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ARBITRATION AND BANKRUPTCY: A TUG OF WAR

The pro-arbitration policies underlying the FAA conflict with the centralization policies of the Bankruptcy Code, causing these two statutes to pull in opposite directions. After describing this conflict, the authors discuss the interplay between the statutory regimes for "non-core" and "core" bankruptcy matters and how courts have dealt with them. They conclude that the standards and analyses employed by courts are open-ended and highly dependent on the facts of the case.

By Leah M. Eisenberg, Katherine R. Catanese, and Sam Lawand *

The Federal Arbitration Act (the "FAA") requires courts to enforce arbitration provisions. In furtherance of the FAA's purpose, the Supreme Court continues to aggressively enforce arbitration provisions, including those applicable to federal statutory rights. *Shearson/American Express Inc. v. McMahon* stands as the seminal case delineating the burden faced by parties opposing arbitration.[1] There, the Supreme Court decided whether to compel arbitration over a customer's Racketeer Influenced and Corrupt Organizations Act (the "RICO") claims against a broker. In examining the interplay between the RICO and the FAA, the Supreme Court explained that the FAA prevails, unless the party opposing arbitration can show congressional intent for the RICO to serve as an exception to the FAA. In short, *McMahon* requires a party opposing arbitration to show that Congress intended for the competing federal statute to serve as an exception to the FAA.[2] Accordingly, the FAA and the Supreme Court present high hurdles to parties opposing arbitration.[3]

The authority afforded to bankruptcy courts to decide substantive bankruptcy issues in bankruptcy cases parallels the broadening scope of the FAA. Centralization of creditor claims in a transparent and public forum is one of the leading policies underlying the Bankruptcy Code. Such policy, however, militates

[1] 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

[2] *In re Bethlehem Steel Corp.*, 390 B.R. 784, 793 (Bankr. S.D.N.Y. 2008).

[3] *McMahon*, 482 U.S. at 226 ("The [FAA], standing alone, mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command."); *In re Gandy*, 299 F.3d 489, 494 (5th Cir. 2002) (explaining that "[t]he [FAA] directs courts rigorously to enforce agreements to arbitrate").

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against the FAA's policy of enforcing arbitration provisions in private and non-public disputes. This conflict commonly presents itself in bankruptcy proceedings where a debtor is a party to a contract containing an arbitration provision, and the counterparty seeks to enforce the arbitration provision in order to have the underlying matter decided by an arbitrator, rather than a bankruptcy court. Given the Bankruptcy Code's sparse legislative history and the lack of Supreme Court authority, bankruptcy courts at times employ inconsistent standards and approaches to determine whether to compel arbitration in bankruptcy cases. Nevertheless, as the general trend, bankruptcy courts employ a factual, case-by-case analysis to determine whether arbitration of the underlying matter sufficiently frustrates bankruptcy policies to meet *McMahon*'s rigorous standard.

Specifically, to decide whether to compel arbitration, a court must conduct the following inquiries: (1) determine whether the parties agreed to arbitrate; (2) determine the scope of the arbitration provision; (3) "if federal statutory claims are asserted, it must consider whether Congress intended those claims to be non-arbitrable"; and (4) "if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration."[4] This article focuses on the third prong — the analysis to determine whether a claim is arbitrable. Part I of this article discusses the background and policy of the FAA. Part II discusses the background of the Bankruptcy Code and its jurisdictional scheme.[5] Finally, part III discusses the interplay between the Bankruptcy Code and the FAA, as well as the divergent standards and analyses employed by courts addressing such interplay. This article concludes that the standards and analyses employed by courts are open-ended and highly dependent on the specific facts and circumstances of the case.

I. THE FEDERAL ARBITRATION ACT

The concept of arbitration was initially met with skepticism. Courts were "suspicious of the desirability of arbitration and of the competence of arbitral tribunals."[6] To overcome the courts' reluctance to enforce arbitration provisions, Congress in 1925 enacted the FAA to "place arbitration agreements upon the same footing as other contracts."[7] The FAA dictates that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] According to the Supreme Court, the FAA leaves no discretion for courts presented with valid arbitration provisions.[9] Any doubt or ambiguity is resolved in favor of arbitration.[10]

II. THE BANKRUPTCY CODE

"The [FAA] was passed not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction, while at the same time recognizing

[4] *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004).

[5] The jurisdictional scheme of the Bankruptcy Code is relevant because a bankruptcy court's authority to compel arbitration over a claim depends, in part, on the court's jurisdiction over such claim.

[6] Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 186 (2007); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (explaining that "the FAA's purpose [is] to reverse the longstanding judicial hostility to arbitration agreements").

[7] *Green Tree*, 531 U.S. at 89 (explaining that "the FAA's purpose [is] to . . . place arbitration agreements upon the same footing as other contracts").

[8] 9 U.S.C. § 2 (2006).

[9] *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (explaining that "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed"); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim, which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.").

[10] According to the Supreme Court, there is a "liberal federal policy favoring arbitration agreements." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

arbitration agreements as affirmative defenses and providing a forum for their specific enforcement."[11] Rather than divest courts of jurisdiction, arbitration provisions simply enjoin courts from adjudicating the underlying matters.[12] Nonetheless, whether bankruptcy courts have jurisdiction over a matter is an important distinction drawn by courts faced with the murky interplay between arbitration and bankruptcy. Accordingly, a discussion of the Bankruptcy Code's jurisdictional scheme is necessary.

The Bankruptcy Reform Act of 1978 gave bankruptcy courts broad authority, comparable to that of district courts, to adjudicate most claims involving debtors in bankruptcy.[13] In one early case, for example, the Third Circuit did not compel arbitration over a bankruptcy trustee's state-law claims against a third party, reasoning that the "purposes of the Bankruptcy Reform Act of 1978 impliedly modify the Arbitration Act."[14] However, this broad grant of authority was short-lived. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*,[15] the Supreme Court held that the Bankruptcy Reform Act of 1978 is unconstitutional. According to the plurality, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages."[16]

In the wake of *Marathon*, Congress amended the Bankruptcy Code by creating a dichotomy under which matters are classified as either "core" or "non-core."[17] "Core" matters are those matters that directly affect a core bankruptcy function — e.g., fixing the order of priority of claims against a debtor. "Non-core" matters are those matters that "could conceivably have any effect on the estate being administered in bankruptcy," but do not raise bankruptcy issues — e.g., breach of contract and fraud claims brought on behalf of a debtor against a third party.[18] For "non-core" matters, bankruptcy courts are limited to issuing proposed findings of fact and conclusions of law for *de novo* review by the district court.[19]

To further limit jurisdiction, the Supreme Court held that a state-law counterclaim, even if "core," cannot be *finally* adjudicated by a bankruptcy court.[20] This adjudicative authority, the Supreme Court explained, is for district courts. Accordingly, certain "core" matters may not fall within the jurisdiction of a bankruptcy court.

III. INTERPLAY BETWEEN THE BANKRUPTCY CODE AND THE FAA

The interplay between the Bankruptcy Code's centralization policy and the FAA's pro-arbitration policy is not entirely clear. For example, allowing an arbitrator to decide a "core" matter would make bankruptcy rights "contingent upon an arbitrator's ruling," as opposed to a bankruptcy judge's ruling, and

[11] *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71 (1st Cir. 2000) ("DiMercurio complains that drawing a line between a court's jurisdiction over a case and its authority to hear a case creates a distinction without a difference. We disagree. It is neither illogical nor meaningless for a court's jurisdiction to remain intact and crucial to the overall arbitration scheme even while it honors the parties' voluntary agreement to deal with the merits outside the courtroom.").

[12] *Borrero v. United Healthcare of New York, Inc.*, 610 F.3d 1296, 1307 (11th Cir. 2010) ("Most courts considering the issue have concluded that the arbitrability of a claim is not a jurisdictional limitation."); *DiMercurio*, 202 F.3d at 77 ("The difference in language reflects the modern view that arbitration agreements do not divest courts of jurisdiction, though they prevent courts from resolving the merits of arbitrable disputes.").

[13] 28 U.S.C. § 1471 (1978) (Granting "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.").

[14] *Zimmerman v. Cont'l Airlines, Inc.*, 712 F.2d 55, 56 (3d Cir. 1983).

[15] 458 U.S. 50 (1982).

[16] *Id.* at 71.

[17] *In re Clay*, 35 F.3d 190, 193 (5th Cir. 1994) ("In the wake of *Marathon,* Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).").

[18] *In re Exide Techs.*, 544 F.3d 196, 205–06 (3d Cir. 2008) ("As we have said, a non-core proceeding belongs to the broader universe of all proceedings that are not core proceedings but are nevertheless related to a bankruptcy case. They, therefore, need not necessarily be against the debtor or against the debtor's property, but, rather, need only be such that "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.").

[19] *Matter of Axona Intern. Credit & Com. Ltd.*, 924 F.2d 31, 34 (2d Cir. 1991).

[20] *Stern v. Marshall*, 564 U.S. 462, 487 (2011). The Supreme Court did not find a constitutional basis to provide a bankruptcy court with authority to enter "a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime." *Id.*

is, therefore, contrary to the centralization policy.[21] As the Second Circuit bluntly explained, "bankruptcy policy exerts an inexorable pull towards centralization, while arbitration policy advocates a decentralized approach towards dispute resolution."[22]

The Bankruptcy Code's and the FAA's competing policies compel a demanding analysis where an arbitration provision purports to bind claims of a debtor in bankruptcy. This issue generally presents itself where a debtor (1) asserts "non-core" claims, such as personal injury claims; (2) asserts bankruptcy "core" claims, such as preference claims; or (3) invokes Section 365 of the Bankruptcy Code to reject an executory contract or unexpired lease. In these circumstances, bankruptcy courts are faced with deciding whether the policy of centralization trumps the policy of enforcing arbitration provisions.

Given that the Supreme Court has not specifically examined the interplay between the Bankruptcy Code and the FAA, bankruptcy courts are left to rely on *McMahon*, but only as a starting point. As discussed above, in *McMahon*, the Supreme Court held that the FAA prevails, unless the party opposing arbitration can show congressional intent for the competing statute to create an exception to the FAA. This congressional intent, the Supreme Court explained, is "deducible from [the competing statute's] text or legislative history, or from an inherent conflict between arbitration and the [competing] statute's underlying purposes."[23] In applying *McMahon* in bankruptcy cases, "courts have found little guidance either in the text or the legislative history of the [Bankruptcy] Code provisions relating to bankruptcy jurisdiction; the inquiry, therefore, has been framed as whether arbitrating the dispute in question would pose an irreconcilable conflict with the [Bankruptcy] Code."[24]

To determine whether an "irreconcilable conflict" exists, bankruptcy courts approach the analysis on a case-by-case basis, examine the facts and circumstances, and apply different standards. As a starting point, bankruptcy courts generally determine whether the underlying matters are "core" or "non-core." Such determination usually turns on the following factors: (1) the degree to which the arbitration is independent of the bankruptcy and (2) whether the underlying matters are unique to, or uniquely affected by, the bankruptcy or otherwise directly affect a "core" bankruptcy function.[25] The "core" versus "non-core" distinction, "though relevant, is not alone dispositive."[26] While most courts start with designating the matter as either "core" or "non-core," courts are inconsistent on the remainder of the analysis.

(a) Arbitration of "Non-Core" Matters

Generally, arbitrating "non-core" matters does not "inherently conflict" with the Bankruptcy Code. Bankruptcy courts generally enforce arbitration provisions if doing so does not affect the orderly administration of the estate.[27] In *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[28] a bankruptcy trustee asserted, among other things, claims arising under state and federal securities law. Focusing on the rights vested in the bankruptcy trustee pursuant to the debtor's bankruptcy filing, the Third Circuit explained that "the trustee-plaintiff stands in the shoes of the debtor for purposes of the arbitration clause," notwithstanding that neither the trustee nor the creditors agreed to the arbitration provision. The Third Circuit found that the trustee's state and federal securities law claims are "non-core." Because the Third Circuit found no indication in the Bankruptcy Code's text or legislative history that Congress intended to bar arbitration in "non-core" matters, the Third Circuit held that the trustee's state and federal securities law claims

[21] *In re White Mountain Mining Co., L.L.C.*, 403 F.3d 164, 169 (4th Cir. 2005) ("Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case.").

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

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

[24] Resnick, *supra* note 6, at 202.

[25] *U.S. Lines*, 197 F.3d at 637.

[26] *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012) ("We agree that the core/non-core distinction, though relevant, is not alone dispositive. We join our 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.").

[27] *Bethlehem Steel*, 390 B.R. at 794 ("In assessing whether the court has discretion to refuse to compel arbitration, core bankruptcy proceedings 'implicate more pressing bankruptcy concerns' than do non-core proceedings.").

[28] 885 F.2d 1149 (3d Cir. 1989).

are arbitrable.[29] Likewise, the Fifth Circuit in *In re National Gypsum*[30] expressed its agreement with *Hays*, after discussing it at length. Holding that "non-core" claims are arbitrable, the Fifth Circuit explained, is "universally accepted" and makes "eminent sense, particularly in light of the 1984 amendments to the Bankruptcy Code."[31]

(b) Arbitration of "Core" Matters

To determine whether a "core" matter is arbitrable, courts examine whether Congress intended to preclude a waiver of judicial remedies for the matter — i.e., whether arbitrating the matter presents an "inherent conflict" with the Bankruptcy Code. As part of this analysis, courts may analyze whether a matter is "procedurally core" or "substantively core."[32] "Procedurally core" matters are "garden variety prepetition contract disputes dubbed core because of how the dispute arises or gets resolved" — e.g., "[o]bjections to proofs of claim and counterclaims asserted by the estate."[33] "Substantively core" matters are those "not based on the parties' prepetition relationship, and involve rights created under the Bankruptcy Code."[34] Stated differently, "substantively core" matters are so "central to the bankruptcy process that Congress contemplated as substantially altering otherwise existing and enforceable rights under applicable non-bankruptcy law, and that Congress did so in light of the fact that it is a multi-party process, and not just a simple two-party dispute."[35] Enforcing an arbitration provision over a "substantively core" matter generally presents an "inherent conflict" with the Bankruptcy Code.[36] Enforcing an arbitration provision over a "procedurally core" matter, however, rarely conflicts with the Bankruptcy Code. Accordingly, a matter's designation as "core" is not dispositive of whether it is arbitrable.[37]

In *Hays* and *National Gypsum*, discussed above, the courts employed an analysis that is distinct from that for "non-core" matters.[38] In *Hays*, the bankruptcy trustee also asserted bankruptcy-specific fraudulent conveyance and constructive trust claims. Focused on the rights vested in the bankruptcy trustee pursuant to the debtor's bankruptcy filing, the Third Circuit examined the claims under Section 544(b) of the Bankruptcy Code. Because such claims are derived from the Bankruptcy Code for the benefit of the estate, the Third Circuit held that they are not arbitrable.[39] The Fifth Circuit employed a similar analysis in *National Gypsum*.[40] There, the debtor filed a declaratory action to determine whether preconfirmation liability is barred by the discharge injunction and the confirmed plan. Analyzing the origin of the "core" claims, the Fifth Circuit explained that the propriety of arbitrating such claims depends on whether they are derived from bankruptcy law.[41] According to

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[29] *Id.* at 1157 ("[I]t is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court.").

[30] 118 F.3d 1056 (5th Cir. 1997). The Fifth Circuit subsequently employed a similar analysis in *In re Gandy*, 299 F.3d 489 (5th Cir. 2002).

[31] *National Gypsum*, 118 F.3d at 1066.

[32] *In re Hostess Brands, Inc.*, Case No. 12-22052-RDD, 2013 WL 82914, at *3 (Bankr. S.D.N.Y. Jan. 7, 2013).

[33] *In re Hagerstown Fiber Ltd. Partn.*, 277 B.R. 181, 203 (Bankr. S.D.N.Y. 2002).

[34] *Id.*

[35] *Hostess*, 2013 WL 82914, at *3.

[36] *Hagerstown*, 277 B.R. at 203.

[37] *In re Caldor*, 217 B.R. 121 (Bankr. S.D.N.Y. 1998).

[38] *National Gypsum*, 118 F.3d at 1155 ("Claims asserted by the trustee under section 544(b) are not derivative of the bankrupt. They are creditor claims that the Code authorizes the trustee to assert on their behalf. The Supreme Court has made it clear that it is the parties to an arbitration agreement who are bound by it and whose intentions must be carried out . . . Thus 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. . . It follows that the trustee cannot be required to arbitrate its section 544(b) claims and that the district court was not obliged to stay them pending arbitration.").

[39] The Third Circuit in *In re Mintze*, 434 F.3d 222 (3d Cir. 2006), found that debtor-derived claims, as opposed to bankruptcy claims, are arbitrable. There, the debtor asserted state and federal consumer protection claims against a lender, and the parties stipulated that the matter's effect on the priority of claims deemed the matter "core." The Third Circuit did not find a conflict between the asserted claims and the Bankruptcy Code, and expressly rejected the proposition that the parties' designation of the claims as "core" are dispositive.

[40] 118 F.3d at 1066.

[41] Noting that *Hays* did not "specifically" address "core" claims, the Fifth Circuit set forth factors to analyze the arbitrablity of "core" claims — i.e., "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." *National Gypsum*, 403 F.3d at 1066 ("Whether a bankruptcy court has discretion to enforce an applicable arbitration clause where core bankruptcy issues are

the Fifth Circuit, arbitrating claims that are not derivative of the debtor's prepetition legal or equitable rights is inconsistent with Bankruptcy Code policies, 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."[42] On this basis, the Fifth Circuit found that the claims are not arbitrable. Notably, the *Hays* and *National Gypsum* courts did not adopt a *per se* rule that a matter's "core" designation, without more, is a sufficient ground to deny arbitration.

Courts may focus on the facts and ramifications of compelling arbitration over a "core" matter. In *In re U.S. Lines, Inc*.,[43] a successor to a debtor filed an action seeking a declaratory judgment on certain rights under prepetition insurance policies whose potential proceeds served as the only funds available to cover a class of mass tort claims.[44] Analyzing the matter's "coreness," including its need for a centralized proceeding, the Second Circuit found that the centralization of mass tort actions involving an insolvent debtor is integral to the bankruptcy court's ability to preserve and equitably distribute the estate's assets and thus held that the matter is not arbitrable.[45]

Similarly, in *In re White Mountain Mining Co., L.L.C.*,[46] the principal of the debtor filed a declaratory action to determine whether contributions to the debtor constitute equity or debt, and the debtor's operating agreement required disputes to be arbitrated in London. The Fourth Circuit held that the matter is "core" because the principal sought a declaration that the monetary contributions to the debtor were "due and owing." Limiting its holding to the particular facts, the Fourth Circuit found that compelling arbitration abroad would: (1) make it difficult for the debtor to attract additional funding due to the uncertainty as to whether the contributions are 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.[47] In short, the Fourth Circuit held that compelling arbitration abroad would conflict with the purposes of the Bankruptcy Code and thus denied arbitration.[48] The *U.S. Lines* and *White Mountain* courts

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involved was not addressed specifically by *Hays*, although other courts have found the core/non-core distinction useful.").

[42] *Id.* at 1069.

[43] 197 F.3d 631 (2d Cir. 1999).

[44] In *U.S. Lines*, the Second Circuit, in denying arbitration, emphasized that the underlying insurance proceeds are "the only potential source of cash available" for employees who filed asbestos-related personal injury claims against the debtors. 197 F.3d at 638. This "impact . . . on other core bankruptcy functions," the Second Circuit explained, make it a "core" matter. *Id.* Whether a matter is "core," the Second Circuit held, "depends on (1) whether the conflict is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization." *Id.* at 637.

[45] The Second Circuit in *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006), found that the assertion of a substantive bankruptcy right, without more, is an insufficient ground to deny arbitration. There, a debtor completed her bankruptcy case and then filed a putative class action in the bankruptcy court premised upon a lender's violation of the automatic stay. The Second Circuit focused on the claim's "origin," as opposed to its "core" or "non-core" designation. Although finding the automatic stay claim to be "core" specifically derived from

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bankruptcy law, the Second Circuit nevertheless held such claim to be arbitrable, noting a lack of "severe conflict" with the Bankruptcy Code.

Similarly, the Second Circuit *In re Lehman Bros. Holdings Inc.*, Case No. 15-3480, 2016 WL 5853265 (2d Cir. Oct. 6, 2016), explained that a matter's designation as "core," without more, is not a sufficient ground to deny arbitration. The Second Circuit concluded that (i) the enforcement of a subordination provision under an employee compensation plan by a SIPA trustee is a "core" matter; and (ii) arbitration of such claims would seriously jeopardize the objectives of the Bankruptcy Code. Accordingly, the Second Circuit found that the claims are not arbitrable.

[46] 403 F.3d 164, 170 (4th Cir. 2005).

[47] *Id.* The Fourth circuit found that referring the matter to international arbitration abroad is "inconsistent with the purpose of the bankruptcy laws to centralize disputes about a chapter 11 debtor's legal obligations so that reorganization can proceed efficiently." *Id.*

[48] The analysis is more complicated in the international context. International arbitration is replete with its own conflicts including: (1) inconsistent contract, insolvency, and arbitration laws; (2) the designation of the proper estate representative the arbitration; (3) the enforceability of arbitration provisions and rulings; (4) the policy to keep arbitrations private; and (5) the lack of a single cross-jurisdictional forum that is acceptable to all parties. At this time, no international arbitration framework has been uniformly accepted. Proposals have been made to better coordinate international insolvency

thus focused on the facts and ramifications of compelling arbitration.[49]

Whether a "core" matter is arbitrable turns on the extent to which it is "core." Matters that involve rights created under the Bankruptcy Code — i.e., "substantively core" matters — are less likely to be arbitrable.[50] More likely arbitrable, however, are "garden-variety" prepetition contract disputes that are designated as "core" simply because of how the dispute arises or is resolved — i.e., "procedurally core" matters.[51]

CONCLUSION

As these decisions make clear, the Bankruptcy Code and the FAA are often at the opposite ends of the tug of war. The determination on which statute controls is fact driven and based, at least in part, on whether the matter before the bankruptcy court is "core" or "non-core." Courts generally employ an open-ended, case-by-case analysis to determine whether arbitration sufficiently frustrates bankruptcy policies to meet *McMahon*'s rigorous standard. Consider, for example, the Second Circuit in *U.S. Lines* – there the panel's three members expressed divergent views on the most important part of the analysis.[52] The lack of bright-line rules makes the analysis open-ended. Practitioners are thus well-advised to research caselaw of the jurisdiction in which the matter is pending and analyze the conflict from a practical perspective. ■

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and arbitration matters through the United Nations Commission on International Trade Law. *See* Caroline Simson, UN to Take on Murky Intersection of Arbitration & Insolvency, LAW360 (December 6, 2016, 1:51 PM), https://www.law360.com/articles/868600/un-to-take-on-murky-intersection-of-arbitration-insolvency; Allan L. Gropper, The Arbitration of Cross-Border Insolvencies, 86 AM. BANKR. L.J. 201, 201 (2012). If these proposals or a framework gain acceptance, parties must be aware that "congressional intent to permit a bankruptcy court to enjoin arbitration is sufficiently clear to override even *international* arbitration agreements." *U.S. Lines*, 197 F.3d at 639.

[49] The Ninth Circuit in *In re Thorpe Insulation Co.*, 671 F.3d 1011 (9th Cir. 2012), employed a similar analysis. There, an insurer argued that the confirmed plan violated a prepetition settlement of a coverage dispute. Because the insurer filed a proof of claim, the Ninth Circuit found that the matter is "core." Explaining that the consolidation of the debtor's asbestos-related assets and liabilities into a single trust for the benefit of asbestos claimants are in furtherance of bankruptcy policy, the Ninth Circuit found that the matter is not arbitrable. According to the Ninth Circuit, "the nature of the allegations were such that adjudication of [the insurance company's] claim in any forum other than a bankruptcy court would conflict with fundamental bankruptcy policy." *Id.* at 1022.

[50] *Hostess*, 2013 WL 82914, at *3.

[51] *Hagerstown*, 277 B.R. at 203.

[52] Due to the divergent views on how to define "core" matters, the members of the three-judge panel entered concurring opinions. According to Judge Newman, "the efficient functioning of the bankruptcy system [requires] a bright-line rule that treats as core proceedings all suits alleging postpetition breaches of prepetition contracts." *U.S. Lines*, 197 F.3d at 641. Judge Calabresi, however, prefers a "case-by-case approach." *Id.* at 643.