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Labor Arbitration and Bankruptcy: A Trek into the Serbonian Bog*

By

Thomas R. Haggard**

I. INTRODUCTION

The employer/employee relationship, though heavily regulated by statute, is still contractual in nature. In the unionized sector of the economy this contract, called a "collective bargaining agreement," defines wages, hours, and other terms and conditions of employment for each employee represented by the union. Because of the complex and specialized nature of this contract, the parties customarily agree that all disputes arising under it will be resolved by private arbitration rather than the normal judicial processes.¹ Nourished by a favorable legal climate, labor arbitration has evolved into an extensive and sophisticated system of industrial jurisprudence, drawing its sustenance from the practices and traditions of the workplace, from the expertise of labor arbitrators, and from the fact that it deals with an ongoing relationship between an employer and the union that represents its employees.

When a business is or threatens to become insolvent, however, its contract and other legal disputes are normally removed to a specialized forum, that of bankruptcy. The bankruptcy forum

* "A gulf profound as that Serbonian bog, . . . where armies whole have sunk." J. MILTON, PARADISE LOST, Book II, 1.592. The reference is to a "large marshy tract of land in the northern part of ancient Egypt in which entire armies are said to have been swallowed up." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1302 (1966). It is an apt description of this area of the law, and of the perils of venturing into it!

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provides "a distinct system of jurisprudence the nature of which is to sort out all of the debtor's legal relationships with others, and to apply the principles and rules of the bankruptcy laws to these relationships."²

Because bankruptcy courts have tended to be jealous of their jurisdictional prerogatives,³ two jurisdictional conflicts have arisen in the labor contract area. The first is between the district courts and their bankruptcy counterparts. The second is between the bankruptcy courts and private arbitration. The purposes of this article are to explore the nature of these conflicts and to suggest a possible accommodation.⁴

II. THE NATURE AND SCOPE OF THE COMPETING JURISDICTIONAL CLAIMS

A. Labor Arbitration

The jurisdictional claims of arbitration are firmly embedded in federal law. Section 203(d) of the Taft-Hartley Act states that the preferred method for resolving industrial disputes is that chosen by the parties themselves.⁵ In the vast majority of cases the parties negotiate a collective bargaining agreement which contains an arbitration clause.⁶ Section 301 of the Taft-Hartley Act also gives the federal district courts jurisdiction over suits alleging violations of such agreements.⁷ Moreover, in Textile Workers Union v. Lincoln

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⁶ See 2 Collective Bargaining Negotiations and Contracts § 1:1 (BNA 1983) (grievance and arbitration provisions found in all 400 labor contracts examined in the BNA survey).
Mills, the Supreme Court held that section 301 authorized the federal courts to create a federal "common law" of labor contracts, one tenet of which was that arbitration provisions could be specifically enforced.

Subsequently, in the famous Steelworkers Trilogy of cases, the Court further enhanced the status of arbitration as the nearly exclusive forum for the resolution of labor contract disputes. In United Steelworkers v. American Manufacturing Co., the first case of the trilogy, the Court held that courts "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." Rather, "[w]hether the moving party is right or wrong is a question of contract interpretation for the arbitrator."

In United Steelworkers v. Warrior & Gulf Navigation Co., the second case in the trilogy, the Court indicated that the existence of a contractual duty to submit to arbitration is a threshold issue that the court must necessarily decide before it can order arbitration. Nonetheless, the Court, in order to avoid the possibility of inadvertently resolving the issue on the merits, held that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of any interpretation that covers the asserted dispute." And in the final case of the trilogy, United Steelworkers v. Enterprise Wheel & Car Corp., the Court held that an arbitrator's decision is final on the merits; a reviewing court can set an arbitration award aside only if the arbitrator has clearly gone beyond the terms of the contract and the scope of his authority. In sum, federal law posits that the arbitration forum should have virtually exclusive jurisdiction over labor contract disputes, leaving

9. Id. at 456-58. At common law, executory agreements to arbitrate were revocable at any time by either party, and thus could not be specifically enforced. D. Nolan, Labor Arbitration Law and Practice 36 (1979).
12. Id. at 568.
13. Id.
15. Id. at 582-83.
17. Id. at 596-97.
the federal district courts with only a narrow channeling and supervisory function.

B. Bankruptcy

The jurisdictional claims of bankruptcy, on the other hand, are more uncertain and complicated than those of the arbitration forum. Under the Bankruptcy Act of 1898 (the "1898 Act"), the bankruptcy court had "summary jurisdiction" over two kinds of matters: proceedings in bankruptcy and controversies arising in proceedings in bankruptcy. The former pertained to administrative and other matters internal to the bankruptcy system itself, and the latter were limited to matters in which the court had actual or constructive possession of the res involved in the dispute. If a dispute did not fall within the summary jurisdiction of the Bankruptcy Court, then it was necessary for a party to bring a plenary action in a state court or the federal district court.

This divided jurisdiction proved unsatisfactory because of the delay that it caused and the expense it imposed on the bankruptcy estate. Accordingly, Congress enacted the Bankruptcy Reform Act of 1978 (the "1978 Act"), which significantly extended the jurisdiction of the bankruptcy courts by giving them original and exclusive jurisdiction over all "bankruptcy cases." The 1978 Act also provided for original but not exclusive jurisdiction in the bankruptcy courts over all "civil proceedings arising out of, arising under, or relating to a bankruptcy proceeding." The 1978 Act's broad jurisdictional grant gave the bankruptcy court both in personam and in rem jurisdiction to handle everything that arises in a bankruptcy case. As a result, actions that formerly had to be tried in state court or in federal district court, at great cost and delay to the estate, could now be tried in the bankruptcy courts.

However, in *Northern Pipeline Construction Co. v. Marathon*...
Pipe Line Co., the Supreme Court held that this broad grant of jurisdiction was unconstitutional. The Court reasoned that the 1978 Act granted article III powers to the bankruptcy court which, because its judges were not appointed for life, was not itself an article III court. Congress, after much travail and delay, finally responded to the Marathon decision in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Amendments"). The jurisdictional provisions of the 1984 Amendments, which are patterned after the emergency rule promulgated by the Court following its Marathon decision, are extremely obscure and confusing. As one leading commentator recently put it, "[U]nderstanding the matter is not easy. At least until some gifted judicial mind definitively resolves certain matters, it defies simple summarization." But in relevant part, this is what the law provides:

Section 1334(a) of the 1984 Amendments states that "[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [the Bankruptcy Code]." The exclusive jurisdiction covers the filing of the bankruptcy petition itself and the issuance of the final order for relief; how much more it covers is a matter of some dispute. Section 1334(b) provides that "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." The use of the phrases "arising under," "arising in," and "related to" was apparently intended to make federal bankruptcy jurisdiction as broad and all-encompassing as possible — although the precise meaning and constitutionally permitted scope of these terms has yet to be determined by the courts.

Section 1334 of the 1984 Amendments is very similar to section 1471 of the 1978 Act. The difference, however, lies in the fact...

29. Id. at 87.
33. Cowans, supra note 31 at 27.
35. See Cowans, supra note 31, at 28.
36. Section 1471 of the 1978 Act provides:
   a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 . . . .
that section 1334 grants jurisdiction to the federal district court rather than to the bankruptcy court as such. Indeed, the 1984 Amendments contain no express grant of jurisdiction to any bankruptcy court — a change obviously intended to obviate the constitutional difficulty found by the Court in Marathon Oil. While section 1334 does not expressly grant jurisdiction to a bankruptcy court, section 151 of title 28 provides that “[in] each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district.”\(^37\) And section 157(a) of the same title states that “[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”\(^38\) Notwithstanding the merely permissive nature of this grant of authority which suggests some degree of discretion on the part of the district courts, practice under the emergency rules and the probable intent of Congress suggest that the district court refer all section 1334 matters to the bankruptcy judges for initial consideration.\(^39\) However, section 157(d) provides that for cause shown the district court may withdraw all or part of the cases it refers to the bankruptcy judge and that “the district court shall, on timely motion of a party, . . . withdraw a proceeding [referred under this section] if the court

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b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, 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 . . . .

c) The bankruptcy court for the district in which a case under title 11 . . . is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 . . . or arising in or related to a case under title 11 . . . . Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

e) The bankruptcy court in which a case under title 11 . . . is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.


determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.\textsuperscript{40}

Some of the matters that can be referred under section 157 are designated by the statute as "core proceedings."\textsuperscript{41} As the name suggests, these are integral to the bankruptcy process itself, and Congress apparently intended that these particular matters should be dealt with by the bankruptcy court.\textsuperscript{42} More specifically, "core proceedings" are matters over which the bankruptcy judge may issue final orders or judgments; unless the parties assent, only the district court may issue a final order or judgment over non-core proceedings.\textsuperscript{43} Core proceedings include "matters concerning the administration of the estate,"\textsuperscript{44} the "allowance or disallowance of claims against the estate,"\textsuperscript{45} "counterclaims by the estate against persons filing claims against the estate,"\textsuperscript{46} "motions to terminate, annul, or modify the automatic stay,"\textsuperscript{47} "determinations as to the dischargeability of particular debts,"\textsuperscript{48} and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship."\textsuperscript{49} Each of these "other proceedings" is potentially relevant to the enforcement, through arbitration, of a collective bargaining agreement.\textsuperscript{50}

To be sure, this collage of statutory provisions presents a confusing and obscure jurisdictional picture, and it is difficult to know where even some of the more traditional bankruptcy law issues fit into the statutory scheme. However, it does seem relatively clear that the statute gives bankruptcy judges the power to hear and finally resolve most breach of contract claims against the debtor or

\textsuperscript{47} 28 U.S.C.A. § 157(b)(2)(G) (West Supp. 1968-1984). The automatic stay referred to in the list of core proceedings applies to, among other things, "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ."
the estate—subject, of course, to the district courts' exercise of the referral power, the assent of the parties in some instances, and the right to appeal.

III. Framing the Issue

The question, then, is this: How can the jurisdiction of the bankruptcy forum over the debtor's general contract liabilities be reconciled with the jurisdiction of the arbitration forum over the debtor's breaches of a special kind of contract, the collective bargaining agreement? Or more precisely, as between the federal district court, the bankruptcy judge, and a labor arbitrator, who shall decide which issues?

There is no easy answer to the question. In resolving it one can, however, look to the literal words of the 1984 Amendments, to the broader purposes and policies of both bankruptcy and labor law, and to the cases that were decided under the 1978 and 1898 statutes, to the extent that they remain relevant. In addition, one would hope that a fair amount of common sense and due regard for the practicalities of the situation would influence the resolution of the issue.

IV. Allocating Jurisdiction: Some General Principles

The two sets of "jurisdictional" struggles which occur in this area are first, between the federal district court and the bankruptcy component of that court, and second, between the bankruptcy court and arbitration. Some general principles or "presumptions" about how jurisdiction ought to be allocated will be outlined first.

A. The District Court versus the Bankruptcy Court

The allocation of jurisdiction under the 1984 Amendments, though obscure, recognizes that:

[t]here are certain types of problems which seem to many people to be so inherently a part of what happens in a bankruptcy that it is agreed that the bankruptcy court should decide them ["core proceedings"]. At the other extreme are disputed rights and causes of action that involve no points of bankruptcy law and have no other connection with bankruptcy than that they are as-

51. "Contract claims, while not explicitly mentioned by § 157(a)(2)(B), are drawn squarely within the powers of the bankruptcy judge to determine the allowance or disallowance of claims." W. Norton & R. Lieb, Norton on Bankruptcy 105-06 (Monograph No. 1, 1985). The authors question the constitutionality of allowing a non-article III court to decide a breach of contract claim. Id. at 106-10.
serted by or against a debtor or trustee.\textsuperscript{52}

Presumably, the bankruptcy court should hear cases falling in the first category, and the district court should hear the others. But those are the clear cases; the problem is with cases that fall between the two extremes.

One can, however, begin with the proposition that the 1978 Act was intended to vest the bankruptcy courts with as broad a jurisdiction as was possible.\textsuperscript{53} The 1984 Amendments, which were necessitated by the \textit{Marathon Oil} decision, should be read as narrowing that jurisdiction only to the extent necessary to obviate the constitutional problems. Thus, if there are labor contract issues involving a bankrupt employer which clearly require a judicial resolution, then the presumption should be that it is the bankruptcy court rather than the district court that should hear them, at least initially. In such a case the burden is on the party asserting district court jurisdiction to show that such a forum is either constitutionally or statutorily required.

\textbf{B. The Bankruptcy Court versus an Arbitration Tribunal}

The current Bankruptcy Code contains no express reference to arbitration or its relationship with the bankruptcy process.\textsuperscript{54} Indirectly, however, section 1334(c)(1) permits abstention "in the interest of justice."\textsuperscript{55} Although this section is worded in terms of the "district court," it probably also applies to the bankruptcy court and could perhaps be used in favor of the arbitration forum in an appropriate case. Moreover, section 362(d)(1) allows for relief

\textsuperscript{52} Cowans, \textit{supra} note 31, at 25.

\textsuperscript{53} The \textit{House Report} states that "the combination of the three bases for jurisdiction, 'arising under title 11,' 'arising under a case under title 11,' and 'related to a case under title 11,' will leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." H.R. REP. NO. 595, 95th Cong., 1st Sess. 445-46 (1977). Cowans states that in the above quoted sentence "the authors seem to be saying that . . . the bankruptcy court has jurisdiction in every way they could." Cowans, \textit{supra} note 31, at 28.

\textsuperscript{54} Section 26 of the Bankruptcy Act of 1898 authorized the trustee in bankruptcy or the receiver to submit matters to arbitration and outlined the procedures that were to be followed. 11 U.S.C. § 49 (repealed 1978). This provision was omitted in the Bankruptcy Code, although an abbreviated version of it has been carried forward in Bankruptcy Rule 9019(c) which provides: "On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." 11 U.S.C. Rule 9019(c) (Supp. II 1984). Some courts had held that these statutory arbitration procedures were intended to apply only where the parties had not otherwise agreed to arbitration. \textit{See}, e.g., Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312, 319 (2d Cir. 1976), \textit{on remand}, 431 F. Supp. 646 (E.D.N.Y.), \textit{aff'd per curiam}, 567 F.2d 237 (2d Cir. 1977), \textit{cert. denied}, 439 U.S. 825 (1978). \textit{But see} Johnson v. England, 356 F.2d 44 (9th Cir.), \textit{cert. denied}, 384 U.S. 961 (1966).

from the operation of the automatic stay,\textsuperscript{56} again suggesting that in some instances a forum other than that of bankruptcy, such as arbitration, may be the proper one in which to resolve a particular issue. The question is when the arbitration forum should be used.

Courts should begin with the presumption that claims predicated on an alleged breach of a collective bargaining agreement should be established in the manner agreed to by the parties. As contemplated by federal law, this should be done through the arbitration process by a person with expertise in construing this type of contract.\textsuperscript{57} But it is clear that a claim involving an interpretation of the federal Bankruptcy Code must be decided by the bankruptcy court itself. Among the issues that bankruptcy courts have reserved to themselves in the past, and which they should continue to reserve, are whether the duty to arbitrate survives a filing in bankruptcy,\textsuperscript{58} the effect of a court-approved rejection of the contract,\textsuperscript{59} the extent to which an order confirming a reorganization plan operates as a discharge of workers' claims under the contract,\textsuperscript{60} and the status and priority of contract claims.\textsuperscript{61}

The difficulty arises when the underlying issue is basically one of contract interpretation rather than bankruptcy law as such but an arbitration decision on that issue might nevertheless impact negatively on legitimate bankruptcy interests. In this situation the general rule should be that the policy in favor of arbitration must bend to the policy in favor of the primacy of bankruptcy court jurisdiction. The interests of creditors in the assets of the estate and of


\textsuperscript{57} See \textit{In re Smith Jones, Inc.}, 17 Bankr. 126, 128 (Bankr. D. Minn. 1981) (suggesting that while "certain exigent circumstances" might justify denial of the arbitration forum, this would be an "extraordinary action" which this court would not take when the grievance involves merely a wrongful discharge).


\textsuperscript{60} \textit{L.O. Koven & Bros. v. Local 5767, United Steelworkers}, 381 F.2d 196, 201 (3d Cir. 1967).

\textsuperscript{61} \textit{Truck Drivers Local 807 v. Bohack Corp.}, 541 F.2d 312, 321 n.15 (2d Cir. 1976), \textit{on remand}, 431 F. Supp. 646 (E.D.N.Y.), \textit{aff'd per curiam}, 567 F.2d 237 (2d Cir. 1977), \textit{cert. denied}, 439 U.S. 825 (1978); \textit{see also L.O. Koven & Bros. v. Local 5767, United Steelworkers}, 381 F.2d 196, 205-06 (3d Cir. 1967) (whether vacation benefits constituted wages for priority purposes); \textit{Johnson v. England}, 356 F.2d 44, 51 (9th Cir.), \textit{cert. denied}, 384 U.S. 961 (1966) (whether the claimed monies were "trust funds" and whether employees were entitled to a preference in payment); \textit{In re Penn Fruit Co.}, 1 Bankr. 714 (Bankr. E.D. Pa. 1979) (whether a claim was entitled to priority as an administrative expense); \textit{accord In re Braniff Airways, Inc.}, 33 Bankr. 33 (Bankr. N.D. Tex. 1983).
society as a whole in the successful revitalization of the business should take precedence over the narrow interests of the employer and its employees in obtaining the bargained-for forum for resolution of their contract disputes.\textsuperscript{62}

V. FACTORS MITIGATING AGAINST DEFFERAL TO ARBITRATION

If the accepted principle is that arbitrators should decide contract disputes unless those disputes implicate important bankruptcy interests, then the next determination is what those interests are and how they might be jeopardized by the use of arbitration. One area of concern involves the remedies or relief that an arbitrator might order. For example, in \textit{Local 807, International Brotherhood of Teamsters v. Bohack Corp.},\textsuperscript{63} the bankruptcy court had authorized the arbitrator to decide whether the contract rejected by the employer should be specifically enforced by the reinstatement of each employee who had been laid off by the alleged breach. The district court felt that such a remedy would encroach upon the prerogatives of bankruptcy. The district court noted that "in allowing rejection of the contract, the bankruptcy judge found that Bohack could not attain financial viability and at the same time employ Local 807 drivers. If the arbitrator is now allowed to reinstate terminated employees, the rejection of the contract becomes meaningless."\textsuperscript{64}

Similarly, in \textit{Local 692, United Food Workers v. Pantry Pride},\textsuperscript{65} the union first petitioned the bankruptcy court for relief from an

\textsuperscript{62} L.O. Koven & Bros. v. Local 5767, United Steelworkers, 381 F.2d 196, 205 (3d Cir. 1967).  


\textsuperscript{64} Id. at 654 (footnote omitted).  

automatic stay so that it could sue to compel arbitration. The petition was granted, but on the condition that no court or arbitrator would have jurisdiction "to interfere with the going-out-of-business sales presently being conducted by the debtors, the sale of leases, or the closing of the Baltimore area stores." The union then sued to compel arbitration and for an injunction compelling the employer to continue to provide health care coverage pending the outcome of that arbitration. The district court granted the motion to compel arbitration, but denied the injunction. The court reasoned that the union's sole remedy against Pantry Pride for closing its stores was monetary damages. Neither the district court nor an arbitration forum had the jurisdiction or authority to stop the closing of the area stores or to preserve the jobs of the affected employees. Even after arbitration Pantry Pride would not be required to continue paying health and welfare premiums.

Even if an arbitrator is allowed to determine the amount of damages arising from a breach of contract, the bankruptcy court should still have ultimate jurisdiction over enforcement of the award. This will allow the court to determine the status and priority of the claim and whether it is subject to equitable subordination.

In the past, some courts have declined to defer to arbitration if the grievance involved a monetary claim that would have to be paid out of funds in which other creditors also had an interest. For example, in Johnson v. England, the union demanded arbitration over the debtor-employer's past failure to fund adequately a pension plan as required by the collective bargaining agreement. The Ninth Circuit held that this was not an appropriate issue for arbitral determination. The court, emphasizing that this case involved a complete liquidation of the business rather than merely a reorganization, noted that:

66. Id. at 1014.
67. Id.; see infra text accompanying notes 128-37.
69. See supra note 61.
71. 356 F.2d 44 (9th Cir.), cert. denied, 384 U.S. 961 (1966); see also In re F & T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981) (commercial arbitration); In re Brookhaven Textiles, 21 Bankr. 204, 207 (Bankr. S.D.N.Y. 1982) (commercial arbitration).
[t]his does not present the type of grievance which is ordinarily the subject of arbitration under a collective bargaining agreement pursuant to § 301(a) [of the Taft-Hartley Act]. Such controversies usually involve disputes between the union and the current operating employer and are generally of such character that they lend themselves most readily to solution through arbitration. In that type of case the arbitrators "sit to settle disputes at the plant level—disputes that require for their solution knowledge of the customs and practices of a particular factory or of a particular industry as reflected in particular agreements." 72

The court also noted that although the employer had breached the contract, "the result was merely that the employees became creditors to the extent of that default," 73 with just another claim on the assets of the debtor-employer. Thus, the court concluded that "the controversy which now arises is between two groups of creditors . . . . On the one hand we have the employees and on the other we have the other general creditors such as creditors for merchandise sold." 74 The court reasoned that "a decision of an arbitrator here would involve interests of parties who never consented to arbitration, namely, the trustee in bankruptcy and the general creditors. They ought not to be bound by the decision of an arbitrator selected by the employer and the union." 75

The court's reasoning, however, is not persuasive on either point. The assertion that the dispute was not of the kind ordinarily handled by arbitration was apparently predicated on the belief that arbitrators function more as informal mediators of disputes about working conditions and employment practices than as adjudicators of claims for monetary amounts, and that bankruptcy should thus defer to arbitration only when the former function is being performed, rather than the latter. This is a two-fold misconcep-

72. 356 F.2d at 51 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960)).
73. 356 F.2d at 51.
74. Id.

Now, if this were a situation where the internal affairs of the Defendant [the bankrupt employer], based upon maybe its rules of procedure such as a union might have, were at issue, working conditions, et cetera, then I would think that this would be particularly within the realm of arbitration, but every one of these issues . . . . are tried out every day before a Court as a part of a law suit.

Id. at 1232-33.
tion. The subject matter of arbitration involves both kinds of disputes, and in either event the arbitrator's exclusive function is to construe the contract, not to act as some roving, ad hoc "problem solver." Moreover, the expertise of a labor arbitrator is in construing the specialized contract, whether the dispute involves an alleged failure to follow agreed-upon work practices, an alleged breach of the duty to pay the agreed-upon wages, or an alleged breach of the duty to pay into the pension fund, as in Johnson v. England. In sum, federal policy in favor of arbitration does not recognize the distinction the Johnson court was apparently drawing between various types of arbitral disputes.

Also, the fact that, in Johnson, the union's pension fund claims would have to be paid out of the liquidation assets of the employer does not necessarily mean that only the bankruptcy court could decide the claim. Indeed, the Johnson court suggested that another form of arbitration could be resorted to in order to determine the amount of the claim, namely, the arbitration forum provided for by the 1898 Act itself. But if another forum can decide the amount, then it would seem that the forum used should be the one that the parties themselves have selected. If the theory is that an arbitrator is required in order to construe properly the terms of a collective bargaining agreement, then the amount of money to which the claimants have a right (an issue which the court said someone else could decide) is inexorably connected to the forum that the parties have selected for the resolution of the controversy. The fact that the other creditors have not consented to that forum is no more relevant than the fact that they have also not consented to a contract giving the employees a pension fund in any amount.

The Supreme Court has stated that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." Moreover, if the amount to which the employees are contractually entitled is fairly determined by a labor arbitrator, the status and priority of that claim are still subject to deter-

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77. See Johnson, 356 F.2d at 51-52; supra note 54 and accompanying text.
78. Id.
80. The Johnson court implied that it would not be fair for the other creditors to be bound by the decision of an arbitrator picked only by the now-defunct employer and the contracting union. 356 F.2d at 51. Similarly, if only the employer had standing to contest the union's claim in the arbitration forum, resort to that forum would be obviously unfair since, in a straight bankruptcy, the employer may lack both the interest and the resources to contest adequately the claim against the estate. Neither concern, however, is
mination by the bankruptcy court. There the interests of the other creditors can be adequately protected.

The fact that the Johnson case involved a straight bankruptcy rather than a reorganization may be relevant in another respect, however. In a reorganization, the contracting employer generally will also be appointed the debtor in possession, and it is this combined entity that will defend against the union's claim before the arbitrator. The cost of this defense is no greater than it would be in a non-chapter 11 situation. But in a straight bankruptcy, the contracting employer fades out of the picture, and the responsibility for contesting claims against the estate falls on the appointed trustee. This trustee will normally be an attorney who, though familiar with business and commercial matters, may be totally unfamiliar with the practice and procedure of labor arbitration. The retention of special labor counsel may be required, thus putting an additional financial burden on the estate. Of course, even if the litigation occurs in court rather than before an arbitrator, the trustee may still find it necessary to retain labor counsel to deal with the substantive issues. In any event, this is a matter that the courts should take into account in deciding whether or not to defer to arbitration.

Two other factors that the courts sometimes consider, albeit in the context of deferral under a commercial rather than a labor arbitration agreement, are the delaying effect deferral may have on the bankruptcy proceeding itself and the underlying unfairness of forcing the bankrupt (or its representative) into a forum which may lack adequate discovery procedures. These considerations usually arise when the bankrupt himself files a breach of contract claim against another party, that party demurs on the ground that the contract calls for the arbitration of disputes arising under it, and the bankrupt raises delay and lack-of-discovery issues. The interests of bankruptcy clearly dictate that the bankrupt's claims against third parties be resolved as quickly as possible and that the success of this litigation not be hampered by the inadequacy of discovery and other processes, since this will affect the size of the estate.

valid. The trustee in a straight bankruptcy would assume the employer's responsibilities both in selecting the arbitrator and defending against the claim.

81. In Coar v. Brown, 29 Bankr. 806, 807 (N.D. Ill. 1983), the court emphasized that the trustee, as a representative of the other creditors, had never agreed to arbitration. That is true, but irrelevant; the trustee inherited both the rights and the duties of the debtor under the contract being sued upon, even though the trustee consented to neither.

These concerns are equally pressing when labor arbitration is at issue. Although labor arbitration was originally thought of as a speedy and inexpensive alternative to litigation, in recent years it has become increasingly slow and costly.\textsuperscript{83} Moreover, discovery and other forms of compulsory process are somewhat limited in the arbitration context.\textsuperscript{84} Courts must be sensitive to these concerns. If the interests of the estate or other creditors would be adversely affected by delay or other procedural inadequacies, then the court should either refuse to defer to arbitration or defer only on the condition that the arbitration be conducted in a manner that may go beyond the scope of the collective bargaining agreement.\textsuperscript{85}

These are the factors that mitigate against deferral to arbitration. However, in some instances, deferral to arbitration may actually enhance, rather than harm, the interests of other creditors — and thus serve, rather than retard, the purposes of bankruptcy. For example, some courts have noted that deferral to arbitration is particularly appropriate when it promotes “labor peace.”\textsuperscript{86} Such courts are apparently referring to the legal theory that treats arbitration as the substitute for industrial strife (strikes).\textsuperscript{87} If an employer can be compelled to arbitrate an issue, then the union cannot go out on strike over it.\textsuperscript{88} But if the same issue is not going to be resolved by arbitration and is, rather, going to be resolved by the bankruptcy court, this presumably frees the union from its contractual “no-strike” obligations.\textsuperscript{89} It is widely recognized that a strike against an employer who has gone into a chapter 11 reorganization may be devastating.\textsuperscript{90} Indeed, it may defeat the entire

\textsuperscript{83} One commentator has estimated that a normal arbitration case with a one-day hearing costs each party $2,200 or more and that the average time from the filing of the grievance to the issuance of the award is eight months. LABOR RELATIONS YEARBOOK 1977, at 206 (BNA 1978).

\textsuperscript{84} See O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 133-59 (2d ed. 1983).


\textsuperscript{90} In Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976), on remand, 431 F. Supp. 646 (E.D.N.Y.), aff’d per curiam, 567 F.2d 237 (2d Cir. 1977), cert. denied, 439 U.S. 825 (1978), the court of appeals noted that “[t]he argument is made that to allow picketing in the case of this financially troubled debtor is to put it out of business. That is, unfortunately, sometimes the sad outcome when a union and an employer cannot come to terms.” Id. at 318; see also Crowe & Assoc., Inc. v. Bricklayers Local 2,
reorganization effort and drive the business into a total liquidation to the considerable detriment of the creditors. Thus, where there is the likelihood of a strike, bankruptcy law interests may weigh in favor of arbitration rather than against it.

This "labor peace" theory, however, is valid only if the strike is not subject to the automatic stay provisions of the Bankruptcy Code or could not otherwise be enjoined under the bankruptcy court's section 105 equity powers — an issue over which there is considerable dispute.\(^9\) Moreover, "labor peace" is a relevant consideration only in the context of a chapter 11 reorganization. If the case involves a straight bankruptcy and the employer has already gone out of business, then there is nothing for the union to strike against and the "labor peace" issue does not even come into consideration.

The interests of bankruptcy may be infringed or enhanced by arbitration in other ways as well. The point, however, is that the effect of arbitration on bankruptcy interests is the critical factor in deciding whether a labor contract issue should be resolved by an arbitrator or by the bankruptcy court.\(^2\)

VI. Tracking a Path Through the Jurisdictional Maze: A Look at Specific Situations in Which the Issue May Arise

The jurisdictional frameworks of arbitration and bankruptcy have been described, some general principles have been proposed, and the interests that must be taken into account in applying those principles have been identified in part. We can now address the more specific situations in which the triangular conflict among district court, bankruptcy court, and arbitration is most likely to occur.

A. When the Grievance Occurs During Bankruptcy Proceedings

Under section 1113 of the Bankruptcy Code, a collective bargaining agreement remains in full force and effect until its rejection


is approved by the bankruptcy judge or other interim relief is allowed. Such approval by the court or other interim relief is allowed.

Thus, the debtor in possession or trustee has the contractual duty to adhere to the substantive provisions of the agreement and the duty to arbitrate any alleged breaches of those provisions.

With respect to such an alleged breach, one of three things might happen. First, the parties (employer and union) may agree that the grievance over the alleged breach is arbitrable and may be perfectly willing to proceed with the arbitration process. Second, the employer may contend that the grievance is not arbitrable, that the bankruptcy court should decide the issue itself, or both. And third, while the union may be content to have the grievance heard and resolved by the bankruptcy judge, the employer may insist that the arbitration forum be used, as provided for in the contract.

1. Obtaining Permission to Proceed to Arbitration

Although the parties themselves may be willing to submit to arbitration, once a bankruptcy petition is filed the parties cannot simply proceed in blithe disregard of the jurisdiction of the bankruptcy tribunal. As one court has noted, “there must be judicial control over the exercise of the right to arbitrate just as there is over other rights and duties of the bankrupt. For now [in bankruptcy], an additional consideration has been added, the rights of the creditors.” This is particularly true with respect to breaches that occur between the time of filing and the court’s approval of the rejection of the contract, and with respect to the liabilities the debtor in possession incurs as a result of these breaches. These are technically classified as “administrative expenses,” which section 157 includes within the list of “core proceedings” (that is, matters within the presumed unique expertise of the bankruptcy court).

In *L. O. Koven & Brothers v. Local 5767, United Steelworkers*, the union asserted a claim for vacation benefits arising during three periods: prior to the bankruptcy filing, during the bankruptcy proceeding itself, and after the order of confirmation. The Third Circuit held that during the bankruptcy proceedings “the bank-

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95. Id.
97. 381 F.2d 196 (3d Cir. 1967).
98. Id. at 199.
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Bankruptcy court [has] the exclusive right and duty under its basic custodial power to decide what were proper administration expenses and to shield the estate from unnecessary and improvident expenditures.” The court further noted that “until any expense was allowed by the bankruptcy court as an administrative expense, Koven had no obligation to pay it.” Thus, although the court allowed arbitration over the portions of the vacation pay claims that were attributable to the prefiling period and to the period following the order of confirmation, the bankruptcy court itself was held to be the proper forum to consider the eligibility and amount of vacation pay claims that accrued during the reorganization period.

Although the court in Koven was undoubtedly correct in concluding that the allowance of “administrative expenses” was within the exclusive purview of the bankruptcy court, there is no reason why the amount of those expenses could not have been determined by the arbitrator when it determined the amount of vacation benefits that arose during the other two periods. This was the approach taken in In re Penn Fruit Co., in which the court held that:

[a]lthough the determination of whether a claim is entitled to priority as an administrative expense is within the province of the bankruptcy court, the determination of the amount due employees who have filed grievances under the collective bargaining agreement is a contractual matter which . . . should be decided according to the procedure to which both the debtor in possession and the employees (through the union) agreed and by which both are bound.

The procedure for accomplishing this result is provided in section 1334(c)(1) of the 1984 Amendments, which allows the court, “in the interest of justice,” to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. If deference to arbitration is otherwise appropriate, it would seem that the fact that the grievance arose during the bankruptcy proceeding itself should not be controlling, and that in such a situation abstention under section 1334(c)(1) is appropriate.

99. Id. at 208 (footnote omitted).
100. 1 Bankr. 714 (Bankr. E.D. Pa. 1979).
101. Id. at 716-17.
103. Id.
2. Obtaining an Order to Compel Arbitration Against a Recalcitrant Employer

If the employer refuses to agree to submit the grievance to arbitration, then the union has additional problems. If the employer were not in bankruptcy, the union would simply file a Taft-Hartley section 301 action, and the federal district court would use the *Warrior Gulf* criteria to determine whether or not the grievance was arbitrable under the contract. But when the employer is in bankruptcy, presumably any action against it that is filed in the federal district court will be automatically referred to the bankruptcy court. This referral, however, is subject to section 157(d) of the Bankruptcy Code, which requires the district court, on timely motion of any party, to withdraw from the bankruptcy judge any proceeding which involves a construction of both the Bankruptcy Code and a federal law regulating interstate commerce. An action to enforce the arbitration provisions of a collective bargaining agreement arises under section 301 of the Taft-Hartley Act and involves an interpretation of the section 301 “common-law” standard of arbitrability articulated in *Warrior Gulf*. Moreover, the legislative history of section 157(d) of the Bankruptcy Code, though scant, does cite the National Labor Relations Act (and that presumably includes the Taft-Hartley Act amendments) as the kind of nonbankruptcy federal statute to which the mandatory withdrawal provision was intended to apply. It would thus seem that the district court is required, pursuant to appropriate motion, to withdraw from the bankruptcy court an action to compel arbitration.

This allocation of jurisdiction between the district court and the bankruptcy court certainly is reasonable when the employer’s only defense is that the grievance is not in fact arbitrable under the contract. Federal district courts have traditionally handled this issue, while the bankruptcy courts have not. Therefore, if there is no danger that an arbitration award will somehow impinge upon the prerogatives of the bankruptcy system, or if any such danger will be obviated by the bankruptcy court’s ultimate control over the enforcement of the award, then the district court appears to be the proper forum for resolution of the arbitrability issue.

This jurisdictional dilemma is complicated further if, in addition

104. See *supra* text accompanying note 14.
105. See *supra* text accompanying note 40.
to the employer's traditional section 301 defenses, a claim is also made (by the employer or some other interested party) that deferral to arbitration is not appropriate for reasons related to the proper administration of the bankruptcy laws. Section 157(d) of the Bankruptcy Code still seems to require that the district court resolve the Taft-Hartley section 301 arbitrability issue. And while bankruptcy court input on the bankruptcy law implications might seem desirable, the Bankruptcy Code apparently does not contemplate a bifurcated proceeding of that nature. Thus the district court will of necessity determine both the labor law and the bankruptcy law issues.\textsuperscript{107}

On the other hand, if the employer's objections to arbitration pertain solely to arbitration's alleged impact on bankruptcy interests and processes, then it appears that the bankruptcy court is the forum in which those determinations should be made. The mandatory withdrawal provisions of section 157(d) might be avoided by arguing that such a case does not in fact require "consideration of" a nonbankruptcy law. The legislative history suggests that actual consideration is required.\textsuperscript{108} Indeed, one court has held that this consideration must be of a "substantial and material" nature.\textsuperscript{109} Thus, although an action to enforce an arbitration agreement will necessarily involve section 301 in the sense that it provides the basis for federal jurisdiction, that alone should not be deemed sufficient to trigger the mandatory withdrawal provision.\textsuperscript{110}

In any event, if the case is not withdrawn from the bankruptcy court and that court determines that arbitration would impinge upon legitimate bankruptcy interests, the bankruptcy judge should proceed to resolve the contract issue himself. But if, as is more likely to be the case, the bankruptcy judge determines that arbitration would not have that impact (and assuming that there are no genuine section 301 issues at stake), then he should have the power to order the employer to submit to arbitration. Since this determination does not appear to be within the definition of a "core pro-


\textsuperscript{108} "The district court should withdraw such proceedings only if the court determines . . . that other laws regulating organizations affecting interstate commerce are in fact likely to be considered." 130 CONG. REC. S6081 (daily ed. June 19, 1984) (remarks of Sen. DeConcini) (emphasis added).


\textsuperscript{110} See W. NORTON & R. LIEB, supra note 51, at 145.
ceeding,” the bankruptcy judge’s findings of fact and conclusions of law will still have to be submitted to the district court for the entry of a final order. But despite the apparent cumbersomeness of this process (in contrast to allowing the district court to decide the issue in the first instance), the expertise of the bankruptcy judge appears necessary here.

3. Inducing a Recalcitrant Union to Use Arbitration

A union with a grievance against an employer is not affirmatively required to use the arbitration process, but it must use that process before it can pursue other relief. That is, in the nonbankruptcy context, if the union files a section 301 breach of contract action in federal district court, the employer will simply move to have the action dismissed for failure to exhaust contract remedies. But when the employer is in bankruptcy, the situation again becomes more complicated. Here, the breach of contract claim is automatically referred to the bankruptcy judge. The union will contend that the claim constitutes an “administrative expense” or “claim against the estate” and that it is thus a “core proceeding” under section 157. If the employer files a motion to have the claim dismissed for failure to exhaust contract remedies, the union will presumably defend on the grounds that the grievance is not arbitrable, or that bankruptcy interests require the adjudication of the dispute in the bankruptcy forum, or both.

Such action on the part of the union raises issues requiring “consideration” of section 301 of the Taft-Hartley Act, and thus allows the employer to request that the district court withdraw the matter from the bankruptcy judge and decide the issue itself. If the union’s position is predicated solely or even primarily on a section 301 interpretation of the contract, this bifurcated allocation of decisional authority is reasonable. But if the defense is predicated exclusively on bankruptcy considerations, then the matter should be resolved by the bankruptcy judge. And in this situation the union again can argue that the “resolution of the proceeding” (whether to dismiss the claim for failure to exhaust contract reme-

111. 28 U.S.C.A. § 157(c)(1) (West Supp. 1968-1984) (unless under § (c)(2) all parties consent to district court’s referral of proceeding to bankruptcy judge for entire proceeding, including issuance of final order).


113. See supra notes 41-50 and accompanying text.


dies) does not require "consideration" of section 301 at all, in which case withdrawal under section 157(d) will not be required.

If the district court determines that the grievance is arbitrable and that no bankruptcy interests will be jeopardized by arbitration, then it should grant the employer's motion to dismiss the breach of contract action — thereby inducing the union to resort to arbitration. On the other hand, if the court determines that the grievance is not arbitrable, the question remains of who, as between the district court and the bankruptcy court, should decide the contract breach issue. The union will continue to contend that this is a "core proceeding" which the bankruptcy court must resolve. The employer, however, may contend that any suit on a collective bargaining agreement is necessarily predicated on section 301, thus activating the mandatory withdrawal provisions of section 157(d).116

The employer's contention, however, represents an extremely broad reading of a section of the statute intended to have only a narrow application.117 Moreover, with a view to who is best qualified to construe the contract (since it is not going to be construed by an arbitrator), it should be noted that direct judicial enforcement of the substantive provisions of collective bargaining agreements is relatively infrequent. Thus, it is unlikely that the district court judge will have any greater expertise in construing such a contract than does the bankruptcy judge. Consistent with the general principle favoring bankruptcy court resolution of all issues affecting the bankrupt, the better approach is to treat the union's breach of contract claim no differently than any other contract claim against the estate, and to have it resolved by the bankruptcy court.

B. Arbitration of Issues Flowing from the Rejection of the Contract

In Local 807, International Brotherhood of Teamsters v. Bohack Corp.,118 the court noted that when the contract is rejected, the law treats the rejection as a breach as of the moment prior to the filing in bankruptcy — thus making the nonbreaching party a general unsecured creditor. But "like any other unilateral breach of contract, it does not destroy the contract so as to absolve the parties

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116. See supra note 40 and accompanying text.
117. See W. Norton & R. Lieb, supra note 51, at 145.
Breaches occurring prior to filing thus remain arbitrable, while conduct occurring after an effective rejection does not constitute a "breach." That much is clear. However, two problems remain.

1. The Status of Alleged Breaches That Occur Between the Filing Date and the Court's Approval of the Contract Rejection

On remand from the Second Circuit, the district court in Bohack held that the contract rejection constituted not only a breach of the contract retroactive to the date of filing, but also a unilateral "termination" of the contract as of that date. The question of any subsequent breach was thus mooted. The issue in Bohack was mooted, however, only because the nature of the original claim involved an objection to the subcontracting that Bohack arranged during the reorganization period. Since the employees would have lost their jobs anyway, because of the court-approved termination of this portion of the employer's business under the reorganization plan, it was irrelevant whether the job loss was also a breach of the collective bargaining agreement. The employees suffered no injury beyond that flowing from the terms of the bankruptcy reorganization — thus the contract violation issue was mooted in fact as well as law.

But this might not always be the case. Suppose the contract is rejected, but the affected portion of the business stays in operation. What is the status of the employee who is "wrongfully discharged" between the time the employer files in bankruptcy and the time the contract rejection is approved? If Bohack is to be taken literally, the collective bargaining agreement covering the employee (which we will assume contains a discharge clause) is retroactively terminated on the date of filing. This means that the discharge, however "wrongful" it was at the time it occurred, is nevertheless not a contract violation and that there is nothing to arbitrate.

This result also seems to be dictated by the logic of NLRB v. Bildisco, which held that the collective bargaining agreement ceases to be an "enforceable contract" once the petition is filed.

119. Id. at 321 n.15.
121. Id.
123. Id. at 1199. Since there was no "enforceable contract," the Court concluded
If this result occurs under section 8(d) of the National Labor Relations Act, then presumably it will occur also under section 301 of the Taft-Hartley Act. Applying this reasoning, the court in In Re Midwest Emery Freight System, Inc., citing Bildisco, held that grievances arising between the filing of the petition in bankruptcy and the approval of rejection of the contract cannot be submitted to arbitration.

The Emery decision, however, seems inconsistent with section 1113 of the 1984 Amendments. Although a rejected contract is still treated as being breached and terminated as of the date prior to the filing of the bankruptcy petition, the whole thrust of section 1113 is to ensure that the contract remains in effect and is honored by the parties until its rejection is approved by the bankruptcy court. Conduct that violated the contract at the time it occurred remains a "contract violation" for purposes of arbitration, even though for other purposes the relation-back theory regards the contract as being nonexistent at the time of the alleged breach. While this result may be somewhat lacking in terms of conceptual tidiness, it makes up for this in terms of fundamental fairness to the employees.

2. Liquidation of the Damages That Flow from Contract Rejection

As previously indicated, a rejected contract is deemed totally breached as of the time of filing, and the nonbreaching party is a general unsecured creditor with respect to the damages that flow from such a breach. But should those damages be determined by an arbitrator or by the bankruptcy court? In the Bohack case, both...
the bankruptcy court and the district court concluded that “the amount of damages suffered by the employees as a result of the rejection . . . [is] appropriate for arbitration.”¹²⁸

In most cases, the breach flows from the rejection of the contract and the damages caused by the breach can thus be characterized as a dispute “arising under the contract.” Such damages appear to be covered by most arbitration clauses. While the liquidation of damages flowing from a total repudiation of the contract is not the kind of issue that labor arbitrators customarily handle,¹²⁹ they do have expertise in dealing with the component parts of such a breach.¹³⁰ That is, the damages that flow from the rejection of the contract will usually pertain to entitlements which have vested as of the date of breach, such as vacation benefits, unused sick leave, severance pay, health and life insurance premiums and pension fund contributions. Arbitrators often deal with these matters and, indeed, their expertise may well be necessary to a decision of who is entitled to what under the contract in question. Damages flowing from an employer’s repudiation of an obligation to make payments for a fixed or indefinite term in the future, as in the case of retirement benefits or pensions, are also within the scope of an arbitrator’s expertise.

Arbitral expertise is also required in resolution of some other damages issues that arise from the rejection of the collective bargaining agreement. In Bohack, for example, the court stated:

[V]aluing seniority rights under the unfulfilled portion of the collective bargaining agreement, as well as ascertaining the mitigating value of the new seniority rights of terminated employees who subsequently obtained employment, does not appear to be simply a matter of dollars and cents, rather it involves knowledge of the likelihood of attrition and advancement of employees within the industry and an interpretation of contract provisions respecting seniority rights.¹³¹

A word of caution is in order here. An arbitral determination of


131. 431 F. Supp. at 654.
the current and future entitlements that had vested at the time of breach would seem to implicate few bankruptcy interests. Once the arbitrator determines the amount of a claim, the bankruptcy court can then determine its status and priority and deal with it in conjunction with other claims against the estate.

The matter is more complicated, however, when the claimed damages are predicated on postrejection "might have beens" — that is, when damages are sought to put the employees in the position they would have been in but for the breach. As a matter of combined bankruptcy/labor law, it may be that once a collective bargaining agreement has been effectively rejected, prospective damages should never be allowed. For example, where the bankruptcy court has approved a plant closure, claims for entitlements predicated on work the employees would have performed if the plant had stayed open are legitimate only on the assumption that the employees had a right of continued employment, which is to say that the closure itself violated the contract.132 This is not often the case.133 But if the contract is construed as prohibiting a closure, allowing the full measure of damages is inconsistent with the bankruptcy court's decision to allow the employer to reject the contract and close the plant. And even if the plant is not closed and the employees continue to work, albeit for lower postrejection wages, the awarding of employee damages measured as the difference between the wages to which employees were entitled under the contract and the wages they later received defeats the purpose of allowing the employer to reject the contract in the first place.134

The court in Bohack was apparently unconcerned about prospective damages, since it allowed the arbitrator to determine the value of the seniority rights that the employees lost by virtue of the plant closure and contract rejection. But in In re Muskegon Motor Specialties Co.,135 the court may have had this difficulty in mind when it refused to defer to arbitration. In Muskegon, the employees sought to recover vacation pay for a period which extended beyond the date of the termination of the debtor-employer's busi-

132. See generally Krotseng, supra note 130, at 397-98.
ness. The court refused to defer to arbitration, reasoning ambiguously that the claim involved merely a “question of law” rather than “working conditions or practices in a shop.” Whether the contract required payment for this period certainly is a “question of law,” in the sense that it is a matter of contract interpretation. But presumably an arbitrator should decide that issue. On the other hand, whether the allowance of vacation pay under those circumstances is inconsistent with bankruptcy interests is also a “question of law.” If this is what the court had in mind, then it properly reserved the issue to itself.

In sum, before the district court or the bankruptcy court allows arbitration of damages flowing from the rejection of the collective bargaining agreement, the union’s claims should be carefully scrutinized and the feasibility of any prospective damages determined in advance. It is senseless for an arbitrator to make these complicated computations, only to have the claims subsequently disallowed as inconsistent with bankruptcy interests.

C. Arbitration of Grievances Arising Prior to the Bankruptcy Filing

When an alleged contract breach has occurred at some time prior to the employer’s filing in bankruptcy, the union faces essentially the same procedural choices previously discussed. There is, however, another Bankruptcy Code provision implicated here. The automatic stay provision prohibits the initiation or continuance of any legal proceedings against the debtor on claims which arose before the commencement of the bankruptcy case. The legislative history of this section indicates that it was intended to apply to arbitration, as well as to more traditional legal proceedings.

In order to proceed with arbitration, the party desiring that course of action will have to file a motion for relief from the provisions of the automatic stay. Such a motion is regarded as a “core proceeding” by section 157(b)(2)(G) of the Bankruptcy

136. Id. at 843.
137. See L.O. Koven & Bros., Inc. v. Local Union 5767, United Steelworkers, 381 F.2d 196, 203 n.27 (3d Cir. 1967).
139. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 50 (1978); see also In re Pen Fruit Co., 1 Bankr. 714, 716 (Bankr. E.D. Pa. 1979) (“under the stay provisions . . . , the parties may not proceed to arbitration without the permission of the bankruptcy court”).
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Code,\textsuperscript{141} and is thus within the jurisdiction of the bankruptcy court. The court's decision whether to grant relief from the stay should be governed by the principles that have already been discussed.\textsuperscript{142}

Arguably, a motion for abstention might have the same effect as a motion for relief from the stay.\textsuperscript{143} The difference is that the latter can be appealed, while the former cannot.\textsuperscript{144} In either event, a decision by the bankruptcy court to lift the stay or abstain will merely permit the parties to proceed with arbitration; it does not compel them to do so. If the employer resists arbitration of the dispute, the union will have to file an additional action to compel arbitration. As discussed above, this action will probably be subject to section 157(d) withdrawal for resolution by the district court rather than the bankruptcy court.

D. Enforcement of Arbitration Awards

Like any other judgment against a debtor, an arbitration award must be filed with the bankruptcy court; the automatic stay provisions prohibit any independent attempts to enforce or collect the judgment. If the award involves the payment of money, this is a "claim against the estate"\textsuperscript{145} and thus a core proceeding within the jurisdiction of the bankruptcy court. The same is true if the enforcement of the award results in an order approving the use\textsuperscript{146} or sale\textsuperscript{147} of the debtor's property, or affects the liquidation of the assets of the estate.\textsuperscript{148} But an arbitration award that requires the employer to take some other kind of affirmative action, such as adjustment of seniority ranking or reinstatement of an employee, appears not to be a core proceeding but, rather, a proceeding within the "relating to" coverage of section 1334(b) of the Bankruptcy Code.\textsuperscript{149}

Generally, an action to enforce an arbitration award is brought

\begin{itemize}
  \item \textsuperscript{142} See \textit{supra} notes 41-50 and accompanying text.
  \item \textsuperscript{143} The court in \textit{In re Sterling Mining Co.}, 21 Bankr. 66 (Bankr. W.D. Va. 1982), apparently regarded the two motions as being interchangeable; it formally granted the union's motion for relief from the stay under § 364(b), but characterized its action in terms of a § 1471(d) (now § 1334(c)(1)) abstention. \textit{Id.} at 62; see also \textit{In re Smith Jones}, Inc., 17 Bankr. 126, 127 (Bankr. D. Minn. 1981).
  \item \textsuperscript{144} 28 U.S.C.A. § 1334(c)(2) (West Supp. 1977-1984).
  \item \textsuperscript{149} 28 U.S.C.A. § 1334(b) (West Supp. 1977-1984).
\end{itemize}
in federal district court pursuant to section 301 of the Taft-Hartley Act. If the award is presented to the bankruptcy court, it appears to be subject to the withdrawal provisions of section 157(d) of the Bankruptcy Code. However, if the validity of the award is not at issue, status questions, priority, and equitable subordination should be decided by the bankruptcy court. Again, a good argument can be made that this is not a proceeding which requires "consideration" of the labor statutes and that section 157(d) is therefore inapplicable.

However, if questions are raised about the underlying validity of the arbitration award, complications will arise. Normally, the bankruptcy court can "inquire into the validity of any claim asserted against the estate and . . . disallow it if it is ascertained to be without lawful existence, . . . [and] the mere fact that a claim has been reduced to judgment does not prevent such an inquiry." Putting aside the meaning of this as a matter of pure bankruptcy law, it is clear that as a matter of labor law judicial review of arbitration decisions is extremely limited. In this instance, the labor law standard of review should prevail, particularly if the award is the result of an arbitration previously permitted by the court to proceed. Presumably in making that determination the court has already considered the bankruptcy law interests and found that they will not be adversely implicated. Moreover, the whole purpose of initially deferring to arbitration would be defeated if the parties were later permitted to substantially relitigate the merits in the bankruptcy court. If the award results from an arbitration that occurred prior to bankruptcy, review on the merits should still be limited; the bankruptcy court should, however, have the power to refuse to honor the award if conditions are such that the initial deferral to arbitration was inappropriate.

If the employer has legitimate objections to the validity of the award, section 301 issues are clearly raised and the matter should be subject to withdrawal under section 157(d). If, after reviewing the award under the truncated Enterprise Wheel & Car stan-

153. The arbitration of a commercial dispute under § 26 of the Bankruptcy Act was generally considered reviewable on the merits. See Kreindler, supra note 4, at 35. But see In re Mastercraft Record Plating, Inc., 39 Bankr. 654, 658-59 (S.D.N.Y. 1984).
154. See supra text accompanying note 17.
Labor Arbitration and Bankruptcy standards, the district court determines that the award should be enforced, this judgment should be filed with the bankruptcy court before compliance. This allows the bankruptcy court to consider and decide all relevant bankruptcy law issues, such as priority, status, and subordination.

E. Union Breaches of the Collective Bargaining Agreement

Collective bargaining agreements are notoriously one-sided, since duties are imposed principally on the employer while corresponding rights are conferred upon the employees and their union. The primary exception arises when the union agrees to a no-strike clause. If the agreement has an arbitration provision which covers union as well as employer breaches and the union violates the no-strike clause, the employer will be entitled to both equitable relief and damages. The employer, however, must pursue its claims against the union through arbitration.

When the union breaches the collective bargaining agreement the fact that the employer is in bankruptcy does not unduly complicate the matter. Basically, the issues are the same as discussed previously; only the parties have changed. There are, however, two additional considerations. First, unless the union has filed its own claim against the employer, the employer’s claim for damages flowing from the breach of the no-strike clause is not a core proceeding. Similarly, an order requiring the union to end the strike is not a core proceeding regardless of the union’s status as claimant. This suggests that bankruptcy interests are more attenuated when the union, rather than the employer, is in breach. Second, the interest of bankruptcy in this situation is mainly in ensuring that the employer’s rights are vigorously and speedily vindicated. A substantial award of damages will certainly inure to the benefit of both the estate and its creditors, and ending the strike may be essential to the success of the reorganization. Yet it

155. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); supra notes 16-17 and accompanying text.
157. See Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 405 (1976) ("Whether the . . . strike . . . violated the no-strike clause, and the appropriate remedies if it did, are subject to the agreed-upon dispute settlement procedures of the contract and are ultimately issues for the arbitrator.").
159. See supra note 90 and accompanying text.
seems that these interests can be adequately served by arbitration. A chapter 11 debtor in possession has the incentive necessary to press the matter in the arbitration forum. Similarly, in a straight bankruptcy the appointed trustee's standing to compel arbitration is unquestioned. Delay and inadequacy of process — problems inherent in the arbitration forum — might be prejudicial in some instances. However, if an order enjoining the strike is the primary objective and the necessary injunctive relief is not otherwise available, arbitration may be not only the best forum, but the only forum. For unless such an order is processed through the legitimizing portals of arbitration, it can be held invalid under the anti-injunction provisions of the Norris-LaGuardia Act.

VII. CONCLUSION

Although bankruptcy law and labor law conflict on many fronts, it appears that an accommodation is possible insofar as the arbitration of collective bargaining agreements is concerned. Labor arbitration plays an important role in protecting the interests of the debtor's employees under their collective bargaining agreement, and it can serve as a valuable adjunct to the bankruptcy court by providing much-needed expertise on matters of labor contract interpretation. The interests of other creditors can still be safeguarded by the general preeminence of bankruptcy law and by the bankruptcy court's retention of overall jurisdiction for the case. Indeed, it appears that the conflict is not so much between bankruptcy and arbitration over substantive matters, as it is between bankruptcy courts and district courts over who has jurisdiction to decide which issues. Furthermore, this conflict results, not from something inherent in the bankruptcy/arbitration relationship, but from a particularly ill-conceived and poorly written statute.

160. Under Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 254 (1970), an employer can obtain an injunction only if the strike is over a dispute that is itself arbitrable. But see supra text accompanying note 91.

161. 29 U.S.C. §§ 101-15 (1982). This does not, however, prevent a court from specifically enforcing an arbitrator's order to end a strike that is in breach of the no-strike clause. See, e.g., New Orleans Steamship Ass'n v. General Longshore Workers I.I.L. Local Union 1418, 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968).