A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings

by

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INTRODUCTION

The policies and objectives underlying American insolvency[1] and arbitration laws are not easily reconcilable. To make matters more complex, these bodies of law are constantly changing, and, at times, in conflicting ways. During the last half century, the U.S. judiciary has reformed and solidified its acceptance of arbitration, partly on the heels the Federal Arbitration Act[2] adopted in 1925. Under the current regime, arbitration enjoys almost unfettered acceptance as a copacetic form of dispute resolution. Regardless of the cause, the pacification of judicial hostility toward arbitration is undeniable. But this overly deferential approach has its drawbacks. For instance, the United States is currently experiencing public outcry over abusive arbitration practices in the consumer space, a prime example of which is the use of arbitration agreements to foreclose class action litigation. The disgruntled sentiment toward arbitration has prompted responses from the U.S. Congress,[3] government regulatory bodies,[4] scholars,[5] and the media.[6] This atten-

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[1]This Article uses the terms "insolvency" and "insolvent" synonymously with the terms "bankruptcy" and "debtor," unless otherwise indicated. Because "insolvency" is used more commonly internationally, and because this Article advances a comparative law approach, the term is more fitting. Additionally, the terms are more inviting of an international readership.

[2]9 U.S.C. §§ 1 to 16 (2012).

[3]*See infra* note 109.

[4]*See infra* note 109.

[5]*See infra* note 107.

[6]*See* discussion *infra* subpart I.B.2 and accompanying notes.

tion guarantees to keep arbitration in the spotlight—and the courts—in the years to come.

During the same period, American insolvency law has seen its own shifts and structural changes.[7] Most specifically, the jurisdictional scheme and the authority of American bankruptcy judges have been reconceptualized multiple times, both by statutory directives and by judicial decisions. In the early 1980s, the U.S. Supreme Court announced a monumental decision that undermined bankruptcy judges' authority to finally decide certain insolvency-related disputes.[8] What ensued in the years following was a back-and-forth between Congress and the Supreme Court to reconcile the role of bankruptcy courts in the domestic insolvency scheme with Article III of the U.S. Constitution. The result is a fragmented jurisdictional design mostly predicated on claim classifications[9] that are sometime undiscernible in their own right.

With all of these moving parts, it is unsurprising that U.S. courts have struggled when insolvency and arbitration converge. Determining the enforceability of arbitration agreements in insolvency cases illustrates this problem. Through the guise of foundational Supreme Court jurisprudence, intermediate appellate courts have sought to balance an unabashed acceptance for arbitration with the intricacies of insolvency. Unfortunately for all involved, courts have construed the governing statutes and Supreme Court case law in a manner that fails to promote uniformity and predictability.[10] Parties in insolvency proceedings seeking guidance on the enforceability of arbitration agreements instead face standards that are malleable and that, for the most part, provide no clear answers.

The arbitration and insolvency law abyss has not gone unnoticed. Scholars and commentators over the past decade have proposed innovative solutions. The proposals truly run the gamut, from a legislative solution to a modified abstention framework to rethinking foundational Supreme Court jurisprudence.[11] But neither Congress nor the courts have heeded this commentary. Instead, U.S. courts have further entrenched themselves in standards that, as one scholar describes, provide "very little clear guidance" and are "so vague and malleable that they give courts a license to do almost anything they want."[12] Through the uncertainty, a clear circuit split has developed.

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[7]*See* discussion *infra* subpart II.A and accompanying notes.

[8]*See* N. Pipeline Constr. Co. v. Marathon Pipe Co., 458 U.S. 50 (1982).

[9]*See* discussion *infra* subpart II.A and accompanying notes.

[10]*See* discussion *infra* subpart II.B and accompanying notes.

[11]*See* discussion *infra* Part III and accompanying notes.

[12]Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 520 (2009).

The Supreme Court, however, has not yet taken the occasion to address the issue, leaving lower courts guessing.

Because the scholarly debate thus far has failed to gain traction, this Article advances a reset so to speak through the lens of a comparative law analysis.[13] To date, the scholarly commentary has focused exclusively (but thoughtfully) on American law in an effort to tease out a solution. But, as this Article details, the problem is not limited to domestic soil. Governments and courts around the globe face the similar question of how to reconcile arbitration with local insolvency schemes. For that reason, there exists a developed and approachable body of knowledge that may serve to expand our understanding of this common issue and deepen our intellectual stock so to divine a workable solution. This Article upends the current perspective by examining how some twelve countries from around the world deal with arbitration agreements in insolvency cases.[14] In doing so, common principles and themes emerge, which serve as a platform to guide and support a reconstituted framework.

In the end, the proposed framework advanced by this Article draws from foundational Supreme Court cases in order to categorize potential arbitrable claims by determinative markers, such as the origin of the claim and bankruptcy judges' final adjudicatory authority. These markers translate into claim categories, which then receive mostly per se treatment (subject to limited exceptions) consistent with how other developed countries approach similarly situated claims. Most importantly, the framework advanced is one that is workable and predicable, alleviating some of the morass that plagues the current approaches utilized by the courts.

This Article proceeds in five Parts. Part I outlines the policies and objectives underlying both American insolvency law and arbitration law. The analysis portrays the pro-arbitration stance of the U.S. courts but foreshadows hard times to come. The analysis also highlights important principles of American insolvency law and illustrates some of the impediments that restrict arbitration's reach in insolvency cases. Part II starts by providing an overview of the jurisdictional design and authority of U.S. bankruptcy courts and judges, which has seen tremendous movement over the last few years. Additionally, this Part provides a comprehensive analysis of how U.S. courts currently view arbitration agreements in insolvency cases, focusing on the deepening split between circuit courts. Part III details an array of proposed solutions in response to the struggle to develop a workable framework to govern arbitration agreements in insolvency proceedings. As a testament to the difficulty and seriousness of the problem, the proposals are of all shapes

[13] *See* discussion *infra* Part IV and accompanying notes.

[14] *See* discussion *infra* subpart IV.B and accompanying notes.

and sizes. Because these proposals have yet to gain the attention of U.S. decision makers, Part IV offers a change of perspective through a comparative law analysis. The analysis highlights common issues that arise across foreign jurisdictions and serves as a source of ideas and potential solutions. Finally, Part V proposes a reconstituted framework predicated on existing Supreme Court jurisprudence and informed by how other developed countries around the world approach this issue. The proposed framework is workable and immediate.

I. AMERICAN INSOLVENCY AND ARBITRATION LAW

Both bankruptcy and arbitration serve important functions in the American legal landscape.[15] Although much ink has been spilt over bankruptcy and arbitration's competing policy objectives,[16] the two bodies of law largely coexist, and with increasing overlap.[17] As expected, this interaction has stimu-

[15]The framers' express reference to bankruptcy in the U.S. Constitution underscores its importance to the United States legal system. *See* U.S. CONST. art. 1, § 8, cl. 4 (authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States"). In The Federalist No. 42, James Madison perceived the purpose of the Bankruptcy Clause as: "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question." *See also* Barry E. Adler, *The Law of Last Resort*, 55 VAND. L. REV. 1661, 1662 (2002) ("bankruptcy law, properly understood, is an inevitable part of private law"); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 5 (1995) ("[Bankruptcy] is a subject . . . that commands much attention in modern American life. No corner of our society seems immune from the ubiquitous reach of bankruptcy."). Comparatively, although arbitration is not as steeped in American legal history, its importance to the United States's modern legal regime is no less real. *See* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1946 (1996) ("The idea of . . . arbitral adjudication . . . has gained substantial standing in the U.S. legal system in the last ten to fifteen years. Owing largely to the holdings of the U.S. Supreme Court, arbitration law and procedure have emerged from the obscurity of specialized practice and entered the adjudicatory mainstream." (footnotes omitted)); Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 143 (2002) ("Our society is witnessing . . . the evolution of an arbitration system that is the preferred way used to resolve various types of disputes and that is gradually replacing litigation as the primary dispute resolution process.").

[16]It is well documented that the underlying principles of insolvency and arbitration serve different purposes. *See, e.g.*, U.S. Lines, Inc. v. Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999); MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006); La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987); Philipp Wagner, *Insolvency and Arbitration: A Pleading for International Insolvency Law*, 5 NO. 2 DISP. RESOL. INT'L 189, 189 (2011); Kirgis, *supra* note 12, at 503; Patrick M. Birney, *Reawakening Section 1334: Resolving the Conflict Between Bankruptcy and Arbitration Through an Abstention Analysis*, 16 AM. BANKR. INST. L. REV. 619, 657 (2008); Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 200 (2007).

[17]In surveying cases before a leading international arbitral institution, one commentator noted there were only seventeen arbitral awards dealing with bankruptcy from 1968 to 2002; whereas, from 2002 to 2006, there were sixteen awards dealing with insolvency issues. Sara Nadeau-Seguin, *When Bankruptcy and Arbitration Meet: A Look at Recent ICC Practice*, 5 NO. 1 DISP. RESOL. INT'L 79, 79 (2011).

lated both judicial and scholarly response in an attempt to navigate the intersection between the two bodies of law. This Article is concerned with one aspect of that intersection: the enforceability of arbitration agreements contained in pre-insolvency contracts upon commencement of an insolvency case. That is, this Article examines the enforceability paradigm that is constructed the moment one party to the agreement invokes the protections of domestic insolvency laws.

The next two subparts provide a brief overview of certain key principles of insolvency and arbitration law in the United States. Particularly, these subparts expand on how these bodies of law have evolved in American legal history, which is critical to understanding the approaches U.S. courts have endorsed in their endeavor to balance the two.

A. American Insolvency Law and Policy

American insolvency law is grounded "in a detailed and complex statutory scheme" whereby specialized tribunals interpret and apply a federal statute, the Bankruptcy Code[18] (Code).[19] Since the adoption of the National Bankruptcy Act of 1898,[20] the United States has sought to centralize an array of matters affecting insolvent parties (including dispute resolution) in courts of bankruptcy.[21] Although the jurisdictional and authoritative bounds of bankruptcy courts and judges have consistently been eroded[22]—and, at

[18]Codified in title 11 of the United States Code.

[19]Kirgis, *supra* note 12, at 505. Prior to the adoption of the modern bankruptcy system, the individual states primarily governed bankruptcies in the United States. Tabb, *supra* note 15, at 13 (explaining that in the 109 years after the Constitution was ratified states "were free to act in bankruptcy matters for all but 16 [years]"). The federal government's involvement, which was limited, was mostly triggered by major financial disasters. *Id.*

[20]Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[21]*See* Resnick, *supra* note 16, at 190–96. The 1898 Act "marked the beginning of the era of permanent federal bankruptcy legislation." Tabb, *supra* note 15, at 23. Despite the centralization and expansive model, the 1898 Act actually "narrow[ed] the compass of federal bankruptcy jurisdiction" from the previous federal bankruptcy acts. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 Am. Bankr. L.J. 121, 127 (2012); Resnick, *supra* note 16, at 190.

[22]Some argue the leading edge of this erosion was the U.S. Supreme Court's finding that the Bankruptcy Reform Act of 1978's broad jurisdictional grant to bankruptcy courts was unconstitutional because bankruptcy judges lacked Article III status. *See generally* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). The U.S. Congress has since responded by reconstituting bankruptcy courts as units of the federal district courts and enabling district courts to refer bankruptcy cases to specialized bankruptcy judges. 28 U.S.C. § 157(a) (2012). It should be noted, however, that the jurisdictional structure for U.S. bankruptcy courts is much more complex than described. Moreover, a recent line of Supreme Court cases suggests the contours of bankruptcy judges' final adjudicatory authority are still being defined. *See generally* Stern v. Marshall, 564 U.S. 462 (2011) (holding bankruptcy judges lack jurisdiction under Article III to enter final judgment on certain statutory "core" claims); Bellingham Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165 (2014); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015) (holding bankruptcy judges may decide so-called *Stern* claims when parties knowingly and voluntarily consent to adjudication by bankruptcy court). *See also infra* subpart II.A.

times, reshaped or reconstituted—the desire to centralize dispute resolution remains a central tenet of American insolvency law.[23] And courts continually remind us that the centralization of insolvency-related disputes is essential to providing insolvent parties an expeditious remedy and preserving creditors' interests in the insolvency estate.[24] As expanded upon later, the concept of centralization is a significant supporting factor that courts rely on to override arbitration agreements so to resolve insolvency-related matters in bankruptcy courts rather than arbitral fora.

Scholars have observed that American insolvency law primarily serves two fundamental purposes: (1) ensuring an insolvent is afforded the opportunity for a "fresh start";[25] and (2) providing a means to equitably distribute nonexempt assets to creditors.[26] The Code outlines numerous mechanisms to facilitate these purposes—indeed, the structure of the Code is formulated in a way to promote these foundational principles. Some of the more important safeguards that affect arbitration agreements are the automatic stay,[27] the creation of the bankruptcy estate,[28] and the insolvent's right to reject executory contracts.[29] These insolvency safeguards alter or limit parties' prepetition contract rights and thus ultimately vest the bankruptcy courts with the authority to enforce or deny arbitration.

1. *Section 362: Automatic Stay*

Broadly speaking, § 362 of the Code "stays" existing proceedings and collection efforts against an insolvent. The effect of the stay is to force those seeking recovery into a single forum under a streamlined process.[30] The im-

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[23]The focus on centralization is a necessary byproduct of the procedural niceties of the bankruptcy process. Unlike traditional modes of litigation—where an adversary's litigation posture is mostly defined by which side of the "v" it is on—insolvency cases pool together a multitude of parties with varying interests, both in the insolvent and in the underlying proceeding. *Cf.* Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 170 (4th Cir. 2005) ("To protect reorganizing debtors and their creditors from piecemeal litigation, the bankruptcy laws 'centralize all disputes concerning [a debtor's legal obligations] so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.'" (citations omitted)).

[24]*See, e.g.*, Adams v. Zarnel (*In re* Zarnel), 619 F.3d 156, 171 (2d Cir. 2010) (noting bankruptcy's centralization feature "ensures a fair distribution of assets if the debtor proceeds through bankruptcy").

[25]Kirgis, *supra* note 12, at 505. *See also* Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 562 (2010) (labeling insolvent's fresh start as "one of the central, if not the most significant, policies underlying" insolvency law); Jay L. Zagorsky & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?*, 16 AM. BANKR. INST. L. REV. 283, 283 (2008) ("Bankruptcy's central theoretical objective, from the perspective of the individual debtor, is to afford debtors the opportunity for a 'fresh start.'"). *See also* Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918).

[26]Kirgis, *supra* note 12, at 505. *See also* 2 COLLIER ON BANKRUPTCY, para. 105.01 (15th ed. 2009).

[27]11 U.S.C. § 362 (2012).

[28]§ 541.

[29]§ 365.

[30]*See, e.g.*, Bronson v. United States, 46 F.3d 1573, 1579 (Fed. Cir. 1995) (citing Pettibone Corp. v.

portance of staying the actions of zealous creditors is twofold. The stay provides the insolvent the necessary "breathing room" to reorganize its financial affairs.[31] And, the stay protects the assets of the estate for the benefit of *all* creditors, diluting the need for a race to the insolvent's assets.[32] The stay therefore functions to protect creditors from one another.[33] Consequently, the stay forecloses the opportunity for creditors independently to pursue prepetition debts that are subject to the jurisdiction and authority of the bankruptcy court, absent obtaining express relief from the court.

The stay is especially important to arbitration because it shifts determinations on the enforceability of an arbitration agreement to the bankruptcy court. Because the "commencement or continuation" of an arbitration is within the scope of the stay,[34] a party seeking to compel arbitration or continue an ongoing proceeding must first approach the bankruptcy court for leave to proceed with arbitration or risk a stay violation claim[35]—or, even worse, the nonenforcement of an arbitral award. For example, in *ACandS, Inc.*, the U.S. Court of Appeals for the Third Circuit held that an arbitration between the debtor and a creditor violated the stay and, therefore, the result-

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Easley, 935 F.2d 120, 123 (7th Cir. 1991)); Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1214 (9th Cir. 2002) ("In providing the automatic stay, Congress intended all claims against a debtor be brought in a single forum, the bankruptcy court."). The stay does not affect a limited list of conduct enumerated in § 362(b). Additionally, § 362(d) provides means by which creditors may obtain relief from the stay after notice and a hearing before the bankruptcy court.

[31]*See* Nat'l Bank of Ark. v. Panther Mountain Land Dev., LLC (*In re* Panther Mountain Land Dev., LLC), 686 F.3d 916, 927 (8th Cir. 2012) (discussing and citing legislative history of § 362, H.R. Rep. No. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 6297 and S. Rep. No. 95-989, at 54-55 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41). *See also* Nadeau-Seguin, *supra* note 17, at 81.

[32]*See, e.g.*, C.H. Robinson Co. v. Paris & Sons, Inc., 180 F. Supp. 2d 1002, 1016 (N.D. Iowa 2001) (discussing and citing legislative history of § 362, S. Rep. No. 95-989, at 54-55 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41); Official Comm. of Unsecured Creditors v. PSS Steamship Co. (*In re* Prudential Lines Inc.), 928 F.2d 565, 573 (2d Cir. 1991).

[33]John D. Ayer, Michael Bernstein, & Jonathan Friedland, *An Overview of the Automatic Stay*, AM. BANKR. INST. J., Dec./Jan. 2004, at 16; Nadeau-Seguin, *supra* note 17, at 81.

[34]§ 362(a)(1) (providing the automatic stay operates to stay "the commencement of or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor"). *See* H.R. Rep. No. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 ("The scope of [362(a)(1)] is broad. All proceedings are stayed, including arbitration . . . ."); S. Rep. No. 95-989, at 49, 54-55 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5835, 5840-42. *See also* ACandS, Inc. v. Travelers Cas. & Sur. Co., 435 F.3d 252, 259 (3d Cir. 2006) ("The scope of the automatic stay is broad and covers all proceedings against a debtor, including arbitration."); *but cf.* Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 992 (2d Cir. 1990) ("We hold, therefore, that § 1113(f) precludes application of the automatic stay to disputes involving a collective bargaining agreement only when its application allows a debtor unilaterally to terminate or alter any provision of a collective bargaining agreement."). Furthermore, courts have held that § 362(a) cannot be waived or limited by contract. *See, e.g.*, *ACandS, Inc.*, 435 F.3d at 259.

[35]The Code provides an aggrieved individual debtor with a cause of action for willful violations of the automatic stay. *See* § 362(k)(1). The debtor may recover "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." § 362(k)(1).

ing award was void.[36] The lower court had found no violation because *the debtor* initiated the arbitration.[37] In reversing, the Third Circuit held, "To avoid interfering with the broad purposes served by the automatic stay, it was necessary for the arbitration proceeding to halt as soon as the scope of the parties' submissions supported an award that could diminish ACandS's estate."[38]

The effect of the stay is not necessarily limited to domestic debtors. The United States has officially adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law on Cross-Border Insolvency),[39] codified at 11 U.S.C. §§ 1502 to 1532, which is generally "designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency."[40] Section 1520 (Article 20 of the Model Law on Cross-Border Insolvency) instructs that § 362's provisions will apply equally to an insolvent's U.S. assets upon recognition of that insolvent's "foreign main proceeding."[41] The Guide to the Model Law clarifies that the restrictions on the "commencement or continuation of individual actions"[42] apply equally to actions that are before arbitral tribunals.[43]

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[36]*ACandS, Inc.*, 435 F.3d at 260.

[37]ACandS, Inc. v. Travelers Cas. & Sur. Co., CIV.A.00-CV-4633, 2004 WL 2075117 (E.D. Pa. Sept. 16, 2004), *vacated and remanded*, *id.*

[38]*ACandS, Inc.*, 435 F.3d at 260. Interestingly, the Third Circuit also rejected the creditor's argument that its participation in the arbitration did not violate the stay because it was only defending itself in the debtor-initiated arbitration. *Id.* at 259. The court acknowledged that, "Defenses, as opposed to counterclaims, do not violate the automatic stay because the stay does not seek to prevent defendants sued by a debtor from defending their legal rights and 'the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it . . . .'" *Id.* (citing Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989)). And the "procedural flexibility" that govern arbitrations generally permitted the creditor "to make a colorable argument that it respected the stay by merely defending its interests." *Id.* But "[d]espite the importance of procedural informality, however, the panel's authority must yield when a dispute threatens the rights of third parties in violation of the laws of the United States." *Id.* at 260.

[39]Forty-three countries have adopted the Model Law on Cross-Border Insolvency, including some of the Unites States's closest trade partners, including Australia, Canada, Japan, Mexico, and the United Kingdom. *See* UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Aug. 26, 2017).

[40]UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation 27 (2014), http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf [hereinafter Guide to the Model Law].

[41]"Foreign main proceeding" is a term of art as used by the Model Law on Cross-Border Insolvency. It refers to "a foreign proceeding pending in the country where the debtor has the center of its main interests." § 1502(4).

[42]Model Law on Cross-Border Insolvency, art. 20(1)(a).

[43]Guide to the Model Law *supra* note 40, at para. 180. The Guide to the Model Law explains, however, that the particularities of international arbitration cannot be completely accounted for in applying the stay in an international proceeding. *Id.* "For example, if the arbitration does not take place in either

In sum, by forcing creditors to the bankruptcy courts for relief from the stay,[44] § 362 of the Code operates to vest with the bankruptcy court the authority to decide whether arbitration is appropriate under the circumstances. Armed with this review power, and the policy objectives of the Code, U.S. bankruptcy courts are perceived to enjoy a heightened level of discretion[45]—as compared to the level of discretion courts have to deny requests to compel arbitration in non-bankruptcy proceedings—to limit otherwise valid arbitration agreements.

2. *Section 541: Property of the Bankruptcy Estate*

Section 541 of the Code defines property of the bankruptcy estate broadly and effectively shelters an insolvent's assets from becoming subject to an arbitral award without court approval.[46] Even further, several provisions in the Code bring into the estate interests in which the insolvent does not have a possessory interest at the time of filing the petition for bankruptcy.[47] This definition comports with achieving the objectives of the Code[48] by ensuring the bankruptcy courts have broad jurisdiction over an insolvent's assets to promote the central aggregation of the property and the expeditious resolution of all matters connected thereto.[49] As Professor Jay Westbrook has noted, "The objective of bankruptcy law is best served by vesting total

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the enacting State [of the Model Law on Cross-Border Insolvency] or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings." *Id.* This reality demands that international parties take an even more measured approach in navigating the contours of insolvency and arbitration law.

[44]Creditors eager to proceed with arbitration would need to seek relief from stay under § 362(d). Subsection (1) provides that after notice and a hearing the bankruptcy court may grant relief "for cause" shown.

[45]*See* discussion *infra* subpart II.B. and accompanying notes.

[46]11 U.S.C. § 541(a)(1) (2012) (defining property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case"). Recognizing the broad nature of § 541, the U.S. Supreme Court in *United States v. Whiting Pools, Inc.* noted the legislative history of § 541 confirmed this proposition: "The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." 462 U.S. 198, 205, n.9 (1983) (alteration in original) (citing H.R. Rep. No. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 6297; S. Rep. No. 95-989, at 82 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5868, 6323).

[47]*Id.* at 205 ("These sections [§§ 543, 547, and 548] permit the trustee to demand the turnover of property that is in the possession of others if that possession is due to a custodial arrangement, § 543, to a preferential transfer, § 547, or to a fraudulent transfer, § 548.").

[48]5 COLLIER ON BANKRUPTCY, para. 541.01 (16th ed. 2014).

[49]*Id.* The bankruptcy courts by reference from the district courts, 28 U.S.C. § 157(a), have exclusive jurisdiction over property of the bankruptcy estate. *See* 28 U.S.C. § 1334(e)(1) (2012). The U.S. Court of Appeals for the Ninth Circuit has explained:

> The rationale underlying section 1334's broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate is clear. This section allows a single court to preside over all of the affairs of the estate, which promotes a "congressionally-endorsed objective: the efficient and expeditious resolution of all matters connected to the bankruptcy estate."

control of the debtor's affairs in the bankruptcy court."[50] Therefore, most creditors who intend to participate in the distribution of an insolvent's estate must (at some point) submit to the jurisdiction of the bankruptcy court.[51]

Moreover, when a corporate entity files for bankruptcy protection in the United States a new fictional legal entity, which is separate and distinct from the prepetition entity, is automatically formed for administering the affairs of the insolvent.[52] The insolvent generally remains in possession of the assets in reorganization cases, absent a showing of cause or gross mismanagement, in which case, the bankruptcy court may appoint a trustee to manage the assets of the insolvent. A representative of insolvent is appointed as the debtor-in-possession to manage estate assets.[53] In managing the property of the estate, the Code requires that a debtor-in-possession or trustee operate under a "heightened fiduciary duty" to preserve the estate and maximize the return for creditors.[54] These duties, "in something more than an abstract sense," are greater than those "imposed under a contract, or pursuant to court order."[55]

Like the automatic stay, the broad definition of estate property naturally funnels disputes concerning the insolvent and its property to the bankruptcy court. This is particularly relevant to arbitration in the enforcement of awards. That is, a creditor seeking to enforce an arbitral award against an insolvent generally must approach the bankruptcy court for recognition by filing a proof of claim in the insolvency case. This scheme therefore indirectly affects the enforceability of arbitration agreements. For instance, parties must recognize that the value of any future award—at least as to collecting against assets of the estate—is derivative of the bankruptcy court's approval of the arbitration agreement and the arbitration itself. Put differently, although a non-sanctioned arbitration may result in a favorable award, the award only has value if the court recognizes it. Accordingly, § 541 of the Code also func-

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Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1155 (9th Cir. 1991).

[50]Jay Lawrence Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 598 (1983). *See also Town & Country*, 963 F.2d at 1155.

[51]Creditors generally assert their interest by filing a proof of claim in the insolvency case under 11 U.S.C. § 501 (2012). *Compare* § 501(a) (allowing but not requiring creditors to file proofs of claim), *with* § 502(a) (providing a "claim or interest, proof of which is filed under section 501," may be deemed allowed entitling creditor to share in disbursement of the estate). *See also* Int'l Bus. Mach. v. Fernstrom Storage & Van Co. (*In re* Fernstrom Storage & Van Co.), 938 F.2d 731, 733 (7th Cir. 1991) (construing §§ 501 and 502).

[52]*See, e.g.*, *In re* Trans World Airlines, Inc., 261 B.R. 103, 115 (Bankr. D. Del. 2001); Michael D. Sousa, *Making Sense of the Bramble-Filled Thicket: The "Insured vs. Insured" Exclusion in the Bankruptcy Context*, 23 EMORY BANKR. DEV. J. 365, 421 (2007).

[53]Kirgis, *supra* note 12, at 507.

[54]Sousa, *supra* note 52, at 421 (noting § 1107 in chapter 11 reorganization cases).

[55]*In re* Erickson, 183 B.R. 189, 194 (Bankr. D. Minn. 1995).

tions to direct decisions on the enforceability of arbitration agreements to bankruptcy courts.

3. *Section 365: Executory Contracts*

Equally important to this discussion is the Code's manipulation of parties' prepetition contract rights as a matter of substantive, statutory bankruptcy law. Section 365(a) of the Code permits the debtor-in-possession or trustee to reject or assume executory contracts.[56] The definition of an executory contract is somewhat amorphous and has prompted more debate than this author cares to detail.[57] Notwithstanding, it is widely accepted an executory contract is a contract "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[58] Once an executory contract is rejected, the aggrieved party is left with a prepetition breach of contract claim, which will receive unsecured status in the insolvency case.[59]

The Code's treatment of executory contracts illustrates the centralized focus of American insolvency law. That is, § 365 includes a host of treatments in dealing with executory contracts that otherwise do not exist outside of the insolvency process. Some have even argued that § 365 grants a debtor-in-possession or trustee the right to reject an agreement to arbitrate.[60] This theory is premised on the doctrine of separability, reasoning that an arbitration agreement is a separate agreement from that of the principal agreement and, therefore, may be rejected alone as an executory contract. As

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[56]11 U.S.C. § 365(a) (2012) provides: "[T]he trustee, subject to court approval, may assume or reject any executory contract . . . of the debtor." One commentator has exhorted that § 365 advances the policies and goals of bankruptcy by expediting the sale of a debtor's assets, which "include[s] the right to assign contracts regardless of non-bankruptcy law and contractual provisions to the contrary." David R. Kuney, *Intellectual Property Law in Bankruptcy Court: The Search for A More Coherent Standard in Dealing with A Debtor's Right to Assume and Assign Technology Licenses*, 9 AM. BANKR. INST. L. REV. 593, 603 (2001).

[57]*See* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. COLO. L. REV. 845, 846 (1988) ("Much of the trouble surrounds the definition of an 'executory' contract, a term which has no statutory definition.").

[58]This definition originated from Professor Vern Countryman's oft-cited law review article. Vern Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 MINN. L. REV. 439, 460 (1973). Although numerous scholars have offered competing theories, Professor Countryman's definition has withstood the test of time. Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 236–37 (1989) (explaining Professor Countryman's definition for executory contracts is standard).

[59]For instance, if the insolvent breaches the executory contract after it has assumed the contract, the non-offending party may assert a claim in the insolvency case, which is entitled to priority status as a post-petition administrative expense. § 503(b)(7). Rejection of the contract under § 365(a), however, constitutes a breach of contract that relates back to the petition for insolvency. *See* § 365(g). This leaves the non-offending party with a prepetition breach-of-contract claim rather than an administrative expense claim.

[60]*See* discussion *infra* subpart III.C. and accompanying notes.

detailed later, this theory has failed to gain traction with U.S. courts. Quite to the contrary, courts have treated the doctrine of separability in a different manner.

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Sections 362, 541, and 365 are only a few of the provisions that the Code deploys to effectuate the purposes and objectives of insolvency law. On a macro level, and as detailed further in the next subpart, the tenets of American insolvency law conflict with the policy underpinnings of arbitration law. In practice, the result is a malleable framework that attempts to guide parties seeking to enforce arbitration agreements in domestic insolvency cases.

B. American Arbitration Law and Policy

Similar to insolvency law, American arbitration law is a creature of statute. The Federal Arbitration Act (FAA), however, is less comprehensive (this is a gross understatement) than the Bankruptcy Code and is seemingly straightforward in its application.[61] Notwithstanding the statute's brevity, the FAA is vast in scope,[62] especially as to its preemptive power.[63] The FAA facilitates three purposes[64]: (1) enforcing agreements to arbitrate;[65] (2)

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[61]Kirgis, *supra* note 12, at 511; Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 Nev. L.J. 385, 390 (2007).

[62]*See, e.g.*, David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. Rev. 1027, 1069 (2012). Professor Roger Perlstadt has argued the FAA is inconsistent with Article III's "ostensible assignment of the task of resolving the dispute to the federal judiciary." Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 Am. U. L. Rev. 201, 203 (2012). A spin on this argument received lip service at oral arguments before the U.S. Supreme Court in an important, but underwhelming, bankruptcy jurisdiction case. *Exec. Benefits Ins. Agency v. Arkinson Oral Arguments*, SupremeCourt.Gov,http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx. In addressing the issue of whether district courts' referral of bankruptcy cases to bankruptcy courts violates Article III, Justice Kagan asked the advocate whether this scenario was any different from arbitration and the FAA. *Id.* at 53. Chief Justice Roberts quickly deflected the question, opining that arbitration is different because it involves private contracts. *Id.* at 54. Justice Kagan quipped, "A matter of contract versus a matter of consent? Like I said, you understand the difference." *Id.* at 55. Although the issue was not addressed in the written opinion, in a follow up case to *Executive Benefits*, the Supreme Court did hold that "[t]he entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver'" by informed consent. Wellness v. Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015).

[63]Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?*, 8 J. Bus. & Tech. L. 345, 346 (2013); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. Rev. 1189, 1191 (2011); Weston, *supra* note 61, at 386. *See also* Southland Corp. v. Keating, 465 U.S. 1, 3 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

[64]Kirgis, *supra* note 12, at 511.

[65]9 U.S.C. § 2 (2012) ("A written provision . . . evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

outlining a framework for judicial enforcement of arbitral awards;[66] and (3) prescribing the limited grounds for judicial review of arbitral awards, which furthers the finality of awards.[67]

Understanding the tenor of American arbitration law in its current form is best accomplished by examining its history, specifically U.S. courts' acceptance of arbitration as a permissible form of dispute resolution.[68] It is widely held that Congress enacted the FAA to "reverse[ ] years of judicial hostility towards arbitration."[69] But even after the FAA came into being, courts' acceptance of arbitration was not immediate; rather, it gradually began to take shape in the latter half of the twentieth century. A prime illustration of the U.S. Supreme Court's view of arbitration in the mid-twentieth century is its decision in *Wilko v. Swan*.

1. *Wilko v. Swan* and its Eventual Demise

In the seminal case of *Wilko v. Swan*, the Supreme Court interpreted the FAA narrowly and declined to compel arbitration.[70] *Wilko* involved a customer of a brokerage house subject to an arbitration agreement in a margin

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[66]§ 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.").

[67]§ 10(a) provides that an award may be vacated in the following cases:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[68]For a detailed account of arbitration in the United States up until 1991 *see* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION (1991).

[69]Resnick, *supra* note 16, at 186 (noting the "hostility was premised, in part, on the possibility that an arbitrator could make an unreviewable error of law. The possibility of such errors was heightened because arbitrators in commercial disputes were 'frequently men drawn for their business expertise,' rather than chosen for their erudition in the law." (citations and footnotes omitted)); Kirgis, *supra* note 12, at 512. *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) ("The United States Arbitration Act, now 9 U.S.C. s 1 et seq., revers[ed] centuries of judicial hostility to arbitration agreements. . . ." (footnote omitted)). One author has traced the judicial hostility towards arbitration back to English judges. Aragaki, *supra* note 63, at 1128 (explaining "[t]he traditional account is that English judges had crafted artificial common law rules that impaired the enforceability of arbitration agreements because they were jealous of competing dispute resolution forums that tended to 'oust' them of their jurisdiction . . . ." (footnotes omitted)); *see also* Resnick, *supra* note 16, at n.17.

[70]346 U.S. 427 (1953).

contract.[71] The customer brought a claim for fraud under the Securities Act of 1933 (1933 Act).[72] The Court held that the customer was free to litigate his claim in the courts because the agreement to arbitrate was, in essence, a stipulation to waive compliance with an express provision in the 1933 Act.[73] The underlying facts and holding in *Wilko* are not as important as the tone used by the Court. The Court denounced arbitration as an adequate form of adjudication because of arbitrators' ability to ignore the law.[74] *Wilko* perfectly embodies U.S. courts' hesitation to accept arbitration as an alternative to court-based litigation in the United States in the mid-1900s.

In the years following *Wilko*, however, judicial acceptance of arbitration began to take shape.[75] In 1967, the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* confirmed the broad enforceability of arbitration agreements, finding fraud in the inducement of a contract was a question for the arbitrators to decide, not the courts.[76] This was a monumental step, and the Court did not stop there. Later, in *Scherk v. Alberto-Culver Co.*, the Court distinguished *Wilko* and ordered international parties to arbitrate their claims in Paris under the Securities and Exchange Act of 1934 (1934 Act).[77]

Scherk involved an international arbitration agreement between an American buyer and a German seller in a contract for the purchase of three enterprises.[78] After the buyer discovered certain trademarks were substantially encumbered—despite the seller's warranty to the contrary—the buyer offered to rescind the contract.[79] When the seller refused, the buyer initiated

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[71]*Id.* at 429.

[72]*Id.* at 428.

[73]*Id.* at 438.

[74]*See* MACNEIL, *supra* note 68, at 63. Specifically, the Court noted:

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the [Securities] Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," see, note 1, supra, cannot be examined. Power to vacate an award is limited.

Wilko, 346 U.S. at 435.

[75]Professor Macneil suggests that the growing acceptance during the time was partly due to the Supreme Court's "general rejection of public policy and one-sided limitations." MACNEIL, *supra* note 68, at 71. Additionally, "the increasing legalization and lawyerization of arbitration . . . [has] been a significant factor in the elimination of resistance by the legal profession as such to modern arbitration." *Id.* at 59 (footnotes omitted).

[76]388 U.S. 395 (1967).

[77]417 U.S. 506, 519-20 (1974).

[78]*Id.* at 508.

[79]*Id.* at 509.

litigation under the 1934 Act in the federal district court in Illinois.[80] In a 5-4 decision reversing two lower courts, the Supreme Court mandated compliance with the arbitration agreement and signaled the first carve-out to *Wilko*.[81]

Writing for the majority, Justice Stewart left no question as to his immediate concern. Indeed, animating throughout the relatively short decision is the international nature of the parties' relationship and the underlying dispute. He explained, "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes [namely, agreeing to choice-of-law rules and a neutral forum upfront], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[82] The Court therefore aptly recognized that,

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. . . . "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."[83]

In a host of cases stretching over the 1970s and 1980s, the Supreme Court laid to rest its concerns about arbitration as a suitable form of dispute resolution.[84] Particularly important to American insolvency law is the Court's stance on parties' right to arbitrate federal *statutory* claims. Intermediate appellate courts have identified at least four statutory exceptions to the FAA: "securities law, antitrust law, RICO, and bankruptcy law."[85] The Supreme Court has addressed three of the four, finding the statutory claims

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[80]*Id.*

[81]MACNEIL, *supra* note 68, at 72.

[82]*Scherk*, 417 U.S. at 516-17.

[83]*Id.* at 519 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)).

[84]*See* Kirgis, *supra* note 12, at 513-14 (discussing *Scherk*, 417 U.S. at 506 (enforcing arbitration agreement for a claim under the 1934 Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985) (finding antitrust claims arbitral); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987) (enforcing arbitration agreement for fraud claims under the 1934 Act and RICO); and Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)).

[85]Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under the Bankruptcy Code*, 65 AM. BANKR. L.J. 525, 532 (1991). *See also* Clary v. Helen of Troy, L.P., No. EP-11-CV-284, 2011 WL 6960820, at *7 (W.D. Tex. Dec. 20, 2011) (finding a statutory exception to Jury Act because of an inherent conflict with FAA).

arbitrable.[86] But the Court has not yet addressed the arbitrability of disputes in insolvency proceedings.

2. *U.S. Judiciary's "Global" Acceptance of Arbitration*

Today most would agree that American arbitration law personifies a "strong federal policy in favor of arbitration."[87] Some have even described this personification as a "radical[ ] pro-arbitration agenda."[88] Broad acceptance of arbitration represents an equal acceptance of the foundational principles of arbitration. Arbitration is a process premised on party autonomy, privity of contract, entrustment of private tribunals, and finality.[89] These principles diverge from American insolvency law. Fittingly, one bankruptcy judge has explained, "The statutory interaction . . . presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."[90]

The U.S. judiciary's embrace of arbitration is even more profuse in an international context.[91] The United States ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[92] (New York Convention) in 1970. The New York Convention represents the backbone of international commercial arbitration and is a lifeline between 157 countries[93] for the recognition and enforcement of foreign arbitral agreements and awards.[94] In adopting the New York Convention, Congress made its

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[86]*See* Birney, *supra* note 16, at 636-40 (providing a detailed account of the Court's jurisprudence as to statutory claims and the FAA).

[87]Resnick, *supra* note 16, at 188. *See also* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 264 (1988) (explaining "the federal policy favoring arbitration gains so large an institutional statute that it becomes uncontrolled"); Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 173 (2010); Ann C. Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 CHI.-KENT L. REV. 631, 657 (1990); Thomas J. Lilly, Jr., *Participation in Litigation As A Waiver of the Contractual Right to Arbitrate: Toward A Unified Theory*, 92 NEB. L. REV. 86, 115 (2013).

[88]Kirgis, *supra* note 12, at 512.

[89]EDWARD BRUNET, ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3 (2006); Nadeau-Seguin, *supra* note 17, at 82.

[90]La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987).

[91]*See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Carbonneau, *supra* note 87, at 64 ("The United States Supreme Court has guided the federal courts toward an unequivocal endorsement of arbitration for the resolution of private international commercial disputes.").

[92]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[93]*See* UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Aug. 26, 2017).

[94]Edward Ti Seng Wei, *Why Egregious Errors of Law May Yet Justify a Refusal of Enforcement Under the New York Convention*, 2009 SING. J. LEGAL STUD. 592, 592 (2009); Alexia Brunet & Juan Agustin

supremacy explicit by enacting law to ensure that the New York Convention would control when it is otherwise inconsistent with the FAA.[95] Courts are "mindful" that the New York Convention "generally establishes a strong presumption in favor of arbitration of international commercial disputes."[96] Particularly, the U.S. Supreme Court has recognized that "litigation regarding the application of the Convention is inconsistent with the heightened need for predictability in the resolution of international commercial disputes."[97]

Support for international commercial arbitration as the preferred form of dispute resolution in international transactions was mostly driven by the increased amount of international trade in the late-twentieth century and early-twenty-first century.[98] International commercial parties view arbitration as a viable dispute resolution mechanism both because of "the advantages of speed, flexibility, and economy" and because of a "distrust of foreign courts."[99] Heeding international parties' desires for an alternative to court-based litigation, the U.S. Congress has sought to promote arbitration by legislative enactments.[100] Such steps facilitate international trade by providing parties with the flexibility to contract for a predictable and neutral forum to resolve their disputes.

Although the current posture among U.S. courts is one of acceptance, it is important to note there is a growing sense of skepticism and disdain for arbitration in consumer disputes. As detailed later, this dissatisfaction has prompted both congressional and regulatory responses aimed at chipping away at the deferential stance arbitration currently enjoys. This is significant because any erosion of the acceptance of arbitration is certain to disrupt the

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Lentini, *Arbitration of International Oil, Gas, and Energy Disputes in Latin America*, 27 NW. J. INT'L L. & BUS. 591, 604 (2007).

[95]*See* 9 U.S.C. § 208 (2012).

[96]Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998) (citing *Mitsubishi Motors Corp.*, 473 U.S. at 638-40).

[97]S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47, 50 (2012) (citing Mitsubishi Motors Corp., *473 U.S. at 629*; Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 538 (1995); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974)).

[98]*See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 68 (2009); S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA.J. INT'L L. 499, 502 (2013); Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights From the U.S. Federal Courts*, 2 WORLD ARB. & MED. REV. 39, 43-52 (2008); Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12 BUS. & POL. 1, 6-8 (2010).

[99]Jill A. Pietrowski, Comment, *Enforcing International Commercial Arbitration Agreements-Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 58 (1986) (collecting articles by scholars).

[100]*Id.* ("Moreover, legislative enactments reflect Congress' desire to promote international commerce and to minimize uncertainty in enforcing international arbitration agreements and awards.").

paradigm generally. Thus, we must at least be sensitive to current movements on the ground.

One example of the hostility is a series of articles by *The New York Times* in October and November of 2015. The three-part series is scathing and teases out some of the less illustrious aspects of arbitration, including religious-based arbitrations,[101] the perceived privatization of the courts,[102] and class action waivers through arbitration agreements.[103] The last example, class waivers, is the source of a trilogy of Supreme Court cases decided in the last few years, *AT&T Mobility LLC v. Conception*,[104] *CompuCredit Corp. v. Greenwood*,[105] and *American Express Co. v. Italian Colors Restaurants*.[106] In all three cases, the Court deferred to the parties' arbitration agreements and required individualized arbitration over more plaintiff-friendly class action litigation.[107] Although it is unclear whether these decisions have spurred an increased use of arbitration agreements in consumer contracts,[108] the decisions nonetheless have prompted greater scrutiny of arbitration practices in the consumer space in the United States.[109]

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[101]Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitrations, Scripture Is the Rule of Law*, THE NEW YORK TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html. Religious-based arbitration typically involves agreeing to submit disputes to a religious-affiliated tribunal. These provisions are meant to ensure that disputes are decided in accordance with the parties' sincerely-held religious beliefs. *Id.* (quoting Professor Michael A. Helfand). But this practice has been chastised in some corners because it subjects otherwise secular claims to faith-based adjudicators. *Id.*

[102]Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, THE NEW YORK TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

[103]Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

[104]563 U.S. 333 (2011).

[105]565 U.S. 95 (2012).

[106]133 S. Ct. 2304 (2013).

[107]As Professor Jill Gross has noted, "[m]any arbitration scholars have sharply criticized [the *Conception*, *CompuCredit*, and *Italian Colors*] decisions as anti-consumer or anti-employee, claim suppressing, and at odds with the fundamental right to have a dispute heard in a courtroom." Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 115-16 (2015) (collecting articles by arbitration scholars).

[108]Professors Peter Rutledge and Christopher Drahozal conducted an empirical study on the extent in which businesses increased their use of arbitration agreements after the Supreme Court's *Conception* decision. Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Conception *and* Amex, 67 VAND. L. REV. 955 (2014). Their empirical data suggests that, to date, there has not been an increase in the use of arbitration agreements coupled with class action waivers.

[109]On the legislative front, Senator Al Franken in 2017 (among other years) introduced a bill to amend the FAA and ban predispute arbitration agreements that mandate arbitration of employment disputes, consumer disputes, antitrust disputes, and civil rights disputes. Arbitration Fairness Act of 2017, S. 537, 115th Cong. § 3 (2017). On the regulatory front, the Consumer Financial Protection Bureau (CFPB) in 2016 announced a proposed rulemaking to regulate "agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services."

While consumer-based arbitration has garnered its fair share of bad press lately—some of which is certainly justified—the trust in arbitration to decide disputes between sophisticated, commercial parties remains strong.[110] As arbitration continues to mature in the United States and abroad, it is undeniable that the procedural nuances of arbitration will continue to compound in complexity. As one scholar has observed, "[A]rbitration [has] evolved into a different process than that practiced when Congress enacted the FAA. Though it still retains the hallmarks of a binding decision by a neutral decision maker after a hearing, as actually practiced today . . . arbitration involves more formalities and litigation-like processes."[111] This evolution will require U.S. courts' (and the U.S. Congress's) continued involvement in order to ferret out limitations on arbitration and to reconcile arbitration with traditional modes of litigation. But this ever-"tinkering" role in the development of arbitration law does not (and should not) discount arbitration's prominence within the American legal system, which has been solidified by a half-century's worth of jurisprudence from the Supreme Court.

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A study of the evolution of American arbitration law leaves little doubt as to its status as a valid dispute-resolution vehicle in the United States. Issues abound, however, when the tides of arbitration meet insolvency. Therefore, it should be of no surprise that the perceived conflict between insolvency and arbitration manifests itself at almost every level and stage of

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Arbitration Agreements, 81 Fed. Reg. 32830-01 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040). The final rule "prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service." 12 C.F.R. pt. 1040 (2017). But both the U.S. House and Senate voted to rescind the CFPB's rule under the Congressional Review Act, 5 U.S.C. §§ 801-08 (2012), and President Trump signed the measure on November 1, 2017.

[110]*See, e.g.*, S. 537 § 1 ("The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. . . . Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises."). But at least one prominent international practitioner and scholar has predicted dark days ahead for commercial arbitration. Gary Born, Chair of International Arbitration Practice Group, WilmerHale, Judith S. Kaye Lecture at the New York International Arbitration Center (May 18, 2016); *see* Jack Newsham, *'Winter is Coming' for Commercial Arbitration, Born Says*, LAW360.COM (May 20, 2016 6:44 PM), http://www.law360.com/articles/798830/-winter-is-coming-for-commercial-arbitration-born-says (opining that Born's comments "didn't come out of nowhere" and they are in response to Lord Chief Justice John Thomas's warning that "the time may have come to give courts more authority in arbitral disputes so they can develop better case law" (linking to Caroline Simson, *Rebalancing Court Rile in Arbitration Not Needed, Attys Say*, LAW360.COM (April 18, 2016 8:30 PM), http://www.law360.com/articles/784622/rebalancing-court-role-in-arbitration-not-needed-attys-say)).

[111]Gross, *supra* note 107, at 119 (footnotes omitted).

the insolvency process. The next Part outlines the frameworks adopted for the enforceability of arbitration agreements in American insolvency proceedings. That is, it focuses on the beginning stages of arbitration and its intersection with insolvency by explaining how U.S. courts have managed this issue.

II. CURRENT FRAMEWORK: ARBITRATION AGREEMENTS IN AMERICAN INSOLVENCY PROCEEDINGS

The starting point to understanding U.S. courts' treatment of arbitration agreements in insolvency proceedings is the jurisdictional structure of the bankruptcy courts.[112] This Article focuses on a narrow window of bankruptcy courts' jurisdictional history to illustrate a distinction that has largely proved determinative in evaluating whether courts will enforce an arbitration agreement in an insolvency case.

A. Overview of the Jurisdiction and Authority of U.S. Bankruptcy Courts and Judges

In 1982, around the same time the U.S. Supreme Court was expanding the reach of the FAA, the Court decided a pivotal case, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[113] The Court in *Marathon* held that the Bankruptcy Reform Act of 1978's jurisdictional design was unconstitutional.[114] The Court has since characterized its *Marathon* holding as: "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review."[115] Bankruptcy courts are considered non-Article III courts with bankruptcy judges serving as judicial officers of the Article III district courts.[116]

In response to the *Marathon* decision, the U.S. Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Amendments).[117] The centerpiece to the 1984 Amendments was a revamped jurisdictional design for bankruptcy courts.[118] The federal district courts

[112]For a detailed account of U.S. bankruptcy jurisdiction, *see* Brubaker, *supra* note 21, at 121.

[113]458 U.S. 50 (1982).

[114]*Id.* at 87.

[115]Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985).

[116]Brubaker, *supra* note 21, at 132. Unlike Article III judges who enjoy lifetime tenure and fixed salaries, U.S. Const. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance on Office."), bankruptcy judges are appointed to fourteen-year terms by the circuit court in which the bankruptcy judge sits. Brubaker, *supra* note 21, at 132.

[117]Pub. L. No. 98-353, 98 Stat. 333 (1984) (jurisdictional provisions codified as amended in scattered sections of title 28 of the U.S.C.).

[118]28 U.S.C. § 1334 (2012). *See* Birney, *supra* note 16, at 645.

maintained original and exclusive bankruptcy jurisdiction over insolvency cases,[119] and jurisdiction for bankruptcy judges was accomplished by "reference" from the district courts.[120] In contrast to the pre-1984 jurisdictional structure, jurisdiction over referred cases "differ[ed] markedly."[121] Specifically, the distinction fell along the lines of whether the proceeding constituted a "core proceeding[ ] arising under [the Code], or arising in a [bankruptcy] case"[122] or, by contrast, "a proceeding that is not a core proceeding but that is otherwise related to a [bankruptcy] case."[123] Congress labeled this distinction as "core" and "non-core" proceedings.

The Code does not expressly define all core proceedings; however, 28 U.S.C. § 157(b)(2) does set forth a nonexhaustive list of sixteen types of core proceedings.[124] In core proceedings, a bankruptcy judge may "hear and determine" the case and may "enter the appropriate orders and judgments," subject only to appellate review.[125] That is, bankruptcy judges are permitted to enter final decisions in core matters, which are then reviewable under traditional appellate standards. An appeal from a final decision by a bankruptcy judge is heard by the district court[126] or, where constituted, a three-judge bankruptcy appellate panel (BAP).[127] The circuit courts then hear further appeals.[128]

In contrast, non-core proceedings do not raise substantive rights under the Code and exist outside the insolvency case. In non-core proceedings, a bankruptcy judge may hear the claim if it relates to the bankruptcy case, but may only "submit proposed findings of fact and conclusions of law to the district court."[129] The district court then reviews the bankruptcy judge's findings de novo and enters a final decision.[130]

The distinction between core and non-core proceedings remained rela-

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[119]§ 1334(a).

[120]*See* Stern v. Marshall, 564 U.S. 462, 473 (2011); Brubaker, *supra* note 21, at 132. The reference by the district court may also be withdrawn "for cause shown." § 157(d).

[121]*Id.* at 133.

[122]§ 157(b)(1). Chief Justice Roberts explained in *Stern* that, "The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved." 564 U.S. at 473.

[123]§ 157(c)(1).

[124]Some examples include "matters concerning the administration of the estate," "allowance or disallowance of claims," "proceedings to determine, avoid, or recover preferences," "proceedings to determine, avoid, or recover fraudulent conveyances," and "determinations as to the dischargeability of particular debts." § 157(b)(2)(A), (B), (F), (H), and (I). As discussed *infra*, this list has been subject to litigation in the Supreme Court in recent years.

[125]§ 157(b)(1).

[126]§ 158(a)(1).

[127]The U.S. Court of Appeals for the First, Sixth, Eighth, Ninth, and Tenth Circuits have constituted BAPs as allowed by § 158(b)(1). The BAPs in these circuits hear appeals from the bankruptcy courts unless the parties elect to have the appeal heard by the district court. § 158(c)(1).

[128]§ 158(d)(1).

[129]§ 157(c)(1).

[130]Stern v. Marshall, 564 U.S. 462, 475 (2011) (citing § 157(c)(1)).

tively unobjectionable until the Supreme Court's 5-4 decision in *Stern v. Marshall*[131] and its resulting progeny.[132] In *Stern*, the Court addressed a state law counterclaim by Vickie Lynn Marshall's (a.k.a. Anna Nicole Smith) bankruptcy estate that clearly fell within the list of statutorily core claims.[133] After Marshall's late husband's son, Pierce Marshall, filed a proof of claim, the estate counterclaimed against Pierce seeking to recover for his alleged tortious interference with a gift Marshall expected from her late husband.[134] The bankruptcy court ultimately rejected Pierce's claim and awarded Marshall's estate millions on the counterclaim.[135] Pierce objected, arguing the bankruptcy court lacked jurisdiction.[136] He claimed that Congress's labeling of a claim as "core" was not dispositive and, for a bankruptcy judge to have the authority to make a final determination, the proceeding must arise in a title 11 case or under title 11 itself.[137] Although supposedly deciding a narrow issue, which Chief Justice Roberts assured "[would] not change all that much,"[138] the Court held that the statutory scheme granting bankruptcy courts jurisdiction in core matters was unconstitutionally overbroad.[139] That is, the bankruptcy judge's final decision on the estate's state law counterclaim violated the structural commands of Article III of the Constitution. The result of *Stern* is that a claim may be listed as one that is *statutorily* core, but nonetheless may be *constitutionally* non-core. This has prompted the emergence of the *Stern*-claim, a statutorily core but constitutionally non-core claim.

The precise contours of *Stern* are still developing.[140] Most courts concede, however, that the "correct way" to examine a bankruptcy court's jurisdiction when *Stern* is invoked is to determine whether the judge has

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[131]564 U.S. 462 (2011).

[132]8 NORTON BANKRUPTCY LAW AND PRACTICE 3d § 169:4 (3d ed.).

[133]*Stern*, 564 U.S. at 475 ("Vickie's counterclaim against Pierce for tortious interference is a 'core proceeding' under the plain text of § 157(b)(2)(C).").

[134]*Id.* at 470.

[135]*Id.* at 470-71.

[136]*Id.* at 471.

[137]*Id.*

[138]*Id.* at 502.

[139]*Id.*

[140]*Compare id.* at 503 ("We conclude today that Congress, in one isolated respect, exceeded [Article III's] limitation in the Bankruptcy Act of 1984.") *and In re* Salander O'Reilly Galleries, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011) ("Stern is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case."), *with* Brubaker, *supra* note 21, at 121 ("Few have been willing to accept at face value Justice Roberts' assurance that the 'decision does not change all that much.' Only time will tell, of course, but the majority's reasoning has planted many potential landmines throughout the current statutory provisions governing bankruptcy judges' adjudicatory authority . . . ." (footnotes omitted)). *See also* Albert v. Site Mgmt., Inc., No. 14-360, 2014 WL 824148, at *4 (D. Md. Feb. 28, 2014) ("There is a split of authority as to how broadly *Stern* should be read.").

"statutory *and* constitutional authority to issue a final decision."[141] The statutory authorization is straightforward. But the constitutional authorization has elicited a jurisdictional split, with some courts reading *Stern* narrowly and others reading *Stern* more broadly.[142] Because courts are still wrestling with defining the contours of *Stern*, parties approaching courts with arbitration agreements should at least be cognizant of the inherent difficulties in applying *Stern*.

It is also worth noting that the Supreme Court recently decided in *Wellness International Network, Ltd. v. Sharif*[143] whether a party may *consent* to a bankruptcy court entering a final decision on a *Stern*-claim.[144] *Wellness* involved a creditor's long-running battle to collect on a federal court judgment from Sharif.[145] After Sharif filed for bankruptcy protection, the creditor initiated an adversary proceeding in the bankruptcy case for, among other things, a declaration that a trust Sharif was purportedly holding for the benefit of his sister was Sharif's alter ego and that its assets should be considered estate property.[146] After the bankruptcy judge entered a final decision against Sharif, he appealed and eventually raised *Stern* as a defense to the court's decision.[147] The U.S. Court of Appeals for the Seventh Circuit sided with Sharif.[148] But the Supreme Court reversed the Seventh Circuit, holding that, notwithstanding the Article III concerns noted in *Stern*, "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent," where the consent is "knowing and voluntary."[149] Because insolvency proceedings take place under the control and jurisdiction of the district courts, Article III's structural interests were not implicated.[150]

As depicted, the distinction between core and non-core claims, and a bankruptcy judge's authority to decide those claims, is far from perfunctory. But it is imperative to understand the landscape of bankruptcy jurisdiction, especially as to core and non-core claims, in order to grasp how U.S. courts treat arbitration agreements in insolvency proceedings. And, as further elaborated in the next subpart, this jurisdictional construct has proved to be mostly dispositive in determining whether non-core claims are arbitrable. The

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[141]*Albert*, 2014 WL 824148, at *3.

[142]*Id.* at *4–5 (discussing the split between courts).

[143]135 S. Ct. 1932 (2015).

[144]In fact, this particular question made its way to the Court twice, evading a definitive decision in the first case, *see* Executive Benefits Insurance Agency v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165 (2014).

[145]*Wellness*, 135 S. Ct. at 1940.

[146]*Id.* at 1940–41.

[147]*Id.* at 1941.

[148]*See generally* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *reversed by id.*

[149]*Wellness*, 135 S. Ct. at 1949, 1948.

[150]*Id.* at 1944.

real difficulty lies in evaluating when claims that are traditionally "core" to the insolvency process may be decided through arbitration.

B. Current Framework for Examining the Enforceability of Arbitration Agreements

Making sense of the framework U.S. courts have constructed to evaluate the enforceability of arbitration agreements in insolvency cases requires a holistic approach. Although most of the development has occurred in the last forty years, the cumulative effect—and the resulting tangled web of judicial decisions—can be, at times, maddening. The next three subparts unravel these cases. For historical perspective, the first subpart addresses the status of the law prior to the U.S. Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*.[151] The second subpart then evaluates *McMahon*. Finally, the third subpart details the struggle intermediate appellate courts have had post-*McMahon* and attempts to reconcile the various cases in order to arrive at the current state of the law.

1. Pre-*McMahon*: *Zimmerman v. Continental Airlines, Inc.*[152]

The first U.S. appellate court to address the conflict between the FAA's demand that courts enforce arbitration agreements and the purposes and objectives advanced by the Code was the U.S. Court of Appeals for the Third Circuit.[153] The court in *Zimmerman* left no question as to its perceived task, as the first line of the opinion reads: "This appeal requires us to reconcile two contradictory federal policies"—i.e., the underlying policies of arbitration and insolvency.[154]

The facts in *Zimmerman* are relatively straightforward. The insolvent agreed to a prepetition supply contract with a creditor, which contained a liquidated damages provision for late deliveries and an agreement to arbitrate disputes arising under the contract.[155] Due to delayed deliveries, the creditor withheld some $200,000 in payments in accordance with the liquidated damages provision.[156] After the insolvent filed for bankruptcy protection, the trustee of the bankruptcy estate filed an adversary proceeding against the creditor to collect the withheld payments.[157] The creditor moved to stay the

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[151] 482 U.S. 220 (1987).

[152] 712 F.3d 55 (3d Cir. 1983).

[153] 8 Norton Bankruptcy Law and Practice 3d § 169:4 (3d ed.). *Zimmerman* is often used to illustrate the prevailing view during the pre-*McMahon* period. *See* Resnick, *supra* note 16, at 200-01. Of note, the author of this Article is the co-author for Norton Bankruptcy Law and Practice's chapter on arbitration agreements in bankruptcy.

[154] 712 F.3d at 56.

[155] *Id.*

[156] *Id.*

[157] *Id.*

proceedings and compel arbitration, which the bankruptcy court denied.[158]

The Third Circuit began its analysis of the issue by recognizing that the FAA represents a significant congressional concern,[159] but ultimately subordinated that concern to the "broad jurisdictional provisions of the Bankruptcy Reform Act of 1978."[160] The court reasoned,

> The[ ] [FAA and the Code] are equally specific and focused and in giving a preference for either, the effectiveness of the other will be proportionally diluted. Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. *See* 28 U.S.C. § 1334. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance. Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, *we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act.* Thus, while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the bankruptcy court.[161]

Accordingly, the court pitted the FAA against both the Code and the jurisdictional provisions set out in the Bankruptcy Reform Act, and deemed the latter to be the victor—that is, in the court's view, one statutory scheme trumped the other in whole.

The *Zimmerman* decision also defers greatly to the "sound discretion" of the bankruptcy courts,[162] largely predicated on the jurisdictional constructs of the Bankruptcy Reform Act, which the Supreme Court had found uncon-

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[158]*Id.*

[159]*Id.* at 57 (citing Prima Paint Corp. v. Flood & Corkin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)) ("At the outset, we recognize that there is a strong federal policy favoring arbitration. . . . The Arbitration Act gives effect to an additional federal policy favoring enforcement of contractual obligations. As the Supreme Court has noted, the underlying consideration behind requiring stays of proceedings pending arbitration is 'the unmistakably clear congressional purpose [in enacting the Arbitration Act] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." (alteration in original)).

[160]*Id.* at 58.

[161]*Id.* at 59–60 (emphasis added).

[162]This implicates another anomaly discussed later, *see infra* notes 211—namely, how the amount of discretion a bankruptcy court is given drives the standard of review afforded on appeal, which, in its own right, has been partly determinative of the ultimate result.

stitutional twelve months prior in *Marathon*.[163] Nonetheless, *Zimmerman*'s teachings would be short lived, because, four years later, the Supreme Court supplied a framework for evaluating when federal statutory claims may be subject to arbitration.

2. *Shearson/American Express, Inc. v. McMahon*[164]

The Supreme Court in *McMahon* announced a framework to reconcile the FAA's mandate that courts defer to valid arbitration agreements with the arbitrability of claims arising from other federal statutes—like the Code. The questions specifically addressed in *McMahon* were whether the 1934 Act and the Racketeer Influenced Corrupt Organization Act (RICO) superseded the FAA's direct command to enforce the parties' arbitration agreements.[165]

The McMahons were brokerage customers of Shearson and had agreed to arbitrate any controversy relating to their accounts.[166] The McMahons commenced litigation in federal district court, alleging claims under the 1934 Act and RICO, notwithstanding the arbitration agreements in their account agreements.[167] After Shearson moved to compel arbitration, the district court directed all of the McMahons' claims to arbitration, except for the RICO claim.[168] The Second Circuit reversed the district court's finding that the McMahons' 1934 Act claims—particularly, § 10(b) claims—were subject to arbitration, which left Shearson litigating all the federal statutory claims in federal court.[169]

The Supreme Court, examining the arbitrability of the McMahons' federal statutory claims, first noted that the FAA "standing alone" mandated enforcement of an agreement to arbitrate federal statutory claims.[170] But this mandate "may be overridden by a contrary congressional command."[171] The Court discerned three ways a contrary congressional command might be

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[163]The Supreme Court decided *Marathon* in June of 1982, and indicated that its holding—i.e., that the broad grant of jurisdiction to bankruptcy courts violated Article III—should be applied prospectively, rather than retroactively. N. Pipeline Constr. Co. v. Marathon Pipe Co., 458 U.S. 50, 88 (1982). Further, the Court stayed the judgment until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.* (citations omitted). Notably, the bankruptcy court issued its decision in *Zimmerman* during this dead period. *In re* Ludwig Honold Mfg. Co., 22 B.R. 436 (Bankr. E.D. Pa. Aug. 16, 1982), *aff'd sub nom.* Zimmerman v. Cont'l Airlines, Inc., 712 F.2d 55 (3d Cir. 1983).

[164]482 U.S. 220 (1987).

[165]*Id.* at 222.

[166]*Id.* at 222-23.

[167]*Id.* at 223.

[168]*Id.* at 223-24.

[169]*Id.* at 224.

[170]*Id.* at 226.

[171]*Id.*

shown: (1) the text of the non-FAA statute; (2) the legislative history of the non-FAA statute; or (3) an "inherent conflict" between the purpose of the non-FAA statute and arbitration.[172] That is, "an intention discernable from the text, history, or purpose of the statute."[173] The Supreme Court later observed that, in undertaking this inquiry, courts should keep "in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[174] Moreover, the party opposing arbitration carries the burden of showing that a contrary congressional command exists.[175]

The Court ultimately concluded that no contrary congressional command prevented the enforcement of an agreement to arbitrate 1934 Act or RICO claims.[176] As a result of *McMahon*, lower courts now have a framework to apply in evaluating whether a federal statutory claim may be subject to arbitration. *McMahon* is significant in the insolvency context because neither the Code nor its legislative history evidences a congressional command to supersede the FAA and its dictates.[177] Courts therefore are required to review

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[172]*Id.* at 227. *See also* Resnick, *supra* note 16, at 202. In 2012, the Supreme Court addressed the "contrary congressional command" question raised in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012). In *CompuCredit*, the Court held that the Credit Repair Organizations Act (CROA) did not limit the enforceability of an arbitration agreement because CROA was silent on whether claims could be arbitrated. *Id.* at 104. Interestingly, the majority did not address the second two prongs; however, two justices did concur in the judgment, observing that they did "not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims." *Id.* at 109 (Sotomayor, J., concurring).

[173]*McMahon*, 482 U.S. at 227.

[174]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[175]Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983).

[176]*McMahon*, 482 U.S. at 237, 242.

[177]*See, e.g.*, Ackerman v. Eber (*In re* Eber), 687 F.3d 1123, 1129 (9th Cir. 2012) ("This circuit and sister circuits applying the *McMahon* factors to the Bankruptcy Code have found no evidence in the text of the Bankruptcy Code or in the legislative history suggesting that Congress intended to create an exception to the FAA in the Bankruptcy Code."). But several months before *Eber*, the Ninth Circuit suggested that § 524(g) of the Code elicited a contrary congressional command. *See* Continental Ins. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011, 1022 (9th Cir. 2012). The court held,

> The purpose of § 524(g) is to consolidate a debtor's asbestos-related assets and liabilities into a single trust for the benefit of asbestos claimants. . . . Congress tasked bankruptcy courts with ensuring that § 524(g)'s "high standards" are met and gave them authority to implement and supervise this unique procedure. . . . A claim based on a debtor's efforts to seek for itself and third parties the protections of § 524(g) implicates and tests the efficacy of the provision's underlying policies. Because Congress intended that the bankruptcy court oversee all aspects of a § 524(g) reorganization, only the bankruptcy court should decide whether the debtor's conduct in the bankruptcy gives rise to a claim for breach of contract. Arbitration in this case would conflict with congressional intent.

Id. Even further, the Fourth Circuit has suggested the statute setting forth bankruptcy jurisdiction may evidence a contrary demand as to core claims. Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 169 (4th Cir. 2005) ("There is the counter argument, however, that the statutory text

whether an objecting party can demonstrate an "irreconcilable conflict" between arbitration, as endorsed and mandated by the FAA, and the "underlying purposes" of the Code.[178]

3. The Post-*McMahon* Struggle

At least six circuits have applied the framework announced in *McMahon* to evaluate the enforceability of arbitration agreements in insolvency cases.[179] Although there was little movement in the decade after *McMahon*—producing only one substantive opinion, which happened to be by the same circuit that decided *Zimmerman*—a flurry of cases have followed in the last fifteen years. This may be explained by the expanded use of arbitration as a mechanism to decide disputes at the beginning of the twenty-first century,[180] coupled with, one, a major overhaul of the Code in 2005[181] and, two, the economic struggles that plagued this period. The next five subparts discuss *McMahon*'s progeny through the characterization of claims as core, non-core, and *Stern*-related.

i. The Beginning: *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[182]

The first U.S. appellate court to apply the *McMahon* framework in an insolvency case was the Third Circuit in *Hays*.[183] There, the Third Circuit reviewed a lower court's decision to invalidate an arbitration agreement in a prepetition contract as applied to various federal and state securities claims,

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giving bankruptcy courts core-issue jurisdiction reveals a congressional intent to choose those courts in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims.").

[178]Neufeld, *supra* note 85, at 538.

[179]*See* MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104 (2d Cir. 2006); U.S. Lines, Inc. v. Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631 (2d Cir. 1999); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222 (3d Cir. 2006); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989); Moses v. CashCall, Inc., 781 F.3d 63 (4th Cir. 2015); Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164 (4th Cir. 2005); Gandy v. Gandy (*In re* Gandy), 299 F.3d 489 (5th Cir. 2002); Ins. Co. of N. Am. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056 (5th Cir. 1997); Kirkland v. Rund (*In re* EPD Inv. Co., LLC), 821 F.3d 1146 (9th Cir. 2016); Ackerman v. Eber (*In re* Eber), 687 F.3d 1123 (9th Cir. 2012); Continental Ins. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011 (9th Cir. 2012); The Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791 (11th Cir. 2007).

[180]*See* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis As A Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 858 (2004) ("In total, the late twentieth and early twenty-first centuries present a picture of arbitration and a more aggressive use of arbitration than could have been imagined by Professor Leff and the others who debated the merits of the unconscionability norm during the late 1960s.").

[181]Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 19 Stat. 23 (codified as amended in scattered sections of title 11 of the U.S.C.).

[182]885 F.2d 1149 (3d Cir. 1989).

[183]*Id.* at 1149.

and fraudulent conveyance and constructive trust claims under § 544(b) of the Code.[184] Thus, importantly, *Hays* involved both core and non-core claims.

The Third Circuit began by explicitly retreating from *Zimmerman*'s "sound discretion" approach, explaining, "[G]iven the recent Supreme Court cases concerning the [FAA], we can no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over that Act."[185] Rather, "we must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and that we should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code."[186] Specific to the non-core, securities-based claims, the court noted the 1984 Amendments that revamped bankruptcy's jurisdictional structure envisioned a scheme whereby bankruptcy judges would not decide all bankruptcy-related matters.[187] As such, denying arbitration would "lead either to full scale litigation of this non-core, adversary proceeding in the district court . . . or to referral of that proceeding to the bankruptcy court for a recommendation followed, upon objection, by *de novo* review in the district court."[188] This observation fatally undermines any argument that arbitration of non-core claims would result in undue delay or is inconsistent with the purposes of insolvency law, including centralizing insolvency-related matters, because indeed Congress had seen fit to treat core and non-core claims differently in response to *Marathon*.[189] Thus, finding no contrary congressional command as instructed by *McMahon*, and following the strictures of the FAA and the

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[184]*Id.* at 1149, 1151.

[185]*Id.* at 161.

[186]*Id.*

[187]*Id.* at 1157 ("[T]he 1984 Amendments confer on the district court original but not exclusive jurisdiction over suits of this character. 28 U.S.C.A. § 1334(b). Thus, it is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court."); *see also id.* at 1159 ("Our view that Congress does not see arbitration in a non-core adversary bankruptcy proceeding filed by the trustee in the district court as an anathema to its post-1984 bankruptcy policy is further supported by its subsequent enactment of the Judicial Improvements Act in 1988. In that act, Congress specifically allows certain district courts to authorize by local rule either voluntary or compulsory arbitration, or both in certain adversary bankruptcy proceedings.").

[188]*Id.* at 1158.

[189]*See id.* at 1159, 1160 ("Consequently, unlike the pre-1984 bankruptcy scheme, the current one virtually requires some bankruptcy-related proceedings to proceed outside the bankruptcy court. Thus, the congressional policy of consolidating all bankruptcy-related matters in the bankruptcy court, relied upon by us in *Zimmerman*, is no longer applicable."). The court also went so far as to state "the mere existence of creditors in the core bankruptcy proceeding who might be indirectly affected by the arbitration decision and who were not parties to the [agreement] does not require the denial of [the motion to compel arbitration]." *Id.* at 1159 (citing Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1, 20 (1983)). This suggests that an arbitration award's indirect effect on third-party rights would be insufficient to deny arbitration in an insolvency case.

recent Supreme Court case law advancing arbitration as an acceptable form of dispute resolution, the court held the lower court lacked discretion in the first instance to deny arbitration of the non-core claims.[190]

But for the core claims, the Third Circuit held they were not subject to arbitration.[191] The court reasoned that claims under § 544(b) of the Code are brought by the trustee and are "not derivative of the bankrupt."[192] That is, "[t]hey are creditor claims that the Code authorizes the trustee to assert on their behalf."[193] Because the Supreme Court has made clear that only parties to an arbitration agreement are bound by it, "there is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative from one who was a party to it [i.e., the insolvent]."[194]

ii. The Consensus: Non-Core Claims

Following *Hays*, U.S. courts largely agree that agreements to arbitrate non-core claims are enforceable in insolvency cases.[195] Because there is no inherent conflict between enforcing agreements to arbitrate non-core claims—which are merely *related to*[196] the insolvency proceeding—and the purposes of the Code, the FAA's mandate compelling enforcement controls and lower courts generally lack discretion to deny arbitration. This is a sensible position as non-core claims exist outside the purview of the Code, dimin-

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[190]*Id.* at 1156, 1161.

[191]*Id.* at 1155.

[192]*Id.*

[193]*Id.*; *see also* Kirkland v. Rund (*In re* EPD Inv. Co., LLC), 821 F.3d 1146 (9th Cir. 2016).

[194]*Hays*, 885 F.2d at 1155 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) and Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974)); *see also EPD Inv. Co.*, 821 F.3d at 1152 ("For the purpose of [the §§ 544 and 548] claims, the Trustee stands in the shoes of the creditors, not the debtors. Only the parties to an arbitration agreement are bound by it.").

[195]*See, e.g.*, Gandy v. Gandy (*In re* Gandy), 299 F.3d 489 (5th Cir. 2002) ("[I]t is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings . . . ."); Ins. Co. of N. Am. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1066 (5th Cir. 1997) ("With respect to derivative, non-core matters . . . *Hays* makes eminent sense. . . . Indeed, in this regard it has been universally accepted."); Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 166 (2d Cir. 2000) ("The Third Circuit's *Hays* decision—holding that district courts must stay non-core proceedings in favor of arbitration—is generally accepted."); The Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 796 (11th Cir. 2007) ("In general, bankruptcy courts do not have the discretion to decline to enforce an arbitration agreement relating to a non-core proceeding."); *In re* TP, Inc., 479 B.R. 373, 382 (Bankr. E.D.N.C. 2012) ("[I]f the matter is non-core, it is generally referred to arbitration consistent with the policy in favor of arbitration . . . ."). *See also* Kirgis, *supra* note 12, at 517 (citing Marianne B. Culhane & Michaela M. White, *Enforcing (or not) Arbitration Clauses in Bankruptcy*, 1362 PRAC. L. INSTI. CORP. L. & PRAC. HANDBOOK SERIES 39, 48 (2003) ("[T]he presumption is that if the dispute is covered by an otherwise valid arbitration agreement, the agreement should be enforced. . . . Generally, bankruptcy courts are found to have no discretion to deny motions to stay pending arbitration in debtor-derivative non-core matters . . . .")).

[196]For a discussion regarding "related to" matters *see supra* subpart II.A and accompanying notes.

ishing the likelihood of any competing policy interests.[197]

Some courts, however, have refused a bright-line, categorical approach based solely on the "coreness" of the claim. While these courts acknowledge that non-core claims exist outside the Code, and conflicting policy concerns otherwise affecting core claims are not implicated, they nonetheless conclude the core versus non-core distinction is not dispositive.[198] As one bankruptcy court has reasoned, "Stated simply, the more 'core' the proceeding, the more likely a conflict exists . . . ."[199] The hesitation to subscribe to a categorical approach seems more to do with the "core" side of the equation than the "non-core" side. That is to say that core claims are categorically nonarbitrable. For instance, the court in *National Gypsum* observed, "Although, as appellees suggest, 'the core/non-core distinction is a practical and workable one,' it is nonetheless too broad. [Bankruptcy courts have discretion to reject arbitration] only where a particular bankruptcy proceeding meets the standard for nonenforcement of an arbitration clause set forth in *McMahon* and *Rodriguez*. . . . It is doubtful that 'core' proceedings, categorically, meet the standard."[200] Although courts uniformly enforce agreements to arbitrate non-core matters, based on this dichotomy, parties should at least be cautious of assuming non-core claims are arbitrable on their face.

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[197]*See* U.S. Lines, Inc. v. Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999) (noting any conflict between the Code and the FAA "is *lessened* in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration" (emphasis added)); Kraken Invs. Ltd. v. Jacobs (*In re* Salander-O'Reilly Galleries, LLC), 475 B.R. 9, 26 (S.D.N.Y. 2012) ("As to non-core proceedings, bankruptcy courts usually do not have the discretion to refuse to compel arbitration, as 'the strong national policy favoring the enforcement of arbitration agreements,' generally trumps 'the lesser interest of bankruptcy courts in adjudicating non-core proceedings that could otherwise be arbitrated . . . .'" (citations omitted)); *but see* AmeriCorp, Inc. v. Hamm, No. 2:11-cv-677, 2012 WL 1392927, at *5 (Bankr. M.D. Ala. Apr. 23, 2012) (holding unique facts justified finding inherent conflict between the Code and arbitration of non-core, breach-of-contract claims). As discussed in subpart III.B *infra*, at least one scholar has stated that, because *McMahon* only addresses the arbitrability of federal *statutory* claims, *McMahon*'s framework does not apply to claims that are not specifically grounded in the Code.

[198]*See* Continental Ins. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011, 1021 (9th Cir. 2012) (explaining "the core/non-core distinction, though relevant, is not alone dispositive"); *In re* Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 229 (3d Cir. 2006) ("The core/non-core distinction does not, however, affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement."); *Nat'l Gypsum*, 118 F.3d at 1067 ("The core/non-core distinction conflates the inquiry set forth in *McMahon* and *Rodriguez* with the mere identification of the jurisdictional basis of a particular bankruptcy proceeding.").

[199]Henderson v. Legal Helpers Debt Resolution, L.L.C. (*In re* Huffman), 486 B.R. 343, 357 (Bankr. S.D. Miss. 2013) (discussing "coreness" of trustee's claims).

[200]118 F.3d at 1067; *Thorpe Insulation*, 671 F.3d at 1021 ("However, 'not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code.' We agree that the core/non-core distinction, though relevant, is not alone dispositive." (citation omitted)).

iii. Core Claims: *Insurance Company of North America v. NGC Settlement Trust and Asbestos Claims Management Corp. (In re National Gypsum Co.)*[201]

The more difficult question is determining the enforceability of arbitration agreements covering core claims. The Fifth Circuit took the lead in addressing this issue in *National Gypsum*.[202] The underlying proceeding involved a declaratory judgment action by the successors to National Gypsum, who sought to foreclose National Gypsum's liability insurer from collecting a preconfirmation liability as barred by the discharge injunctions in §§ 524 and 1141 of the Code, a matter the court deemed "core."[203] The bankruptcy court had denied a motion to compel the enforcement of an arbitration agreement between the parties.[204] The Fifth Circuit explained that the first question it must answer is whether the bankruptcy court had any discretion to deny enforcement of the arbitration agreement.[205] According to the court, that question "turns on . . . whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code."[206] Therefore,

> distinguishing between those actions derived from the debtor and those created by the Bankruptcy Code explains the consistent reluctance to permit arbitration of actions brought to adjudicate bankruptcy rights. There can be little dispute that where a core proceeding involves adjudication of federal bankruptcy rights wholly divorced from inherited contractual claims, the importance of the federal bankruptcy forum provided by the Code is at its zenith. Arguably, these actions are simply beyond the coverage of most, if not all, arbitration provisions.[207]

That is, arbitration of claims emanating from the Code will generally be beyond the scope of the parties' agreement. But the court added, even "assuming an otherwise applicable arbitration provision, the adjudication of these actions outside the federal bankruptcy forum could in many instances present the type of conflict with the purpose and provisions of the Bankruptcy Code

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[201] 118 F.3d 1056 (5th Cir. 1997).

[202] *Id.* at 1056.

[203] *Id.* at 1064.

[204] *Id.*

[205] *Id.* at 1067.

[206] *Id.*

[207] *Id.* at 1068.

alluded to in McMahon."[208]

The takeaway from the Fifth Circuit's *National Gypsum* decision is that where a core claim "is derived entirely from the federal rights conferred by the Bankruptcy Code," in many instances arbitration will be inconsistent with the purposes and objectives of the Code, "including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders."[209] Building from the base established by the Fifth Circuit in *National Gypsum*, circuit courts mostly agree their inquiry looks to two questions: (1) whether the bankruptcy court had discretion to deny arbitration—answered by *McMahon*—which is a question of law reviewed de novo; and (2) if the bankruptcy court had discretion, whether the bankruptcy court in fact abused its discretion.[210] But the duality of this test mostly exists in form not substance, because enforcement of an arbitration agreement and the justifications a bankruptcy court invokes in exercising that discretion often overlap.[211] Therefore, the first question generally consumes the second; if a bankruptcy court is found to have discretion, rarely will it abuse that discretion by deciding one way or the other.

Moreover, circuit courts have developed inconsistent standards for applying *McMahon*'s contrary-congressional-command framework. As one scholar put it, the result has been an array of standards "so vague and malleable that they give courts a license to do almost anything they want."[212] The next subpart of this Article attempts to categorize the "vague and malleable" standards expressed by the circuits. This Article identifies three prevailing standards: (1) the narrow approach (Fifth and Third Circuits); (2) the broad approach (Second and Fourth Circuits); and (3) the Ninth Circuit's even broader approach.

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[208]*Id.*

[209]*Id.* at 1069.

[210]Moses v. CashCall, Inc., 781 F.3d 63, 84-85 (4th Cir. 2015); Ackerman v. Eber (*In re* Eber), 687 F.3d 1123, 1131 (9th Cir. 2012); The Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 799 (11th Cir. 2007); MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 230 (3d Cir. 2006); Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 494 (5th Cir. 2002).

[211]For instance, in *Kirkland v. Rund* (In re *EPD Investment Co., LLC*), the Ninth Circuit stated, "[I]n a core [bankruptcy] proceeding . . . 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." 821 F.3d 1146, 1150 (9th Cir. 2016) (emphasis added). This statement perfectly embodies the third prong of *McMahon*. Then, attempting to reconcile two other Ninth Circuit cases (*Thorpe* and *Eber*), the court stated, "the bankruptcy court is entitled to discretion when deciding whether arbitration would conflict with a core bankruptcy proceeding." *EPD Inv.*, 821 F.3d at 1150 n.1. But, as the court initially recognized, a bankruptcy court does not have *discretion* until first making a finding that arbitration would conflict with the purposes of the Code—a decision that is reviewed de novo.

[212]Kirgis, *supra* note 12, at 520.

iv. Core Claims: Circuit Analysis

Fifth Circuit. In *Gandy v. Gandy* (In re *Gandy*), the Fifth Circuit reviewed a bankruptcy court's decision to deny arbitration of core claims (essentially avoidance claims).[213] Applying *McMahon*'s "inherent conflict" prong, the court succinctly stated, "A bankruptcy court *does possess discretion* . . . to refuse to enforce an otherwise applicable arbitration agreement *when* the underlying nature of a proceeding derives exclusively from the provisions of the Bankruptcy Code *and* the arbitration of the proceeding conflicts with the purpose of the Code."[214] That is, the claim must be a bankruptcy right provided by the Code *and* arbitration of that claim must conflict with the purposes of the Code. This dual requirement tracks *McMahon*, which as previously discussed, sets forth a framework for determining the arbitrability of federal *statutory* claims. By requiring that a claim be grounded in the Code—i.e., a bankruptcy right created by federal statute—the Fifth Circuit's approach is in harmony with the teachings of *McMahon*.

The court in *Gandy* ultimately held that "not only are Debtor's claims derived from the Bankruptcy Code, their resolution implicates matters central to the purposes and policies of the Bankruptcy Code."[215] Particularly, the claim represented nearly the entirety of the bankruptcy estate; "implicate[d] . . . the expeditious and equitable distribution of the assets"; at least one of the creditors had already filed a proof of claim in the insolvency case; and the claim related to substantive consolidation, which "may be out of reach in arbitration."[216] While the court did concede it was "technically possible" for some of the claims to be sent to arbitration, it explained that "[p]arallel proceedings would be wasteful and inefficient."[217] And "[w]hile consideration of bifurcated proceedings has been found not to be substantial enough to override the federal policy favoring arbitration" for non-core claims, the concern, "in the context of causes of action derived from the Bankruptcy Code, could present the type of conflict with the purposes and provisions of the Bankruptcy Code that may override the FAA's statutory directive of enforcement of arbitration agreements."[218]

Third Circuit. The Third Circuit substantially agrees with the Fifth Circuit's approach. *Mintze v. American General Financial Services, Inc.* (In re *Mintze*) involved the arbitrability of a claim to rescind a prepetition loan agreement.[219] Citing its earlier *Hays* decision, the court first noted "whether

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[213]299 F.3d 489, 496 (5th Cir. 2002).

[214]*Id.* at 495 (emphasis added) (citing *Nat'l Gypsum Co.*, 118 F.3d at 1067).

[215]*Id.* at 498.

[216]*Id.* at 498-99.

[217]*Id.* at 499.

[218]*Id.*

[219]434 F.3d 222, 226 (3d Cir. 2006). The insolvent's rescission claim was in response to the creditor's

the McMahon standard is met determines whether the court *has the* discretion to deny enforcement of an otherwise applicable arbitration clause."[220] And the "McMahon standard . . . applies to all statutory claims subject to applicable arbitration clauses."[221] In other words, the standard "requires congressional intent 'to preclude a waiver of judicial remedies for the *statutory rights* at issue.'"[222] The court then concluded the insolvent "failed to raise any statutory claims that were *created by the Bankruptcy Code*. With no bankruptcy issue to be decided by the Bankruptcy Court, we cannot find an inherent conflict between arbitration of [the insolvent's] federal and state consumer protection issues and the underlying purposes of the Bankruptcy Code."[223] Thus, the Third Circuit conforms to the Fifth Circuit's reasoning that for a bankruptcy court to have the discretion to deny arbitration in the first instance, the claim must derive from the Code *and* arbitration of that claim must conflict with the purposes and objectives of the Code.

Second Circuit. The Second Circuit, in two different cases, has expanded the Fifth Circuit's *National Gypsum* standard to grant bankruptcy courts greater discretion to reject arbitration agreements. The first case, *U.S. Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.* (In re *U.S. Lines, Inc.*), concerned a declaratory judgment action that "directly affect[ed] the bankruptcy court's core administrative function of asset allocation among creditors"—thus, a core matter.[224] Balancing both the FAA and the New York Convention, as this was an international matter, the court acknowledged that not all core claims will "automatically give the bankruptcy court discretion to stay arbitration."[225] Quoting *National Gypsum*, the court stated, "Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code."[226]

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proof of claim. *Id.* at 226. The parties then stipulated before the bankruptcy court that the matter was a core proceeding. *See id.* at 227. The Third Circuit assumed without deciding the insolvent's claim was core. *Id.* at 229.

[220]*Id.* at 230 (emphasis added) (citing Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1156-57 (3d Cir. 1989)).

[221]*Id.*

[222]*Id.* at 231 (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (1987)).

[223]*Id.* at 231-32.

[224]197 F.3d 631, 639 (2d Cir. 1999). Particularly, the Second Circuit concluded that resolving the disputes over the underlying insurance policies was required "to effectuate an equitable distribution of the bankruptcy estate." *Id.* That is, "a comprehensive declaratory judgment [wa]s required to determine (1) whether a chosen payment plan will trigger the indemnification obligation and (2) the amounts payable under the insurance contracts." *Id.*

[225]*Id.* at 640.

[226]*Id.* (quoting Ins. Co. of N. Am. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997)).

Taking that statement from *National Gypsum*, the court deduced, "Where the bankruptcy court has properly considered the conflicting policies in accordance with law, we acknowledge its exercise of discretion *and show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding.*"[227] The emphasized statement will take on added meaning in the case discussed next. Because the declaratory judgment action "was integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets," and because a "bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor," the court affirmed the bankruptcy court's denial of arbitration.[228]

In the second case, *MBNA America Bank, N.A. v. Hill*, the insolvent initiated an adversary proceeding against a creditor-bank for willful violation of the automatic stay.[229] The creditor moved to compel arbitration in accordance with the parties' account agreement, which the bankruptcy court denied.[230] Following its earlier *U.S. Lines* decision, the Second Circuit explained,

> Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters, which implicate "more pressing bankruptcy concerns." *In re U.S. Lines, Inc.*, 197 F.3d at 640. However, even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement *unless* it finds [1] that the proceedings are based on provisions of the Bankruptcy Code that "inherently conflict" with the Arbitration Act *or* [2] that arbitration of the claim would "necessarily jeopardize" the objectives of the Bankruptcy Code. *Id.*[231]

Therefore, the Second Circuit expanded the standard announced in *National Gypsum* to include instances in which arbitration of a claim "necessarily jeopardizes" the objectives of the Code, notwithstanding whether that claim is derived from the federal bankruptcy rights delineated in the Code.[232] This standard arguably grants bankruptcy courts more discretion to deny arbitration because the court's discretion is activated under broader circumstances. Although this alteration may seem inconsequential, it is nonetheless

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[227]*Id.* at 641 (emphasis added).

[228]*Id.*

[229]436 F.3d 104, 106 (2d Cir. 2006).

[230]*Id.*

[231]*Id.* at 108 (emphasis added).

[232]*See also id.* at 110 ("Arbitration of Hill's automatic stay claim would not necessarily jeopardize *or* inherently conflict with the Bankruptcy Code." (emphasis added)).

significant because the Second Circuit's standard reaches a greater swath of claims. Additionally, it steps outside the logical confines of *McMahon* (i.e., federal *statutory* claims) by applying the *McMahon* framework to non-Code based claims that are implicated in the insolvency process.

Despite announcing a broader rule, the court ultimately reversed the bankruptcy court, concluding the insolvent's willful violation claim should be arbitrated.[233] Because arbitration of that claim would not affect the insolvent's estate, as the bankruptcy case was not ongoing—and any recovery would be personal property—and because arbitrators are competent to interpret § 362 of the Code, arbitration "would not seriously jeopardize the objectives of the Bankruptcy Code."[234]

Fourth Circuit. The Fourth Circuit mostly agrees with the Second Circuit's broad approach. For instance, *Phillips v. Congelton, L.L.C.* (*In re White Mountain Mining Co.*) involved a pending arbitration in London and a later-filed adversary proceeding seeking the classification of certain prepetition advances as debt or equity.[235] The Fourth Circuit concluded the claim was a core matter and proceeded to examine *McMahon*'s "inherent conflict" prong.[236] Without citing any of the then-prevailing cases, the court stated "[t]he inherent conflict between arbitration and the purposes of the Bankruptcy Code is revealed clearly in this case, in which both the adversary proceeding and the London arbitration involved the core issue of whether Phillips's advances to the debtor were debt or equity."[237] The court justified its conclusion by listing various ways in which the arbitration could affect the pending insolvency case.[238] The takeaway from *White Mountain* is, despite the claim for classification of the advances not being a federal bankruptcy right found in the Code, the court concluded that the bankruptcy court had the discretion to reject an agreement to arbitrate because of arbitration's potential adverse impact on the insolvency case.

Perhaps the best illustration of the confusion that ensues when arbitration meets insolvency is the Fourth Circuit's case in *Moses v. CashCall,*

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[233]*Id.* at 109.

[234]*Id.*

[235]403 F.3d 164, 167 (4th Cir. 2005).

[236]*Id.* at 169.

[237]*Id.* at 170.

[238]*Id.* ("[A]n ongoing arbitration proceeding in London would (1) make it very difficult for the debtor to attract additional funding because of the uncertainty as to whether Phillips's claim was debt or equity, (2) undermine creditor confidence in the debtor's ability to reorganize, (3) undermine the confidence of other parties doing business with the debtor, and (4) impose additional costs on the estate and divert the attention and time of the debtor's management (even though the debtor was not a named party in the arbitration, the proceeding would necessarily involve the debtor's personnel and business records). . . . Finally, . . . allowing the adversary proceeding to go forward would 'allow all creditors, owners and parties in interest to participate [in a centralized proceeding] at a minimum of cost.'" (alteration in original)).

Inc.[239] The facts are straightforward. Moses agreed to a high-interest loan (effective rate of 233% per annum) with a payday lender.[240] After experiencing financial troubles, Moses filed for bankruptcy protection.[241] The lender filed a proof of claim and Moses objected and initiated an adversary proceeding seeking to (1) void the loan as illegal under state law, and (2) recover damages for the lender's allegedly illegal collection activity.[242] Despite these relatively plain facts, each member of the three-judge panel wrote, resulting in two different 2-1 splits on whether the claims should be directed to arbitration.

The court first characterized the claims. For the claim to void the loan agreement, the court deemed it both statutorily and constitutionally core because it implicated the "allowance or disallowance of claims against the estate."[243] For the money-damages claim, the court also deemed it statutorily core because it was a "counterclaim[ ] by the estate against persons filing claims against the estate."[244] But applying the Supreme Court's *Stern* decision, the court concluded the claim was constitutionally non-core (i.e., a *Stern*-claim).[245] The court then applied *McMahon*'s "inherent conflict" prong, stating, "Where such an intent can be deduced, the court of first impression has discretion to decide whether to withhold arbitration, a decision that is subject to review for abuse of that discretion."[246] Deferring to the policy objectives of insolvency generally, the first 2-1 majority held that "ordering arbitration of a dispute that directly pertains to Moses' plan for reorganization would 'substantially interfere with [her] efforts to reorganize.'"[247] Thus, the court affirmed the bankruptcy court's decision to deny arbitration of the core claim to void the loan agreement.

The second 2-1 majority, which was only in judgment, reversed the denial of arbitration of Moses's *Stern*-claim. Proceeding as if the claim was a traditional non-core claim,[248] Judge Gregory stated, as with core matters, "the

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[239]781 F.3d 63 (4th Cir. 2015).

[240]*Id.* at 66.

[241]*Id.*

[242]*Id.*

[243]*Id.* at 70 (quoting 28 U.S.C. § 157(b)(2)(B) (2012)).

[244]*Id.* (quoting § 157(b)(2)(C)).

[245]*Id.*

[246]*Id.* at 71-72.

[247]*Id.* at 73 (quoting Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164 (4th Cir. 2005)).

[248]In contrast, responding to an argument that a fraudulent conveyance claim is a *Stern*-claim and should be arbitrated, the Ninth Circuit has stated,

> In this case, though, that doesn't matter because John's answer did not take the Trustee's fraudulent conveyance causes of action outside the analytical paradigm that this court established in Thorpe Insulation.
> * * *

discretion to deny arbitration should be limited to cases where arbitration would 'substantially interfere[ ] with the debtor's efforts to reorganize.'"[249] And "substantial interference occurs when the resolution of the claim will necessarily affect reorganization in a significant way, and arbitration will thus inherently conflict with the purposes of [the] Bankruptcy Code."[250] Had Judge Gregory applied the Fifth and Third Circuit's narrow approach, he could have easily found the lower court lacked discretion to deny arbitration because the money-damages claim arose not from any federal statutory right, but from state law. But instead he determined that any conflict was not "inherent and 'sufficient to override by implication the presumption in favor of arbitration.'"[251] Thus, he concluded that Moses's claim should be submitted to arbitration. Because the bankruptcy court had already approved Moses's plan of reorganization, arbitration would not cause "inefficiency or delay."[252] Even further, Moses's *Stern*-claim did not overlap with the core claim.[253] Judge Gregory explained "the mere possibility of generic litigation-related exigencies, inherent in the act of litigating in another forum, cannot justify the refusal to arbitrate a non-core claim [here, a *Stern*-claim]."[254]

Although the precise contours are still undefined, the Fourth Circuit, like the Second Circuit, grants bankruptcy courts more latitude than the Fifth and Third Circuits in deciding whether to enforce arbitration agreements in insolvency cases.

Ninth Circuit. The Ninth Circuit's approach may be the broadest of them all—or, in the least, the most ill-defined.[255] The first case in which the

> In short, while we agree with John that his answer might affect the bankruptcy court's ultimate weighing of competing bankruptcy and arbitration policies, we disagree that, as a matter of law, the answer stripped the bankruptcy court of discretion to perform that weighing in the first place. The Trustee's fraudulent conveyance claim retains its statutory "core" label. As we have explained, when deciding motions to compel arbitration, nothing more is required.

Kirkland v. Rund (*In re* EPD Inv. Co., LLC), 821 F.3d 1146, 1151 (9th Cir. 2016).

[249]*Moses*, 781 F.3d at 84 (Greggory, J., concurring in the majority opinion in part, concurring in judgment) (citing White Mountain, 403 F.3d at 170).

[250]*Id.*

[251]*Id.* at 88 (citing U.S. Lines, Inc. v. Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999)).

[252]*Id.* at 85.

[253]*Id.*

[254]*Id.* at 86.

[255]Some commentators have opined that the Ninth Circuit subscribes to the narrower approach adopted by the Fifth and Third Circuits. *See* Alexis Leventhal & Roni A Elias, *Competing Efficiencies: The Problem of Whether and When to Refer Disputes to Arbitration in Bankruptcy Cases*, 24 AM. BANKR. INST. L. REV. 133, 152 (2016); Landon G. Van Winkle, Comment, *To Exit the Quagmire, Follow the Bright Line: How Stern Can Guide the Split Circuits Toward A Uniform and Efficient Approach to Enforcing Arbitration Clauses in Bankruptcy*, 33 CAL. BANKR. J. 371, 387 (2016); Benjamin Shiekman, Comment, *The Current Usage and Enforceability of Arbitration Clauses Post-Stern: Have No Fear*, 25 U. FLA. J.L. & PUB. POL'Y 165, 180 (2014). As detailed, this author respectfully disagrees.

Ninth Circuit broached the issue was *Continental Ins. Co. v. Thorpe Insulation Co.* (In re *Thorpe Insulation Co.*).[256] *Thorpe* involved a prepetition, breach-of-contract claim by Thorpe's insurer for Thorpe's alleged breach of a settlement agreement related to asbestos litigation and coverage.[257] The characterization of that claim took on core status when the insurer filed a proof of claim in Thorpe's insolvency case involving a trust established under § 524(g)[258] of the Code—namely, it concerned the allowance or disallowance of a claim under § 157(b)(2)(B).[259] The insurer moved to compel arbitration in accordance with a provision in the settlement agreement, and the bankruptcy court denied the request.[260] On appeal, recognizing the issue was one of first impression in the circuit, the Ninth Circuit took the moment to "*join* [its] sister circuits in holding that, even 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."[261]

The court then turned to *McMahon*. The court first concluded § 524(g) itself evidenced a contrary congressional command from the FAA's requirement that courts enforce parties' arbitration agreements.[262] "Because Congress intended that the bankruptcy court oversee all aspects of a § 524(g) reorganization, only the bankruptcy court should decide whether the debtor's conduct in the bankruptcy gives rise to a claim for breach of contract."[263] But the court did not stop there, stating that "[e]ven apart from § 524(g), the *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.'"[264] The court explained its understanding of that statement with a hypothetical:

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[256]671 F.3d 1011 (9th Cir. 2012).

[257]*Id.* at 1014.

[258]As the Ninth Circuit explained, § 524(g) of the Code specifically

> provides a mechanism for consolidating asbestos-related assets and liabilities of a debtor into a single trust for the benefit of present and future asbestos claimants. [It] authorizes the bankruptcy court to enter a 'channeling injunction'—channeling claims to the trust—to prevent claimants from suing the debtor. The injunction may also bar actions against third parties, such as insurers, that are based on asbestos-related claims against the debtor, if the third parties contribute to the trust in amounts that are commensurate with their likely liability.

Id. at 1015 (citations omitted).

[259]*Id.* at 1016, 1017, 1021.

[260]*Id.* at 1016, 1017.

[261]*Id.* at 1021 (emphasis added).

[262]*Id.* at 1022.

[263]*Id.*

[264]*Id.* (emphasis added).

> Suppose that (1) several creditors seek to arbitrate their *prepetition claims*; (2) each is a party to an agreement containing an arbitration clause; and (3) under the arbitral rules governing the arbitrations, while efficiency is favored there is no absolute time limit on the arbitration, with the pace of proceedings resting on decisions of arbitrators. In such a case separate arbitrations would so fracture the plan confirmation process that one could never say for sure when it could be brought to conclusion for the benefit of the debtor and all creditors. To a certainty, *in such a case the bankruptcy court would lose control over the timing of the reorganization* because it would not have control over the timing of the arbitrations.[265]

The court reasoned that "[p]ragmatic concerns" like these risk conflicting with arbitration.[266] In other words, the court seemed to favor a more holistic approach, guided by whether "arbitration, normally a benign and efficient form of dispute resolution, and the underlying purposes of the Bankruptcy Code, which are tailored to the needs of debtors and creditors," seriously conflict.[267]

The Ninth Circuit continued its expansive trajectory in *Ackerman v. Eber* (In re *Eber*).[268] *Eber* addressed a pending arbitration in New York over various prepetition contract and fraud claims.[269] After Eber filed for chapter 7 bankruptcy protection, two of his creditors filed an adversary proceeding in his insolvency case for a finding that their debt was nondischargeable under § 523(a) of the Code.[270] The creditors moved for leave to proceed with the arbitration to determine liability and damages, and the bankruptcy court rejected their request.[271] Eventually, the bankruptcy court denied the creditors' nondischargeability claim and Eber's unsecured debts (including the creditors') were discharged.[272]

On appeal, the Ninth Circuit agreed with the bankruptcy court. The

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[265]*Id.* at 1023. The hesitation outlined in last two sentences of the quoted passage is a bit of a red herring. Federal Rule of Bankruptcy Procedure 3018(a) permits bankruptcy courts, after notice and a hearing, to "temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." Therefore, completion of the claims allowance process should not impede confirmation of a plan of reorganization. *See generally* Michael A. Axel, *Temporary Allowance of Chapter 11 Claims for Voting Purposes*, AM. BANKR. INST. J., Mar. 2006, at 1.

[266]*Id.*

[267]*Id.*

[268]687 F.3d 1123 (9th Cir. 2012).

[269]*Id.* at 1125.

[270]*Id.* at 1125, 1126.

[271]*Id.* at 1126.

[272]*Id.*

court first acknowledged that under *McMahon* "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."[273] Yet, citing the Second Circuit's *Hill* decision, the court reasoned, "When a bankruptcy court considers conflicting policies as the bankruptcy court did here, we acknowledge its exercise of discretion and defer to its determinations that arbitration will jeopardize a core bankruptcy proceeding."[274] This turns *McMahon* on its head. Only if the purposes and objectives of the Code "inherently conflict" with arbitration will the bankruptcy court have the *discretion* to refuse to enforce an arbitration agreement.[275] The court, however, treats the bankruptcy court's consideration of the conflicting policies as its exercise of discretion, and, thus, deferred to it with due deference.

The Ninth Circuit's understanding of a bankruptcy court's discretion to deny arbitration is further illustrated in *Kirkland v. Rund (*In re *EPD Inv. Co., LLC).*[276] There, the court explained, "On de novo review, we agree with the bankruptcy court that the Trustee's [claims] were core proceedings, *thereby giving the bankruptcy court discretion to weigh the competing bankruptcy and arbitration interests at stake.*"[277] Whether the Ninth Circuit's statements represent a fundamental difference in understanding of *McMahon* and its progeny, or is merely susceptible to misreading based on the court's choice of words, the result is still the same: A standard that is "vague and malleable," lacking in predictability.

v. The New Frontier: *Stern*-Claims

U.S. courts are still defining the outer limits of *Stern* and its effect on bankruptcy judges' authority to enter final decisions in insolvency matters. The treatment of *Stern* in connection with arbitration agreements is no different. To date, several courts have addressed the issue, but approaches adopted by lower courts will continue to evolve as appellate courts weigh in on the discussion. For now, courts seem more inclined to defer *Stern*-claims to arbitration.

A prime example is *TP, Inc. v. Bank of America, N.A. (*In re *TP, Inc.),*

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[273]*Id.* at 1130 (quoting Continental Ins. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011, 1021 (9th Cir. 2012)).

[274]*Id.* at 1131 (citing MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 107 (2d Cir. 2006)).

[275]*See* Santangelo Law Offices, P.C. v. Touchstone Home Health LLC (*In re* Touchstone Home Health LLC), No. 17-11134, 2017 WL 3611046, at *19 (Bankr. D. Colo. Aug. 21, 2017) ("Under the *McMahon* test, the lack of an inherent conflict between arbitration and the Bankruptcy Code in this case dictates that the Court *must* order arbitration under the FAA. *Discretionary considerations only come into play if the Debtor establishes an inherent conflict* (which it has not)." (emphasis added)).

[276]821 F.3d 1146 (9th Cir. 2016).

[277]*Id.* at 1150.

where a bankruptcy court in the Fourth Circuit addressed a motion to enforce an arbitration agreement covering twelve claims.[278] The court observed, "[W]hether a proceeding is a 'core proceeding' . . . generally determines whether an arbitration can be enforced."[279] The court then examined each claim to determine whether the claim was statutorily and constitutionally core.[280] A two-part test guided whether the claim was constitutionally core, "whether the action at issue stem[med] from the bankruptcy itself, and . . . whether the issue would 'necessarily be resolved in' the claims allowance process."[281] Satisfying either test would result in a constitutionally core claim. Of the twelve claims, the court found that all were statutorily core; however, only three of those claims were constitutionally core under *Stern*.[282] The nine *Stern*-claims were referred to arbitration without further discussion.[283]

As highlighted in the last subpart, only the Fourth and Ninth Circuits have considered the arbitrability of *Stern*-claims in any detail.[284] The Fourth Circuit treated the claim as if it were a traditional non-core claim, observing that "bankruptcy courts *generally* have no discretion to refuse to arbitrate a non-core claim."[285] The Ninth Circuit, however, concluded that despite *Stern*'s limits on bankruptcy courts' final adjudicatory authority, a *Stern*-claim "remain[s] statutorily core, meaning that Congress has identified that type of claim as one that historically fell within the scope of the bankruptcy court's power."[286] It therefore reasoned that "Stern does not affect the statu-

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[278]479 B.R. 373 (Bankr. E.D.N.C. 2012). The twelve claims at issue were: "1) constructive fraud; 2) fraud; 3) fraud in the inducement; 4) rescission; 5) breach of fiduciary duty; 6) negligence; 7) negligent misrepresentation; 8) tortious interference with contractual relationships and business opportunities; 9) breach of contract/implied covenant of good faith and fair dealing; 10) unfair and deceptive trade practices; 11) alter ego/insider liability; and 12) equitable subordination/recharacterization." *Id.* at 378.

[279]*Id.* at 382 (citations omitted) (relying on Fourth Circuit precedent discussed *supra*). *See also* Edwards v. Vanderbilt Mortgage & Finance, Inc. (*In re* Edwards), No. 13-00078-8, 2013 WL 5718565, at *2 (Bankr. E.D.N.C. Oct. 21, 2013) ("When 'a core proceeding is at issue, the policy favor in favor of centralized determination in the bankruptcy court generally prevails.' An exception to that rule is where the 'core proceeding' is an unconstitutional core proceeding . . . ." (citation omitted)).

[280]*TP, Inc.*, 479 B.R. at 384-87.

[281]*Id.* at 384 (citing Stern v. Marshall, 564 U.S. 462, 499 (2011)).

[282]*Id.* at 387.

[283]*Id.* In a later ruling, the bankruptcy court stayed the arbitration of the nine *Stern*-claims until the court had the opportunity to decide the three claims in which it retained jurisdiction. TP, Inc. v. Bank of America, N.A. (*In re* TP, Inc.), No. 10-01594-8, 2013 WL 865982, at *4 (Bankr. E.D.N.C. Mar. 7, 2013). Exercising its equitable powers under § 105(a) of the Code, the court explained, "Here, it appears to the court that allowing arbitration of the non-core claims to proceed either simultaneously or, as BOA urges, first, would be wholly at odds with the court's obligation to exercise its full and appropriate jurisdiction over the bankruptcy case." *TP, Inc.*, 2013 WL 865982, at *3.

[284]*See* Kirkland v. Rund (*In re* EPD Inv. Co., LLC), 821 F.3d 1146, 1151 (9th Cir. 2016); Moses v. CashCall, Inc., 781 F.3d 63, 82-88 (4th Cir. 2015).

[285]*Moses*, 781 F.3d at 83.

[286]*EPD Inv.*, 821 F.3d at 1151 (citation omitted).

tory designation of matters as core for the purpose of determining whether the bankruptcy court has discretion to deny arbitration because that decision is not itself a final judgment."[287] Thus, the Ninth Circuit's view stands in contradiction to the Fourth Circuit's treatment.

Because *Stern* held that bankruptcy judges lack the constitutional authority to enter final decisions on statutorily core but constitutionally non-core claims, one has to question whether arbitration of such claims would truly conflict with the purposes and objectives of the Code. As the court in *Hays* said years ago discussing non-core claims generally, denying arbitration would "lead either to full scale litigation of this non-core, adversary proceeding in the district court or to referral of that proceeding to the bankruptcy court for a recommendation followed, upon objection, by *de novo* review in the district court."[288] The same holds for non-consented to *Stern*-claims.[289] This facet of *Stern* discounts certain policy objectives of domestic insolvency law that are traditionally invoked to override arbitration—namely, having insolvency issues decided by specialized tribunals, that are the bankruptcy courts; centralizing resolution of insolvency disputes in a single forum; and protecting parties from piecemeal litigation.

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As Professor Paul Kirgis has noted, the standards for determining whether an arbitration agreement will be recognized in insolvency proceedings provide "very little clear guidance" and "are so vague and malleable that they give courts license to do almost anything they want."[290] These infirmities, compounded with the Supreme Court's concern with bankruptcy courts' final adjudicatory authority, creates an environment plagued with uncertainty, which is destined to spawn a new round of court-based litigation. Below is a diagram charting a decision tree that, for the most part, captures the current paradigm governing the enforceability of arbitration agreements in insolvency—notably, this diagram is closer to the Fifth and Third Circuit's approach.

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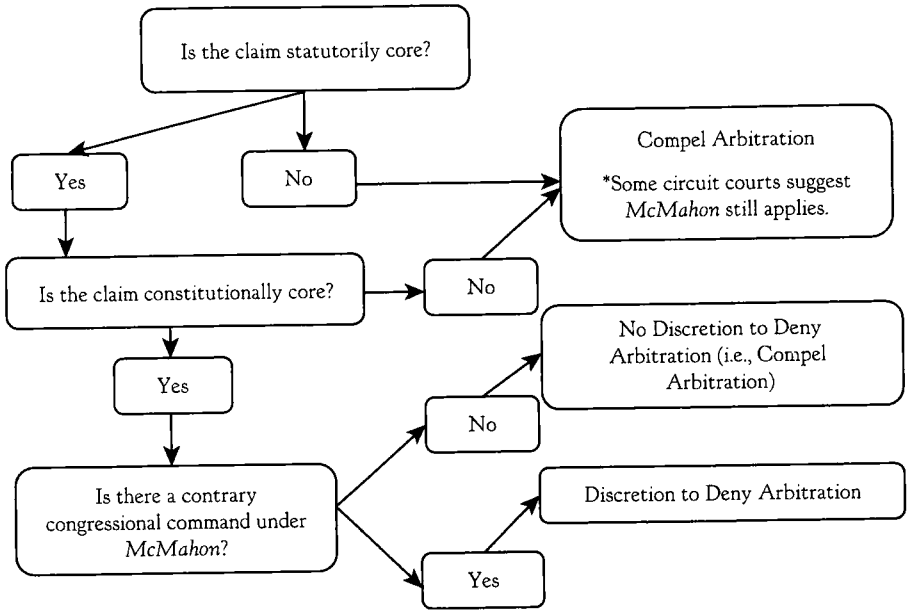
[287]*Id.*

[288]Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1158 (3d Cir. 1989) (citation and footnotes omitted).

[289]*See* Bellingham Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165 (2014) (holding traditional non-core review standards apply to *Stern*-claims). Of course, the same cannot be said if the parties "knowing and voluntary" agree to the bankruptcy judge's adjudication. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015) (holding bankruptcy judge may decide *Stern*-claims when parties knowingly and voluntarily consent to adjudication by bankruptcy court).

[290]Kirgis, *supra* note 12, at 520.



III. PROPOSED REFORMS: ARBITRATION AGREEMENTS IN AMERICAN INSOLVENCY PROCEEDINGS

The popularity of arbitration coupled with insolvency's increased presence over the last two decades has created an ideal battleground for the proverbial clash of these two bodies of law in U.S. courts. Unfortunately, courts have been unable to agree on a consistent standard to examine the enforceability of arbitration agreements in insolvency cases. As a result, scholars and commentators have proposed a number of thoughtful reforms. These proposals vary widely, from a legislative solution to a modified abstention framework to rethinking foundational U.S. Supreme Court jurisprudence. This Part surveys some of the proposals advanced to date.

A. Legislative Solution

Nearly a decade ago Professor Alan Resnick proposed a legislative solution to remedy the varied approaches fashioned by U.S. courts.[291] He noted that, for the most part, courts have distinguished claims based on the core and non-core distinction. Professor Resnick therefore proposed an amendment to the Code, codifying a rule that "contractual arbitration clauses are unenforceable in core proceedings, regardless of whether the proceeding involves causes of action derived from the debtor or bankruptcy actions that the Bankruptcy Code has created for the benefit of creditors or the estate."[292]

[291]Resnick, *supra* note 16, at 213.

[292]*Id.* at 214. Professor Resnick notes that his proposed rule should be subject to several exceptions:

In other words, Professor Resnick would have had Congress effectively codify an ipso facto rule for core claims, i.e., those claims would be statutorily exempt from otherwise enforceable arbitration agreements. Courts would continue, however, to review claims categorized as non-core under the current standards, with the acknowledgement that these claims are generally arbitrable.[293]

Professor Resnick opined that the effect of the legislative solution would be consistent with the Code and the bankruptcy jurisdictional scheme.[294] It would both promote the "centralization of dispute resolution in specialized courts" and allow interested parties to be heard in the insolvency case.[295] Further, congressional action would minimize the resulting burdens from the current scheme, namely "the lack of predictability and costly and time-consuming litigation."[296]

The primary shortfall with adopting a legislative bright-line rule is the *legislative* component of the proposal. It is unlikely that the U.S. Congress would act on or pass an intricate provision of insolvency law such as the one proposed by Professor Resnick. Not to mention, post-*Stern*, it is no longer adequate simply to refer to claims as "core." As previously detailed, whether a claim is core now takes on both statutory and constitutional importance. Thus, taking up this issue would require Congress to confront the sensitive topic of bankruptcy court jurisdiction, which is an invitation that is sure to be refused. Nonetheless, Professor Resnick's proposal is attractive because it elevates an element of predictability that is absence from the existing framework.

B. Rethinking McMahon's Application and Reconceptualizing Arbitration in Insolvency

Professor Paul Kirgis suggests U.S. courts have misapplied the Supreme Court's seminal *McMahon* decision, the cornerstone of the current review scheme. Additionally, he advocates for a reconceptualized model in which

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(1) the bankruptcy court's abstention power under 28 U.S.C. 1334(c)(1); and (2) when the debtor-in-possession or trustee enter into agreements to arbitrate during the bankruptcy case, i.e., post-petition agreements. *Id.* at 214, 215. This last exception is consistent with Federal Rule of Bankruptcy Procedure 9019(c) ("On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.").

[293]*Id.* at 218. Professor Resnick's article predates the Supreme Court's decision in *Stern*. It is unclear whether statutorily core but constitutionally non-core claims (*Stern*-claims) would fall outside the scope of his proposed amendment. But, considering Professor Resnick's proposed amendment is predicated in part on the bankruptcy jurisdictional scheme, *see* discussion *infra*, it is likely *Stern*-claims would be treated as traditional non-core claims. *See also* Comment, *supra* note 255, at 395.

[294]Resnick, *supra* note 16, at 216.

[295]*Id.*

[296]*Id.* at 212.

arbitration would be used as a means to further the goals of American insolvency law.

First, Professor Kirgis aptly observes that *McMahon* was decided in the face of the Supreme Court's decision in *Wilko*—a case that was almost directly on point—and was intended to *expand* the scope of arbitration, not restrict its functionality.[297] In that regard, Professor Kirgis points out that the Court in *McMahon* set out to address a rather limited question: "Whether Congress intended to preclude arbitration of a 'claim *founded on* a statutory right.'"[298] Despite this, Professor Kirgis argues that,

> Lower courts have used *McMahon* as a vehicle to give them the discretion to decide in particular cases whether to enforce an arbitration clause or not. That kind of analysis pushes *McMahon* well beyond its holding. *McMahon* provides a test to determine whether a claim founded on a federal statute is arbitrable. It does not provide a test to allow bankruptcy courts to decide whether an arbitrable claim would be better heard in bankruptcy court.[299]

Without *McMahon* as a means to obfuscate the FAA's mandate to enforce valid arbitration agreements, courts have little discretion to deny arbitration of claims arising outside the Code.[300] Professor Kirgis avers, however, that bankruptcy courts are not left powerless. For instance, "[t]here are several principles of bankruptcy law that apply to any contract and could provide a ground for refusing to enforce an arbitration agreement."[301]

Second, Professor Kirgis notes that courts have wrongly concluded "that the only way to protect bankruptcy is to prevent the arbitration process from going forward."[302] Courts in insolvency proceedings have been reluctant to embrace arbitration out of concern for costs, delay, and the potential for "arbitration to skew the bankruptcy process by favoring one creditor over others."[303] The concern about costs and delay implicates the enforceability of an arbitration agreement. Professor Kirgis nevertheless observes there is Su-

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[297]Kirgis, *supra* note 12, at 523.

[298]*Id.* (alteration in original).

[299]*Id.* at 524. This is consistent with the Fifth and Third Circuits' reading of *McMahon*. *See* discussion *supra* subpart II.B.3.iv and accompanying notes.

[300]Kirgis, *supra* note 12, at 524 ("If a claim is arbitrable and is covered by a written arbitration agreement, a court must enforce the agreement unless some legal defense applicable to contracts in general would allow for the revocation of the agreement to arbitrate.").

[301]*Id.* Professor Kirgis specifically points to the option of treating arbitration agreements as executory contracts under § 365 of the Code. Such treatment would permit the debtor-in-possession or trustee to reject the arbitration agreement. This proposal is discussed in greater detail *infra* subpart III.C.

[302]*Id.* at 525.

[303]*Id.*

preme Court case law that may pacify this concern.[304] For instance, the Court in *Green Tree Financial Corp.—Alabama v. Randolph*[305] recognized that an arbitration agreement may be unenforceable if it precludes a party from "vindicating" its legal rights.[306] In other words, this exception to arbitration seeks to prevent a "prospective waiver of a party's right to pursue statutory remedies."[307] Accordingly, "[i]f arbitration would cause undue cost or delay impairing the Trustee's or debtor-in-possession's ability to protect rights of the debtor or creditors, that should provide grounds for refusing to enforce an arbitration agreement."[308]

Comparatively, the concern about skewed results implicates the enforcement or judicial review of an arbitral award.[309] A proportionally large arbitral award may skew creditors' pro rata share of the insolvent's estate, creating the need for a modified enforceability scheme at the bankruptcy court level. For this, Professor Kirgis proposes a "contractarian approach." He posits that an arbitration award in bankruptcy should be viewed as a contract term, enforceable unless positive law renders it unenforceable.[310] Put another way, "It cannot be the case that an arbitrator has unreviewable power to order parties to violate positive law. . . . A reviewing court should have the power to vacate an award that would have rendered the contract unenforceable if made a contract term."[311] Professor Kirgis argues that judicial review would be accomplished through the non-statutory grounds for vacatur—particularly, the "extremely narrow ground for public policy review."[312] As a result,

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[304]*Id.* at 525-26 (citing Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 92 (2000) (holding "arbitration agreement need not be enforced if the costs of arbitration would prevent a party from effectively vindicating its statutory rights")).

[305]531 U.S. 79 (2000).

[306]Kirgis, *supra* note 12, at 526. This concept actually originated as dictum in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

[307]Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (emphasis omitted).

[308]Kirgis, *supra* note 12, at 528.

[309]*Id.* at 526 (explaining that this concern "is really a concern about finality and judicial review").

[310]*Id.* at 535. Professor Kirgis opines that such review would fall within the reviewing court's "public policy" review power. Additionally, the review would take a different form than the current public policy review.

> [B]ankruptcy is different from ordinary civil litigation, in that a complex statutory scheme overlays the entire process and establishes a set of public policies that must be honored. It thus provides a basis for more extensive review of awards than would be permitted in the ordinary case. In particular, the public policies promoted by the Bankruptcy Code provide solid footing for more probing review of awards on public policy grounds.

Id.

[311]*Id.* (footnote omitted).

[312]*Id.* at 531-36.

> If the parties, pre-bankruptcy, had agreed to a contract term obligating them to do exactly what the award requires, would that contract term be enforceable? If it would, then the FAA requires enforcement. If it would not, then the Bankruptcy Court should vacate or remand the award as violative of public policy.[313]

Professor Kirgis's approach advances a strong pro-arbitration stance consistent with the Supreme Court's current posture toward arbitration. The theories proffered by Professor Kirgis would maintain bankruptcy courts' voice, but they may be overly aspirational. For one, it is unclear that a bankruptcy court would have the discretion to refuse to enforce an agreement to arbitrate based on cost and delay under current Supreme Court jurisprudence.[314] Even further, the Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.* held the statutory grounds for review of an arbitral award enumerated in the FAA "provide . . . [the] *exclusive* grounds for expedited vacatur and modification."[315] Whether non-statutory grounds, like public policy review, survived *Hall Street* is at best questionable.[316] Although this approach correctly advances a broad acceptance for the recognition of arbitration agreements in an insolvency setting, the activation of bankruptcy court discretion must be grounded in a framework that is more decisive and predictable.

C. Arbitration Agreements as Executory Contracts

Several scholars and commentators have suggested that an arbitration agreement may be rejected as an executory contract under § 365 of the Code.[317] As detailed above, § 365 permits the debtor-in-possession or trustee

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[313]*Id.* at 539.

[314]The Supreme Court has recently observed that the "effective vindication" exception is a limited remedy. In addressing a class action waiver in an arbitration agreement relating to antitrust claims, the Court explained, "[T]he fact that [a statutory claim] is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311 (2013) (emphasis in original).

[315]552 U.S. 576, 584 (2008) (emphasis added). Those grounds include where: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident bias or prejudice exhibited by the arbitrators; (3) the arbitrators were guilty of misconduct that affected the award, such as a refusal to grant a hearing or hear evidence; or (4) the arbitrators exceeded their powers "or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10 (2012).

[316]*See* Kirgis, *supra* note 12, at 535 (comparing Jonathan A. Marcantel, The Crumbled Difference Between Legal and Illegal Arbitration Awards: *Hall Street Associates* and the Waning Public Policy Exception, 14 Fordham J. Corp. & Fin. L. 597 (2009), *with* Richard C. Reuben, Building the Civilization of Arbitration: Personal Autonomy and Vacatur After *Hall Street*, 113 Penn St. L. Rev. 1103, 1143 (2009)). *See also Hall Street*, 552 U.S. at 585 (discussing the non-statutory, "manifestly disregard of the law" review standard and noting "[m]aybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them").

[317]*See, e.g.*, André Albertini, *Arbitration in Bankruptcy: Which Way Forward?*, 90 Am. Bankr. L.J.

to assume or reject executory contracts with court approval. By now, it is elementary that an arbitration agreement is separable from the principal agreement. The U.S. Supreme Court first recognized the doctrine of separability in determining whether fraud in the inducement of a contract was a matter for the arbitral tribunal or the court.[318] Looking to the remedies section of the FAA,[319] the Court observed that "the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.'"[320] That is, once the court finds the parties agreed to arbitrate their disputes, the court should compel arbitration. The Court warned, however, fraud in the inducement of the *arbitration agreement* goes to the making of the agreement to arbitrate and, therefore, is a matter for the court.[321] This dichotomy between the principal agreement and the arbitration agreement is known as the doctrine of separability. The Court believed the doctrine "honor[ed] the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."[322]

Armed with the doctrine of separability, some have opined that an insolvent may sever the principal agreement from the arbitration agreement and reject the latter through § 365(a).[323] In theory, the executory nature of an arbitration agreement, and the resulting rejectability, is adjudged independently of the principal agreement. And, as Professor Jay Westbrook has noted, "Viewed as an independent contractual obligation of the parties, an arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought."[324] Based on the foregoing, a debtor-in-possession or trustee could sever the arbitration agreement and reject it independently, thus avoiding the obligation to arbitrate while continuing to enjoy the benefits of the principal agreement.[325]

599, 621-26 (2016); Leventhal & Elias, *supra* note 255, at 153-54; Kirgis, *supra* note 12, at 521; Westbrook, *supra* note 50, at 623; Polina Kushelev, Note, *An International Approach to Breaking the Core of the Bankruptcy Code and FAA Conflict*, 28 EMORY BANKR. DEV. J. 355, 373 (2012); Jason S. Brookner & Monica S. Blacker, *The Rejectability of Arbitration Clauses*, 26 AM. BANKR. INST. J. 1, 77 (April 2007).

[318]*See* Prima Paint Corp. v. Flood & Corkin Mfg. Co., 388 U.S. 395, 402-04 (1967). *See also* Westbrook, *supra* note 50, at 623.

[319]9 U.S.C. § 4 (2012).

[320]*Prima Paint Corp.*, 388 U.S. at 403 (quoting § 4).

[321]*Id.* at 403-04 & 12.

[322]*Id.* at 404.

[323]Albertini, *supra* note 317, at 622.

[324]Westbrook, *supra* note 50, at 623.

[325]Albertini, *supra* note 317, at 625 ("[I]t appears that the policy behind the FAA commands that they be placed on equal footing with all other executory contracts and that they therefore be subject to

Despite the "logical attraction" of treating arbitration agreements as rejectable, executory contracts,[326] no court has adopted this framework in a bankruptcy case.[327] In fact, courts have invoked the principle of separability in a different manner. For instance, several courts faced with rejected principal agreements have compelled arbitration of disputes arising under the rejected agreements, reasoning that the arbitration agreement survives the § 365 rejection.[328] Although such treatment may emphasize the doctrine of separability[329]—by permitting the insolvent to reject the principal agreement while at the same time compelling arbitration under the agreement—it is actually consistent with the idea that rejection of an executory contract does not equate to termination of that contract. Rather, rejection "cuts off any right of the contracting creditor to require the estate to perform the remaining executory portions of the contract and limits the creditor's claim to breach of contract."[330] This then begs the question whether the contracting creditor would truly have a claim for breach of an arbitration agreement. By classifying rejection as a breach, § 365(g) of the Code converts the insolvent's unfilled obligations into damages payable as a prepetition debt.[331] But assuming § 365 eliminates any specific-performance remedy—otherwise rejection of an arbitration agreement would be illusory—it is difficult to conceive how

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the 'power to breach' conferred upon the debtor-in-possession or trustee in bankruptcy by the Bankruptcy Code. It ensu[r]es that, an arbitration clause, being a separate executory contract subject to § 365 of the Bankruptcy Code, could be rejected alone or concurrently with the rejection of the container contract." (footnote omitted)).

[326]Kirgis, *supra* note 12, at 521.

[327]*But see* Janvey v. Alguire, No. 3:09-cv-0724, 2014 WL 12654910, at *10 (N.D. Tex. July 30, 2014) (holding receiver could reject arbitration agreements in federal equity receivership as executory contracts), *aff'd on other grounds*, 847 F.3d 231 (5th Cir. 2017).

[328]*See* Truck Drivers Local Union No. 807, Int'l Bd. of Teamsters v. Bohack Corp., 541 F.2d 312, 321 n.15 (2d Cir. 1976) ("If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI. But like any other unilateral breach of contract, it does not destroy the contract so as to absolve the parties (particularly the breaching party) from a contractual duty to arbitrate their disputes."); *In re* Statewide Realty Co., 159 B.R. 719, 719 (D. N.J. 1993); La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 B.R. 606, 609 (D. Mass. 1987); Fleming Cos. v. PCT (*In re* Fleming Cos.), No. 05-749, 2007 WL 788921, at *3 (D. Del. Mar. 16, 2007).

[329]*See* Albertini, *supra* note 317, at 624 n.161.

[330]Univ. Med. Ctr. v. Sullivan (*In re* Univ. Med. Ctr.), 973 F.2d 1065, 1075 (3d Cir. 1992); Top Rank, Inc. v. Ortiz (*In re* Ortiz), 400 B.R. 755, 765 (C.D. Cal. 2009) ("Although rejection also serves to relieve a debtor from certain financial obligations, the breach created by rejection under the Bankruptcy Code does not terminate rights and obligations under the contract. Rather, the debtor is relieved because monetary claims for breach are treated as claims against the estate rather than the debtor: '[r]ejection's effect is to give rise to a remedy in the non-debtor party for breach of the rejected contract, typically a right to money damages assertable as a general unsecured claim in the bankruptcy case. Rejection has absolutely no effect upon the contract's continued existence; the contract is not cancelled, repudiated, rescinded, or in any other fashion terminated.'").

[331]Sunbeam Prod., Inc. v. Chicago Am. Mfg., LLC, 686 F.3d 372, 377 (7th Cir. 2012).

"damages" could be calculated for breach of an arbitration agreement in and of itself.

An additional factor that may explain why courts have been reluctant to adopt this approach is the general rule that a debtor-in-possession or trustee must assume or reject the *entire* contract.[332] A piecemeal assumption or rejection is prohibited. Although under *Prima Paint* an arbitration agreement is a separate contract, a court may be hesitant to allow parties to treat a contract in piecemeal fashion for purpose of rejection under § 365. Put differently, courts may view the application of the doctrine of separability in a § 365 context as a perverse use of the doctrine because it grants the debtor-in-possession or trustee the unilateral power to reject the contractual obligation to arbitrate disputes that arise under the principal agreement. Even further, such use of the doctrine flies in the face of the pro-arbitration tenets the Supreme Court relied on in first recognizing the doctrine of separability.[333] For now, it is safe to say that given the strong policy towards enforcing arbitration agreements in the United States, this approach is unlikely to find suitors in the near term unless Congress elects to amend the Code,[334] which, again, is something that is unlikely.

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[332]*See* 3 COLLIER ON BANKRUPTCY, para. 365.03(3) (16th ed. 2014) ("An executory contract may not be assumed in part and rejected in part. The trustee must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits.").

[333]*See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-45 (2006); Prima Paint Corp. v. Flood & Corkin Mfg. Co., 388 U.S. 395, 403 (1967). Indeed, the doctrine of separability has been described as a "foundation stone" to modern (and historical) arbitration schemes. *See* Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 81-82 (2003) ("In none of this discussion, however, do I find any recognition of the fact that every modern regime of arbitration—if not indeed every piece of legislation in the civilized world—takes separability as the foundation stone of the entire structure: Entrusting the validity of the underlying contract to arbitrators seems universally recognized as being necessary both to guard the integrity of arbitral decision-making on the merits, and to allow the process to get smoothly under way. Predating *Prima Paint*—but also a central and quite uncontroversial feature of the UNCITRAL Model Law on International Commercial Arbitration—separability has become 'a truly international rule of law.'" (footnotes omitted)).

[334]Nonetheless, Congress has been quick to act in response to perceived incorrect readings of § 365 by the courts in the past. For example, in *Lubrizol Enterprises v. Richmond Metal Finishers, Inc.* (In re *Richmond Metal Finishers, Inc.*), the U.S. Court of Appeals for the Third Circuit addressed an insolvent's rejection of licensing agreement under § 365. 756 F.2d 1043, 1044 (3d Cir. 1985). The court held that "[u]nder [§ 365(g)], Lubrizol would be entitled to treat rejection as a breach and seek a money damages remedy; however, it could not seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available . . . ." *Id.* at 1048. Congress then enacted § 365(n) in response to industry concerns that "after *Lubrizol* any patent or trademark licensor could go into Chapter 11 and invalidate a license perfectly valid under contract law." Westbrook, *supra* note 58, at 307. Through subsection (n), Congress made "clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy." S. Rep. No. 100-505, at 1 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3200.

D. ABSTENTION FRAMEWORK

Another commentator argues the doctrine of abstention, codified in 28 U.S.C. § 1334(c),[335] is the "most appropriate analytical framework" for determining when to enforce an arbitration agreement in American insolvency cases.[336] This approach would shift the focus away from the nature of the claim at issue and, instead, focus on congressional intent in structuring bankruptcy jurisdiction—that is, the centralization of disputes into a forum concerning a "debtor's assets and legal obligations and litigation 'arising under' or 'arising in' the Bankruptcy Code, or 'related to' a case under the Bankruptcy Code."[337] But as previously discussed, although Congress may have intended to centralize bankruptcy-related matters in a single bankruptcy forum, the Supreme Court in *Stern* held that Congress's chosen design does not pass constitutional scrutiny.

A pivotal underpinning to this commentator's approach is the finding of an "internal conflict" between the FAA, the Code, and bankruptcy's jurisdictional constructs. The commentator first notes that "[t]he federal bankruptcy statutory scheme permits the modification of the rights of debtors and creditors, and one purpose of its structure is to centralize disputes regarding a debtor's assets and liabilities in the bankruptcy courts."[338] But the purpose of FAA is entirely different; it is premised on deferring to parties' right to contract.[339] Accepting the "clash" between the FAA and bankruptcy, the commentator argues, Congress has longed curtailed contractual obligations through the enactment of bankruptcy laws.[340] Even further, Congress's structuring of bankruptcy court jurisdiction by broadly vesting with the district courts' jurisdiction over bankruptcy matters evidences congressional ac-

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[335]Specifically, § 1334(c)(1) provides,

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

[336]Birney, *supra* note 16, at 623.

[337]*Id.* at 622 (footnote omitted).

[338]*Id.* at 657.

[339]*Id.*

[340]For instance, the commentator lists the Code's following impairments to contractual obligations:

> (1) congressional intent to temporarily or permanently enjoin a party's right to enforce its contractual rights and security interests; (2) the reshuffling of creditors' believed priorities and the consequential fair and equitable distribution of a debtor's property to those creditors; (3) the potential subordination of a party's claim against a debtor; (4) the assumption or rejection of a party's executory contract; (5) the negation of ipso facto clauses; and (6) the impairment or, in some instances, the outright stripping of a lien holder's security interest in the debtor's property interest.

Id. at 660 (footnotes omitted).

knowledgement "that the bankruptcy court's jurisdictional reach was critical 'to the efficient administration of bankruptcy proceedings' and that the district court's jurisdictional reach expanded beyond traditional federal question, admiralty, or diversity jurisdiction."[341] With this in mind, the commentator opines that bankruptcy courts must "have jurisdiction and authority in *all instances* to determine if an arbitration agreement is enforceable in a particular proceeding."[342] And to guide courts' enforceability determinations, the commentator offers the doctrine of abstention codified in § 1334(c).[343]

Section 1334(c)(1), described as *permissive* abstention, provides that, other than cases in Chapter 15, "nothing in this section prevents [a court] in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under [the Code] or related to a case under [the Code]."[344] This provision confers upon bankruptcy courts the right to limit their own exercise of bankruptcy-related subject matter jurisdiction.[345] To evaluate whether abstention is appropriate, the commentator proposes a list of factors for consideration.[346] These factors inevitably pay homage to "the contours

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[341]*Id.* at 662 (footnote omitted).

[342]*Id.* at 657 (emphasis added).

[343]*Id.* (quoting Kittay v. Landegger (*In re* Hagerstown Fiber Ltd. P'ship), 277 B.R. 181, 199 (Bankr. S.D.N.Y. 2002) and U.S. Lines, Inc. v. Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999)).

[344]28 U.S.C. § 1334(c)(1) (2012).

[345]Several court have enumerated a non-exhaustive list of factors when considering whether abstention in appropriate. *See, e.g.*, Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1168 (9th Cir. 1990) (setting forth a twelve factor test).

[346]Birney, *supra* note 16, at 674–75. The author sets forth a revised *Tucson Estates*-twelve factor test:

> (1) if an arbitration agreement is enforced, and arbitration compelled, the effect or lack thereof on the efficient administration of the estate; (2) if an arbitration agreement is not enforced, and arbitration not compelled, the identification of one or more findings of fact supporting the retention of bankruptcy court jurisdiction over arbitration; (3) the extent to which arbitration is favored because the adjudication of the dispute will be more timely or less costly to the estate, or because a specialized tribunal with a well-developed understanding of the particular industrial or business context in which a given dispute arose is needed; (4) the difficulty or unsettled nature of the applicable law; (5) the existence of a constituted arbitration panel and ongoing arbitration regarding the case in controversy; (6) the degree of relatedness or remoteness between the issues subject to the arbitration and the main bankruptcy case; (7) the substance rather than form of whether the issues subject to arbitration are "core" proceedings or "non-core" proceedings; (8) the feasibility, if an arbitration agreement is enforced and arbitration compelled, to separate the arbitration proceeding from core bankruptcy matters to allow arbitration awards to be entered with the subsequent enforcement left to the bankruptcy court; (9) if an arbitration agreement is not enforced, or arbitration not compelled, the burden on the bankruptcy court's docket; (10) the likelihood that the motion to compel arbitration in bankruptcy court involves forum shopping by one of the parties; (11) the presence in the proceeding of nondebtor parties; and (12) in a chapter

and policy considerations of the jurisdictional and substantive provisions of the bankruptcy statutory scheme and the FAA."[347] But the commentator reminds us that in evaluating these factors, courts must keep in mind the policy objectives of both the FAA and the insolvency scheme.[348]

In the end, this approach vests too much discretion with bankruptcy courts to decide whether to enforce otherwise valid arbitration agreements. As discussed, this is a problematic characteristic pervading the current approaches. Additionally, it is questionable whether Congress's structuring of bankruptcy court jurisdiction provides enough of an inherent conflict with the FAA to justify overriding arbitration agreements concerning non-core claims and *Stern*-claims, as these claims are already finally (and routinely) decided outside the bankruptcy courts.

E. Enforcing Arbitration Agreements Carte Blanche

Lastly, another commentator has argued that U.S. courts should enforce arbitration agreements carte blanche.[349] This may be one of the more radical approaches—at least, seemingly from the bankruptcy community's perspective.

This commentator's approach relies on the premise that parties, by mutually agreeing to an arbitration agreement, at one time expressed an intent to arbitrate their disputes; therefore, bankruptcy courts should honor that election.[350] The approach is mostly borrowed from Brazil's *Superior Tribunal de Justiça* (Superior Court of Justice),[351] which "adopt[ed] a policy of unequivocally compelling arbitration even in the face of bankruptcy proceedings."[352] In support of its decision, the *Superior Tribunal de Justiça* noted that (1) the existence of a bankruptcy proceeding does not invalidate an agreement to arbitrate; (2) arbitration provides parties with the same rights as they would receive in bankruptcy; and (3) any issue with the arbitration or agreement to arbitrate could be settled in an action to enforce the award.[353]

> 11 case, the impact of the outcome of the proceeding on the debtor's ability to reorganize.

Id. at 675 (citations omitted).

[347]*Id.* at 623 (citations omitted).

[348]*Id.* at 676.

[349]Note, *supra* note 317, at 389.

[350]*Id.*

[351]Brazil's *Superior Tribunal de Justiça* is the highest appellate court in Brazil for non-constitutional questions.

[352]Note, *supra* note 317, at 390 (citing Arnoldo Wald & Rodrigo Garcia Da Fonseca, *Arnoldo Wald and Rodrigo Garcia Da Fonseca on the "Interclinicas Case": Brazil's Superior Court of Justice Rules on the Arbitrability of Disputes Involving Bankrupt Companies and Reaffirms the Principle of Kompetenz-Kompetenz*, 2008 Lexisnexis Emerging Issues Analysis 2780, at 4–5 (2008)).

[353]*Id.* For further developments in Brazil as to the enforceability of arbitration agreements in insolvency cases see discussion *infra* subpart IV.B. and accompany notes.

After an award is rendered, the parties would seek enforcement of the award. If no grounds for vacatur existed, the bankruptcy court would have to determine whether to confirm the amount of the award.[354] Such confirmation would vest with bankruptcy courts the autonomy to "reject [an award] if it too heavily skews the recovery of the other creditors."[355]

This approach is admittedly appealing because it is simplistic in its application. But the issue is that the FAA does not permit supplementary review of an award after determining that no grounds for vacatur exist.[356] Put simply, once an award is deemed enforceable under the applicable FAA framework (or the New York Convention), the court must enter judgment. Therefore, in order to deploy this approach, some added legislative step would be required, or the bankruptcy court's review would have to be achieved through one of the non-statutory grounds—assuming the non-statutory grounds for review survived *Hall Street*.[357]

IV. COMPARATIVE LAW APPROACH: ARBITRATION AGREEMENTS IN INSOLVENCY PROCEEDINGS

The last Part illustrates the valiant attempts by scholars and commentators alike to disentangle the standards that have evolved to govern the enforceability of arbitration agreements in American insolvency cases. As a testament to the importance of this issue, the proposed solutions discussed truly run the gamut. Unfortunately for all involved, not only has this thoughtful commentary failed to gain traction, but intermediate appellate courts have further entrenched themselves in a divide that is at times undiscernible—and certainly, unpredictable. The time is ripe for something new, a reset so to speak. This Part offers a change in perspective to refresh and deepen our understanding of arbitration agreements in insolvency proceedings by examining some of the approaches used in other developed countries around the world through a comparative law analysis.

A. COMPARATIVE LAW: THE BENEFITS

Analyzing other counties' laws on insolvency and arbitration imbues a heightened degree of awareness and understanding of the theoretical underpinnings of both sources of law. Both insolvency and arbitration are inextrica-

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[354]Note, *supra* note 317, at 390. The commentator notes that this process is similar to the process used in France. The arbitration tribunal determines the validity and the amount of the claim, and then the tribunal refers an award to the court for enforcement. *See* José Rosell & Harvey Prager, *International Arbitration and Bankruptcy: United States, France and the ICC*, 18 J. INT'L ARB. 417, 419 (2001). *See also* discussion *infra* subpart IV.B and accompany notes.

[355]Note, *supra* note 317, at 390.

[356]In U.S. Supreme Court held in *Hall Street Assoc., LLC v. Mattel, Inc.* that the FAA provides the "*exclusive* grounds for expedited vacatur and modification." 552 U.S. 576, 584 (2008) (emphasis added).

[357]*See supra* note 316.

bly engrafted into the international legal landscape. For that reason, a comparative law analysis offers a wealth of knowledge from an international perspective as a means to better understand the current American framework and to provide a source of ideas that may guide us in reshaping our current view on the treatment of arbitration agreements in insolvency.

It is generally accepted that the framers had English insolvency laws in mind when they included the Bankruptcy Clause in the Constitution, giving Congress the power to enact "uniform laws on the subject of bankruptcy."[358] Early English insolvency laws date back nearly half a millennium to the Act of Parliament of 34 & 35 Henry the VIII, c. 4 (1542).[359] Although the Act of Henry the VIII can hardly be compared to the insolvency laws we know today—it was merely a criminal statute aimed at men "who indulged in very prodigal expenditure and then made off"—the act set the stage for future laws, like the famed 4 Anne, c. 17 (1705) and 10 Anne, c. 15 (1711) (Statutes of Anne), that stand as a cornerstone to today's insolvency regimes.[360] This brief history explicates the international origin and prominence of insolvency law. Even further, the United States has not been one to cast aside the international import of insolvency in a world of global trade. As discussed previously, the United States is one of forty-three countries to have adopted the Model Law on Cross-Border Insolvency, which amends local insolvency laws to more effectively and efficiently deal with cross-border proceedings.[361] Therefore, the United States is keenly aware of insolvency law's international stature and the role the law plays in the global commerce chain.

Similarly, arbitration is steeped in an international pedigree. Since the early 1980s international commercial arbitration has "witnessed a dramatic growth" and has become the "normal method of resolving disputes in international transactions."[362] This revelation is made possible by the New York Convention, which is a convention between 157 countries ensuring the recognition and enforcement of foreign arbitral agreements and awards.[363] International arbitration's global rise in popularity has called upon courts from other countries to reconcile the principles of arbitration—some of which are

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[358]Tabb, *supra* note 15, at 6. *See supra* note 15 for further discussion on the origin of insolvency laws in the United States.

[359]Louis Edward Levinthal, *The Early History of English Bankruptcy Law*, 66 U. PA. L. REV. 1, 1 (1918).

[360]*Id.* (footnotes omitted).

[361]*See supra* subpart I.A.1 and accompanying notes.

[362]FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD, GAILLARD, & GOLDMAN]; REDFERN AND HUNTER ON INTERNATIONAL COMMERCIAL ARBITRATION 1 (Nigel Blackaby & Constantine Partasides eds., 5th ed. 2009) [hereinafter REDFERN & HUNTER] (noting "[i]nternational arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment").

[363]*See* discussion *supra* subpart I.B.2. and accompanying notes.

cost savings, ease of enforcement of awards, confidentially, neutral decision makers, and autonomy to shape party-specific dispute resolution frameworks[364]—with domestic law and procedure. Accordingly, courts from around the world have amassed a body of knowledge interpreting arbitration and its foundational principles.

Importantly, this Article does *not* seek to engage in the philosophical debate that continues to occupy the comparative law field as to the efficacy of using comparative law principles to interpret domestic law.[365] The approach as applied in this Article is more guileless in form, as it assumes comparative law principles at least have *some* interpretive value. As two scholars on the side of a more restricted role of international law in domestic interpretation have explained,

> Some [Supreme Court] Justices appear to believe that foreign and international legal practices and opinions can serve, at a minimum, *to illuminate possible solutions to questions similar to those that U.S. courts must address*, just as our federal courts may learn from our state courts, and vice versa. . . . Or, like law review articles, *they can furnish original legal arguments*. To the extent that foreign and international legal materials are used only for those purposes, *such*

[364]FOUCHARD, GAILLARD, & GOLDMAN, *supra* note 362, at 1.

[365]*See Jaye Ellis, General Principles and Comparative Law*, 22 EUR. J. OF INT'L L. 949 (2011) (discussing various comparative law perspectives); WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 26 (2d ed. 2006) ("The present discussion highlights the theoretical challenges faced by comparative lawyers in reconciling their own partially subconscious adherence to positivist axioms with growing recognition of legal plurality as a global reality." (footnote omitted)). Additionally, in the United States there is an intense debate between some of the foremost American legal scholars on what role foreign and international law plays in deciding questions of constitutional interpretation. *See* Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POLY 291, 294, 296 (2005) (noting "Professor Bruce Ackerman has advocated 'world constitutionalism'; Professors Vicki Jackson and Mark Tushnet have become interested in the possibilities of comparative constitutional analysis; Professor Harold Koh has argued that the Court should look beyond American law when interpreting a constitutional term (like unreasonable search or due process) that 'implicitly refers to a community standard'; and international law scholar Anne-Marie Slaughter has argued in favor of transnational communication between courts" (footnotes omitted)). *Compare* Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself."), *with id.* at 604 (O'Connor, J., dissenting) ("Nevertheless, I disagree with Justice SCALIA's contention, post, at 1225-1229 (dissenting opinion), that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency."). *See generally* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015).

> *use is unobjectionable* (assuming it is methodologically sound).[366]

Similarly, the foreign practices and procedures detailed below advance our understanding of the U.S. system and provide a source of original ideas.

It has been observed that comparative law is unlike most legal subjects and inheres a certain intellectual use.[367] First, a comparative law approach serves as a platform for the accumulation of knowledge.[368] With a global overview of the law—i.e., an expanse on knowledge—it enhances the understanding of a particular legal rule or system beyond the study in geographic isolation. Second, enhancing one's knowledge through an international perspective exposes the researcher to an inherently different type of knowledge.[369] For example, "comparative law challenges the lawyer's knowledge about her own system with the different results and approaches of the foreign system. . . . [And] the simple awareness of alternatives enlarges the lawyer's intellectual stock, making her analytically better trained and more adept in dealing with complex legal questions within her own legal system."[370] Third and finally, comparative law exposes the researcher to an array of new ideas, acting as a source of possible solutions to domestic law problems.[371]

So with that methodological framework in mind, the next subpart examines how other countries around the world treat arbitration agreements vis-à-vis insolvency.

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[366]Delahunty & Yoo, *supra* note 365, at 295.

[367]Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 333, 335 (1998).

[368]ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 2-4 (T. Weir trans., 2d ed. 1987); VIVIAN GROSSWALD CURRAN, COMPARATIVE LAW: AN INTRODUCTION 5 (2002).

[369]Schadbach, *supra* note 367, at 344 ("I never completely understood the French law before coming to the United States and studying another system." (quoting Pierre Lepaulle, *The Function of Comparative Law—With a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 858 (1921-22)).

[370]*Id.* (footnotes omitted).

[371]*Id.* at 350. To the extent legal rules can be "transplanted" from one legal system to another is subject to academic debate centering on law and society. Ellis, *supra* note 365, at 963. On one end of the spectrum is Professor Alan Watson, who argues that "a law reformer looking for inspiration to solve a legal problem can feel free to borrow rules and institutions from other legal systems without being particularly concerned either about the legal, social, or cultural context of the rules or with how well they work in that context." *Id.*; *see also* Alan Watson, COMPARATIVE LAW: LAW, REALITY AND SOCIETY 5 (2d ed. 2008) (explaining "[b]orrowing is the name of the legal game and is the most prominent means of legal change"). On the other end of the spectrum is Professor Pierre Legrand. He argues that "law is inextricably linked not only to the legal culture but also to the broader culture in which it emerged and continues to be interpreted and applied." Ellis, *supra* note 365, at 963. "When a rule is taken out of its culture, 'as the words cross boundaries there intervene a different rationality and morality to underwrite and effectuate the borrowed words[.] . . . Accordingly, the imported form of words is inevitably ascribed a different, local meaning which makes it *ipso facto* a different rule.'" *Id.* at 963-64 (footnotes omitted).

B. COMPARATIVE LAW: COUNTRY-BY-COUNTRY ANALYSIS

The discussion below outlines how some twelve countries approach arbitration agreements in insolvency cases, and includes: England, Germany, France, Switzerland, Brazil, Hong Kong, the Netherlands, Spain, Latvia, Poland, Argentina, and Singapore. The sample countries were selected because they have developed laws on the topic, which translate to a greater impact from a comparative law perspective. The countries also include a cross-section of both civil law[372] and common law[373] jurisdictions and span territories from all over the world. The illustrations, however, are by no means exhaustive. Rather, this Article draws from statutes, case law, and commentary on the same in order to provide general principles that animate throughout the jurisdiction on how local courts address arbitration agreements in insolvency.

England. The commencement of an insolvency case generally does not have a legal effect on pre-insolvency arbitration agreements.[374] But for *individual* (or personal) insolvencies, the Arbitration Act of 1996 did amend the Insolvency Act of 1986 to set forth a procedure for the estate's trustee to deal with pre-insolvency arbitration agreements entered into by the bankrupt.[375] In broad measure, § 315 of the Insolvency Act grants the trustee the right to reject "unprofitable" contracts.[376] By extension, § 349A (Arbitration agreements to which bankrupt is party) provides,

> (1) This section applies where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy.
> (2) If the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract.
> (3) If the trustee in bankruptcy does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings—

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[372]"Civil law" is "[o]ne of the two prominent legal systems in the Western world, originally administered in the Roman Empire and still influential in continental Europe, Latin America, Scotland, and Louisiana, among other parts of the world. . . . [A] body of law imposed by the state, as opposed to moral law." *Civil Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[373]"Common law" is a "body of law derived from judicial decisions, rather than from statutes or constitutions." *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[374]ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES 170 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009) [hereinafter INTERNATIONAL & COMPARATIVE PERSPECTIVE].

[375]*See* Arbitration Act 1996, c. 23, § 107(1), sch. 3 para. 46 (Eng.). *See also* REDFERN & HUNTER, *supra* note 362, at 131.

[376]Insolvency Act 1986, c. 45, § 315(1) and (2)(A) (Eng.).

> (a) the trustee with the consent of the creditors' committee, or
> (b) any other party to the agreement,
> may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement . . . .[377]

Accordingly, the statutory scheme bestows upon the trustee the authority to affirm contracts containing arbitration agreements; but in the event the trustee does not affirm the contract, arbitration is only possible with permission of the English High Court after application by a party to the agreement or the trustee with consent of the creditors' committee.[378]

The Insolvency Act, however, does not provide similar statutory guidance for business insolvencies, which may take on various forms, the most common of which are voluntary liquidations, compulsory liquidations, and administrations. As commentators have observed, whether English courts will recognize arbitration agreements in these insolvency cases is partly predicated on the administrators' and liquidators' capacity to initiate or defend proceedings and the operation of the stay in favor of insolvency proceedings.[379] Additionally, the posture of the insolvency case and the characterization of the underlying dispute may influence the decision. The cases discussed below provide some context.

Recently, in *Philpott v. Lycee Francais Charles De Gaulle School*, the English High Court addressed the arbitrability of a creditor's proof of debt claim in the insolvent's voluntary liquidation.[380] The underlying claim was effectively a setoff claim, which the creditor argued should be liquated in arbitration in accordance with the contract. The court explained, "The real issue arises under section 9 of the Arbitration Act of 1996," which requires courts to stay court-based proceedings in favor of arbitration unless the "arbitration agreement is null and void, inoperative, or incapable of being performed."[381] The court held that although the Insolvency Rules set forth a procedure for handling proofs of debt, "the Arbitration Act of 1996 trumps . . . the taking of an account under the court's directions, as envisaged by the Insolvency

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[377]Insolvency Act 1986, c. 45, § 345A (Eng.).

[378]*See* BORN, *supra* note 98, at 811 n.1251.

[379]Jonathan Sutcliffe & James Rogers, *Effect of Party Insolvency Proceedings: Pause for Thought in Testing Times*, 76 ARB. 277, 279 (2010).

[380]Philpott v. Lycee Francais Charles De Gaulle School [2015] EWHC (Ch) 1065 [1]-[5] (Eng.). In a voluntary liquidation, a creditor need not seek permission from the court to initiate proceedings (including arbitration) against the insolvent, but may be subject to a stay upon application by the liquidator. *Id.* at [5], [6].

[381]*Id.* at [18] (quoting Arbitration Act 1996, c. 23, § 9 (Eng.)).

Rules."[382] And because "this case does not come within any of the limited statutory exceptions," the Arbitration Act requires adherence to the parties' agreement to arbitrate.[383]

Comparatively, in *Salford Estates (No.2) Ltd v. Altomart Ltd*, the English Court of Appeal held that § 9 of the Arbitration Act will not stay a *petition* for compulsory liquidation.[384] There, creditor-Salford initiated compulsory liquidation proceedings against Altomart as result of Altomart's failure to pay the balance of a prepetition arbitration award and other payments required under the parties' contract.[385] Altomart objected to the petition partly on the basis that amounts unrelated to the arbitral award were in dispute and, therefore, should be decided in a second arbitration.[386] Altomart invoked § 9 of the Arbitration Act, which the court rejected because it requires a "claim or counterclaim," and a petition for liquidation is not necessarily a "claim" for the payment of the debt.[387] The court held: "Plainly, there is no basis for staying the Petition itself," adding,

> [I]t seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts.[388]

Nevertheless, the court ultimately concluded that § 122(1)(f) of the Insolvency Act granted the lower court discretion "to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."[389] In other words, because the debt supporting the compulsory liquidation petition was disputed, the court of first instance had *discretion* to dismiss the petition in favor of the parties' arbitration agreement.[390]

On the first reading, the holdings of these two cases may appear at odds.

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[382]*Id.* at [9], [25].

[383]*Id.* at [28].

[384][2014] EWCA (Civ) 1575 [34] (Eng.).

[385]*Id.* at [14].

[386]*Id.* at [15].

[387]*Id.* at [31].

[388]*Id.* at [34], [35].

[389]*Id.* at [41].

[390]*See Re* Eco Measure Mkts. Exch. Ltd [2015] EWHC (Ch) 1797 [10] (Eng.) ("The result of Salford (above), it seems to me, is to place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause. . . . What the Court of Appeal decided in clear terms in the Salford Estate case was that, where there is an arbitration clause, it is

But what is consistent through both decisions is a distinction between matters that "strike at the heart of the jurisdiction and discretionary power of the court,"[391] e.g., a petition for insolvency—and more traditional legal "claims" that exist outside the purview of the domestic insolvency scheme.[392] In many respects, the English view is analogous to the approaches in the United States. Where a potential arbitral claim is more pure in form and central to the insolvency case, English courts are more inclined to deny arbitration. This premise is further supported by England's general practice to grant leave to pursue or continue claims in alternative forums, like arbitration, unless the liquidation proceeding provides for a more efficient forum.[393]

Germany. The commencement of insolvency proceedings in Germany does not invalidate pre-insolvency arbitration agreements; rather, the insolvency administrator, who is the only authority entitled to manage the insolvent's assets, is bound by such agreements in the same manner as the insolvent.[394] The rule is subject to one exception germane to insolvency. The insolvency administrator may terminate an arbitration agreement when the administrator is unable to pay the entire cost of the arbitration.[395] But the other party has the right to elect to cover the costs of the arbitration prior to the termination of the agreement.[396]

Notwithstanding, an arbitration agreement does not govern indispensable rights specific to the insolvency administrator. For instance, the *Bundesger-*

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sufficient to show that the debt is 'disputed' and for that it is sufficient to show that the debt is not admitted.").

[391]*Id.* at [35].

[392]*See also* Philpott v. Lycee Francais Charles De Gaulle School [2015] EWHC (Ch) 1065 [9]-[12] (Eng.) (discussing the distinction between liquidators rejection or acceptance of a proof of debt under Rule 4.82 and Rule 4.90's governance of mutual debts).

[393]*See* Gardner v. Lemma Europe Ins. Co. (In Liquidation) [2016] EWCA (Civ) 484 [2] (Eng.) ("[L]eave to commence proceedings will only be granted by the court when it is right and fair to do so in all the circumstances and is unlikely to be granted where the issue in the action could be dealt with as conveniently in the liquidation as in other proceedings.").

[394]Jan Kraayvanger & Mark C. Hilgard, *The Impact of German Insolvency Proceedings on International Arbitration*, MAYER BROWN (July 19, 2010), https://www.mayerbrown.com/de/publications/The-Impact-of-German-Insolvency-Proceedings-on-International-Arbitration-07-19-2010/ (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 2003, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 24, 18 (Ger.)); JULIAN D.M. LEW, ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 208 (2003); PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 367 (Loukas A Mistelis & Julian D.M. Lew eds., 2009) [hereinafter PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION]; BORN, *supra* note 98, at 811 n.1255. Indeed, § 240 of German's Code of Civil Procedure (*Zivilprozessordnung*), which "interrupts" pending proceedings upon insolvency, has been construed not to apply to arbitral proceedings. PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 501 (Frank-Bernd Weigand, 2d ed. 2010). But, in accordance with the principles of due process, the arbitral tribunal should grant the insolvency administrator sufficient time decide how to proceed. *Id.*

[395]LEW, ET AL., *supra* note 394, at 208 (citing BGH Sept. 14, 2000, III ZR 33/00, http://interarb.com/clout/clout404.htm).

[396]BORN, *supra* note 98, at 811 n.1255 (2009) (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 1987, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1215 (1988) (Ger.)).

ichtshof (Federal Court of Justice) has held that avoidance claims are not within the ambit of German arbitration law, reasoning these claims emanate from statute, rather than contract, and originate in the insolvency administrator, rather than the insolvent.[397] Additionally, commentators have also observed that arbitration may be restricted to a threshold determination of whether a particular claim is valid—that is, the arbitral tribunal may not order an insolvency administrator to pay an arbitral award.[398] Such limitation is required because otherwise ordering "the insolvency administrator to pay a certain amount of money or to release a certain asset would discriminate against the competing insolvency creditors."[399]

Although Germany's approach is more deferential to arbitration, it does share some of the same reflections of U.S. courts. For example, the *Bundesgerichtshof*'s reasoning discussed above follows a distinction made by the U.S. Court of Appeals for the Third Circuit in *Hays*. That is, some indispensable rights provided by the Code are vested in and brought by the trustee and are "not derivative of the bankrupt"—thus they are beyond the scope of the insolvent's arbitration agreement.[400] Moreover, Germany's limit on arbitral tribunals' authority to order payment in insolvency cases is consistent with U.S. practices.

France. Similar to the United States, French law seems to distinguish between matters that are "core" to the insolvency case and those that are merely related to insolvency. The *Cour de cassation* (French Supreme Court) has held that French bankruptcy courts have exclusive jurisdiction "to decide disputes resulting from the insolvency proceedings or those on which such proceedings have legal effect."[401] But French courts generally defer to pre-insolvency arbitration agreements involving claims independent of the insolvency case—e.g., breach-of-contract claims.[402] In that regard, article L. 622-

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[397]PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 394, at 372 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 2003, DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND INSOLVENZRECHT [DZWiR] 161 (Ger.)).

[398]Kraayvanger & Hilgard, *supra* note 394; *see also* KARL-HEINZ BOCKSTIEGEL, ET AL., ARBITRATION IN GERMANY: MODEL LAW IN PRACTICE 61 (2008).

[399]Kraayvanger & Hilgard, *supra* note 394.

[400]Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1155 (3d Cir. 1989).

[401]SEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 308 (2d ed. 2007) (citing Cour de cassation [Cass.] [supreme court for judicial matters] com., Jun. 8, 1993, Bull. civ. IV, no. 233 (Fr.)). *See also* LEW, ET AL., *supra* note 394, at 208 (footnotes omitted); JEAN-LOUIS DELVOLVÉ, ET AL., FRENCH ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION 46 (2d ed. 2009).

[402]DELVOLVÉ, ET AL., *supra* note 401, at 46 (citing Cour de cassation [Cass.] [supreme court for judicial matters] com., July 19, 1982, Rev. Arb. 1983.321 (Fr.)); Allan L. Gropper, *The Arbitration of Cross-Border Business Insolvencies*, 86 AM. BANKR. L.J. 201, 239 (2012). The French government overhauled the country's insolvency law in 2005, *see* Loi 2005-845 du 26 juillet 2005 de sauvegarde des entreprises [Law 2005-845 of July 26, 2005 on Safeguard of Enterprises] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] July 27, 2005, p. 12187, but commenta-

22 of the French *Code de Commerce* (Commercial Code) dictates that the filing of an insolvency case interrupts pending proceedings until the creditor properly files its declaration of claim, at which time proceedings (including arbitrations) may resume upon proper notice to the court-appointed administrator and receiver or commissioner of the plan.

Arbitral proceedings with an insolvent are limited, however, to a determination of the existence and the amount of the claim at issue—in other words, liquidating the claim at issue.[403] The *Cour de cassation* in 2009 provided guidance on this issue, holding in the *Jean Lion* case[404] that an arbitral tribunal may decide how much the insolvent owes, but may not order payment of that amount.[405] The *Cour de cassation* reversed the lower courts' enforcement of the arbitral award, reasoning that to ensure the equal treatment of creditors arbitrators are limited to fixing or valuing the debt owed.[406]

Although beyond the scope of this Article, it is notable that the French government in 2014 adopted a new regulation[407] to accommodate and encourage pre-insolvency consensual restructurings through conciliation and ad hoc mandates. These proceedings precede formal insolvency filings and are monitored by a *conciliateur* (appointed professional) or *mandataire ad hoc* (ad hoc representative). Importantly, they operate outside the confines of the courts. The new law provides creditors with a greater voice in the restructuring but retains certain core features of French insolvency law.[408]

Switzerland. The *Bundesgericht* (Federal Supreme Court) has plainly stated that under Swiss law a domestic insolvency case does not affect the

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tors mostly agree the revisions did not alter the enforceability of pre-insolvency arbitration agreements. DELVOLVÉ, ET AL., supra note 401, at 46.

[403]PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 394, at 369; Sutcliffe & Rogers, *supra* note 379, at 283 (citing Rosell & Prager, *supra* note 354. at 422).

[404]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ, May 6, 2009, Bull. civ. I, No. 86 (Fr.).

[405]*See* Christophe von Krause, *International Arbitration and French Insolvency Proceedings: French Supreme Court Reiterates Importance of Public Policy*, KLUWER ARBITRATION BLOG (Oct. 28, 2009), http://kluwerarbitrationblog.com/2009/10/28/international-arbitration-and-french-insolvency-proceedings-french-supreme-court-reiterates-importance-of-public-policy/ (discussing case and linking to French version, *see* http://kluwerarbitrationblog.com/2009/10/28/international-arbitration-and-french-insolvency-proceedings-french-supreme-court-reiterates-importance-of-public-policy/); Dany Khayat, *Coexistence Between Bankruptcy and Arbitration Laws in France*, MAYER BROWN (July 19, 2010), https://www.mayerbrown.com/publications/Coexistence-Between-Bankruptcy-and-Arbitration-Laws-in-France-07-19-2010/ (discussing *Jean Lion*). *See also* Sutcliffe & Rogers, *supra* note 379, at 283.

[406]Khayat, *supra* note 405.

[407]Ordonnance No. 2014-326 du 12 mars 2014 portant réforme de la prévention des difficultés des entreprises et des procédures collectives [Ordinance of Mar. 12, 2014 on Reforming the Prevention of Business Difficulties and Bankruptcy Proceedings] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Mar. 14, 2005, p. 5249.

[408]*See* Didier Bruère-Dawson, *The 2014 Reform of the French Bankruptcy & Insolvency Proceedings*, CORPORATELIVEWIRE (Feb. 24, 2015, 9:22 AM), http://www.corporatelivewire.com/top-story.html?id=the-2014-reform-of-the-french-bankruptcy-insolvency-proceedings.

validity of an arbitration agreement.[409] Thus, commentators agree that agreements to arbitrate claims that are not "pure" or "core" to the bankruptcy will generally be recognized in Swiss insolvency proceedings.[410] Particularly, claims that "concern[ ] the recognition or denial of the existence of a debt ('*action en reconnaissance ou libération de dette*'), for restitution of monies paid without cause ('*répétition de l'indu*'), and in validation of a freezing order ('*validation de séquester*')."[411] Additionally, matters considered "mixed" are also ordinarily arbitrable. These include,

> (i) actions involving preferences; (ii) actions concerning fraudulent conveyances . . . ; (iii) decisions for the admission of creditors into the schedule of claims . . . ; (iv) actions to include or exclude assets from the estate; (v) set-off exceptions . . . ; (vi) the determination of the class of creditors in which a claim should be classified; (vii) actions where a creditor challenges the schedule of claims[;] and (viii) whether certain claims are to be paid directly from the estate rather than be included in the schedule of claims.[412]

But matters core to the insolvency case cannot be decided by arbitration—such as, "the initiation of insolvency proceedings; appointment of trustees; verification and acceptance of the creditor's claims[;] and the administration of the reorganisation or liquidation of a company pursuant to the [*Loi fédérale sur la poursuite pour dettes et la faillite* (the Swiss Federal Act on Debt Enforcement and Bankruptcy)]."[413]

Accordingly, without question Switzerland's approach is more arbitration friendly than the United States. But, as depicted, even Switzerland recognizes that certain features of insolvency are beyond arbitration's reach.

Brazil. The *Superior Tribunal de Justiça* or *STJ* (Superior Court of Justice) decided two cases in 2013 clarifying Brazil's stance on the enforceability

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[409]Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2012 138 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 714 (Switz.) (citing Bundesgericht [BGer] [Federal Supreme Court] Aug. 9, 1991 117 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 94 (Switz.)) (for English translation *see* http://www.swissarbitrationdecisions.com/sites/default/files/16%20octobre%202012%204A%2050%202012_0.pdf).

[410]POUDRET & BESSON, *supra* note 401, at 307; REDFERN & HUNTER, *supra* note 362, at 130 ("In Switzerland, the insolvency of one of the parties will not generally affect the arbitration agreement, and arbitrators retain wide jurisdiction to decide disputes relating insolvency issues, including claims made on behalf of the estate itself." (footnote omitted)); BORN, *supra* note 98, at 811 (collecting cases related to international arbitration agreements); Robert B. Kovacs, *A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration*, 21 J. BANKR. L. & PRAC. 5 ART. 3, at 7.2.2. (2012).

[411]POUDRET & BESSON, *supra* note 401, at 307.

[412]Kovacs, *supra* note 410, at 7.2.2.2. There is some dispute between scholars, however, about the arbitrability of mixed claims. *See* POUDRET & BESSON, *supra* note 401, at 307 nn.993, 994.

[413]Kovacs, *supra* note 410, at 7.2.2.1.

of arbitration agreements in Brazilian insolvencies. In the first case, *Jutaí 661 Equipamentos Eletrônicos Ltda v. PSI Comércio e Prestação de Serviços em Telefones Celulares Ltda*,[414] the *STJ* addressed an insolvent's argument that an arbitration agreement between the parties effectively prevented a creditor from commencing an involuntary insolvency proceeding predicated on the nonpayment of a debt.[415] The lower court dismissed the insolvency case by deferring to the parties' agreement to arbitrate all claims arising under the service agreement at issue.[416] But the *STJ* disagreed with the lower court, holding that an arbitration agreement does not trump a party's right to initiate insolvency proceedings.[417] That is to say, "bankruptcy procedures are beyond the legal objective of arbitrability."[418]

The second case, *KwikasairCargasExpressas SA—Bankrupt Estate v. AIG Venture Holdings Ltd*,[419] which was announced a week after *Jutaí*, required the *STJ* to decide whether an insolvent could commence court proceedings against a creditor for damages under an insurance agreement, despite the parties' agreement to arbitrate claims under that agreement.[420] The insolvent argued first that the court had jurisdiction to make a ruling on the validity of the arbitration agreement and, second, that its bankruptcy filing invalidated the arbitration agreement.[421] The *STJ* rejected both arguments. First, the *STJ* held that under Article 20 of the Brazilian Arbitration Act of 1996, the decision as to the enforceability or validity of an arbitration agreement is vested in the arbitral tribunal.[422] Such ruling advances the familiar principle of competence-competence—namely, that the arbitral tribunal has the competence to decide its own jurisdiction. Second, the *STJ* proceeded to clarify insolvency's effect on arbitration agreements in Brazil. As one commentator has noted, the *STJ* deferred to Article 117 of the Brazilian Bankruptcy Act and explained that "bilateral contracts are not terminated by

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[414]S.T.J.J., Special Appeal No. 1.277.725 - AM (2011/0146922-2), Relatora: Ministra Nancy Andrighi, 12.03.2013 (Braz.).

[415]Eduardo Damião Gonçalves, et al., *Arbitration Agreement Cannot Override Judicial Competence for Bankruptcy Proceedings*, PRACTICAL LAW (Apr. 18, 2013), http://uk.practicallaw.com/0-525-8462?q= (summarizing *Jutaí*).

[416]*Id.*

[417]*Id.*

[418]*Id.* Other commentators are in accord. *See* REDFERN AND HUNTER - LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2.145 (Nigel Blackaby & Constantine Partasides eds., 2015).

[419]S.T.J.J., Special Appeal No. 1.355.831 - SP (2010/0174382-7), Relator: Ministro Sidnei Beneti, 19.03.2013 (Braz.).

[420]Eduardo Damião Gonçalves, et al., *Brazilian Courts Cannot Rule on Validity of Arbitration Agreement Before Arbitrators*, PRACTICAL LAW (May 15, 2013), http://uk.practicallaw.com/1-529-1847?q= (summarizing *KwikasairCargasExpressas*).

[421]*Id.*

[422]*Id.*

bankruptcy" where performance would "reduce[ ] or prevent[ ] an increase in the liabilities of the bankrupt estate or is necessary to maintain and preserve its assets."[423] Accordingly, the *STJ* concluded arbitration would be an appropriate forum to decide the contract dispute,[424] confirming Brazil's tradition of recognizing arbitration's place in insolvency proceedings.[425]

Based on these cases, like other courts, the *STJ* draws a distinction between claims implicating the court's core insolvency function—i.e., the filing of an insolvency case—and claims that are independent of Brazil's bankruptcy procedure.

Hong Kong. Sections 181 and 186 of Hong Kong's Companies Ordinance (Cap. 32) provide courts with the authority to stay or preclude certain proceedings upon the commencement of "winding up" orders. Section 186 specifically states, "When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to the terms as the court may impose." It is widely recognized that the phrase "action or proceeding" encompasses arbitration.[426] For instance, the Court of First Instance in *Re UDL Contracting Ltd.* plainly stated,

> There is little doubt but that section 186 extends to arbitrations. When a provisional liquidator assumes office, he takes over the control of the company and its assets. If proceedings by and against the company are to be continued, leave of the court must be obtained. In other words, no expenditure may be incurred without such leave.[427]

In exercising its discretion to compel arbitration, Hong Kong courts look to balance the interests of the parties, focusing on unwarranted prejudice to the creditor body. In *Re B+B Construction Company Ltd. (In Liquidation)*, the Court of First Instance confirmed that the test turns on "what is right and fair according to the circumstances of each case," which inherently involves balancing the competing interest.[428] *B+B Construction* involved an application by the Hong Kong Housing Authority for leave to commence court-based proceedings—or alternatively arbitration—against the company, despite an earlier winding up order.[429] The court observed, "If the issue can be conveniently decided in the course of the winding up, leave will be refused

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[423]*Id.*

[424]*Id.*

[425]*Compare* discussion *supra* subpart III.E and accompanying notes.

[426]*See, e.g., Re* UDL Contracting Ltd., [2000] 1 H.K.C. 390 (C.F.I.).

[427]*Id.*

[428]*Re* B+B Constr. Co., [2003] H.K.E.C. 883 (C.F.I.).

[429]*Id.* at para. 1.

. . . as there is a positive benefit in having the issue decided by the liquidator since this should be less expensive and quicker than an independent action."[430] Put differently, if it is an easy issue, there is no reason to incur the costs of empaneling an arbitral tribunal and commencing arbitration proceedings. But arbitration will be permitted where such action "is the most convenient method of trying a question, and specifically so when the questions would involve substantial issues of facts that are in dispute and also matters of law of complexity where the arbitral forum is more convenient."[431] The court ultimately granted the Authority leave to proceed with litigation or arbitration because there were significant undecided insurance issues, and resolving the proof of debt before the court would not be cheaper and more expeditious.[432]

Accordingly, Hong Kong courts appear to favor a more pragmatic view, deferring to arbitration when the underlying claim requires more than a perfunctory factual or legal analysis—that is to say, where the claim cannot be resolved easily on its face.

The Netherlands. Article 26 of the *Faillissementswet* (the Dutch Bankruptcy Code) requires creditors to assert any claim against an insolvent in verification proceedings.[433] Contested claims are settled in claim validation proceedings under Article 122 by the court in bankruptcy.[434] Commentators generally agree that Article 122 "impl[ies] that an arbitration agreement concluded prior to the bankruptcy may not be successfully invoked by or against the trustee (or another party contesting the claim)."[435] That is not the case, however, for non-monetary claims against the estate.[436] Thus, Dutch insolvency law seemingly draws a line between monetary and non-monetary claims, with "any [contested] monetary claim against the bankrupt . . . resolved in special bankruptcy proceedings, rather than arbitration, effectively invalidating the arbitration agreement."[437]

The approach endorsed by the Netherlands is the most pro-insolvency approach examined thus far. Moreover, the distinction between monetary

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[430]*Id.* at para. 6.

[431]*See id.* at para. 7 (citing *Re* King's Dyeing & Weaving Factory Ltd., [1986] H.K.C. 621 (C.F.I.)).

[432][2003] H.K.E.C. 883, paras. 19, 42-45. *See also Re* Quiksilver Glorious Sun JV Ltd., [2014] 4 H.K.L.R.D. 759, para. 162 (C.F.I.) (staying petition to wind up so shareholders could resolve a shareholder dispute in accordance with their arbitration agreement).

[433]Vesna Lazic, *Arbitration and Insolvency Proceedings: Claims of Ordinary Bankruptcy Creditors*, 3.3 ELECTRONIC J. OF COMP. L. 2 (1999) (discussing operation of Article 26).

[434]*Id.*

[435]*Id.* (citing Rb. Rotterdam 29 mei 1919, NJ 1913, 896 (Neth.); Rb. Amsterdam 16 februari 1937, NJ 1937, 1004 (Neth.)). *See also* BORN, *supra* note 98, at 810; PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 394, at 368; POUDRET & BESSON, *supra* note 401, at 308; LEW, ET AL., *supra* note 394, at 208.

[436]LEW, ET AL., *supra* note 394, at 208.

[437]BORN, *supra* note 98, at 810.

and non-monetary claims makes imminent sense if the purpose is to protect against unwarranted diminution of estate assets.

Spain. Prior to 2011, Article 52 of the Spanish Insolvency Act invalidated arbitration agreements upon the filing of an insolvency case,[438] unless the arbitration had commenced prior to the insolvency filing.[439] But Article 52 was significantly overhauled in 2011, and now paragraph one of Article 52 reads,

> The declaration of insolvency, by itself, does not affect the agreements to mediate nor the arbitral agreements made by the insolvent. When the court with jurisdiction considers that these agreements could be prejudicial to the administration of the insolvency it may order the suspension of their effects, always without prejudice to the provisions of international treaties.[440]

The amendment to Article 52 embodies a more pro-arbitration stance consistent with how other counties approach the issue. The amendment also comports with the idea that arbitration is not necessarily inconsistent with the commands of insolvency in all circumstances. Article 52 therefore sets forth the general rule that arbitration agreements remain effective upon the filing of an insolvency case, but provides an exception where arbitration would prejudice the administration of the case. One drawback to this measure is that it lacks predictability, similar to the approaches adopted by U.S. courts. As detailed at length above, granting courts broad discretion to determine the enforceability of arbitration agreements in insolvency cases—here, the "prejudicial" effect standard—can be a futile exercise. This is not because courts are incapable of making such determinations—indeed, bankruptcy courts are well positioned to make the call—but because inconsistency inherently abounds, only serving to compound the confusion and uncertainty.

Latvia. Latvia's *Civilprocesa likums* (Civil Procedure Law) speaks clearly to the enforceability of arbitration agreements in insolvency-related matters. Article 487(8) states that disputes "regarding the rights and duties of persons that have been declared insolvent before the making of the award by the arbitral tribunal" may not be decided through arbitration.[441] There-

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[438]*Id.* at 810 n.1250; REDFERN & HUNTER, *supra* note 362, at 130-31 (citing Lopez Ortiz, *The New Spanish Insolvency Act and Arbitration*, 2005 INT'L ARB. L. REV. 22 (2005)); Sutcliffe & Rogers, *supra* note 379, at 284.

[439]Sutcliffe & Rogers, *supra* note 379, at 284 (citing Articles 52.2 and 53.1 of the Spanish Insolvency Act).

[440]David J. A. Cairns & Alejandro López Ortiz, *Spain's Consolidated Arbitration Law*, KLUWERARBITRATION, http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1207103-n#note(1) (translating Spain's Arbitration Law to English and discussing 2009 and 2011 amendments).

[441]*See* Latvian Civil Procedure Law, ch. 61, § 487; Sutcliffe & Rogers, *supra* note 379, at 284; Gencs

fore, Latvian law treats the issue as a matter of arbitrability, invalidating arbitration agreements to which the insolvent is a party.

Latvia is the first country discussed to adhere to a strict per se rule. But as discussed with Spain, and next with Poland, there is a growing trend to abolish per se rules in lieu of yielding some discretion to the courts.

Poland. Prior to 2016, like Latvia, Poland prescribed to a per se rule. Article 142 of Poland's Bankruptcy and Reorganization Law provided, "Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."[442] This provision was heavily scrutinized by several European courts in the late 2000s in the Elektrim insolvency case. Elektrim was subject to insolvency proceedings in Poland and, at the same time, enthralled in multiple arbitrations, including one in London and another in Geneva.[443] In abbreviated terms, while all courts agreed that Article 142 would operate to invalidate the arbitration agreements, two courts ultimately reached conflicting decisions on what law applied in determining whether to enforce the arbitration agreement. An English court applied the law where the arbitration was seated (i.e., English law) and thus allowed the London arbitration to procced.[444] And a Swiss court deemed Polish law applicable and dismissed Elektrim from a multi-party arbitration.[445] Because of the international attention these cases cast on Poland's treatment of arbitration agreements in insolvency cases, Article 142 was amended effective January 1, 2016.[446]

Now, Article 147a of the Bankruptcy and Reorganization Law regulates arbitration agreements in insolvency proceedings, and reads,

> (1) If on the date of declaration of bankruptcy a proceeding before an arbitration court has not been commenced, with the consent of the judge-commissioner the receiver may renounce the arbitration agreement if pursuing a claim before the arbitration court will hinder liquidation of the bank-

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Valters, *Arbitration in Latvia: New Amendments on Law Regulating Dispute Resolution*, GENCS VALTERS LAW FIRM (Dec. 22, 2014), http://www.gencs.eu/news/view/2063. For English translation of the Latvian Civil Procedure Law see http://www.wipo.int/wipolex/en/text.jsp?file_id=191081#LinkTarget_3101.

[442]*See* Syska v. Vivendi Universal SA [2009] EWCA (Civ) 677 [para. 4] (Eng.) (quoting Article 142). *See also* BORN, *supra* note 98, at 810 n.1247; Sutcliffe & Rogers, *supra* note 379, at 284; Patricia _ivkovic, *The Effects of Bankruptcy on Arbitration: An Unresolved Issue of Characterization and Applicable Law*, KLUWER ARBITRATION BLOG (Sept. 14, 2015), http://kluwerarbitrationblog.com/2015/09/14/the-effects-of-bankruptcy-on-arbitration-an-unresolved-issue-of-characterization-and-applicable-law/.

[443]*See generally* Jay Lawrence Westbrook, *International Arbitration and Multinational Insolvency*, 29 PENN STATE INT'L L. REV. 635 (2011) (discussing various proceedings).

[444]*Id.* at 637.

[445]*Id.*

[446]Polish Restructuring Law of 15 May 2015 (amending the Bankruptcy and Reorganization Law).

> ruptcy estate, and in particular if the condition of the estate prevents coverage of the costs of commencing and conducting the proceeding before the arbitration court.
>
> (2) Upon demand of the other party submitted in writing, the receiver shall state in writing within thirty days whether he renounces the arbitration agreement. The receiver's failure to submit a statement within that time shall be deemed to be renunciation of the arbitration agreement.
>
> (3) The other party may renounce the arbitration agreement if the receiver, although he did not renounce the arbitration agreement, refuses to participate in the costs of the proceeding before the arbitration court.
>
> (4) As a result of renunciation, the arbitration agreement shall cease to be in force.[447]

Accordingly, an insolvency administrator may avoid an arbitration agreement when: (1) arbitral proceedings were not commenced prior to the declaration date; (2) consent is obtained from the court; and (3) pursuing claims in arbitration would impede the liquidation of the bankruptcy estate—e.g., if the assets are insufficient to initiate and continue the arbitral proceedings. Likewise, the non-insolvent party may avoid an arbitration agreement upon motion and thirty days of silence by the insolvency administrator, or if the insolvency administrator (despite deciding not to avoid the agreement) refuses to share in the costs of the arbitral proceedings. Although not in exact terms, the new framework adopted in Poland mirrors that of other countries in that it effectively assumes an arbitration agreement is enforceable absent direction by the court.

Argentina. Insolvency proceedings in Argentina are governed by the *Ley de Concursos y Quiebras* (the Insolvency and Bankruptcy Law No. 24.522).[448] Article 134, which applies to bankruptcies or liquidations, provides,

> Arbitration clause. The declaration of bankruptcy shall bar the application of any arbitration clauses agreed upon with the debtor, unless the Arbitration Board has been organized before the judgment is rendered.
>
> In specific cases the court may authorize the Trustee to

[447]Translated Excepts of the Bankruptcy and Reorganization Law, Arbitraż Łaszczuk, http://m.arbitration-poland.com/legal-acts/102,bankruptcy_and_reorganization_law_of_28_february_2003_-_art_142__art_147.html.

[448]No. 24.522, July 20, 1995 (Arg.) (as amended by 24.760, 25.113, 25.563, and 25.589) (for English translation *see* https://www.iiiglobal.org/sites/default/files/16-_Argentine_Bankruptcy_Law.pdf).

> agree upon the arbitration clause or allow the organization of an Arbitration Board.

Therefore, similar to Spain's and Poland's prior practices, and Latvia's current practice, Argentina appears to invalidate arbitration agreements upon the opening of a bankruptcy or liquidation case, subject to limited exceptions.

But the *Corte Suprema de Justicia de la Nación* (National Supreme Court of Justice) has held that Article 134 does not apply to reorganization cases.[449] In *Bear Services*, an insolvent sought to avoid arbitration in Mexico City with a creditor by arguing that its reorganization filing in Argentina deprived the arbitral tribunal of jurisdiction.[450] The court rejected Article 134's application, explaining there is no equivalent provision in the reorganization title.[451] Additionally, the court reasoned that applying the provision to reorganization cases would allow insolvents to avoid burdensome arbitration agreements by merely petitioning for reorganization in accordance with Argentine insolvency law.[452] Thus, a petition for reorganization will not affect the enforceability of a pre-insolvency arbitration agreement. Argentina is the only country surveyed that distinguishes between the type of insolvency—namely, liquidations as compared to reorganizations—when making enforceability determinations.

Singapore. The Singapore Court of Appeal announced a framework for deciphering when arbitration agreements will be recognized in insolvency cases in *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd.*[453] There, the court explained, "The appeal before us raise[s] an interesting and novel point of law relating to the interfacing of these two policies [arbitration and insolvency] where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process?"[454]

The case centered on avoidance actions initiated by Petroprod's liquidators to recover pre-insolvency payments as preferential or without adequate consideration.[455] Larson Oil applied to stay the proceedings and compel arbitration in accordance with the parties' agreement.[456] The court began its

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[449]BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK: 2012-2011 495 (4th ed. 2011) (discussing Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/4/2005, "Bear Serv. S.A. v. Cerveceria Modelo S.A. de C.V.," Fallos (2005-328-776) (Arg.)).

[450]*Id.* (citing Fallos (2005-328-776)).

[451]*Id.* (citing Fallos (2005-328-776)).

[452]*Id.* (citing Fallos (2005-328-776)).

[453]Court of Appeal [2011] SGCA 21 (Sing.).

[454]*Id.* at para. 1.

[455]*Id.* at para. 4.

[456]*Id.* at para. 5.

inquiry with the text of § 148A of the Singapore Bankruptcy Act, which provides,

> (1) This section shall apply where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy.
> (2) If the Official Assignee adopts the contract, the arbitration agreement shall be enforceable by or against the Official Assignee in relation to matters arising from or connected with the contract.
> (3) If the Official Assignee does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings—
> (a) the Official Assignee; or
> (b) any other party to the agreement,
> may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement.

The court acknowledged that § 148A provides no clear guidance on how courts are to exercise their discretion to refer matters to arbitration.[457] Turning to a comparative law analysis, the court examined the laws in England and Australia.[458]

Ultimately, the court concluded "the concept of non-arbitrability," which "allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds," provided the appropriate framework.[459] Although there is a presumption of arbitrability, it may be "shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's *text* or *legislative history*), or that there is an *inherent conflict* between arbitration and the public policy considerations involved in that particular type of dispute."[460] Interestingly, this language looks very similar to the U.S. Supreme Court's pronouncement in *McMahon*, except there arbitration was balanced against the policy underpinnings of another federal statutory scheme, not general "public policy."

The court next distinguished between "disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insol-

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[457] *Id.* at para. 36.

[458] *Id.* at paras. 39-43.

[459] *Id.* at para. 44.

[460] *Id.* at para. (emphasis added).

vency regime."[461] As to the latter,

> [T]he insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. *The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.*[462]

The court noted "different considerations arise," however, when a dispute involves "pre-insolvency rights and obligations."[463] Thus, if the agreement concerns "prior private *inter se* disputes between the company and another party there will usually be no good reason not to observe the terms of the arbitration agreement."[464] But if an agreement operates to affect the substantial rights of other creditors, an arbitration agreement will not be honored because "[o]therwise it will undermine the policy aims of the insolvency regime."[465] Based on the foregoing framework, the court deemed the claims against Petroprod nonarbitrable because they derived exclusively from the insolvency statute.[466]

* * *

As illustrated above, countries from around the globe face the common question of how to navigate the intersection between insolvency and arbitration. Particularly, legislatures and courts have consistently been called upon to fashion standards to govern the enforceability of arbitration agreements in insolvency cases. The approaches that have been adopted are by no means uniform, which may be explained partly by the procedural and substantive variations of the local insolvency laws. But upon close examination, there are common threads among the countries surveyed. For instance, every country concluded in one way or another that *some* forms of insolvency proceedings are beyond the confines of arbitration. That is, they recognize that the pur-

[461] *Id.* at para. 45.

[462] *Id.* at para. 46 (emphasis added).

[463] *Id.* at para. 47. For instance, the court explained, "The proof of debt process is merely a substituted means of enforcing debts against the company, and does not create new rights in the creditors or destroy old ones. . . . Hence, even if the claim is subsequently proved to be valid and enforceable against the liquidator, the pool of assets available to all creditors at the time of the liquidation of the company is not affected." *Id.* at para. 51.

[464] *Id.* at para. 51.

[465] *Id.* at para. 50.

[466] *Id.* at para. 52.

poses and objectives of insolvency law, to a degree, justify frustrating pre-insolvency contractual rights and obligations. Of course, the deference afforded to either insolvency or arbitration varies widely among the countries.

The country-by-country discussion depicts a struggle to properly define the level of discretion courts should have to reject otherwise valid arbitration agreements in insolvency cases. This requires balancing the strictures of per se rules (or the like), which promote predictability and uniformity, with the flexibility that insolvency proceedings necessarily demand. The current trend is to retreat from strict per se rules and vest with courts greater discretion to override arbitration agreements in insolvency. But this of course takes fine tuning. And for that reason, this Article finds the Singapore Court of Appeal's position the most persuasive. Rather than adopt a per se rule generally—like Spain's and Poland's prior practices—it is more beneficial to first categorize various claims and insolvency-related disputes and then deal with each category individually. Such approach borrows from both sides of the equation. It allows for the application of per se rules to claim categories, while at the same time acknowledging that not all insolvency-related matters are created equal. In the end, like many complex legal debates, there is no perfect answer. But there is a balance to be struck, and the U.S. Supreme Court may have provided the necessary guidepost to support a reconstituted framework for the enforceability of arbitration agreements in American insolvency cases. As elaborated on in the next Part, following that Supreme Court guidance actually results in a framework that is mostly in harmony with the prevailing practices in other parts of the world.

V. PROPOSED FRAMEWORK: ARBITRATION AGREEMENTS IN AMERICAN INSOLVENCY PROCEEDINGS

This Article advances a reconstituted framework to govern the enforceability of arbitration agreements in American insolvency cases by drawing from existing U.S. Supreme Court jurisprudence that (1) outlines the arbitrability of federal statutory claims, and (2) redefines the jurisdictional metes and bounds of American bankruptcy courts. Importantly, then, the framework offered is one that may be immediately implemented; rather than sitting by idly and waiting on Congress or the Supreme Court to provide further direction and clarity.

The proposed framework is premised on analyzing two categorical variables with binary responses. The first variable questions whether the claim at issue is one created by the Code—that is, a "bankruptcy right" that only exists because the Code bestows that right. The second variable questions whether a bankruptcy judge has "final adjudicatory authority" over the claim—which is defined by the bankruptcy jurisdiction statute and the Su-

preme Court's *Stern* decision and its progeny. Therefore, the model results in a two-by-two matrix, producing four distinct claim categories.

	Variable One	*Variable Two*
(1)	Bankruptcy Right	Final Adjudicatory Authority
(2)	Bankruptcy Right	No Final Adjudicatory Authority
(3)	Non-Bankruptcy Right	Final Adjudicatory Authority
(4)	Non-Bankruptcy Right	No Final Adjudicatory Authority

As detailed below, the framework advanced advocates for per se rules (with minor exceptions) for categories one, three, and four. That is, category one is per se nonarbitrable, and categories three and four are per se arbitrable. For category two, which, at this time, is undefined and admittedly narrow, the framework proposes a claim-centric test grounded in *McMahon*. As discussed above, this treatment of these four categories is informed by how other developed countries approach the issue.

Following Professor Kirgis's lead, the starting point is to recognize the limits of the Supreme Court's foundational decision in *McMahon*. For the last thirty years, U.S. courts have improperly converted *McMahon* into a test for "determin[ing] which among several possible forums is the best for hearing a cause of action that could be arbitrated."[467] But such use expands *McMahon* beyond its logical bounds. Rather, *McMahon* sets forth a relatively straightforward proposition: A test for gauging "whether Congress intended to preclude arbitration of a 'claim *founded on* statutory rights.'"[468] Despite courts' use to the contrary, *McMahon* was not intended to adopt a judicial limitation on arbitration; rather, it was intended more so to recognize the FAA's pro-arbitration stance. Accordingly, adhering to the strict teachings of *McMahon*, where a claim cannot be traced to a right created by federal statute, *McMahon* does not provide the answer.

Recognizing the limits of *McMahon* is crucial to demarcating whether to enforce arbitration agreements covering claims in categories three and four. Consistently, lower courts have invoked *McMahon* as a source of authority to deny arbitration of claims related to these categories. The typical analysis starts with the court citing *McMahon* and explaining an otherwise valid arbitration agreement may not be enforceable if Congress has expressed a contrary congressional command in another federal statute. The court then sets forth the purposes and objectives of the Code and concludes that the Code inherently conflicts with the FAA's mandate to enforce the arbitration

[467]Kirgis, *supra* note 12, at 523.

[468]Kirgis, *supra* note 12, at 523 (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

agreement. This conclusion manifests in the court discretion to deny or compel arbitration, subjecting its decision to the deferential abuse of discretion review standard. For example, the Second Circuit in *U.S. Lines*, citing *McMahon*, explained that "[i]n the bankruptcy setting, congressional intent to permit a bankruptcy court to enjoin arbitration is sufficiently clear to override even international arbitration agreements."[469] The court did not distinguish between statutory and non-statutory claims, adding that, although "[s]uch a conflict [referring to *McMahon*'s "inherent conflict" prong] is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration," *McMahon* still applies.[470]

But the foundation of this line of reasoning is flawed. The *McMahon* framework does not invite courts to study the purposes and objectives of potentially competing federal statutory schemes in isolation in order to glean whether one trumps the other. That is the approach the Third Circuit adopted in *Zimmerman* and later rejected in *Hays* after the Supreme Court decided *McMahon*. Rather, *McMahon*'s interest in the non-FAA statute's underlying purposes and objectives (here, the Code) is to divine whether it evidences a contrary congressional command to preclude arbitration of a federal claim emanating from that non-FAA statute. Thus, absent a federal statutory claim, *McMahon* does not give courts roving authority to deviate from Congress's express word in the FAA—that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[471]

Without *McMahon*'s helping hand, this author is unaware of any recognized ground *outside the FAA* giving courts discretion to deny enforcement of a valid arbitration agreement in an insolvency case, where the claim does not involve a bankruptcy right provided by the Code, i.e., claims in categories three and four. That is not to say, however, that courts are completely disarmed. For instance, a creditor who prevails in arbitration must still present its arbitral award to the bankruptcy court in order to share in any distribution of estate assets. Put differently, a decision to compel arbitration does not answer the question of whether the creditor will ultimately be able to collect on its award and for how much. For this, bankruptcy courts should (and do) treat awards that are derivative of prepetition agreements like any other prepetition judgment (assuming confirmation of the award).[472] Such practice

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[469]U.S. Lines, Inc. v. Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 639 (2d Cir. 1999).

[470]*See id.* at 640 (citation omitted).

[471]9 U.S.C. § 2 (2012).

[472]This concept is similar to instances in which bankruptcy courts lift the automatic stay to allow parties to *liquidate* claims in state court. *See, e.g.*, Dorris v. Chacon (*In re* Chacon), 438 B.R. 725, 736

follows that of Germany and France, where the arbitral tribunal is authorized to decide liability and fix damages, but is forbidden from ordering payment by the estate.

Additionally, it is important not to lose sight of the fact that an arbitration agreement is merely a *contract* between two parties for an alternative dispute resolution process. Naturally, then, parties to the insolvency case who are nonparties to the arbitration agreement generally cannot be compelled to arbitrate. Even further, a party cannot be compelled to arbitrate claims that are outside the scope of the arbitration agreement. Admittedly, these questions—questions that are beyond the scope of this Article—can be complex and weedy. But suffice it to say that arbitration only operates within the paradigm created by the parties.

Based on the foregoing, courts should recognize that claims not involving federal statutory rights created by the Code are per se arbitrable, assuming, of course, a valid arbitration agreement exists between the parties. This approach is consistent with U.S. courts' current posture, absent the per se component. But as argued, per se treatment is a necessary byproduct of a proper reading of the Supreme Court's *McMahon* decision.

That leaves only those claims derived from the Code itself. The first category concerns the "core-est" of all claims—namely, claims involving bankruptcy rights in which bankruptcy judges have final adjudicatory authority.[473] Some examples include, enforcement of the discharge injunction, claims for violation of the automatic stay, and confirmation of plans of reorganization. As the Supreme Court described in *Stern*, these claims "stem[ ] from the bankruptcy itself" and do not exist outside the confines of an insolvency case.[474] Many foreign jurisdictions describe these claims as "pure" insolvency claims and almost uniformly agree they are nonarbitrable.[475] For instance, and as previously discussed, the Singapore Court of Appeal in *Larsen Oil* held that "disputes arising from the operation of the statutory provisions of the insolvency regime" are per se nonarbitrable.[476] The court reached that conclusion through the doctrine of arbitrability, reasoning that arbitration agreements must be recognized *unless they are contrary to public pol-*

(Bankr. D.N.M. 2010) (collecting cases and explaining that "[a] number of courts have addressed this circumstance and come up with the same solution: permit the liability and damages issues to be determined either in the state court or the U.S. district court, and then have the parties return to the bankruptcy court as needed for an adjudication of the dischargeability issue"). After the claim is liquated, a prevailing creditor may then present its claim to the bankruptcy court in order to share in any distribution of estate assets.

[473]By reference from the district courts, *see supra* subpart II.A and accompanying notes.

[474]*See* Stern v. Marshall, 564 U.S. 462, 499 (2012).

[475]REDFERN & HUNTER, *supra* note 362, at 129; POUDRET & BESSON, *supra* note 401, at 306.

[476]*See generally* Larsen Oil and Gas Pte Ltd v. Petroprod Ltd., [2011] SGCA 21.

icy.[477] The court then observed that the nation's insolvency regime "is an area replete with public policy considerations that were too important to be settled by parties privately through the arbitral mechanism."[478] Unfortunately, neither the text of the FAA nor the U.S. Supreme Court's interpretation thereof has recognized a public policy exception to the enforcement of arbitration agreements.[479] Nevertheless, *McMahon* may hold the blueprint to a general acceptance that category one claims are per se nonarbitrable.

Although ultimately not dispositive, the Fourth Circuit in *White Mountain* suggested Congress's jurisdictional design for bankruptcy may reveal a "congressional intent to choose [bankruptcy] courts in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims."[480] This is evidenced by Congress's attempt to statutorily vest bankruptcy courts with exclusive jurisdiction over insolvency cases.[481] Upon the filing of an insolvency case, Congress intended to funnel insolvency matters to specialized insolvency tribunals.[482] Even more, Congress gave bankruptcy judges the authority to "hear and determine" core matters, subject only to appellate review.[483] Nonetheless, we know from the Supreme Court's decision in *Stern* that Congress's statutory design is unconstitutionally overbroad; but that still leaves a certain class of claims (category one claims) that

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[477]*Id.* at paras. 29, 30, 34.

[478]*Id.* at para. 30.

[479]*But cf.* David Horton, *Federal Arbitration Act Preemptive, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1273 (2013) (arguing "the FAA's context and legislative history reveals that a reasonable member of Congress likely would have understood violation of public policy to be a 'ground[ ] . . . for the revocation of any contract'" (second and third alteration in original)).

[480]Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 169 (4th Cir. 2005).

[481]As previously detailed in subpart II.A, Congress actually vested the *district courts* with original and exclusive jurisdiction over insolvency cases. *See* 28 U.S.C. § 1334(a) (2012) ("Except as provided in subsection (b) of this section, *the district courts shall have original and exclusive jurisdiction* of all cases under title 11." (emphasis added)). The district courts may refer—and all districts do—insolvency cases to bankruptcy judges in the district. *See* § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

[482]Although the district courts have original and exclusive jurisdiction over "cases under title 11," § 1334(a), their jurisdiction is concurrent with "courts other than the district courts . . . [for] all civil proceedings arising under title 11 or arising in or related to cases under title 11," § 1334(b). That means a court other than a district court or a bankruptcy court *may* decide a claim arising under the Code (i.e., a core matter). But, importantly, where an insolvency case has been filed and is pending, concurrent jurisdiction is restricted in a sense because bankruptcy judges (by reference from the district courts) have original and exclusive jurisdiction over the insolvency case. Even further, § 1334(e)(1) dictates that bankruptcy courts have exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of [a case under title 11], and of property of the estate." The key takeaway here is that although non-bankruptcy courts enjoy concurrent jurisdiction, the bankruptcy jurisdiction statute operates to funnel core insolvency matters to the *bankruptcy courts*.

[483]28 U.S.C. § 157(b)(1) (2012).

both Congress and the Supreme Court believe bankruptcy judges have the statutory and constitutional authority to enter final decisions.

With that jurisdictional construct in mind, the primary purpose behind vesting a single forum with control over certain "pure" insolvency matters is well founded. Since the adoption of early American insolvency laws, Congress has seen fit to vest specialized tribunals skilled in insolvency issues with jurisdiction over insolvency cases. This aspect of the American insolvency regime necessarily centralizes resolution of insolvency disputes—particularly those originating from the Code—and protects parties from the prospect of piecemeal litigation. Although this author is not convinced of the Fourth Circuit's position that the statutory *text* may reveal a contrary congressional command, at the very least, it does appear that the motivating purposes of the Code and the statute conferring bankruptcy jurisdiction "inherently conflict" with arbitrating certain insolvency matters.[484] That is, Congress's "inten[t] to limit or prohibit waiver of a judicial forum for a particular claim" is evidenced by the "inherent conflict between arbitration and the [statutes'] underlying purposes."[485] This finding, however, must be limited to category one claims—namely, claims created by the Code *and* in which bankruptcy judges have final adjudicatory authority.

Although reached through a different angle—one that this author believes is more true to Supreme Court jurisprudence and the FAA and the Code—this conclusion is mostly consistent with U.S. courts' current practice, and most developed countries for that matter. Accordingly, category one claims should be treated as per se nonarbitrable. But, similar to the legislative solution offered by Professor Resnick,[486] this per se rule should be subject to two limited exceptions: (1) bankruptcy courts authority to permissively abstain under 28 U.S.C. § 1334(c)(1); and (2) *post*-petition arbitration agreements as allowed by Federal Rule of Bankruptcy Procedure 9019(c).[487] Current practice already contemplates both of these exceptions, which grants bankruptcy courts—and the parties for that matter—limited discretion to manage an insolvency case as presented. But courts should be cautious not to allow these narrow exceptions to devolve into habits of the past, otherwise consuming the general rule.

The last class of claims (category two) is, at this time, admittedly ill defined. In other words, it is unclear whether some claims, although derived from the Code, are beyond bankruptcy judges' constitutional authority to

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[484]*See* Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).

[485]*Id.*

[486]*See* discussion *supra* subpart III.A and accompanying notes.

[487]Resnick, *supra* note 16, at 214, 215. Federal Rule of Bankruptcy Procedure 9019(c) provides, "On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration."

adjudicate finally under *Stern*. For example, the Ninth Circuit in *Bellingham Insurance Agency, Inc. v. Arkison* (In re *Bellingham Insurance Agency, Inc.*) seized on the Supreme Court's statements in *Stern* and other pre-*Stern* cases and held a fraudulent conveyance claim under § 548 of the Code was the type of claim *Stern* envisioned, thus obviating the bankruptcy judge's authority to issue a final decision on the matter.[488] In short, this debate—which is more complex and detailed than this Article provides—turns on whether a claim involves a "public" right or "private" right as expounded in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[489]

Notwithstanding the debate surrounding bankruptcy judges' adjudicatory authority, the impact is minimal to the framework announced here, because category two claims are still federal statutory claims grounded in the Code. With that, the *McMahon* framework applies to determine whether the text, legislative history, or purpose of the Code evidences a contrary congressional command. In contrast to category one claims, however, category two claims should not enjoy per se status because they are not necessarily centralized for final disposition in the bankruptcy courts. That is to say, they are *finally* decided outside the insolvency process by non-bankruptcy courts. But circumstances of the claim may still justify rejecting arbitration. For instance, a contrary congressional command may be deduced from an inherent conflict between arbitration and other underlying purposes and objectives of Code—e.g., protecting the rights of creditors, etc.—which override the FAA's direction to enforce arbitration agreements.

In summary, the framework advanced by this Article provides a blueprint for enforcing arbitration agreements in insolvency cases. The approach relies on foundational Supreme Court cases in order to categorize claims by key markers—namely, (1) whether the origin of the claim is grounded in the Code, and (2) whether the bankruptcy judge has final adjudicatory authority. These markers then translate into claim categories, which mostly receive per se treatment informed by the approaches adopted by other developed nations. Importantly, the framework is workable and predicable, alleviating the morass that plagues the current standards.

CONCLUSION

This Article provides a descriptive account of the enforceability of arbitration agreements in American insolvency proceedings. There is little doubt about the U.S. judiciary's acceptance of arbitration as an adequate form of dispute resolution. But when that acceptance converges with American insolvency law, uncertainty abounds. This is the product of two different legal

[488] 702 F.3d 553, 565 (9th Cir. 2012) *aff'd on other grounds*, 134 S. Ct. 2165 (2014).
[489] 458 U.S. 50, 67 (1982) (plurality opinion).

regimes principled on divergent policies. The insolvency system is premised on specialized tribunals that decide insolvency disputes in a centralized forum to protect parties from piecemeal litigation; whereas American arbitration law serves to honor and defer to parties' right to contract for alternative forms of dispute resolution outside the confines of the court system.

Since the U.S. Supreme Court's decision in *McMahon*, courts have struggled with constructing a workable and predicable framework to govern the enforceability of arbitration agreements in insolvency. The current standards advanced by circuit courts are conflicting and malleable, providing little guidance to the bankruptcy court or the parties in insolvency proceedings seeking to compel arbitration. Scholars and commentators have recognized the problem and proposed thoughtful solutions. But to date those proposals have failed to gain traction outside the academic space.

This Article advocates for a renewed perspective of the issue through a comparative law analysis. Observing how other countries deal with this common problem not only expands and deepens our own understanding of the issue, but it also acts as a source of new ideas to guide a reconstituted framework. Ultimately, this Article advances a framework drawing from foundational Supreme Court cases in order to categorize potential arbitrable claims by determinative markers, such as the origin of the claim and bankruptcy judges' final adjudicatory authority. The claim categories for the most part receive per se treatment informed by how other developed countries around the world approach arbitration and insolvency. Importantly, the proposed solution is workable and immediately implementable without further action by Congress or the Supreme Court.