Bankruptcy Arbitration

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Introduction

Bankruptcy proceeding was first provided in the U.S. Constitution[1] as the federal jurisdiction in 1787. It took, however, thirteen years after that to enact the first Bankruptcy Act in 1800, which was effective for only three years. The first full scale Bankruptcy Act was waited for until 1898.[2] The Bankruptcy Reform Act of 1978[3] established the bankruptcy court to authorize the bankruptcy judge as the comprehensive jurisdiction over bankruptcy proceedings, which was later declared unconstitutional in 1982 by the U.S. Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[4] It was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984.[5] In 1986 and 1994,

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1. The U.S. Constitution, Article 1, Section 8(4).
2. ch. 541, 30 Stat. 544, codified at 11 U.S.C.A. §§ 1051(1898).
3. Pub. L. No. 95-598, 92 Stat.2549, codified at 11 U.S.C.A. § §101-1330(1978).
4. 12 BR 946(D. Minn.1981), *aff'd*, 458 U.S. 50(1982).
5. Pub. L. No. 98-353, 98 Stat.333(1984).

amendments were also made.[6] Under the Act of 1978, the congressional policy consolidating all bankruptcy related matters in the bankruptcy court, *Zimmerman v. Continental Airlines, Inc.*[7] upheld the exercise of discretion by the bankruptcy court in denying arbitration because the Act of 1978 impliedly modified the Arbitration Act. However, after the Act of 1984, the same Third Circuit decided in *Hays & Co. v. Merrill Lynch*[8] that the *Zimmerman* theory was no longer applicable, and it was proper to enforce an arbitration clause in a non-core bankruptcy proceeding.

After these decisions, some courts still follow *Zimmerman*, some follow *Hays* and some limit *Hays* to non-core matters.

Does the Bankruptcy Act conflict with the Arbitration Act ? The Act of 1978, especially, enlarged the jurisdiction of the bankruptcy court aiming to eliminate serious delay, expense and duplication in bankruptcy cases. What kind of relationships exist between the district judge and the referee or bankruptcy judge ? How do core and non-core relate to the bankruptcy proceedings ?

Through examination of the legislative history of the Bankruptcy Act and case law on bankruptcy, the relationships between the Bankruptcy Act and Arbitration Act will be recognized, and it will be confirmed how party autonomy exists in this area.

1. The Legislative History of the Bankruptcy Act

The Act of 1898 vested the bankruptcy referee with a limited scope of proceedings, as summary proceedings, and others were heard by the dis-

6. Pub. L. No. 99-554, 100 Stat.3088(1986). Pub. L. No. 103-394, 108 Stat.4106(1994).
7. 22 BR 438(Bankr. E.D. Pa.), *aff'd*, 712 F.2d 55(3rd Cir. 1983), *cert. denied*, 464 U.S. 1038(1994).
8. 885 F.2d 1149(3rd Cir. 1989).

trict court judge, as plenary proceedings.[9] Because of the separation of the jurisdiction between the two, bankruptcy proceedings took time resulting in an inefficient bankruptcy arrangement.[10]

The Act of 1978, aiming to cure the situation of the serious delay, expense and duplications associated with the dichotomy between summary and plenary jurisdiction under the Act of 1898,[11] established the U.S. Bankruptcy Court for the District, which was as an adjunct to the District Court for each judicial district,[12] and centralized all disputes concerning bankruptcy matters in the Bankruptcy Court with the broad jurisdiction of bankruptcy matters, *i.e.,* jurisdiction over all civil proceedings arising under title 11 (bankruptcy of the U.S. Code) or arising in or related to cases under title 11,[13] by eliminating the distinction between summary and plenary jurisdiction. The Bankruptcy Court had the powers of a court of equity, law and admiralty.[14] The Bankruptcy Court was given *in personam* jurisdiction as well as *in rem* jurisdiction to handle everything that

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9. Summary jurisdiction is jurisdiction over controversy involving property in the actual or constructive possession of the court. Plenary jurisdiction is jurisdiction over a dispute such as one involving property in the possession of a third party. The bankruptcy court had jurisdiction over some of the latter with consent of the parties. *See* 11 U.S.C. § 46 (b). *Marathon Pipe Line*, *supra* note 4 at 53.
10. *See* D. James MacKall, *Comment: Balancing Section 3 of the U.S. Arbitration Act and Section 1471 of the Bankruptcy Reform Act of 1978: A Bankruptcy Judge's Exercise of "Sound Discretion"*, 53 U.Cin.L.Rev.231 (1984). Fred Neufeld, *Enforcement of Contractual Arbitration Agreements under the Bankruptcy Code,* 65 Am.Bankr. L.J.525 (1991). Lawrence P. King, *The History and Development of the Bankruptcy Rules,* 70 Am.Bankr.L.J.217 (1996). Mette H. Kurth, *Comment: An Unstoppable Mandate and an Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide,* 43 UCLA L.Rev.999 (1996). Glenn A. Guarino, *Disposition by Bankruptcy Court of Request for Arbitration pursuant to Arbitration Agreement to which Debtor in Bankruptcy,* 72 A.L.R. Fed. 890 (2003).
11. S. Rep. No.95-989, 95 Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5803.
12. 28 U.S.C. § 151 (a).
13. 28 U.S.C. § 1471 (b).
14. 28 U.S.C. § 1481.

arose in a bankruptcy case.[15] The Act also changed the status of the bankruptcy referee to the bankruptcy judge with a fourteen-year term appointed by the President, with the advice and consent of the Senate.[16] This status was, however, not the Article 3 status. The purpose was to give the debtor and the creditor a full, fair, speedy and unhampered chance for reorganization.[17]

The Act of 1984 was enacted in response to the U.S. Supreme Court decision of unconstitutionality of the jurisdiction and status of bankruptcy judges under the Act of 1978 in *Marathon Pipe Line*.[18] The Act adopted core and non-core proceedings for bankruptcy proceedings: core is proceedings arising under title 11 or arising in a case under title 11, and non-core is proceedings related to a bankruptcy case. A non-exclusive list of core proceedings is stipulated in Act.[19] The Act provides the jurisdiction of the district courts that (a) except as provided in (b), the district courts shall have original and exclusive jurisdiction of all cases under title 11. Subject to exception, (b) the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.[20] Each district court may refer both core and non-core proceedings to the bankruptcy judges. The bankruptcy judges may hear and determine core proceedings and may enter appropriate orders and judgments subject to review of the district

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15. H. R. Rep. No.95-595, p.445(1977). *See Marathon, supra* note 4 at 97.
16. 28 U.S.C. § 152, 153(a).
17. *In re Braniff Airways, infra* note 33.
18. *Marathon Pipe Line, supra* note 4.
19. 28 U.S.C. § 157(b)(2)(A)~(O); core proceedings are, such as, the administration of the estate; obtaining credit; issues of preferences, automatic stay, fraudulent conveyances; dischargeability of particular debts; liens; confirmations of plans; use, lease or sale of property; other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship.
20. 28 U.S.C. § 1334.

court. A bankruptcy judge may hear non-core proceedings, and in this case, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court; any final order or judgment shall be entered by the district judge after reviewing *de novo* of the proposal and objection by the parties.[21]

In order to understand the relationships between the Bankruptcy Act and the Arbitration Act, cases under three Bankruptcy Acts of 1898, 1978 and 1984 are to be reviewed reflecting the particular aspect of each Bankruptcy Act. In introducing the cases, details of the bankruptcy matters of each will not be shown but focus is paid attention to the relationships between the Bankruptcy Act and the Arbitration Act involved in each case.

2. Arbitration under the Act of 1898

1) *Fotochrome, Inc. v. Copal Co.,*[22] was a contract dispute between a U.S. corporation and a Japanese corporation. Fotochrome purchased cameras from Copal, manufactured according to specifications of the former for distribution in the U.S. Copal claimed damages for non-payment to cameras purchased by Fotochrome, which in turn claimed the failure of meeting scheduled delivery and defects in cameras. The parties agreed to arbitrate in Tokyo under the rules of the Japan Commercial Arbitration Association (JCAA). The arbitration proceedings took twenty-five months. At the final stage Fotochrome was allowed two witnesses to be examined, but failed to produce the witnesses four times and the final hearing date was scheduled. Five days before the last scheduled hearing, Fotochrome

21. 28 U.S.C. § 157(a), (b) (1), (c) (1).
22. 377 F. Supp. 26 (E.D.N.Y. 1974), *aff'd*, 517 F.2d 512 (2nd Cir. 1975).

filed Chapter 11 petition at the U.S. District Court for the Eastern District of New York. The referee issued an order enjoining all creditors from commencing or continuing any action or arbitration against the debtor. Fotochrome did not seek the court's permission to continue to participate in the JCAA arbitration. The JCAA panel examined the effect of the U.S. stay order, and decided it was not effective to it. Six months later, the JCAA awarded in favor of Copal, of which award was filed at Tokyo District Court under the Code of Civil Procedure.

Copal filed a proof of claim in the Fotochrome bankruptcy proceedings. The referee held that as the Japanese award could not be treated as final judgment, the Bankruptcy Court needed to reconsider the merits. The District Court reversed it, holding that the Japanese award was a final judgment under Japanese law, and the referee's stay order had no extraterritorial effect. Copal was not subject to the *in personam* jurisdiction, because it did not have minimum contacts with the U.S. The Second Circuit affirmed.

The Court concluded that a foreign arbitral award rendered after the filing of the Chapter 11 petition in the U.S. Bankruptcy Court in an arbitration proceedings commenced prior to such filing was valid determination on the merits and was unreviewable by the Bankruptcy Court. A foreign arbitration award must be enforced under the 1958 New York Convention subject to Article V for refusal or deferral. Copal must seek a judgment based on the award in the District Court under 9 U.S.C. § 207 (Arbitration Act) for enforcement, and, if successful, Copal may thereafter file a proof of claim in the Chapter 11 proceedings. The Court reserved the holding for a foreign party if it was subject to an *in personam* jurisdiction.

2) *Allegaert v. Perot,*[23] Allegaert, a bankruptcy trustee, filed a suit at the

23. 548 F.2d 432 (2nd Cir.), *cert. denied*, 432 U.S. 910 (1977).

U.S. District Court for the Southern District of New York alleging violations of the Bankruptcy Act, the Securities Act of 1933, the Securities Exchange Act of 1934, etc. against the defendants, Ross Perot, his related companies and their directors, alleging that they rearranged to transfer the assets, collateral and liabilities among the companies in order for Perot to get out of a disastrous involvement with the brokerage business. The defendants moved to stay action pending arbitration under the NYSE and the Amex. The Court granted a stay of the trustee's action pending arbitration. The trustee appealed to the U.S. Court of Appeals for the Second Circuit, which reversed the order of the District Court and remanded. The Court held that a bankruptcy trustee was a new entity. The trustee cannot be compelled to arbitrate his claim under the securities laws and the Bankruptcy Act. Under the circumstances, no arbitration should be permitted at this time.

3. Arbitration under the Act of 1978

1) *Cross Electric Co. v. Driggs Co.,*[24] was a contract dispute between Cross, a subcontractor, and Driggs, a prime contractor of a construction contract. Cross filed the Chapter 11 petition at the U.S. Bankruptcy Court for the Western District of Virginia, and sought to recover the contract amount from Driggs, which moved to dismiss the case for the lack of subject matter jurisdiction of the Court based on the arbitration clause in the construction contract. As the case was one of the first impressions under the Act of 1978, the Court reviewed the new Act and the newly created bankruptcy court had jurisdiction, which was sufficiently broad, promptly and expeditiously to hear and determine all controversies. The provision

24. 9 BR 408(Bankr. W.D. Va. 1981).

for arbitration in 11 U.S.C. § 49 was not carried forward in the Act of 1978. The Court concluded that the issues raised in the complaint seeking recovery by Cross against Driggs could be expeditiously heard and determined by this Court. Regarding the arbitration, the Court stated that relegating these matters to protracted arbitration proceedings where rules of discovery might not be available to the parties might prolong indefinitely a decision in this matter. The rehabilitation of the debtor required prompt disposition of the claim asserted.

2) *In re F & T Contractors,*[25] was a contract dispute between F & T, a contractor, and the defendants' owners under a construction contract. F & T filed the Chapter 11 petition before completion of an apartment complex. The trustee was granted permission by the Bankruptcy Court to continue the construction, to which the owner agreed. The trustee filed at the Bankruptcy Court seeking the payment from the owner upon completion of the project. The owner moved to arbitrate under the arbitration clause of the construction contract. The bankruptcy judge denied the motion to compel arbitration, holding that since there were other parties involved in the bankruptcy proceedings whose interest would not be represented at an arbitration hearing, and because the issues raised were those which a court would be as competent to decide as would an arbitrator, reference to an arbitrator would not serve the interests of the bankruptcy proceedings. The U.S. District Court for the Eastern District of Michigan affirmed the ruling of the bankruptcy judge, holding that the decision to compel or deny arbitration was discretionary with the bankruptcy judge. The U.S. Court of Appeals for the Sixth Circuit affirmed.

25. 649 F.2d 1229(6th Cir. 1981).

3) *In re Brookhaven Textiles,*[26] was a contract dispute. The Bankruptcy Court stated that arbitration was a method by which disputes were resolved when the issues involved require the particular knowledge and expertise of a tribunal, which was more qualified than any other to hear the controversy. The matter to be decided herein concerned a contract dispute well within the ken of this Court, not requiring the expertise of any special tribunal. Equally important considerations in deciding whether to retain jurisdiction or surrender it to an arbitration tribunal concern the bankruptcy court's obligation to determine claims arising under a petition so as to provide effectively for the protection of the debtor and the preservation of the rights of the creditors. A decision of the arbitrator here would involve the interests of parties who never consented to arbitration, namely, the trustee in bankruptcy and the general creditors. Thus, this Court, in its discretion, determined that it did not need to submit the controversy to an arbitration tribunal, even though the contract between the parties provided for arbitration.

4) *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,*[27] is an important case deciding the Act of 1978 unconstitutional. After Northern filed a petition for Chapter 11 at the U.S. Bankruptcy Court for the District of Minnesota, it filed a suit against Marathon seeking damages for breach of contract, warranty, etc. Marathon sought dismissal of the suit on the ground that the Act of 1978 unconstitutionally conferred Article 3 judicial power upon the bankruptcy judge. The Bankruptcy judge denied the motion to dismiss. On appeal, the U.S. District Court for the District of Minnesota granted the motion on the ground that the delegation

26. 21 BR 204 (Bankr. S.D.N.Y. 1982).
27. *Marathon, supra* note 4. 6 BR 928 (Bankr. D. Minn. 1980), *rev'd*, 12 BR 946 (D. Minn. 1981), *aff'd*, 458 U.S. 50 (1982).

of authority in 28 U.S.C. § 1471 to the bankruptcy judges to try cases which were otherwise relegated under the Constitution to Article 3 judges was unconstitutional. On appeal, the U.S. Supreme Court affirmed the decision of the District Court.

The Court held that the broad grant of jurisdiction by Section 1471 to bankruptcy judges violated Article 3 of the Constitution. The bankruptcy judges created by the Act of 1978 were not Article 3 judges. Article 3 judges shall enjoy life tenure, subject only to removal by impeachment; the Good Behavior Clause, whereas the bankruptcy judges are appointed for 14-year terms by the President. The Compensation Clause guarantees Article 3 judges a fixed and irreducible compensation for their services, whereas the salaries of the bankruptcy judges are not immune from diminution by Congress. Article 3 bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The Court cannot discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Article 3. The Court concluded that 28 U.S.C. § 1471 had impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article 3 district court, and had vested those attributes in a non-Article 3 adjunct. Such a grant of jurisdiction could not be sustained as an exercise of Congress' power to create adjuncts to Article 3 courts.

5) During the period between the U.S. Supreme Court decision of *Marathon* and enactment of the new Act of 1984, some courts avoided ruling on questions by taking refuge in the Supreme Court decision, or decided firmly.

In re Morgan,[28] a reorganization debtor-in-possession was bound by

28. 28 BR 3(Bankr. App. 9th Cir. 1983).

the mandatory arbitration contained in the construction contract where it made a pre-petition contract claim against a non-creditor.

Coar v. Brown,[29] the presence of a trustee in bankruptcy is one factor which indicates that public interest is indicated. As trustee in bankruptcy is a different legal entity from the bankrupt, he should not be compelled to arbitration.

Coastal Steel Corp. v. Tilghman Wheelabrator,[30] the forum selection clause, in the English court, in a construction contract is valid and enforceable.

In re Hart Ski,[31] the arbitration clause, arbitration at the ICC, in the sales agreement of ski equipment, was agreed between a Minnesota corporation and a German corporation, and the court ordered that the parties submit their dispute to international arbitration. The U.S. Bankruptcy Court for the District of Minnesota found that the disputes were within the scope of the agreement to arbitrate, and Hart sought to avoid the expense and inconvenience involved if the international arbitration appeared to be immaterial or prejudiced. The U.S. District Court for the District of Minnesota and the U.S. Court of Appeals for the Eighth Circuit affirmed.

Zimmerman v. Continental Airlines,[32] the contract dispute for delay in delivery of vehicles. The express provisions of the two Federal Acts, the Bankruptcy Act and the Arbitration Act, which do not dispose of the present jurisdictional conflict, so the court must look beyond the statutes themselves, to their underlying purposes and goals, to resolve the controversy. The policy underlying the expansion of bankruptcy court

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29. 29 BR 806 (N.D. Ill. 1983).
30. 709 F.2d 190 (3rd Cir.), *cert. denied*, 464 U.S. 938 (1983).
31. 18 BR 154 (Bankr. D. Minn.), *aff'd*, 22 BR 763 (D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983).
32. 22 BR 436 (Bankr. E.D. Pa.1982), *aff'd*, 712 F.2d 55 (3rd Cir. 1983), *cert.denied*, 464 U.S. 1038 (1984).

jurisdiction embodied in the Bankruptcy Reform Act may be relied on to resolve the conflict in the instant case. Despite the breadth of the language of § 3 of the Arbitration Act, and the importance of that Act's policy underpinnings, the Court noted that certain types of actions have been held exempt from its commands.(cf. the securities laws, antitrust laws) Because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, the Court held that the intentions of Congress would be better realized if the Bankruptcy Reform Act was read impliedly to modify the Arbitration Act. Thus, while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power was left to the sound discretion of the bankruptcy court. The U.S. Court of Appeals for the Third Circuit held that, considering the policies underlying the new bankruptcy code and the importance of the resolution of disputes to the underlying bankruptcy proceedings, no abuse of discretion was here.

In re Braniff Airways,[33] with the enactment of the Bankruptcy Act in 1978, Congress enacted a comprehensive framework to deal with the specialized area of bankruptcy problems, intending to centralize all disputes concerning such matters in the Bankruptcy Court, and consequently, the Arbitration Act would not apply to bankruptcy matters. The legislative history of § 362 specifically mentions that arbitration proceedings are stayed. Thus, Congress has enacted comprehensive statutes giving the bankruptcy court exclusive jurisdiction of certain bankruptcy matters, an option to exercise jurisdiction in all remaining matters relating to the bankruptcy case, and has prohibited action elsewhere until such time as the bankruptcy court decides what action to take. The purpose behind this policy is to give the debtor and his creditor body a full, fair, speedy,

33. 33 BR 33(Bankr. N.D. Tex. 1983).

and unhampered chance for reorganization. The Court concluded that this congressional policy overrode the provisions of the Arbitration Act, particularly where, as here, the issues would determine which creditors were entitled to share in the debtor's assets and in what priority. Requiring the debtor to resort to arbitration would delay the efforts to reorganize. Resorting to arbitration at this stage would result in such delay as to effectively deny all creditors and the debtor opportunity for reorganization. Moreover, arbitration would fragment resolution of the same issues.

In re Miller & Neill Co.,[34] whether arbitration is available for the change of rental under renewal of the lease agreement for a Chapter 11 party. The U.S. Bankruptcy Court for the Northern District of Ohio, referring to the decision of *Zimmerman,*[35] held that the arbitration clause in the contract was not binding. Considering the need for a prompt resolution of the issue under Chapter 11 of the Code, the Court found that application for stay of this proceeding should be denied.

4. Arbitration under the Act of 1984

The Act provides the concept of core and non-core proceedings, which affects the status of arbitration under bankruptcy cases. Cases will be introduced here by itemizing, based on these concepts of core and non-core, and international cases.

A. Cases Referring to Core Proceedings

In re Allen & Hein,[36] the labor union sought relief from the automatic stay to allow an arbitration proceeding. Referring to cases of discussing

34. 41 BR 589 (Bankr. N.D. Ohio 1984).
35. *Zimmerman*, *supra* note 32.
36. 59 BR 733 (Bankr. S.D. Cal. 1986)

the interplay between the Arbitration Act and the Bankruptcy Act, the U.S. Bankruptcy Court for the Southern District of California granted to lift the stay to allow arbitration because the debtor failed to meet the burden of proof. The Court was not persuaded that allowing arbitration was tantamount to allowing a claim which was a core proceeding.

In re Double TRL,[37] a dispute which arose out of the sale of an automobile leasing business among three parties was settled and agreement was reached. Double TRL purchased the assets of ESP Leasing, which Strada Group had previously owned but Strada failed to turn over ESP assets. Double TRL could not obtain all assets from ESP Leasing, to which Double TRL was entitled. This was said to be a major cause for filing by Double TRL of Chapter 11. Double TRL filed an adversary proceeding seeking a turn over assets from Strada, which moved to stay pending arbitration and dismissal for lack of jurisdiction. The U.S. Bankruptcy Court for the Eastern District of New York stated that the enforcement of a contractual arbitration agreement was left to the sound discretion of the bankruptcy court: the factors considered include i) the degree to which the nature and extent of the litigation and evidence made the judicial forum preferable to arbitration, ii) the extent to which special expertise was necessary to resolve the disputes, and iii) the identity of the persons comprising the arbitration committee and their track record in resolving disputes between the parties. The issue related to claims for turnover of the assets, which did not require special expertise, all matters obviously within the ken of the Court. The Court declined to stay proceeding pending arbitration. The Court stated that the turnover of assets to the estate as such was prima facie a core proceeding; the bankruptcy judge could enter all appropriate orders.

37. 65 BR 993(Bankr. E.D.N.Y. 1986)

In re Edgerton,[38] Edgerton, a debtor, engaged in option trading at Shearson Lehman for over twenty years, received a margin call from the latter in the year of the stock market crash. Shearson initiated arbitration at the National Association of Securities Dealers (NASD) under the Customer Agreement, and filed the motion for relief from the automatic stay in the Chapter 11 proceeding at the U.S. Bankruptcy Court for the Northern District of Illinois. The Court granted, finding that the debtor's argument that it did not freely negotiate the arbitration clause was without merit, and because of the complexity of the securities transactions, the NASD with its special expertise is better able to resolve effectively and expeditiously the matter. The debtor had not yet filed a Plan for almost one year at the Court, and in fact resolution of the arbitration would allow the debtor to formulate a Plan.

In re Al-Cam Development Corp.,[39] Woodbury contracted with Al-Cam as a prime contractor to build a shopping center and later filed an arbitration at the American Arbitration Association (AAA) claiming for Al-Cam and its subcontractors' poor performance under the contract. Before proceeding with the arbitration, Al-Cam filed a petition of Chapter 11, which later converted to Chapter 7, at the U.S. Bankruptcy Court for the Southern District of New York. The arbitration was automatically stayed. One year and two months later, the trustee in bankruptcy wrote to the AAA to commence the arbitration proceeding, which Woodbury opposed to continue based on the reason that all litigation should be conducted under the jurisdiction of the Bankruptcy Court. The Court after reviewing many cases handling the clash of two Federal Acts, the Bankruptcy Act and the Arbitration Act, decided that had the debtor's bankruptcy not intervened, Woodbury would have been permitted to proceed with arbitration. The

38. 98 BR 392 (Bankr. N.D. Ill. 1989)
39. 99 BR 573 (S.D.N.Y. 1989)

debtor's commencement of the bankruptcy case, which did not alter the arbitration agreement, authorized the trustee in bankruptcy, in the exercise of his business judgment, to proceed within the authority conveyed under the Bankruptcy Rules and to continue the arbitration process. The Court concluded that though the Court had jurisdiction of the subject matter and parties, and this was a core proceeding, Woodbury's motion to prevent the trustee from continuing with the arbitration proceeding previously initiated by it was denied.

In re Guild Music Corp.,[40] the omission of a certain parcel of land of Guild, a debtor, from description of sale of debtor's assets was originally inadvertently not included in the first purchase from Avnet three years before. The purchaser of the land from Guild and the bankruptcy trustee reached a compromise, one of which concessions was to resolve the dispute by arbitration. The U.S. Bankruptcy Court for the District of Rhode Island approved the compromise, to which Guild filed a motion to reconsider, arguing that the Court had relinquished the exclusive jurisdiction over the core bankruptcy matter. The Court after reviewing the items to be resolved by the arbitration stated that the decision by the arbitration panel on the amount of payment due to the trustee or Avnet was not exclusively a bankruptcy matter and might be referred to arbitration. However, the allowed amount of Avnet's claim, determination of its secured and/or priority status, were core matters, which were not subject to arbitration but to the Court, and the Court approval and order should be modified to exclude those issues from arbitration. The Court set the condition to resolve by arbitration within three months in order to get a speedy resolution.

In re Chorus Data Systems,[41] after negotiation to settle a dispute

40. 100 BR 624 (Bankr. D.R.I. 1989)
41. 122 BR 845 (D.N.H. 1990)

arose out of a product development agreement between Chorus and MELA for almost one year, MELA filed arbitration at the AAA in Chicago under the arbitration clause in the agreement for damages for breach of contract. Discovery took more than one year, and four days before the hearing Chorus filed its voluntary Chapter 11 petition at the U.S. Bankruptcy Court for the District of New Hampshire. Arbitration was stayed and MELA moved to relief from the automatic stay. Chorus filed a counterclaim for damages. The Court stated that this was core proceeding under § 157 of the Bankruptcy Act. There must be a good faith effort to balance the competing policies of the two Federal Acts, the Arbitration Act and the Bankruptcy Act, to the particular case. The burden of proof was on the debtor in opposing the lifting of the automatic stay. Though Chorus argued the enforcement of the arbitration clause required expending additional costs in going to Chicago, the record did not establish it would be so expensive or so disruptive that it would interfere with the debtor's reorganization. Though Chorus argued that arbitration would require a substantially longer time for resolution than the judicial reorganization proceedings, there was no reason to believe it. The Court could not conclude that enforcing the arbitration clause in these particular circumstances would frustrate the reorganization of this debtor. It all depended on the particular proceeding and the particular facts involved. In this case the exercise of this Court's discretion, trying to accommodate the legitimate policies underlying both the Federal Arbitration Act and the Bankruptcy Act, should be in the direction of the enforcement of the arbitration clause bargained for by the parties in their contractual dealings. The order would provide that the arbitration proceeding might go forward with both parties' claim now pending in that proceeding.

In re Statewide Realty Co.,[42] Statewide, a hotel owner and debtor,

42. 159 BR 719 (Bankr. D.N.J. 1993)

agreed to a Management Agreement with Hilton International(HI) for the term of twenty years with renewal option. Not long after the hotel opened adjacent to Newark International Airport, a dispute arose regarding the operation of the hotel. HI filed arbitration at the AAA under the agreement. After selection of an arbitrator, the parties tried to settle the dispute by staying the arbitration. One year later, Statewide filed a petition for Chapter 11 at the U.S. Bankruptcy Court for the District of New Jersey and moved to reject the Management Agreement. HI filed an amended arbitration to remove the debtor as a party and to request to proceed against its former partners, to which the debtor objected. The AAA rejected the debtor's argument and directed as HI requested. HI filed a motion at the Court to compel arbitration. The Court determined that no conflict with the Bankruptcy Act arose from enforcement of the arbitration clause, and as a consequence, the Court did not have discretion to refuse to permit the arbitration proceeding to resume. The fact that the matter before the court was a core proceeding did not mean that the arbitration was inappropriate. The description of a matter as a core proceeding simply meant that the bankruptcy court had the jurisdiction to make a full adjudication. However, merely because the court had the authority to render a decision did not mean it should do so. The Court stated that following the reasoning of *Hays*[43] in this case, the Court could not perceive any greater impact of the Bankruptcy Act in compelling arbitration than denying it.[44]

In the Matter of National Gypsum Co.,[45] the Plan of Reorganization for National Gypsum Co., an asbestos producer, under Chapter 11 was confirmed by the U.S. Bankruptcy Court for the Northern District of Texas,

43. *Hays*, *infra* note 52.
44. *National Gypsum*, *infra* note 45 at 1068.(We find the Statewide bankruptcy court's reading of *Hays* persuasive.)
45. 118 F.3d 1056(5th Cir. 1997)

and the NGC Settlement Trust (Trust) was established as the sole shareholder of the reorganized National Gypsum Co. (Asbestos Claims Management Corp., ACMC). ACMC assumed the Wellington Agreement, which was agreed to by sixteen property and casualty insurers and thirty-three asbestos producers regarding the handling of asbestos-related bodily-injury claims. The Insurance Company of North America (INA), one of National Gypsum's insurers, neither objected to nor appealed the Bankruptcy Court's confirmation of the reorganization plan of ACMC. INA demanded the Trust to pay the advanced money under the Wellington Agreement. The Trust and ACMC replied that the confirmed reorganization plan had discharged ACMC from the obligation asserted in the demand, and filed at the Bankruptcy Court alleging that ACMC's confirmed reorganization plan barred INA's collection efforts. INA requested arbitration under the Wellington Agreement, and also filed at the Court a motion seeking abstention in favor of arbitration and others. The Court denied INA's motion based on the core jurisdiction. The U.S. Court of Appeals for the Fifth Circuit affirmed, agreeing with the Bankruptcy Court and the District Court holding that a declaratory judgment action seeking merely a declaration that collection of an asserted pre-confirmation liability was barred by a bankruptcy court's confirmation of a debtor's reorganization plan was a core proceeding arising under title 11. The Court stated that not all core bankruptcy proceedings were premised on provisions of the Bankruptcy Code that inherently conflict with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code. Non-enforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding, *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 purpose of the Code. The Court followed

Hays and developed it further.[46]

In re United States Lines,[47] United State Lines, Inc. and United State Lines (S.A.) Inc. filed a petition under Chapter 11 at the U.S. Bankruptcy Court for the Southern District of New York, and Reorganization Trust was established as their successor-in-debtor pursuant to a plan of reorganization. Creditors and employees for asbestos related injuries while sailing on the debtor's ships filed claims. The Trust asserted that these were covered by the Protection and Indemnity Insurance policies (P&I policies) before the debtor's petition for bankruptcy relief, and sought a declaratory judgment. The Bankruptcy Court held that the action was core to be tried in the bankruptcy court and the bankruptcy court had discretion to deny the motion to compel arbitration. The U.S. District Court for the Southern District of New York reversed it stating that the adversary proceeding was non-core and the Bankruptcy Court was without discretion to deny enforcement of the applicable arbitration clause. On appeal, the U.S. Court of Appeals for the Second Circuit reversed the District Court's ruling. The Court held that the declaratory proceedings brought by the Trust in this case directly affect the Bankruptcy Court's core administrative function of asset allocation among creditors, and for that reason they were core. Where the Bankruptcy Court had properly considered the conflicting policies in accordance with the law, the Court acknowledged its exercise of discretion and showed due deference to its determination that arbitration would seriously jeopardize a particular core bankruptcy proceed-

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46. Christina Tillett, *Enforcement of Pre-Petition Contractual Arbitration Clauses in Bankruptcy: A Case Note on National Gypsum Co. v. NGC Settlement Trust & Asbestos Claims Management Corp.,* 50 Baylor L.Rev. 1041 (1998). (It is a turning point to enforce pre-petition contractual arbitration clauses in the bankruptcy context in the Fifth Circuit.)

47. 169 BR 804 (Bankr. S.D.N.Y. 1994), *rev'd,* 220 BR 5 (S.D.N.Y. 1997), *rev'd,* 197 F.3d 631 (2nd Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000).

ing. The Court saw no basis for disturbing the Bankruptcy Court's determination to that effect here. The Court concluded that it was within the Bankruptcy Court's discretion to refuse to refer the declaratory judgment proceeding, which it properly found to be core, to arbitration.

In the Matter of Gandy,[48] a dispute arose regarding asset liquidation of investment interests between partnerships with family members prior to bankruptcy. Sarma filed a suit against the Gandys for breach of fiduciary duty, etc. at the State Court of Texas. The Gandys filed a motion to compel arbitration based on the arbitration clauses in the partnership agreements, which the Court granted. Sarma filed for bankruptcy that afternoon. The State Court suit was removed to the Bankruptcy Court as an adversary proceeding. The Gandys filed a motion to compel arbitration. The Bankruptcy Court denied the motion after finding that the debtor's complaint essentially sought avoidance of fraudulent transfers. The U.S. District Court for the Western District of Texas affirmed the Bankruptcy Court's exercise of discretion, holding that the debtor had raised actual core proceedings. On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed, holding that a Bankruptcy Court did possess discretion to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of a proceeding derived exclusively from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicted with the purpose of the Code, referring to *Hays* as non-core and *National Gypsum* as core.

In re Mintze,[49] the debtor filed a complaint objecting to the secured claim of abusive home equity loans which the debtor was induced into prior to the debtor's bankruptcy filing and seeking to enforce an earlier rescission of the mortgage. The lender filed a motion to compel arbitra-

48. 299 BR 489 (5th Cir. 2002).
49. 288 BR 95 (Bankr. E.D. Pa. 2003).

tion. The U.S. Bankruptcy Court for the Eastern District of Pennsylvania denied the motion to compel arbitration, holding that the Court had a jurisdiction over this matter, which was a core proceeding. The outcome of the adversary proceeding would directly affect the terms of the Chapter 13 plan proposed by the debtor, which, in turn, directly impacted the amount available for payments of unsecured creditors. Therefore, the Bankruptcy Court was the best forum for resolving the matter. Insufficient information on the chosen arbitrators, including information about their experience, expertise, or neutrality provided further grounds for exercising discretion to keep this adversary proceeding in the Bankruptcy Court.

B. Cases Referring to Non-core Proceedings

In re Diaz Contracting,[50] Diaz, a bankruptcy debtor, sought a payment under a sub-construction contract in New York with Nanco at the U.S. Bankruptcy Court for the District of New Jersey. Nanco filed a cross-motion on the basis of the forum selection clause, in the courts of New York, under the contract. The Bankruptcy Court denied under the reasons of the debtor's financial difficulty conditions and the unreasonableness of remitting the claims to the courts of New York, and the U.S. District Court for the District of New Jersey affirmed it. On appeal, the U.S. Court of Appeals for the Third Circuit reversed, stating that the controversy at issue here was a non-core proceeding, one that could have easily been instituted in a State court or a district court. Mere inconvenience or additional expense was not the test of unreasonableness, since it might be assumed that Diaz received under the contract consideration for these things. Diaz had not carried its burden of demonstrating that requiring that litigation be brought in New York as opposed to New Jersey would

50. 817 F.2d 1047(3rd Cir. 1987).

effectively deprive it of its day in court.

In re Guy C. Long,[51] Long, a debtor, brought a claim for payment under the subcontract of the construction contract against the defendant. The defendant moved for a recommendation that the dispute be resolved by arbitration at the AAA under the arbitration clause of the construction contract, as this proceeding was a non-core proceeding. The Court stated that if this dispute was characterized as a collection suit, it was correct to categorize it as non-core. Due to the performance of this construction, the categorization was less than clear. The majority of construction was performed pre-petition but some was post-petition; a claim based on an executory contract might be a core proceeding. The Court, balancing the competing interests of the parties, concluded to stay the proceeding in favor of arbitration, reasoning that the dispute was a simple breach of contract question involving no bankruptcy issue, and the stay of proceeding would not jeopardize the debtor as no plan was filed more that one year in the Chapter 11 proceeding.

Hays & Co. v. Merrill Lynch,[52] Hays, a trustee, filed a claim for breach of contract and others for securities transaction at Merrill Lynch, which moved to compel arbitration under the Customer Agreement. The U.S. District Court for the Eastern District of Pennsylvania rejected the defendant motion based on the decision of *Zimmerman,*[53] and the trustee was not a party of the Customer Agreement. On appeal, the U.S. Court of Appeals for the Third Circuit reversed, holding that as the amendment of the Bankruptcy Act 1984, after the decision of *Zimmerman,* the congressional policy of consolidating all bankruptcy-related matters in the bankruptcy court, relied on by the Third Circuit in *Zimmerman,* was no

51. 90 BR 99 (Bankr. E.D. Pa. 1988).
52. 885 F.2d 1149 (3rd Cir. 1989).
53. *Zimmerman*, *supra* note 32.

longer applicable. Given the Supreme Court cases concerning the Arbitration Act, the Court could no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over the Arbitration Act. The Court held that as the trustee stood in the shoes of the debtor for the purpose of the arbitration clause, the trustee was bound by the clause to the same extent as would the debtor. The courts lacked discretion to deny enforcement of the arbitration clause in a non-core bankruptcy proceeding which the trustee's claim involved.

In re Newman Brewing Co.,[54] after Newman, a debtor, petitioned Chapter 11 at the U.S. Bankruptcy Court for the Northern District of New York, Newman sought damages for breach of contract by Schmidt. The defendant moved to dismiss the suit because of lack of the jurisdiction of the Bankruptcy Court, or alternatively, for stay of the suit pending arbitration under the arbitration agreement in the contract. The Court stated that though the fact that this suit technically fell within the listed wording of § 157(b)(2) of the Bankruptcy Act, it was not a core proceeding since this cause of suit existed prior to and apart from the filing of the debtor's petition of the bankruptcy. The jurisdiction of the Court, therefore, was limited. After reviewing the policy of the arbitration and bankruptcy, the Court concluded that the litigation should proceed in this court, because (i) the federal court had expertise at least equal to the arbitrators in the resolution of Pennsylvania law as it related to the present contract dispute, (ii) the identity of the arbitrators was unknown, and (iii) the preference of a judicial forum to arbitration strongly favored the conclusion that the litigation proceed in the present forum.

Schmidt, after the action was transferred to the U.S. District Court for the Northern District of New York for a trial on the merit, filed a motion for

54. 87 BR 236(Bankr.N.D.N.Y. 1988), *reconsideration denied*, 115 BR 25(N.D.N.Y. 1990).

reconsideration seeking a stay of the proceedings pending arbitration. The Court denied the motion, holding that the parties' choice of the State law did not govern the Federal questions presented here. The Court was bound, as the Bankruptcy Court was, by the Second Circuit case law. One of the issues the defendant raised was that the Court should be bound by the Third Circuit decision of *Hays* instead of *Zimmerman*, but the *Hays* decision was, at most, persuasive authority, which was not sufficient ground upon which this Court might reopen consideration of a prior decision. It is well-settled law that a mere change in the law or in the judicial review of an established rule of law after a judgment was rendered is generally not a sufficient basis for reconsideration.

In re Gurga,[55] Gurga filed arbitration at the AAA for damages for breach of contract for billing and collecting service to be provided by MCI. Four months later, upon filing by Gurga a bankruptcy petition at the U.S. Bankruptcy Court for the Northern District of California, the AAA closed the file. Gurga filed an adversary proceeding in the Bankruptcy Court, and MCI moved to stay proceeding pending arbitration and for relief from the automatic stay, which the Court denied. On appeal, the U.S. Bankruptcy Appellate Panel of the Ninth Circuit reversed, holding that the underlying action was a breach of contract, which was a non-core claim for the purpose of resolving the arbitration issue, and a bankruptcy court must enforce an agreement to arbitrate a claim that is non-core referring to *In re Mor-Ben*, *In re Morgan* and *Hays*.[56]

Slipped Disc, Inc. v. CD Warehouse, Inc.,[57] Slipped Disc filed a suit for breach of franchise agreement with Warehouse agreed upon prior to Disc's bankruptcy in an adversary proceeding before the U.S. Bankruptcy

55. 176 BR 196 (Bankr. App. 9th Cir. 1994).
56. *In re Mor-Ben*, *infra* note 63, *In re Morgan*, *supra* note 28, *Hays*, *supra* note 52.
57. 245 BR 342 (Bankr. N.D. Iowa 2000).

Court for the Northern District of Iowa, and Warehouse moved to compel arbitration under the agreement. The Court held that while the present adversary proceeding was indeed a core proceeding under § 157(b)(2)(c), it was not a core proceeding in the same manner as that term was used in cases dealing with enforcement of arbitration clauses. Where the issues to be arbitrated do not implicate the right to bankruptcy, the right to discharge, or some other substantive right created in the Bankruptcy Code, the issues were non-core and suitable for arbitration, even if they arose in a § 157(b) core proceeding. Conversely, where the issues to be arbitrated involve exclusively bankruptcy matters, such as the determination of claim priority, such issues should not be submitted to arbitration because they were core bankruptcy matters. Because the debtor's claim against the defendant arose out of a franchise contract and did not implicate substantive rights created exclusively by Federal bankruptcy law; this was a proceeding suitable for arbitration. The Court concluded that the present adversary proceeding did not implicate any substantive bankruptcy rights; it was a breach of contract action. Such matters could be handled competently by arbitrators. Enforcing pre-petition arbitration agreements with respect to non-core matters gave effect to the policies of the Arbitration Act without significantly undermining those of the Bankruptcy Code.

C. International Cases

Quinn v. CGR,[58] the trustee sought to collect money under the distributorship agreement from CGR, a French company, which moved to compel arbitration by the ICC under the arbitration clause of the agreement. The U.S. District Court for the District of Colorado granted it after reviewing relevant cases including *Zimmerman,*[59] and *Mitsubishi Motors*

58. 48 BR 367(D.Colo. 1985).

59. *Zimmerman*, *supra* note 32.

v. Soler.[60] The Court stated that the primary goal of the Bankruptcy Act giving debtors a fresh start had already been defeated in this case by the proven inability of the debtor to reorganize and continue a revitalized business life. Concededly technical issues did not present nearly the degree of complexity and it presented no issues of sensitive or pressing public policy. No complex or weighty matters of federal law were present in this case.

Societé Nationalé Algerienne v. Distrigas Corp.,[61] Algerienne, a national energy corporation of the Algerian government, sought damages resulting from the rejection by Distrigas, a debtor, a twenty-year supply contract of Algerian liquefied natural gas. The Bankruptcy Court denied motion by Algerienne for arbitration by the ICC, holding that international arbitration would be unduly burdensome to the estate in terms of increased time and expense. On appeal, the U.S. District Court for the District of Massachusetts reversed, ruling that Algerienne was entitled to international arbitration pursuant to the parties' contractual agreement. The Arbitration clause survives by the rejection of an executory contract under the Bankruptcy Code, Section 365. This notion of separability is implicitly acknowledged in a well-established line of Massachusetts State court decisions which hold that even a contract's termination does not necessarily terminate arbitration provisions or other forms of dispute resolution procedure. The statutory interaction inherent in the current dispute 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. With regard to international arbitration agreements, for example, the U.S. Supreme Court has recently stated the emphatic federal policy in favor of arbitration applies with special force in the field of international commerce.

60. *Mitsubishi Motors*, 723 F.2d. 155(1st Cir.1983), *cert. denied*, 473 U.S. 614(1985).
61. 80 BR 606(D. Mass. 1987).

Mitsubishi Motors. With the failure of Distrigas to reorganize successfully, one of the Bankruptcy Code's primary goals, to give debtors a fresh start, has already been frustrated. The situation of *Quinn*[62] is similar to the instant case. In weighing the strong public policy favoring international arbitration with any countervailing potential harm to bankruptcy policy upon the present facts, this Court finds the scales weighted in favor of arbitration. The Court added that although the Supreme Court has not specifically addressed the clash of bankruptcy and international arbitration, it would be unrealistic indeed to argue that bankruptcy principles were qualitatively more fundamental to the U.S. capitalistic democratic system than either the securities laws or antitrust policy.

In re Mor-Ben Insurance Markets Corp.,[63] the arbitration clause in the insurance agreement was agreed upon between a debtor, a California corporation and U.K. companies. The U.S. Bankruptcy Court for the Southern District of California granted the motion to stay proceedings and compel arbitration, following such cases as *Mitsubishi Motors* and *Hart Ski.*[64] The Court stated that the debtor failed to substantiate its argument that arbitration in London was impractical because of the allegedly greater expense and delay necessitated by arbitration of the claims, nor did it refute the strong federal preference for arbitration. The U.S. Bankruptcy Appellate Panel of the Ninth Circuit affirmed, stating that in light of the fact that the majority of the appellees had their principal places of business in London and the subject dispute involved the issues of insurance law and accounting practices, the Court could not conclude that the Bankruptcy Court's finding was clearly erroneous.

In re Seawest Industries,[65] Mustad, a Norwegian company, filed a

62. *Quinn*, *supra* note 58.
63. 59 BR 194 (Bankr. S.D. Cal. 1986), *aff'd*, 73 BR 644 (Bankr. App. 9th Cir. 1987).
64. *In re Hart Ski*, *supra* note 31.
65. 73 BR 946 (W.D. Wash. 1987).

claim for collecting money for the sale of the fishing system in a proceeding at the U.S. Bankruptcy Court of the Western District of Washington. Seawest defended that the system was so defective that Mustad's claim was disallowed in total. In the stipulation to an adversarial proceeding, Mustad did not mention the arbitration clause in the sales agreement. Five months later, when Seawest moved for counterclaim, Mustad moved to withdraw its claim in the bankruptcy proceeding and to stay the counterclaim pending arbitration in Norway. The Bankruptcy Court denied Mustad's motion, stating that Mustad waived the right to arbitration and that as a matter of fact arbitration in Norway would be prejudiced to Seawest due to increased costs and the time delay that would result in administration of the bankruptcy estate. On appeal, the U.S. District Court for the Western District of Washington reversed, stating that the Mustad actions were not inconsistent with an exercise of its contractual right to arbitration. Upon the counterclaims filed by Seawest, immediately, Mustad moved to evoke its contractual right to arbitration. Balancing of the policy goals of the Bankruptcy Code and enforcement of the international arbitration agreement compelled the conclusion that a refusal to enforce the arbitration provision was not justified by the circumstances of the instant case. Both parties obviously negotiated an arbitration clause and specified that the arbitration was to take place in Oslo pursuant to the law of Norway. A dispute over the integral terms of the sales agreement had arisen - whether Mustad would be paid for the equipment contracted for or whether it had breached the agreement such that it had to pay damages to Seawest. Denying arbitration would be contrary to the express language of the agreement.

In re Springer-Penguin,[66] under the sales and supply contract between Springer, a New York corporation, and Jugoexport, a Yugoslav company,

66. 74 BR 879(Bankr. S.D.N.Y. 1987).

the former was engaged in manufacture and distribution of office furniture, and the latter was manufacturing and delivering furniture according to specifications provided by the former, and purchased American walnut and oak veneer from the former. Springer filed a suit seeking damages for breach of contract and warranty against Jugoexport in New York State court, which Jugoexport moved to the U.S. District Court for the Southern District of New York. Jugoexport filed a claim to recover the sales price at arbitration in Yugoslavia based on the sales and supply contract and petitioned the District Court to stay the action. The Court ordered to stay the action. Three months later, Springer petitioned Chapter 11 at the U.S. Bankruptcy Court for the Southern District of New York. Jugoexport filed a motion requesting modification of the automatic stay to continue the arbitration in Yugoslavia, which the Court denied.

The Court found that Springer's claim for damages would require the attendance of customers in the U.S. to whom Springer resold the imported furniture products, whereas Jugoexport's evidence as to the quantities sold to Springer and the amounts due would be relatively easy to establish. No special expertise on the part of the arbitrators was required to solve the claims between the parties. The dispute could be determined expeditiously in the Bankruptcy Court, where the creditors' interests in this estate could be protected.

The same Court commented on this case two years later that Yugoslavia, as a Communist country, where the debtor's witnesses could not conveniently testify and no special expertise on the part of the arbitrators was required.[67]

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九 *In the Matter of Cordova International,*[68] Cordova, a New Jersey corporation and a subsidiary of a Philippine coconut producer, sent a

67. *In re Al-Cam Development*, *supra* note 39, at 577.
68. 77 BR 441(Bankr. D.N.J. 1987).

notice to trading partners indicating its intention to discontinue all its operation because of financial difficulties by shutting down of the supplier's operation caused in part by a strike in the Philippines. Next month the creditors filed involuntary petition of Chapter 7, and the U.S. Bankruptcy Court for the District Court of New Jersey entered an order for relief under Chapter 7. There were buy or sell contracts and favorable contracts and unfavorable contracts depending on the timing of the market price, which rose sharply. The Court denied the trustee's motion to assume the certain contracts pursuant to §365 of the Bankruptcy Code, stating that the Cordova's notice operated as an anticipatory repudiation of the contract; therefore, the contracts in question were not executory at the time the involuntary petition was filed, and were not subject to assumption by the trustee. The Court allowed the trader's cross-motion to commence arbitration under the trading contracts which incorporated the Trading Rules of the trading association, stating that should the trustee and the contract claimants not settle the amount involved, the matter of the amount of moneys due the parties under the contract was referred to arbitration. The question as to the amount of settlement of damages flowing to the traders in question and/or the estate under the applicable Trading Rules as the result of the debtor's pre-petition anticipatory repudiation of the 'open' contracts, triggering a closure under the Rules, as well as the effect of the express 'wash out' provisions of certain of the agreements were unique issues arising under the particular contracts in question and require the expertise of arbitrators familiar with the coconut oil industry at large.

In re Nu-kote Holding,[69] Pelikan, a Swiss company, sold assets and 九八
stock of a printing company to Nu-kote and assumed to fund an

69. 257 BR 855(M.D. Tenn. 2001).

Environmental Escrow Fund to indemnify Nu-kote for environmental liabilities. Four years later Nu-kote filed a petition of Chapter 11 at the U.S. Bankruptcy Court for the Middle District of Tennessee. Nu-kote demanded payment from the Environmental Escrow Fund. Pelikan objected because of Nu-kote's breach of agreement and filed a complaint for declaration of enforcement of arbitration under the agreement. The Court stated that it was now a confirmed Chapter 11 case. None of the claims or defenses raised by Pelikan or Nu-kote was created by the Bankruptcy Code. The direct claims the parties asserted against each other were inherited contractual claims derivative of the pre-bankruptcy agreements that included arbitration agreements. Impact on the bankruptcy estate was minimal based on the confirmed Chapter 11 plan. Some international interests were implicated because the agreements included an international transaction involving facilities in North America and Europe, and Pelikan was a Swiss entity. Nu-kote failed to carry its burden to demonstrate substantial bankruptcy interests to overcome enforcement of the arbitration procedures agreed to before Chapter 11. The Court ordered that the arbitration provisions of the agreement applied and was enforceable.

In re Startec Global Communs.,[70] Startec, a debtor, after getting from the U.S. Bankruptcy Court for the District of Maryland the Critical Vendor Order for authorization to pay pre-petition unsecured obligations to a creditor, Videsh, an Indian company, in order to receive Videsh's continued services under the International Telecommunication Services Agreement made pre-petition of the bankruptcy, agreed to an LoC Standstill Agreement for not drawing on the outstanding letters of credit

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70. 292 BR 246(Bankr. D.Md.), *aff'd*, 300 BR 244(D.Md. 2003), *motion granted*, 303 BR 605(D.Md. 2004).

by exchange of letter. The former agreement provided an arbitration clause but the latter did not. The debtor filed the Bankruptcy Court seeking relief that i) Videsh applied the Critical Payment to the pre-petition outstanding indebtedness, which was violation of the automatic stay and the Order, in contempt of the court, ii) Videsh drew upon the letters of credit, which was breach of the LoC Standstill Agreement and iii) Videsh interfered with communication traffic originated through the debtor, and also failed to pay post-petition services provided by the debtor. Videsh filed a motion to compel arbitration in India under the Service Agreement asserting that the Critical Vendor Payment was accepted based on a pre-petition Payment Schedule under the Service Agreement. The Court denied the motion, holding that regarding the cause of action for violation of the automatic stay, enforcement of the automatic stay was generally held to be the exclusive jurisdiction of the Bankruptcy Court. Avoidance of transfer was specifically defined by statute as part of the core jurisdiction of the Bankruptcy Court and a matter over which the court held exclusive jurisdiction. In this proceeding, avoidance was sought solely under a provision of the Bankruptcy Code and was a cause of action that might only exist within a bankruptcy case. As such this cause of action was within this Court's exclusive jurisdiction. The causes of action raised in the complaint did not arise out of or in connection with the Services Agreement; rather, the causes of action involved post-petition disputes and alleged violations of this Court's orders. As the actions asserted by the debtor did not directly arise from the Services Agreement, the binding arbitration was inapplicable. Furthermore, to the extent that any of the causes of action might be subject to the arbitration provision, because the actions were within this Court's core jurisdiction and, at least as to some counts, exclusive jurisdiction, the Court in its discretion found that the best interests of the estate would be served by litigation of all claims

before this Court so as to provide one forum to determine all issues. On appeal, the U.S. District Court for the District of Maryland affirmed, holding that given the complexity of the facts and the estate's interest in the disputed amounts due, the Bankruptcy Court did not abuse its discretion in finding that the best interests of the estate would be served by litigation of all claims before the Court so as to provide one forum to determine all issues. No international related cases were referred to.

5. Review and Comment

The purpose and basis of the Bankruptcy Act is to keep the assets of the debtor in question and to give the debtor and the creditor a full, fair, speedy and unhampered chance for reorganization. It is also said that a fundamental tenet of bankruptcy law is the centralization of all disputes concerning the debtor's property in the bankruptcy court so that the bankruptcy case may be handled in a speedy and expeditious manner, unimpeded by uncoordinated proceedings in other arenas.[71]

As is reviewed above, bankruptcy court is a primary organization to settle a bankruptcy case, but arbitration may be available to settle a related case. From which point of time or issue, either of litigation or arbitration is used to settle the dispute on or relating to bankruptcy ?

1) Under the Bankruptcy Act of 1898, *Copal* Court concluded that a foreign arbitral award rendered after the filing of the Chapter 11 petition in the U.S. Bankruptcy Court in an arbitration proceedings commenced prior to such filing was valid determination on the merits and was unreviewable by the Bankruptcy Court.[72] *Perot* Court held that as a bankruptcy trustee

71. Fred Neufeld, *Enforcement of Contractual Arbitration Agreements under the Bankruptcy Code*, *supra* note 10 at 525.

72. *Copal*, *supra* note 22.

was a new entity, it could not be compelled to arbitrate its claim under the Bankruptcy Act.[73]

2) The Act of 1978 established the U.S. Bankruptcy Court for the District with the broad jurisdiction of bankruptcy matters and centralized all disputes concerning bankruptcy matters in the Bankruptcy Court. The Bankruptcy Court decided that the case could be expeditiously heard by the court because the rehabilitation of the debtor required prompt disposition of the claim,[74] the decision to compel or deny arbitration is discretionary with the bankruptcy judge.[75]

After the decision of *Marathon Pipe Line*[76] on the unconstitutionality of the jurisdiction and status of the bankruptcy judge, *Hart Ski* was admitted arbitration at the ICC.[77] *Zimmerman* Court held the Bankruptcy Act impliedly modified the Arbitration Act. While a Bankruptcy Court would have the power to stay proceedings pending arbitration, the use of this power was left to the sound discretion of the Bankruptcy Court.[78]

3) The Act of 1984 was enacted as a result of the U.S. Supreme Court decision of the unconstitutionality in *Marathon Pipe Line*. There are core and non-core for bankruptcy proceedings in the Act: core is proceedings arising under title 11 or arising in a case under title 11, and non-core is proceedings related to a bankruptcy case.

There is the distinction between core and non-core; in the former a bankruptcy court has jurisdiction and in the latter a court may. *Double*

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73. *Perot*, *supra* note 23.
74. *Driggs*, *supra* note 24.
75. *In re F & T Contractors*, *supra* note 25.
76. *Marathon Pipe Line*, *supra* note 27.
77. *In re Hart Ski*, *supra* note 31.
78. *Zimmerman*, *supra* note 32.

TRL Court stated that the enforcement of an arbitration agreement was left to the sound discretion of the Bankruptcy Court considering factors including the nature and extent of the litigation and evidence, or necessity of expertise to resolve disputes.[79] *United States Lines* Court stated that it was within the Bankruptcy Court's discretion to refuse to refer the declaratory judgment proceedings, which it found to be core, to arbitration.[80] *Gandy* Court stated that a Bankruptcy Court possessed discretion to refuse to enforce an otherwise applicable arbitration agreement when the underlining nature of a proceeding derived exclusively from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicted with the purpose of the Code.[81]

Even in a core case, depending on the particular proceedings and the particular facts involved, a court has discretion to allow arbitration. *Chorus Data* Court held that it could not conclude that enforcing the arbitration clause in these particular circumstances would frustrate the reorganization of the debtor. It all depended on the particular proceeding and the particular facts involved.[82] *Statewide Realty* Court held that the fact before the court was a core proceeding did not mean that the arbitration was inappropriate. The description of a matter as a core proceeding simply meant that the bankruptcy court had the jurisdiction to make a full adjudication. However, merely because the court had the authority to render a decision did not mean it should do so.[83] *National Gypsum* Court stated that not all core bankruptcy proceedings were premised on provisions of the Bankruptcy Code that inherently conflict with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily

79. *Double TRL*, *supra* note 37.
80. *In re United States Lines*, *supra* note 47.
81. *In the Matter of Gandy*, *supra* note 48.
82. *Chorus Data*, *supra* note 41.
83. *Statewide Realty*, *supra* note 42.

jeopardize the objectives of the Bankruptcy Code.[84] *Edgerton* Court granted arbitration because of the complexity of the securities transactions; the NASD with its special expertise was better able to resolve effectively and expeditiously the matter.[85]

In the non-core proceedings, *Hays* Court stated that the court could no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over the Arbitration Act. The courts lacked discretion to deny enforcement of the arbitration clause in a non-core bankruptcy proceeding which the trustee's claim involved; as the trustee stood in the shoes of the debtor for the purpose of the arbitration clause, the trustee be bound by the clause to the same extent as would the debtor.[86] *Gurga* Court stated that the underlying action was a non-core claim for the purpose of resolving the arbitration issue, and a bankruptcy court must enforce an agreement to arbitrate a claim that was non-core.[87] *Slipped Disc* Court stated that matters, which did not implicate any substantive bankruptcy rights, could be handled competently by arbitrators. Enforcing pre-petition arbitration agreements with respect to non-core matters gave effect to the policies of the Arbitration Act without significantly undermining those of the Bankruptcy Code.[88]

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84. *National Gypsum*, *supra* note 45.
85. *In re Edgerton*, *supra* note 38.
86. *Hays*, *supra* note 52. *See* Fred Neufeld, *supra* note 10. (Since neither the Bankruptcy Code nor its legislative history expresses a clear intent to preclude enforcement of arbitration clauses in the bankruptcy context, a party seeking to avoid an arbitration agreement must show that an irreconcilable conflict exists between the policies of the Bankruptcy Code and the Arbitration Act. At first glance, the policies of both statutes appear to coincide, rather than conflict. Both have as their aim the rapid resolution of disputes. Where the disputed issues are considered non-core, ... the district court has the choice to refer the matter to the bankruptcy court, to itself hear the matter, or to compel arbitration.)
87. *In re Gurga*, *supra* note 55.
88. *Slipped Disc.*, *supra* note 57.

On the other hand, some courts in core proceedings added unconvincing explanations such as insufficient information on the chosen arbitrators, including information about their experience, expertise or neutrality provided further grounds for exercising discretion to keep the adversary proceeding in the Bankruptcy Court,[89] or the identity of the arbitrator was unknown, and the preference of a judicial forum to arbitration strongly favored the conclusion that the litigation proceeded in the present forum.[90] When a scheme of the dispute settlement is considered either by court or by arbitration, does the identity of each arbitrator need to be reviewed ? It may not be needed to consider each identity of the arbitrator beforehand as a system for settling disputes.

Regarding international cases, basically, when an action is within the court's core jurisdiction, the court decides a case. *Startec Global* Court stated that because the actions were within this Court's core jurisdiction and, at least as to some counts, exclusive jurisdiction, the Court in its jurisdiction found that the best interests of the estate would be served by litigation of all claims before this Court so as to provide one forum to determine all issues.[91] On the other hand, *Distrigas* Court found that in weighing the strong public policy favoring international arbitration with any countervailing potential harm to bankruptcy policy upon the fact of the case, the scale weighed in favor of arbitration, and added that it would be unrealistic indeed to argue that bankruptcy principles were qualitatively more fundamental to a capitalistic democratic system than either the securities laws or antitrust policy.[92] *Seawest Industries* Court also balancing of the policy goals of the Bankruptcy Code and enforcement of interna-

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89. *In re Mintze*, *supra* note 49.
90. *In re Newman Brewing*, *supra* note 54.
91. *Startec Global*, *supra* note 70.
92. *Distrigas*, *supra* note 61.

tional arbitration agreements compelled the conclusion that a refusal to enforce the arbitration provision was not justified by the circumstances of the instant case, and added that denying arbitration would be contrary to the express language of the agreement.[93]

Conclusion

The Bankruptcy Act aims to provide an opportunity to reorganize or liquidate a corporation by monitoring its assets and by treating its creditors and shareholders, etc. fairly and equally depending on their status. The authority for management or disposition of the assets of a debtor corporation, debtor-in-possession, under the bankruptcy proceedings had been initially and principally vested to the court as the state power. A private party could not do so.

The Bankruptcy Act does not provide the means of arbitration for the decision of core or non-core proceedings nor relationships with arbitration as the Patent Act does. The relationship between the Bankruptcy Act and the Arbitration Act has been recognized by case law as is researched above.

Under the Bankruptcy Act, the distinction between core and non-core proceedings relates to availability of arbitration. Basically, the former "core," a case arising under the Bankruptcy Act, is under the jurisdiction of the court, that is, a case should be decided by the court. The latter "non-core," a case relating to the Bankruptcy Act, arbitration may be available, that is, a case should not always be decided by the court, but may be settled by an arbitrator in accordance with an arbitration agreement under the discretion of the court. Depending on the situation, however, a case of

93. *Seawest Industries*, *supra* note 65.

core proceeding may be arbitrable under the discretion of the court.

The distinction between core and non-core thus affords an opportunity to consider the availability of arbitration in bankruptcy issue basically, and it will be considered further depending on the necessity of expertise of the arbitrator and the situation for arbitration. As *Hays* Court holds the Court could no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over the Arbitration Act.[94]

Through development of the case law, arbitration has been recognized as means for settlement of disputes related to bankruptcy cases. Thus party autonomy has been recognized in the bankruptcy area.

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94. *Hays*, *supra* note 52.