation of N.C. Gen. Stat. §§ 75-11, et seq., against Fox Den and Bryant; (3) fraud against Fox Den and Bryant; (4) conversion against Fox Den and Bryant; (5) violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq.,

against Fox Den and Bryant; (6) violation of North Carolina’s statutory prohibited practices by collection agencies, N.C. Gen. Stat. §§ 58-70-90, et seq., against Bryant; (7) violations of the North Carolina Debt Collection Act, N.C. Gen. Stat. §§ 75-50, et seq., against Fox Den and Bryant; (8) intentional infliction of emotional distress, apparently against all Defendants; (9) negligent infliction of emotional distress, apparently against all Defendants; (10) unconscionability, apparently against all Defendants; (11) civil conspiracy; and (12) improper Proof of Claim against Fox Den only.” *In re Barker*, 510 B.R. 771, 775 (Bankr. W.D.N.C. 2014).

⁹⁰ 537 B.R. 16, 27 (Bankr. M.D. Ala. 2015).

⁹¹ *In re U.S. Lines Inc.*, 197 F.3d at 637.

conflict with the purposes of the Bankruptcy Code, the Supreme Court has said little about the issue, even declining a writ of certiorari that would have put this question squarely before them.⁹² As a result, many of the lower courts still rely on the core/non-core distinction, where core claims are under the jurisdiction of the bankruptcy court and non-core claims can be arbitrated unless they are so intertwined with the core proceedings. The determinations remain fact specific to each case, and courts have even declined to submit non-core claims to arbitration if they directly affect bankruptcy proceedings.

V. Purpose of International Arbitration and the Federal Arbitration Act

International arbitration clauses are increasingly becoming the norm as businesses become more international and commercial disputes in general move toward arbitration and other alternative dispute resolutions outside of judicial adjudication. One driving purpose of moving to international

arbitration is to provide a neutral forum for the companies, as neither wants to go to court in the other's country on the apprehension of some type of "home court" advantage. The New York Convention's purpose, as the Supreme Court described, was to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."⁹³ Article II of New York Convention provides court must order arbitration unless it finds agreement null and void, inoperative or incapable of being performed, and § 206 of Federal Arbitration Act requires court to do the same.⁹⁴ When a party moves for international arbitration, the most minimal indication of the parties' intent to arbitrate "must be given full effect, especially in international disputes."⁹⁵

The Federal Arbitration Act⁹⁶ codified the New York Convention, and the Act was designed to prevent judicial hostility to international arbitration.⁹⁷ The Supreme Court

⁹² See *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir.), cert. denied, --- U.S. ---, 133 S.Ct. 119, 184 L.Ed.2d 26 (2012).

⁹³ *Scherk*, 417 U.S. at 520 n. 15.

⁹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II §§ 4, 206.

⁹⁵ *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991).

⁹⁶ 9 U.S.C. § 1-208.

⁹⁷ See H.R. Rep. No. 96-68, 1, 2 (1924); see also *Scherk*, 417 U.S. at 510 ("The United

has recognized an “emphatic federal policy in favor of arbitral dispute resolution.”⁹⁸ The federal policy of resolving doubts in favor of arbitration “applies with special force in the field of international commerce.”⁹⁹

In enacting this strong federal policy in favor of arbitration, Congress was concerned with enforcing private agreements into which parties had entered, which demands rigorous enforcement of arbitration agreements. This is so even when the result is “piecemeal” litigation, “at least absent a countervailing policy manifested in another federal statute.”¹⁰⁰ Courts today have sought to determine when the Bankruptcy Code creates a countervailing policy that would override this strong federal policy in favor of enforcing arbitration agreements. In the international context, “it will be necessary for national courts to subordinate domestic notions of arbitrability to

the international policy favoring commercial arbitration.”¹⁰¹

“With respect to international agreements, the Court has less discretion to deny motions to arbitrate than it does with respect to domestic agreements.”¹⁰² The Court looks to international comity, business need for predictability of disputes in the international commercial system, and a need for a neutral forum.¹⁰³ The Federal Arbitration Act was designed to “enable business men to settle their disputes expeditiously and economically.”¹⁰⁴

If courts do not respect the international arbitration agreement, “the very image of the United States in the international business community stands to be tarnished.”¹⁰⁵ Businesses would not want to continue transacting with American companies if their international arbitration agreements would not continue to be effective in providing a neutral

States Arbitration Act ... [reversed] centuries of judicial hostility to arbitration agreements”).

⁹⁸ *Mitsubishi*, 473 U.S. at 631; see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (noting a “strong federal policy in favor of enforcing [arbitration agreements]”).

⁹⁹ *Mitsubishi*, 473 U.S. at 631.

¹⁰⁰ *Dean Witter Reynolds, Inc.*, 470 U.S. at 221.

¹⁰¹ *Mitsubishi*, 473 U.S. at 639.

¹⁰² *In re Bethlehem Steel*, 390 B.R. at 795.

¹⁰³ *Mitsubishi*, 473 U.S. at 629 (“[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”).

¹⁰⁴ Hearings on S. 4213 and S. 4213 Before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., at 14 (1923) (emphasis omitted).

¹⁰⁵ *Distrigas*, 80 B.R. at 614.

international dispute resolution, and we cannot have international disputes governed solely by our laws if a prior agreement to arbitrate is valid.¹⁰⁶ The manifest intent of the Convention was to promote arbitration as resolving international disputes to facilitate international commerce.¹⁰⁷

It is important and necessary for the United States to hold its domiciliaries to their bargains and not allow them to escape their commercial obligations by ducking into statutory safe harbors. Rather, our country should take special pains to project those qualities of honesty and fairness which are essential parts of the traditional American character and be perceived as a fair and equal player in the global marketplace, particularly in our commercial relations with the underdeveloped world. Any additional time and expense required by the international arbitration process—which is only speculative at this

point—will be overshadowed in importance by the virtues of having the parties abide by their commitments.”¹⁰⁸

U.S. courts and parties are not without protection if a claim is sent to arbitration. Though the Court created this strong presumption in favor of arbitration even where statutory rights are concerned, there is still a safety net for the parties. For the award to be enforced, the parties must bring the award to the court for enforcement proceedings. When an arbitral award is brought to the court to be enforced, the court may decline to enforce the award on several grounds, including that it conflicts with public policy.¹⁰⁹ In *Mitsubishi Motors*, the court stated that even though the award is determined under another nation’s laws, if the arbitrators did not review U.S. antitrust law, and the award becomes a waiver to party’s right to pursue statutory remedy for antitrust violations, then the Court would refuse to enforce the arbitral award as against the United States’ public policy.¹¹⁰ This may reassure

¹⁰⁶ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7, 92 S. Ct. 1907, 1912 (1972) (“The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our

terms, governed by our laws, and resolved in our courts.”).

¹⁰⁷ GARY BORN, *INTERNATIONAL ARBITRATION CASES AND MATERIALS* 36 (Wolters Kluwer, 2 ed.).

¹⁰⁸ *Distrigas*, 80 B.R. at 614.

¹⁰⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b).

¹¹⁰ *Mitsubishi*, 473 U.S. at 637 n.19.

opponents of sending bankruptcy claims to arbitration because an enforcing court would have the chance to review whether the party's statutory rights were protected in the arbitration, and may decline enforcement if their rights were not.

While the Supreme Court has not addressed the issue, the Seventh Circuit has in *Baxter International v. Abbott Laboratories*.¹¹¹ In *Baxter*, the court held that the arbitral award was enforceable, and that a mistake of law is not ground for setting aside award.¹¹² The district court had construed *Mitsubishi* to only require for an enforcing court to look into whether "the tribunal took cognizance of the antitrust claims and actually decided them," but no further.¹¹³ Even though not a Supreme Court decision, it may detract from some of the protection *Mitsubishi* promised, as *Baxter* gives the indication that an enforcing court will only look to whether the arbitrators decided the issue, but not probe further.¹¹⁴

Courts should still weigh in favor of enforcing international arbitration agreements, even in bankruptcy proceedings. Broadly enforcing arbitration agreements in

the international context follows the Supreme Court's decisions, and is in line with the international communities' movement toward a neutral forum protecting all parties' rights. The international commercial community requires uniformity and predictability, and uncertainty in enforcement, even in bankruptcy proceedings can affect international commerce.

VI. Conclusion

The Supreme Court's jurisprudence has been moving towards more broadly compelling arbitration, especially in the international context; allowing arbitration over statutory claims; and limiting bankruptcy courts' power, following the *Stern* line of precedent. How this will affect the arbitration of bankruptcy claims is uncertain, but it indicates that the Court is moving in a direction of compelling arbitration even when there are core bankruptcy claims at issue, as it has done with previous statutory claims.¹¹⁵

International arbitration agreements should be even more rigorously enforced than domestic arbitration agreements, even in

¹¹¹ *Baxter Int'l, Inc. v. Abbott Labs.*, 315 F.3d 829 (7th Cir. 2003).¹¹² *Id.* at 831.

¹¹² *Id.* at 831.

¹¹³ *Id.* at 832.

¹¹⁴ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (listing the exclusive list of reasons for refusing enforcement of arbitral award); see

also *I/S Stavborg (O. H. Meling, Manager) v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974) ("We see no basis, however, to reverse the award even though it is based on a clearly erroneous interpretation of the contract.").

¹¹⁵ See, e.g., *Mitsubishi*, 473 U.S. at 625.

bankruptcy cases. As they become the norm in international agreements, companies increasingly rely on these agreements, and the need for predictability in international business is essential. Like William Mansfield, the international legal community should be “extraordinarily sensitiv[e] to the actual practices of the mercantile community,”¹¹⁶ and while the Supreme Court has not addressed the issue of when arbitration and bankruptcy cross, the United States should continue its trend of enforcing international arbitration agreements broadly.

¹¹⁶ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 153 (Yale University Press, 2 ed., 2014).