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The Special Nature of International Insurance and Reinsurance Arbitration:

A Response to Professor Jerry

*S.I. Strong**

I. INTRODUCTION

As Professor Jerry has so eloquently demonstrated, dispute resolution plays a significant role in the insurance industry, even though very few academics have written about the special nature of this area of law, largely because of a lack of communication between specialists in insurance law and specialists in dispute resolution.¹ Though understandable from a historical perspective, this sort of separation of substantive and procedural expertise can create numerous individual and systemic problems.² Not only are parties left without a full appreciation of the scope and nature of the dispute resolution options that are available to them, but courts and legislatures are forced to make critical determinations about the content and shape of the law without a proper understanding of how various mechanisms operate in a particular context.³

One unfortunate side effect of the current situation has been the unspoken assumption that dispute resolution of insurance matters can or should be considered analogous to procedures used in other areas of law.⁴ While some similarities of course exist, insurance disputes involve a number of unique attributes that require specialized analysis.⁵ As a result, Professor Jerry is completely correct in calling for more intensive consideration of how dispute resolution processes operate in

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1. See Robert H. Jerry, II, *Dispute Resolution, Insurance, and Points of Convergence*, 2015 J. DISP. RESOL. 255 (2015).

2. Experience in other fields has shown the type of issues that can arise in cases where substantive experts do not communicate with procedural experts. See S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1165 (2012) (discussing the lack of communication between arbitration specialists and trust law specialists in cases involving arbitration of internal trust disputes).

3. See *id.* at 1165-66, 1193-95 (discussing problems in the context of trust arbitration).

4. See *infra* notes 27-28, 35-40 and accompanying text.

5. See Jerry, *supra* note 1, at 256.

the insurance industry so as to ensure the development and use of fair and efficient procedures.⁶

Professor Jerry has provided an excellent overview of the field and has demonstrated the need for further work in a variety of areas of insurance law. This Response seeks to further illustrate a number of Professor Jerry's points by going into depth in one specific area of insurance law, namely international insurance and reinsurance arbitration.⁷ In so doing, this Response hopes to provide experts in both insurance law and dispute resolution with new insights about this particular procedure while also inspiring further work in this area. Although the current analysis is intended to be introductory rather than comprehensive, the discussion nevertheless seeks to demonstrate the diversity and depth of legal and policy issues associated with international insurance and reinsurance arbitration.

Perhaps the best way of illustrating the complexity of this area of law is by describing some of the legal tensions that are characteristic of international insurance arbitration. Three key conflicts exist. The first, which is discussed in Section III, involves the interaction between international law and U.S. constitutional law. This issue, which is becoming particularly acute, arises as a result of the debate about the extent to which the McCarran-Ferguson Act reverse preempts certain legal principles in international disputes.⁸

The second type of conflict involves the tension between U.S. and foreign law. This discussion, which appears in Section IV, is placed in the context of Bermuda Form arbitration, although the points are equally applicable to other types of international insurance arbitration.

The third and final type of conflict arises at the policy level. This analysis, which is found in Section V, focuses on the tension between the pro-arbitration policy exhibited by the United States and other countries in matters involving international commercial disputes and the principle of state regulation to promote the public interest in insurance law. Inherent in this discussion is the question of whether private parties should be able to exercise their personal autonomy to create dispute resolution mechanisms that may subvert or conflict with certain public values.⁹

Although the various analyses are meant to be introductory rather than comprehensive, they nevertheless require a relatively sophisticated understanding of the relevant legal principles. Since most readers do not have expertise in all three areas of practice (insurance law, arbitration law and international law), it may be helpful to provide a small amount of background information about both insur-

6. *See id.* at 256.

7. Although Professor Jerry is correct that all forms of insurance dispute resolution deserve more attention, the literature on international insurance arbitration is particularly sparse. For example, a Westlaw search of all journals and law reviews looking for materials with the words "insur! and arbitration or 'dispute resolution'" in the title yielded only 56 hits. However, when the word "international" was added to the search parameters, Westlaw identified only 6 items. While there are doubtless a number of relevant articles that do not feature those particular words in the title, a search for articles with the word "insur!" in the title yielded 7,592 items while a similar search for articles with the word "arbitration" yielded 5,814 items. The combination of "international" and "arbitration" resulted in 1,043 items. This phenomenon confirms Professor Jerry's hypothesis that insurance law and arbitration law are largely distinct fields while also showing how limited the scholarship on international insurance arbitration is. *See id.* at 256.

8. *See* 15 U.S.C. §1012(b) (2012).

9. *See* Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 262-63 (2004-2005).

ance law and international arbitration to facilitate conversations across disciplinary lines. This material is found in Section II below.

II. A BRIEF INTRODUCTION TO INTERNATIONAL INSURANCE AND ARBITRATION LAW

The specialized nature of most areas of law can make interdisciplinary work extremely challenging. Errors may be particularly likely to arise in situations where three different disciplines intersect, as is the case with international insurance arbitration, where each of the individual fields of inquiry (international law, insurance law and arbitration law) are extremely complicated. Although it is impossible to provide a comprehensive analysis of each practice area in this Response,¹⁰ it is nevertheless helpful to mention a few basic background points to put the substantive discussion into context.

A. *Basic Principles of International Insurance and Reinsurance Law*

Although most lawyers believe themselves familiar with insurance law as a result of their first-year tort class and their routine daily experiences,¹¹ international insurance and reinsurance differ from domestic insurance in a number of ways. The key difference, of course, is geographic, since international insurance involves “insurance underwritten in one country covering risks in another” as well as “insurance that covers an insured for risks beyond the borders of the insured’s home country.”¹² However, the term “international insurance” can also be used to refer to various types of reinsurance, which is an insurance mechanism that is outside the scope of most lawyers’ expertise. Rather than providing direct, primary coverage for a particular risk, reinsurance involves the process of transferring or “ceding” the risk of insurance from one entity to another.¹³ Reinsurance often

10. Further reading is of course available for those seeking more information on any particular point. For background on insurance law, see ROBERT H. JERRY, II & DOUGLAS S. RICHMOND, *UNDERSTANDING INSURANCE LAW* (5th ed. 2012); STEVEN PLITT ET AL., *COUCH ON INSURANCE* (2015). For background on international commercial arbitration, see NIGEL BLACKBURN ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* (5th ed. 2009); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2014); S.I. STRONG, *INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES* (2012) [hereinafter STRONG, GUIDE], available at [http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/\\$file/strongarbit.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/$file/strongarbit.pdf). For background on international law, see JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF INTERNATIONAL LAW* (8th ed. 2012). The American Law Institute (ALI) is also developing a number of relevant Restatements. See *RESTATEMENT OF THE LAW, LIABILITY INSURANCE*; *RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION*.

11. Of course, as Professor Jerry notes, insurance law is much more complicated than most people believe. See Jerry, *supra* note 1, at 257-260.

12. PETER A. MCLAUCHLAN, *Keeping on Top of Trends in the International Insurance Marketplace*, in *INTERNATIONAL INSURANCE LAW CLIENT STRATEGIES: LEADING LAWYERS ON DEVELOPING PURCHASE STRATEGIES AND OVERCOMING REGULATORY CHALLENGES* (2015), available at 2015 WL 831989, *1, *1.

13. See PLITT ET AL., *supra* note 10, § 9.2. Vocabulary in this field can be confusing. For example, “[t]he insurance company that is transferring or ‘ceding’ its risk is known as the reinsured, the ‘cedent,’ the original insurer, or the direct insurer” while “[t]he insurance company to which the risk is being transferred is known as the reinsurer;” “the person or entity that acquires the original insurance contract from the original insurer . . . is . . . known as the original insured.” *Id.* (footnotes omitted). A reinsurer is itself “free to transfer the reinsured risk to another reinsurer, acquiring its own reinsur-

occurs across national borders so as to spread the risk of loss in a more economically efficient manner.¹⁴

Another practical difference between domestic and international insurance involves the type of coverage. Most people think of insurance in the context of everyday matters, with automobile insurance, health insurance and life insurance representing the best-known types of insurance.¹⁵ Although international insurance and reinsurance can address these sorts of concerns,¹⁶ international insurance also provides for more specialized and often individualized types of risk¹⁷ ranging from maritime matters¹⁸ and excess liability¹⁹ to political risk, terrorism and kidnapping.²⁰ International insurance also exists for more esoteric matters such as “rocket launches . . . as well as global rock tours.”²¹

ance.” *Id.* (footnotes omitted). “Such a transaction is known as a ‘retrocessional agreement. The transferring reinsurer is known as the ‘retrocedent’ and the reinsurer assuming the risk is known as a ‘retrocessionaire.’” *Id.* (footnotes omitted).

14. See Hubertus Labes, *Selected Areas and Issues of Arbitration in Germany: Arbitration of Insurance Disputes in Germany*, in *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 889, 890 (Karl-Heinz Böckstiegel & Stefan Michael Kröll et al. eds., 2015); Jerry, *supra* note 1, at 276; see also Mauricio Gomm Ferreira Dos Santos, *Arbitration in the Light of the Opening of the Brazilian Reinsurance Market*, *V REVISTA BRASILEIRA DE ARBITRAGEM* 38, 38-43 (2008).

15. In fact, insurance is a much broader field, as Professor Jerry notes. See Jerry, *supra* note 1, at 257-260.

16. For example, reinsurance cover involves virtually every type of matter contained in a domestic insurer’s book of business.

17. See Jerry, *supra* note 1 at 276; see also Lorelie S. Masters, *International Insurance: Purchase and Claim Strategies*, in *INTERNATIONAL INSURANCE LAW CLIENT STRATEGIES: LEADING LAWYERS ON DEVELOPING PURCHASE STRATEGIES AND OVERCOMING REGULATORY CHALLENGES* (2015), available at 2015 WL 831988, *1, *1-2 (discussing various types of insurance needed by businesses operating across national borders); McLauchlan, *supra* note 12, at *3 (noting international insurance can address “property, casualty, life, and health . . . because of the commonality of risk issues throughout the world”).

18. Maritime insurance was the first type of international insurance to develop. See McLauchlan, *supra* note 12, at *1.

19. Excess liability insurance track[s] the primary insurance in coverage, conditions, definitions, and exclusions. The excess carrier relies on the primary carrier for coverage interpretations. The excess contract will not pick up coverages that are left out of the primary policy. It is and should be used as a means of layering limits of liability to the level needed by the insured.

Howard Ende et al., *Liability Insurance: A Primer for College and University Counsel*, 23 *J.C. & U.L.* 609, 675 (1997); see also Richard C. Mason et al., *Recent Developments in Excess Insurance, Surplus Lines Insurance, and Reinsurance Law*, 46 *TORT TRIAL & INS. PRAC. L.J.* 331, 367-69 (2011) (discussing international issues, among other things).

20. Political risk insurance is becoming increasingly important to companies operating internationally and includes a variety of types of coverage, including that relating to “1. political violence, 2. terrorism, 3. confiscation, expropriation, and nationalization, 4. contract frustration, 5. currency inconvertibility, 6. kidnap and ransom, and 7. selective discrimination.” Sandra Smith Thayer, *Political Risk Insurance: Coverage for Your International Investment*, in *INTERNATIONAL INSURANCE LAW CLIENT STRATEGIES: LEADING LAWYERS ON DEVELOPING PURCHASE STRATEGIES AND OVERCOMING REGULATORY CHALLENGES* (Aspatore 2015), available at 2015 WL 831986, *1, *1; see also Irene S. Kaptzis, Note, *Looking Beyond the Sunset: International Perspectives on the Terrorism Risk Insurance Act of 2002 and the Issue of Its Renewal*, 29 *BROOK. J. INT’L L.* 827, 828 (2004) (discussing the Terrorism Risk Insurance Act (TRIA), which has been extended to the year 2020 pursuant to the Terrorism Risk Insurance Program Reauthorization Act of 2015 (Pub. L. 114-1, 129 Stat. 3)). Many political risk policies include arbitration provisions. See Thayer, *supra*, at *5. Furthermore, a number of these issues would arise in claims arising under investment treaties, suggesting a potentially significant overlap between insurance law and international investment arbitration (also known as treaty-based arbitration or investor-state arbitration and sometimes involving bilateral treaty arbitration (BIT arbitration) or arbitration under the Convention on the Settlement of Investment Disputes Between States

Another difference between international and domestic insurance involves the role that regulation and public policy play.²² Domestic insurance is a highly regulated field, although most laws exist at the state rather than federal level.²³ This phenomenon has resulted in numerous discrepancies in insurance practices across the United States, including with respect to the availability of arbitration.²⁴ Although the situation is changing, with a number of states now allowing arbitration of insurance disputes,²⁵ the availability of arbitration is still highly regulated.²⁶

Insurance arbitration has been challenged for many of the same reasons that have been raised in other types of domestic arbitration such as employment and consumer arbitration.²⁷ Indeed, many types of insurance arbitration can and perhaps should be classified as a form of consumer arbitration, although that is a question that would benefit from further analysis.²⁸ However, it is unclear whether any or all of the criticisms that have been aimed at arbitration of domestic insurance disputes also apply to arbitration of international insurance disputes.

and Nationals of Other States (ICSID arbitration)). See Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 234 (2010); Franco Ferrari et al., *Panel 3: Multi-Party Arbitration Issues in International Project Finance Arbitration*, 9 N.Y.U. J. L. & BUS. 759, 768-772 (2013). While this Response does not address the overlap between insurance and investment arbitration, the issues are intriguing. See Mark Kantor, *Comparing Political Risk Insurance and Investment Treaty Arbitration, in A Revolution in the International Rule of Law: Essays in Honor of Don Wallace, Jr.*, 455, 455-56 (Borzu Sabahi et al. eds., 2014).

21. McLauchlan, *supra* note 12, at *1.

22. See Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 MD. L. REV. 1192, 1198 (1993) ("Insurance law reflects two compelling themes – contract and public policy."); Leo P. Martinez, *A Unified Theory of Insurance Risk*, 74 U. PITT. L. REV. 713, 740-41 (2013).

23. See Martinez, *supra* note 22, at 740-41; Masters, *supra* note 17, at *3; McLauchlan, *supra* note 12, at *2.

24. See Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran-Ferguson Act: How Far Should the Protection to Policyholders Go?* 1 U. PUERTO RICO BUS. L.J. 35, 35-36 (2010); Jerry, *supra* note 1, at 274.

25. As Professor Jerry notes, arbitration is standard in many disputes involving the ISO Commercial General Liability policy as well as in matters involving automobile insurance, crop insurance and various types of commercial insurance, including those relating to directors and officers (D&O), employment liability, cyber liability, and errors and omissions (E&O). See Jerry, *supra* note 1, at 274-275. Arbitration is also common in other types of insurance, including healthcare insurance. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* 57 STAN. L. REV. 1631, 1632 (2005). However, many states have prohibited arbitration of insurance disputes pursuant to the doctrine of reverse preemption under the McCarran-Ferguson Act. See 15 U.S.C. §1012(b) (2012); see also *infra* notes 68-72.

26. See Hernández-Gutiérrez, *supra* note 24, at 35-36.

27. See Randall, *supra* note 9, at 262-63 (noting various issues ranging from concerns about due process and matters involving individual costs to worries about the resolution of socially important disputes outside the public eye).

28. Some commentators already appear to consider insurance arbitration to fall within the realm of consumer arbitration involving financial services. See Sternlight, *supra* note 25, at 1632. However, other authorities, including various legislatures, specifically exclude insurance arbitration from the definition of consumer arbitration. See Laura Magnotta, *I Agreed to What? Protecting Consumers From Unfair Practices in Binding Consumer Arbitration*, 4 Y.B. ON ARB. & MED. 190, 191 (2012) (discussing a consumer protection provision enacted by Maryland that explicitly excluded matters involving property insurance, casualty insurance and surety insurance). This particular issue may be addressed in the forthcoming Restatement on liability insurance, which distinguishes between sophisticated and unsophisticated policyholders. See RESTATEMENT OF THE LAW, LIABILITY INSURANCE §1 and cmt. b (Tentative Draft No. 1 dated April 9, 2013).

Closer examination of the insurance industry demonstrates a number of key differences between international and domestic insurance that could and perhaps should affect analyses about the propriety of arbitration in each of those fields. For example, most international insurance policies are typically negotiated at arm's length by two equally sophisticated commercial actors rather than imposed by a stronger party on a vulnerable individual.²⁹ These types of issues have been considered significant when distinguishing between different types of arbitration outside the insurance context.³⁰

International insurance also differs from domestic insurance in terms of the amount and type of regulation that exists.³¹ For example, rather than being subject to detailed regulatory requirements, most forms of international insurance are only "regulated by states from a security/solvency standpoint."³² While this phenomenon can be traced to certain practical difficulties associated with controlling transnational activities in the absence of a single political actor with global regulatory authority,³³ the lack of international regulation can also be attributed to the fact that international insurance involves highly individualized (as opposed to standardized) types of risks that are quite simply not amenable to blanket regulation.³⁴

B. Basic Principles of International Arbitration Law

Many commentators, including those in the insurance realm, criticize arbitration as providing "second class" or "rough justice," based on the belief that all insurance disputes are subject to highly routinized procedures that cannot provide parties with the proper procedural safeguards to ensure a fair result.³⁵ Although the veracity of these sorts of claims can and has been disputed (indeed, empirical studies suggest that many of these types of criticisms are largely incorrect in the context of both consumer and employment arbitration),³⁶ there is nothing about international arbitration that can be framed as constituting "rough justice."³⁷ To the contrary, international arbitration has been referred to as "'Rolls Royce' justice" as a result of the extremely sophisticated procedures that are used to resolve complex, high-value and highly individualized disputes.³⁸ Unlike consumer and

29. See Masters, *supra* note 17, at *3; McLauchlan, *supra* note 12, at *2.

30. See STRONG, GUIDE, *supra* note 10, at 3-5.

31. See Masters, *supra* note 17, at *3; McLauchlan, *supra* note 12, at *2.

32. McLauchlan, *supra* note 12, at *2; see also Masters, *supra* note 17, at *3 (discussing regulatory regime). Some types of voluntary self-regulation also exist in the international realm. See McLauchlan, *supra* note 12, at *3 (discussing the rise of the International Association of Insurance Supervisors (IAIS) over the last decade).

33. See Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 13 (2009); S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?* 88 NOTRE DAME L. REV. 899, 913 (2012) [hereinafter Strong, *Regulatory Litigation*].

34. See Masters, *supra* note 17, at *3; McLauchlan, *supra* note 12, at *2.

35. See generally Randall, *supra* note 9, at 257-63 (identifying numerous individual and collective criticisms of insurance arbitration).

36. See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System*, 108 PENN ST. L. REV. 165, 179, 187 (2003).

37. See Jan Paulsson, *International Arbitration Is Not Arbitration*, 2008 STOCKHOLM INT'L ARB. REV. 1, 1-2; see also STRONG, GUIDE, *supra* note 10, at 4-5.

38. Mitchell F. Dolin & Ethan M. Posner, *Understanding the Bermuda Excess Liability Form*, 1 J. INS. COVERAGE 68, 79 (1998) (quoting RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND

employment arbitration, which involve standardized arbitration provisions that are imposed by businesses on vulnerable individuals, international arbitration traditionally involves two corporate entities that have negotiated their transaction, including their dispute resolution clause, at arm's length.³⁹ As a result, one of the leading commentators in the field has claimed that "the essential difference" between international and other types of arbitration "is so great that their similarities are largely illusory."⁴⁰

In most cases, the key rationale supporting international commercial arbitration is not the savings of time and money, although parties of course hope for such a result.⁴¹ Instead, parties choose international arbitration to avoid lengthy and expensive disputes about jurisdiction, to ensure a politically neutral decision-maker with particular expertise in the substance of the dispute, and, perhaps most importantly, to reap the advantages of various international treaties providing for the speedy and efficient enforcement of arbitral awards across international borders.⁴² All of these rationales are as relevant to disputes involving international insurance and reinsurance claims as they are to other sorts of international commercial matters.

The two most important treaties in this field, at least for U.S. parties, are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention)⁴³ and the Inter-American Convention on International Commercial Arbitration (commonly known as the Panama Convention).⁴⁴ With 156 states parties, the New York Convention is more widely adhered-to than the Panama Convention, which is only regional in scope.⁴⁵ However, the Panama Convention takes precedence over the New York Convention in cases where both instruments apply.⁴⁶ Because the two conventions are very similar in their operative terms and are intended to be interpreted in a consistent manner, most commentators simply discuss the New York Convention, as will be the case here.⁴⁷

Although the New York Convention is central to the international arbitral regime, the convention actually serves a very limited purpose, namely the identification of the circumstances in which an arbitration agreement or arbitral award will be enforced internationally.⁴⁸ As a result, parties seeking to resolve a dispute

ARBITRATION 455 (1994)); *see also* STRONG, GUIDE, *supra* note 10, at 4-5 (discussing nature of international arbitration).

39. *See* STRONG, GUIDE, *supra* note 10, at 4-5.

40. Paulsson, *supra* note 37, at 1.

41. *See* BORN, *supra* note 10, at 73-93.

42. *See id.*

43. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]; 9 U.S.C. §201 (2012).

44. *See* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975) [hereinafter Panama Convention]; 9 U.S.C. §301 (2012).

45. *See* United Nations Commission on International Trade Law (UNCITRAL), Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Aug. 5, 2015) [hereinafter New York Convention Status]; *see also* Panama Convention, *supra* note 44, pmbl.

46. *See* New York Convention, *supra* note 43; Panama Convention, *supra* note 44; STRONG, GUIDE, *supra* note 10, at 6-7.

47. *See* New York Convention, *supra* note 43; John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 19-23 (2000).

48. *See* New York Convention, *supra* note 43, arts. II-III, V.

relating to international arbitration must have recourse to a variety of other authorities.⁴⁹ The type of authority used will depend on the type of dispute at issue.⁵⁰

One of the more important types of legal authorities in international arbitration involves national laws on arbitration.⁵¹ Although national laws on arbitration address a broader range of subjects than international treaties do, most arbitration laws are also somewhat limited in scope and primarily address the role that courts may play in international arbitration.⁵²

The two most important enactments for parties seeking judicial assistance in the United States are Chapters 2 and 3 (the “international chapters”) of the Federal Arbitration Act (FAA).⁵³ Notably, Chapter 1 of the FAA (the “domestic chapter”) only applies to international arbitration to the extent that chapter is not superseded by or inconsistent with Chapters 2 and 3.⁵⁴ Although some U.S. states have enacted their own laws on international arbitration, it is unclear whether and to what extent these laws are preempted by the FAA.⁵⁵ Thus, at this point, most of the U.S. law of international arbitration exists at the federal level.⁵⁶

International arbitration is also subject to numerous other sources of law.⁵⁷ Some of these authorities (such as procedural rules promulgated by various arbitral institutions) are chosen by the parties rather than imposed by the state.⁵⁸ Other materials (such as scholarly commentary and arbitral awards rendered in other disputes) are considered persuasive rather than mandatory.⁵⁹ However, most international arbitrators give great weight to these sorts of authorities, since reliance on such materials allows the development of a consistent and predictable approach to the resolution of international disputes and provides for a procedural mechanism.⁶⁰

As this discussion shows, the depth and diversity of persuasive authorities in international arbitration is much more extensive than non-specialists realize.⁶¹ Not only do parties and practitioners have access to a significant and ever-increasing number of published arbitral awards (something that does not exist in

49. See STRONG, GUIDE, *supra* note 10, at 12-24.

50. See *id.*

51. See *id.* at 14-15 (discussing the role of national law in international arbitration).

52. See *id.* at 14 (noting that most arbitration statutes do not discuss the procedures to be used during the arbitration itself).

53. See 9 U.S.C. §§ 201-307 (2012); STRONG, GUIDE, *supra* note 10, at 24-27. Chapter 2 relates to the New York Convention while Chapter 3 relates to the Panama Convention. See *id.*; see also New York Convention, *supra* note 43; Panama Convention, *supra* note 44; 9 U.S.C. §§201, 301 (2012).

54. See STRONG, GUIDE, *supra* note 10, at 25-27; see also 9 U.S.C. §§ 1-307.

55. See 9 U.S.C. §§ 1-307; United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006, Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (noting that the UNCITRAL Model Arbitration Law has been adopted by California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 395 (2004).

56. See BORN, *supra* note 10, at 157; S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 3 nn. 9-10.

57. See STRONG, GUIDE, *supra* note 10, at 12-24.

58. See S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 12-14 (2009) [hereinafter STRONG, RESEARCH] (distinguishing between public and private forms of authority); see also STRONG, GUIDE, *supra* note 10, at 19 (listing well-known arbitral institutions in international matters).

59. See STRONG, GUIDE, *supra* note 10, at 21-23.

60. See *id.* at 23.

61. See generally STRONG, RESEARCH, *supra* note 58, at 83-85, 88-137.

many types of domestic arbitration, including consumer arbitration),⁶² they also have access to a vast body of commentary concerning international arbitration.⁶³ Together, these materials create a system that is much more transparent and predictable than non-specialists appreciate.⁶⁴

Although some differences may arise between international insurance and reinsurance arbitration and other sorts of international arbitration, insurance disputes nevertheless fall within the general umbrella of international arbitration.⁶⁵ As a result, the entire body of national, international and persuasive law concerning international commercial arbitration can and should be considered applicable to matters involving international insurance and reinsurance.

III. INTERNATIONAL INSURANCE AND REINSURANCE ARBITRATION – TENSIONS BETWEEN INTERNATIONAL AND U.S. CONSTITUTIONAL LAW

The highly regulated nature of the U.S. insurance industry can sometimes suggest that all matters involving insurance can and should be determined exclusively by reference to the law of individual U.S. states.⁶⁶ However, international insurance disputes can require recourse to other types of law, most notably international and constitutional law.⁶⁷ In some cases, a potential conflict arises between the various types of law, as illustrated by the recent debate about reverse preemption under the McCarran-Ferguson Act.⁶⁸

The concept of “reverse preemption” is well-known in insurance circles and involves situations in which Congress defers to state authority, thereby allowing

62. See *id.* at 83-85. Various types of arbitral awards are published in summary or redacted form. See New York City Bar, Committee on International Commercial Disputes, *Publication of International Arbitral Awards and Decisions* 8, 10 (Feb. 2014), <http://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf> (noting, for example, that the Society of Maritime Arbitrators usually publishes all awards in their entirety).

63. See generally STRONG, RESEARCH, *supra* note 58, at 88-137.

64. See STRONG, GUIDE, *supra* note 10, at 21-24.

65. For example, insurance matters can be considered “commercial” in nature and therefore falls within the scope of the New York Convention. See New York Convention, *supra* note 43, art. I(3); BORN, *supra* note 10, at 307 (noting most countries, including the United States, have adopted a relatively broad definition of “commercial” in the context of international commercial arbitration); S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT’L L. 499, 536 (2013) [hereinafter Strong, *Treaty*] (noting “the Commerce Clause of the U.S. Constitution . . . is broadly construed as a matter of both constitutional and arbitral law”); see also U.S. Const., art. I, §8, cl. 3; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-19 (2001); *infra* note 134 and accompanying text.

66. See *Martinez*, *supra* note 22, at 740-41; *Masters*, *supra* note 17, at *3; *McLauchlan*, *supra* note 12, at *2.

67. See *Allstate Ins. v. Hague*, 449 U.S. 302 (1981) (considering constitutional issues in the context of a conflict of laws issue involving Wisconsin and Minnesota law); *Ario v. The Underwriting Members of Syndicate 53 at Lloyd’s for the 1998 Year of Account*, 618 F.3d 277, 286 (3d Cir. 2010) (considering the interaction between the FAA and the Pennsylvania Uniform Arbitration Act in a case involving the New York Convention); Thomas O. Main, *On Teaching Conflicts and Why I Dislike Allstate Insurance v. Hague*, 12 NEV. L.J. 600, 600 (2012) (noting that *Allstate Ins. v. Hague* required the U.S. Supreme Court to consider “the Due Process and Full Faith and Credit Clauses”).

68. See 15 U.S.C. § 1012(b) (2012). Other types of preemption questions may arise in the future as more states attempt to enact legislation dealing with international commercial arbitration. See *Drahozal*, *supra* note 55, at 395; see also *Ario*, 618 F.3d at 286 (discussing preemption in context of FAA and Pennsylvania Uniform Arbitration Act).

state law to trump (i.e., reverse preempt) federal law.⁶⁹ According to the McCarran-Ferguson Act, “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance.”⁷⁰ Thus, “McCarran-Ferguson authorizes ‘reverse preemption’ of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance.”⁷¹

The McCarran-Ferguson Act has been held to authorize reverse preemption of the FAA in cases where state law bars arbitration of domestic insurance disputes falling entirely under Chapter 1 of the FAA.⁷² While this conclusion is incontrovertible in the domestic realm, problems arise in international disputes due to questions involving the nature of the New York Convention and the relationship between the convention and Chapter 2 of the FAA.⁷³

According to the terms of the McCarran-Ferguson Act, reverse preemption only applies to “acts of Congress.”⁷⁴ As a result, McCarran-Ferguson would not seem to apply to issues governed by international treaties, since a treaty is not technically an “Act of Congress.”⁷⁵ However, certain problems arise as a result of the way that international treaties are given domestic effect in U.S. courts.⁷⁶ According to a well-established line of cases, some treaties signed by the United States are “self-executing” in nature, which means that they can be relied upon in U.S. courts without the need for any help from Congress.⁷⁷ However, other trea-

69. See Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 673 n.29 (2009). A type of reverse preemption could arise under the New York Convention, to the extent Congress declares a certain issue non-arbitrable and thus incapable of resolution under the convention. See New York Convention, *supra* note 43, art. II(1); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 907 (5th Cir. 2005); *Stawski Distributing Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1025-26 (7th Cir. 2003); Alex Glashauser, *What We Must Never Forget When it is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1252 (2005); David A. Rich, *Deference to the “Law of Nations”: The Intersection Between the New York Convention, the Convention Act, the McCarran-Ferguson Act, and State Anti-Insurance Arbitration Statutes*, 33 T. JEFFERSON L. REV. 81, 84 (2010). However, this phenomenon has been traditionally discussed in the arbitration world as involving the principle of non-arbitrability rather than preemption. See BORN, *supra* note 10, at 964-69.

70. 15 U.S.C. § 1012(b) (2012).

71. *ESAB Group, Inc. v. Zurich Ins. plc*, 685 F.3d 376, 380 (4th Cir. 2012).

72. See 9 U.S.C. §§ 1-307 (2012).

73. See New York Convention, *supra* note 43; 9 U.S.C. §§ 201-08; Bernstein, *supra* note 69, at 673 n.29; Strong, *Treaty*, *supra* note 65, at 514-21.

74. See 15 U.S.C. § 1012(b) (2012).

75. See *id.*; *ESAB Group*, 685 F.3d at 390. Because the McCarran-Ferguson Act was enacted in 1945, it pre-dates Chapter 2 of the FAA and therefore cannot benefit from interpretive canons such as the last-in-time rule. See 9 U.S.C. §§ 201-08; 15 U.S.C. § 1012(b); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I.*, 466 F. Supp. 2d 1293, 1304 (N.D. Ga. 2006); Strong, *Treaty*, *supra* note 65, at 515 n.85.

76. See Strong, *Treaty*, *supra* note 65, at 511-14.

77. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-15 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 320 (1992); Strong, *Treaty*, *supra* note 65, at 511-14; Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 578 (2007). The term “self-executing” has several meanings. See *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48 (7th ed. 2008). The issue involves the question of monism and dualism as principles of international law, although the U.S. concept of self-execution incorporates certain constitutional law issues into the analysis. See David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135, 137-39 (2012) [hereinafter Sloss, *Two-Step*]; Strong, *Treaty*, *supra* note 65, at 511-14.

ties are “non-self-executing” and can only be given effect in U.S. courts to the extent the Congress has enacted what is known as “implementing” or “enabling legislation.”⁷⁸

Authorities agree that the judicial test for self-execution is extremely convoluted.⁷⁹ The analysis is made even more confusing by virtue of the fact that a treaty may be self-executing as to some issues or for some purposes but not as to others.⁸⁰ Interestingly, some of the more nuanced questions about self-execution have arisen in cases involving international insurance arbitration.⁸¹

The debate about self-execution in the insurance context is based on language in the FAA indicating that the New York Convention “shall be enforced in United States courts in accordance with this chapter” (i.e., Chapter 2).⁸² On its face, this phrase seems to suggest that the New York Convention is non-self-executing, which could mean that the convention is reverse preempted by the McCarran-Ferguson Act.⁸³ However, the language could also be read as simply referring to the various procedural features reflected in Chapter 2 of the FAA (for example, those relating to federal jurisdiction, venue, etc.) and indicating that those procedural mechanisms were meant to be used in cases arising under the New York Convention.⁸⁴ In many ways, this latter interpretation appears more correct as a matter of arbitration law, given that many countries that do not require enabling legislation to give domestic effect to international treaties have nevertheless adopted national legislation that is the functional equivalent of Chapter 2 of the FAA.⁸⁵

78. See Strong, *Treaty*, *supra* note 65, at 510-11, 546.

79. See *Medellin v. Texas*, 552 U.S. 491, 504-32 (2008); *ESAB Group*, 685 F.3d at 388 (noting the question of self-execution is “murky”); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (describing the test for self-execution as involving “several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute”); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 540 (2008); Sloss, *Two-Step*, *supra* note 77, at 135; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995); Wu, *supra* note 77, at 578-79.

80. See Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 469 (2010); see also *ESAB Group*, 685 F.3d at 387; *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 732 (5th Cir. 2009) (Clement, C.J., concurring in the judgment) (suggesting that only Article II of the New York Convention should be considered self-executing), *cert. denied sub nom. La. Safety Ass’n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd’s London*, 562 U.S. 827 (2010). This bifurcated approach has been considered inappropriate as a matter of statutory construction. See PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 108 (2013) (discussing Chapter 1 of the FAA).

81. See *ESAB Group*, 685 F.3d at 387; *Safety Nat’l*, 587 F.3d at 732 (Clement, C.J., concurring in the judgment) (suggesting that only Article II of the New York Convention should be considered self-executing).

82. 9 U.S.C. § 201 (2012); see also New York Convention, *supra* note 43. The analysis would be the same under the Panama Convention. See Panama Convention, *supra* note 44; 9 U.S.C. § 301 (2012).

83. See New York Convention, *supra* note 43; 15 U.S.C. § 1012(b) (2012).

84. See New York Convention, *supra* note 43; see also 9 U.S.C. §§ 201-08; STRONG, GUIDE, *supra* note 10, at 15 (discussing the role of the FAA in international arbitration matters).

85. See 9 U.S.C. §§ 201-08; Strong, *Treaty*, *supra* note 65, at 518.

At this point, the U.S. Supreme Court has not addressed this issue directly.⁸⁶ However, the Court has occasionally suggested (*obiter dicta* and in other contexts) that the New York Convention may be self-executing,⁸⁷ although those statements were quite brief and have not been relied upon by lower courts.⁸⁸

More detailed analysis exists at the intermediate appellate level, although a rather significant circuit split has developed in recent years.⁸⁹ Most district courts that have considered the question of self-execution have concluded that reverse preemption does not occur in cases falling under the New York Convention.⁹⁰ Although this Response does not seek to resolve this particular question, it is nevertheless useful to outline the circuit court analyses so as to demonstrate the type

86. Certiorari was sought on this issue in 2010 but was not granted. See *La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, 562 U.S. 827 (2010) (regarding an insurance dispute).

87. See New York Convention, *supra* note 43. The Court noted in *Medellin v. Texas* (a non-arbitration case) that Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. See, e.g., 9 U.S.C. §§201-08 ("The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter," §201). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.

Medellin v. Texas, 552 U.S. 491, 521-22 (2009); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (noting that "Congress passed Chapter 2 of the United States Arbitration Act [FAA] in order to implement the Convention," although the Court did not decide whether the convention was self-executing).

88. See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 722 (5th Cir. 2009), *cert. denied sub nom. La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, 562 U.S. 827 (2010). *But see id.* at 733-37 (Clement, C.J., concurring in the judgment). Lower federal courts have typically found a way to avoid the issue of self-execution. See *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 388 (4th Cir. 2012); *Lobo v. Celebrity Cruises, Inc.* 426 F. Supp. 2d 1296, 1301 (S.D. Fla. 2006) (citing both the convention and the FAA), *aff'd*, 488 F.3d 891 (11th Cir. 2007); *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1252-53 (S.D. Cal. 2000); *In re Fochochrome*, 377 F. Supp. 26, 30-31 (D.C.N.Y. 1974).

89. Although the Third Circuit has addressed this issue in passing, that analysis focused largely on issues relating to foreign sovereign immunity and is therefore not really relevant to this discussion. See *Suter v. Munich Reins. Co.*, 223 F.3d 150, 162 (3d Cir. 2000) (noting lack of reverse preemption); Zachary M. VanVactor, Comment, *Three's a Crowd: The Unhappy Interplay Among the New York Convention, the FAA, and McCarran-Ferguson Act*, 36 TUL. MAR. L.J. 313, 327-29 (2011). The Second Circuit has also considered the interplay between the McCarran-Ferguson Act, the New York Convention, the Foreign Sovereign Immunities Act (FSIA) and the FAA, again primarily in passing. See *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d 1226, 1231-34 (2d Cir. 1995); see also New York Convention, *supra* note 43; 9 U.S.C. §§ 201-08; 15 U.S.C. § 1012(b) (2012); 28 U.S.C. § 1602 (2012).

90. See New York Convention, *supra* note 43; *Todd v. Steamship Mut. Underwriting Assoc., Inc.*, No. 08-1195, 2011 WL 1226464, at *10 (E.D. La. Mar. 28, 2011); *Viator v. Dauterive Contractors, Inc.*, 638 F. Supp. 2d 641, 652 n.18 (E.D. La. 2009); *Murphy Oil USA, Inc. v. SR Int'l Bus. Inc. Co.*, No. 07-CV-1071, 2007 WL 2752366, at *3 (W.D. Ark. Sept. 20, 2007) (declining to follow the Second Circuit rule and noting "[t]he court finds more persuasive the Fifth and Eleventh Circuits' statement that the New York Convention 'must be enforced according to its terms over all prior inconsistent rules of law.' This view is more in line with the New York Convention's intended purpose and the Eighth Circuit's strong language recognizing that 'international comity is a fundamental principle deserving of substantial deference'" (citations omitted); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I.*, 466 F. Supp. 2d 1293, 1297 (N.D. Ga. 2006); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, No. 96-4173-CV-C-2, 1996 WL 938126, at *2 (W.D. Mo. June 10, 1996), *appeal dismissed* by 119 F.3d 619 (8th Cir. 1997); *In re Arbitration Between Engl. Ship Owners Mut. Ins. Ass'n (Luxembourg) & Am. Marine Corp.*, No. 91-3645, 1992 WL 37700, at *4-5 (E.D. La. Feb. 18, 1992), *appeal dismissed*, 981 F.2d 749 (5th Cir. 1993).

of complexity that can arise in disputes involving international insurance and reinsurance arbitration.⁹¹

The first decision in this line of cases was issued by the Second Circuit in 1995 in *Stephens v. American International Insurance Co.*⁹² The opinion, which is extremely brief and conclusory, has won few adherents and was almost immediately called into question by another panel sitting in the same circuit.⁹³ In this opinion, the Second Circuit characterized Chapter 2 of the FAA as a type of implementing legislation, which led to the determination that the New York Convention was not self-executing.⁹⁴

In reaching this conclusion, the Second Circuit appears to have overlooked a number of salient issues, the most notable of which is the fact that the United States' treaty obligations continue regardless of the status of the treaty within the domestic legal order.⁹⁵ The court also relied heavily on the U.S. Supreme Court's definition of a self-executing treaty in *Foster v. Nielson*, which was decided in 1829.⁹⁶ Although *Foster* remains good law, the Supreme Court has supplemented its understanding of self-execution in the years since *Stephens* was handed down,⁹⁷ thereby diminishing any persuasive power *Stephens* might have.⁹⁸

91. Interestingly, this is the one area of international insurance arbitration that has attracted the attention of commentators. See Cindy Galway Buys & Grant Gorman, *Movsesian v. Victoria Versicherung and the Scope of the President's Foreign Affairs Power to Preempt Words*, 32 N. ILL. U. L. REV. 205, 219 (2012); Ronald G. Goss, *Can State Laws Prevent International Arbitration of Insurance Disputes Under the New York Convention?* 65 DISP. RESOL. J. 14, 93 (Nov. 2010–Jan. 2011); Joshua J. Newcomer, *International Decision*, 105 AM. J. INT'L L. 326, 326-32 (2011); Rich, *supra* note 69, at 84-86; Michael J. Ritter, *Disputing Arbitration Clauses in International Insurance Agreements: Problems With the Self-Execution Framework*, 3 PACE INT'L L. REV. 40, 41 (2012); Strong, *Treaty*, *supra* note 65, at 14-21; Aaron L. Wells, *When "Yes" Means "No": McCarran-Ferguson, the New York Convention, and the Limits of Congressional Assent*, 12 PEPP. DISP. RESOL. L. J. 267, 297-98 (2012).

92. See *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995); see also New York Convention, *supra* note 43.

93. See New York Convention, *supra* note 43; *Stephens*, 66 F.3d at 41; see also *ESAB Group*, 685 F.3d at 385, 390-91 (claiming *Stephens*, 69 F.3d at 1226, called *Stephens*, 66 F.3d at 41, into question).

94. See 9 U.S.C. §§ 201-08; *Stephens*, 66 F.3d at 45; see also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313-14 (1829), *overruled on other grounds by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

95. See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 726 n.53 (5th Cir. 2009), *cert. denied sub nom.* *La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, 562 U.S. 827 (2010); BROWNLIE, *supra* note 77, at 34-35; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 200 (2d ed. 1996); Jackson, *supra* note 77, at 313, 316-17; see also *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 8 I.L.M. 679 (describing the duty of performance in good faith (*pacta sunt servanda*)).

96. *Stephens*, 66 F.3d at 45. *Foster* stated that [o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself*, without the aid of any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court. *Foster*, 27 U.S. (2 Pet.) at 314.

97. See *Stephens*, 66 F.3d at 45; *Foster*, 27 U.S. (2 Pet.) at 313-14; see also *Medellin v. Texas*, 552 U.S. 491, 521-22 (2009); *Garcia v. Texas*, 131 S. Ct. 2866, 2868-71 (2011) (Breyer, J., dissenting); *Noriega v. Pastrana*, 559 U.S. 917, 917 (2010) (Thomas, J., dissenting from the denial of certiorari); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 436-37 (2006); *Medellin v. Drake*, 544 U.S. 660, 685-90 (2005) (O'Connor, J., dissenting); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004); *Torres v. Mullin*, 540 U.S. 1035, 1035 (2003) (Breyer, J., dissenting from the denial of certiorari).

In 2009, the Fifth Circuit considered similar issues in *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*.⁹⁹ The discussion was extremely robust and considered both the mandatory nature of the New York Convention as well as the purpose of Chapter 2 of the FAA in giving effect to the convention.¹⁰⁰

In its analysis, the Fifth Circuit was guided in part by the pro-arbitration policy enunciated in both the New York Convention and longstanding Supreme Court precedent.¹⁰¹ The Fifth Circuit was also influenced by the fact that Chapter 2 of the FAA serves a variety of purposes within the international arbitral regime, including the creation of federal jurisdiction and the identification of an appropriate venue.¹⁰² This aspect of the Fifth Circuit's analysis is important because it suggests that Chapter 2 of the FAA does not necessarily constitute a form of implementing legislation, at least in the traditional sense.¹⁰³

The Fifth Circuit also expanded on the concept of a self-executing treaty, particularly in the context of reverse preemption, stating that

[e]ven if the [New York] Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation. Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress. The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."¹⁰⁴

98. See *Safety Nat'l*, 587 F.3d at 722; *id.* at 737 (Clement, C.J., concurring in the judgment).

99. See *id.* at 714. In 2010, the Fifth Circuit was presented with additional questions relating to the relationship between the New York Convention, the FAA, and the McCarran-Ferguson Act but declined to address those matters and instead sent the issue to the district court on remand. See *Todd v. Steamship Mut. Underwriting Assoc., Inc.*, 601 F.3d 329 (5th Cir. 2010), *remanded*, No. 08-1195, 2011 WL 1226464, at *1139 (E.D. La. Mar. 28 2011).

100. See New York Convention, *supra* note 43, art. II(1); 9 U.S.C. § 201 (2012); *Safety Nat'l*, 587 F.3d at 719, 722, 725.

101. See *Safety Nat'l*, 587 F.3d at 730; see also New York Convention, *supra* note 43; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-39 (1985). A similar approach has been adopted at the district court level. See *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I.*, 466 F. Supp. 2d 1293, 1303 n.8 (N.D. Ga. 2006) (concluding "that the Convention, and the strong international policy it expresses in favor of enforcing commercial arbitration agreements, supersedes the McCarran-Ferguson Act"); *In re Arbitration Between England Ship Owners Mut. Ins. Ass'n (Luxembourg) & Am. Marine Corp.*, No. 91-3645, 1992 WL 37700, at *4-5 (E.D. La. Feb. 18, 1992), *appeal dismissed*, 981 F.2d 749 (5th Cir. 1993).

102. See 9 U.S.C. §§ 203-04 (2012); see *Safety Nat'l*, 587 F.3d at 719, 722. The Fourth Circuit has taken what seems to be a similar view of Chapter 2, indicating that legislation was necessary as a means of addressing potential conflicts between Chapter 1 of the FAA and the New York Convention and "to aid in the enforcement of the Convention." *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 382-83 (4th Cir. 2012) (discussing the various purposes of Chapter 2 of the FAA); see also New York Convention, *supra* note 43.

103. See New York Convention, *supra* note 43; *Safety Nat'l*, 587 F.3d at 719, 722.

104. *Safety Nat'l*, 587 F.3d at 722-23 (footnotes omitted). Similar conclusions have been reached in other contexts. See *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902-03 (5th Cir. 2005) (noting that "[i]t goes without saying that, upon the United States signing a treaty and Congress adopt-

This language has led some authorities to characterize *Safety National* as indicating “that the provisions of a non-self-executing, implemented treaty ‘have full preemptive effect’” in the United States.¹⁰⁵

In arriving at this conclusion, the Fifth Circuit relied heavily on the fact that Chapter 2 of the FAA invokes rights arising out of the convention, which can be seen as directing the court to the convention itself.¹⁰⁶ Furthermore,

[w]hen Congress amended the FAA in 1970 to include provisions that dealt with the Convention, it provided in 9 U.S.C. §203, that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States.” This is a direct indication that Congress thought that for jurisdictional purposes, an action falling under the Convention arose not only under the laws of the United States but also under *treaties* of the United States.¹⁰⁷

These factors led a majority of the Fifth Circuit to conclude that U.S. courts are empowered under Chapter 2 of the FAA to rely directly on the language of the New York Convention.¹⁰⁸

Although the Fifth Circuit’s analysis of the self-executing nature of the New York Convention is quite detailed, the court did not ultimately decide the case on those grounds.¹⁰⁹ Instead, *Safety National* turned on the court’s conclusion that the “commonly understood meaning of an ‘Act of Congress’ does not include a ‘treaty,’ even if the treaty required implementing legislation.”¹¹⁰ Under this interpretive approach, the McCarran-Ferguson Act does not apply in cases where the language of the convention itself is being construed.¹¹¹

ing enabling legislation, the treaty becomes the supreme law of the land” (citing *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985)); *see also* *Prokopena v. Carnival Corp.*, No. C-08-213, 2008 WL 4276975, at *3 n.8 (S.D. Tex. Sept. 10, 2008); *Matter of Arbitration Between England Ship Owners Mut. Ins. Ass’n & Am. Marine Corp.*, No. 91 – 3645, 1992 WL 37700 at *4. Some courts go even further. *See* *Riley v. Kingsley Underwriting Agencies, Inc.*, 969 F.3d 953, 958 (10th Cir. 1992) (noting “ratification of the Convention makes it part of the supreme law of the land, as enforceable as Congressional enactments”); *Clow v. Ins. Corp. of British Columbia*, No. 07-403-ST, 2007 WL 2292689, at *3 (D. Or. Aug. 6, 2007); *Nw. Airlines, Inc. v. R&S Co.*, 176 F. Supp. 2d 935, 938 (D. Minn. 2001); *Filanto, S.p.A., v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992), *appeal dismissed by* 984 F.2d 58 (2d Cir.1993) (though also noting a role for the FAA).

105. *See* *ESAB Group*, 685 F.3d at 386 (quoting *Safety Nat’l*, 587 F.3d at 733 (Clement, C.J., concurring in the judgment)).

106. *See* *Safety Nat’l*, 587 F.3d at 724-25, 727-28; *see also* New York Convention, *supra* note 43; 9 U.S.C. §§ 201-08 (2012).

107. *Safety Nat’l*, 587 F.3d at 724; *see also* *Missouri v. Holland*, 252 U.S. 416, 430-32 (1920).

108. *See* 9 U.S.C. §§ 201-08; *Safety Nat’l*, 587 F.3d at 724-25, 727-28; *see also id.* at 734 (Clement, C.J., concurring in the judgment) (noting the language of Article II(3) of the New York Convention is addressed directly at the courts themselves). Interestingly, this approach appears very similar to the borrowed treaty rule. *See infra* notes 133-82 and accompanying text.

109. *See* New York Convention, *supra* note 43; *ESAB Group*, 685 F.3d at 385.

110. *Safety Nat’l*, 587 F.3d at 723 (concluding “[i]t would seem that ‘treaty’ would include all implemented treaties, regardless of whether they were self-executing or had required implementing legislation”); *see also* 15 U.S.C. § 1012(b) (2012); *ESAB Group*, 685 F.3d at 385.

111. *See* *Safety Nat’l*, 587 F.3d at 723; *ESAB Group*, 685 F.3d at 385.

In addition to the majority holding, *Safety National* generated both concurring and dissenting opinions.¹¹² The concurring opinion by Circuit Judge Clement suggested that the New York Convention should be considered self-executing, at least with respect to Article II, which is the section of the convention that discusses the mandatory duty to compel arbitration in cases falling under the convention.¹¹³ In arriving at this conclusion, Judge Clement focused on the way in which Article II(3) of the convention speaks directly to the courts of a state party, rather than to the state party itself.¹¹⁴

Because Judge Clement explicitly considered the issue of self-execution in her concurrence, she was forced to consider *dicta* from the U.S. Supreme Court suggesting that the New York Convention is non-self-executing.¹¹⁵ Judge Clement overcame that obstacle by concluding that the Supreme Court was referring to Article III, rather than Article II, of the convention.¹¹⁶ While this approach may make some sense given the language of the convention, commentators have noted the incongruity of giving different effects to different parts of a single legal instrument.¹¹⁷

Safety National also included a dissenting opinion that took the view that the New York Convention was a non-self-executing treaty and therefore had no place in the national legal order.¹¹⁸ In reaching this conclusion, the dissent suggested that only the implementing legislation (i.e., Chapter 2 of the FAA) had preemptive effect.¹¹⁹ Because Chapter 2 constitutes an “Act of Congress,” the dissent concluded that Chapter 2 could be reverse preempted by the McCarran-Ferguson Act.¹²⁰ However, this approach failed to convince the rest of the judges on the panel.

112. See *Safety Nat'l*, 587 F.3d at 732 (Clement, C.J., concurring in the judgment); *id.* at 737 (Elrod, J., dissenting).

113. See New York Convention, *supra* note 43, art. II; *Safety Nat'l*, 587 F.3d at 733-34 (Clement, C.J., concurring the judgment); see also *ESAB Group*, 685 F.3d at 387.

114. See *Safety Nat'l*, 587 F.3d at 736-37 (Clement, C.J., concurring in the judgment).

115. See New York Convention, *supra* note 43; *Medellin v. Texas*, 552 U.S. 491, 521-22 (2009); *Safety Nat'l*, 587 F.3d at 736-37 (Clement, C.J., concurring in the judgment).

116. See New York Convention, *supra* note 43, arts. II-III; *Medellin*, 552 U.S. at 521-22; *Safety Nat'l*, 587 F.3d at 736-37 (Clement, C.J., concurring in the judgment); see also *ESAB Group*, 685 F.3d at 387. Article III of the New York Convention states:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

New York Convention, *supra* note 43, art. III. Article II(3), on the other hand, indicates that “[t]he court of a Contracting State, when seized of an action in a matter in respect of which have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration . . .” *Id.* art. II(3).

117. See RUTLEDGE, *supra* note 80, at 108 (discussing Chapter 1 of the FAA).

118. See New York Convention, *supra* note 43; *Safety Nat'l*, 587 F.3d at 748 (Elrod, C.J., dissenting).

119. *Safety Nat'l*, 587 F.3d at 748 (Elrod, C.J., dissenting); see also New York Convention, *supra* note 43; 9 U.S.C. §§ 201-08 (2012); 15 U.S.C. § 1012(b) (2012).

120. *Safety Nat'l*, 587 F.3d at 752 (Elrod, C.J., dissenting); see also New York Convention, *supra* note 43; 9 U.S.C. §§ 201-08; 15 U.S.C. § 1012(b).

The final federal appellate court decision in this area of law was handed down in 2012.¹²¹ In *ESAB Group, Inc. v. Zurich Ins. PLC*, the Fourth Circuit joined the Fifth Circuit in concluding that the FAA and New York Convention are not reverse preempted by the McCarran-Ferguson Act.¹²² The two circuit court analyses are in many ways similar, with the Fourth Circuit also deciding the dispute as a matter of statutory rather than constitutional law.¹²³

In *ESAB Group*, the Fourth Circuit took the view that “Supreme Court precedent dictates that McCarran-Ferguson is limited to legislation within the domestic realm,” which eliminates any need to even consider the question of reverse preemption.¹²⁴ This conclusion was based on cases indicating that “courts should be most cautious before interpreting . . . domestic legislation in such a manner as to violate international agreements.”¹²⁵ The Fourth Circuit was further persuaded that a broad reading of McCarran-Ferguson was inappropriate in light of the broad U.S. policy in favor of international arbitration.¹²⁶ Indeed, the court held that, with the adoption of the New York Convention and Chapter 2 of the FAA, “the government has opted . . . to articulate a uniform policy in favor of enforcing agreements to arbitrate internationally, even when ‘a contrary result would be forthcoming in a domestic context.’”¹²⁷ As a result, the Fourth Circuit held that “Congress did not intend for the McCarran-Ferguson Act to permit state law to vitiate international agreements entered by the United States.”¹²⁸

As this brief discussion has shown, the law regarding the relationship between the New York Convention, the FAA and the McCarran-Ferguson Act is largely unsettled.¹²⁹ Overall, the Fifth and Fourth Circuit opinions appear to be more consistent with well-established principles of international and arbitration law than the Second Circuit opinion, which suggests that the McCarran-Ferguson Act will not apply to matters involving international insurance and reinsurance arbitration.¹³⁰ However, there are some additional arguments in favor of reverse preemption that may nevertheless arise in the coming years.¹³¹

121. See *ESAB Group*, 685 F.3d at 390-91.

122. See *id.*

123. See *id.* at 388, 390-91; see also 15 U.S.C. § 1012(b). For example, the Fourth Circuit – like the Fifth Circuit before it – did not decide the issue of whether the New York Convention is self-executing in whole or in part. See *ESAB Group*, 685 F.3d at 385, 387-88; see also *Safety Nat'l*, 587 F.3d at 722-23. Instead, the Fourth Circuit characterized the question of self-execution of the New York Convention as “murky” and gave no real clues as to how it would decide these issues. *ESAB Group*, 685 F.3d at 388; see also New York Convention, *supra* note 43.

124. *ESAB Group*, 685 F.3d at 388.

125. *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995)).

126. See *id.* at 390 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985)).

127. *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 629).

128. *Id.* at 388-9 (relying on *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003)).

129. See New York Convention, *supra* note 43; 9 U.S.C. §§ 1-307; 15 U.S.C. § 1012(b); *ESAB Group*, 685 F.3d at 388-90; *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom. La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, 562 U.S. 827 (2010); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

130. See New York Convention, *supra* note 43; 9 U.S.C. §§ 1-307; 15 U.S.C. § 1012(b); *ESAB Group*, 685 F.3d at 388-90; *Safety Nat'l*, 587 F.3d at 714; *Stephens*, 66 F.3d at 41.

131. There are also additional arguments in favor of the non-applicability of the McCarran-Ferguson Act. See 15 U.S.C. § 1012(b). For example, some insurance law experts have suggested other possible arguments, including those alleging that the McCarran-Ferguson Act did not affect Congressional powers under anything other than the Commerce Clause. See *id.*; Raymond A. Guenter, *Rediscovering*

One such argument might claim that insurance disputes do not fall within the scope of the New York Convention, based on the longstanding practice of distinguishing insurance disputes from other types of commercial matters¹³² and the fact that the United States entered a declaration under the New York Convention limiting the treaty to “commercial” matters.¹³³ Although this argument may appear persuasive on some levels, it is unlikely to prevail given the extremely broad way that the term “commercial” has been defined as a matter of both arbitration and constitutional law.¹³⁴ Furthermore, the mere fact that an arbitration agreement or award does not fall within the scope of the New York Convention does not make the agreement or award unenforceable.¹³⁵ Instead, the parties simply rely on longstanding common law methods of enforcing the agreement or award.¹³⁶

This latter mechanism also leads to some potential problems as a result of recent commentary suggesting that foreign arbitral awards not falling under the New York Convention should be considered pursuant to Chapter 1 of the FAA (a move that would result in reverse preemption under the McCarran-Ferguson Act).¹³⁷ However, older and more established authorities take the view that “[f]oreign arbitral awards not falling under the Convention are generally enforceable in the United States in the same manner as foreign judgments”¹³⁸ Since enforcement of foreign judgments is largely governed by state law, the question of reverse preemption under the McCarran-Ferguson Act would not arise.¹³⁹

the McCarran-Ferguson Act’s Commerce Clause Limitation, 6 CONN. INS. L.J. 263, 312 (1999-2000) (suggesting the “preemption provision of Section 2(b) should be applied only to federal commerce clause laws”). This argument would exempt matters involving arbitration pursuant to a treaty, since the treaty-making power is not part of the Commerce Clause. Compare U.S. CONST., art. I, § 8, cl. 3 with *id.* art. I, § 10.

132. The doctrine has a somewhat convoluted history in the United States. See *Paul v. Virginia*, 75 U.S. 168 (1868), *overruled in part by* *United States v. S.-E. Underwriters’ Ass’n*, 322 U.S. 533, 553 (1944), *superseded by statute*, 15 U.S.C. §§ 1011-12; Jeffrey E. Thomas, *Insurance Law Between Business Law and Consumer Law*, 58 AM. J. COMP. L. 353, 353 (2010). Other countries appear to retain this distinction, at least in some regards. See Regulation (EU) 1215/2012, of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), para. 18, 2012 O.J. (L 351) 1 (distinguishing insurance law); Helmut Heiss, *Towards a European Insurance Contract Law: Restatement – Common Frame of Reference – Optional Instrument?*, 7-8 (distinguishing insurance contracts from other types of contracts), http://www.aidahungary.org/wp-content/uploads/2014/02/AIDA2006_11_24_Helmut_Heiss_eloadas.pdf (last visited Oct. 18, 2015).

133. See New York Convention, *supra* note 43, art. I(3); New York Convention Status, *supra* note 45.

134. See Strong, *Treaty*, *supra* note 65, at 536 (noting “the Commerce Clause of the U.S. Constitution . . . is broadly construed as a matter of both constitutional and arbitral law”); see also U.S. Const., art. I, § 8, cl. 3; *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 115-19 (2001). As a result, disputes involving international insurance and reinsurance would likely fall within the scope of the New York Convention. See New York Convention, *supra* note 43.

135. See New York Convention, *supra* note 43.

136. See *Weizmann Inst. of Sci. v. Neschis*, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005) (involving an award made in a country that had not joined the New York Convention).

137. See BORN, *supra* note 10, at 156 (referring to the draft Restatement of the U.S. Law of International Commercial Arbitration); see also New York Convention, *supra* note 43; 9 U.S.C. §§ 1-208 (2012); 15 U.S.C. § 1012(b).

138. *Weizmann Inst.*, 421 F. Supp. 2d at 675 (citing authorities); BORN, *supra* note 10, at 156; STRONG, GUIDE, *supra* note 10, at 30.

139. See 15 U.S.C. § 1012(b); BORN, *supra* note 10, at 163; S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 56 (2014); see also *supra* note 55 and accompanying text (regarding state law on international commercial arbitration).

Another possible argument focuses on Article V(2)(b) of the New York Convention, which allows courts to refuse enforcement of foreign arbitral awards on the grounds of public policy.¹⁴⁰ Given the importance of public policy in insurance law, some parties might claim that the McCarran-Ferguson Act allows individual U.S. states to implement their own individual public policies regarding insurance law, which should include matters with international connections.¹⁴¹ However, this argument is extremely problematic given language from the U.S. Supreme Court indicating that the United States needs to speak with “one voice” regarding matters involving foreign relations¹⁴² and longstanding precedent holding that the public policy exception under the New York Convention is very narrowly drawn and largely dependent on questions of international public policy.¹⁴³

As this brief introduction has shown, questions relating to international insurance and reinsurance arbitration can be quite complicated. Furthermore, given the importance of the international insurance market to U.S. commercial interests,¹⁴⁴ it appears likely that the Supreme Court will need to address the growing circuit split at some point in the relatively near future.¹⁴⁵ The Court’s efforts in this regard would be significantly aided if there were more high-quality commentary in this field, as Professor Jerry has suggested.¹⁴⁶

IV. INTERNATIONAL INSURANCE AND REINSURANCE ARBITRATION – TENSIONS BETWEEN U.S. AND FOREIGN LAW

As intriguing as conflicts between international and U.S. constitutional law may be, such issues arise relatively infrequently.¹⁴⁷ The more common concern in international insurance and reinsurance arbitration involves the tension between U.S. and foreign law.¹⁴⁸

Conflict of laws questions arise with some frequency in insurance disputes, although most cases focus on the applicability of the laws of different U.S. states

140. See New York Convention, *supra* note 43, art. V(2)(b).

141. See 15 U.S.C. § 1012(b).

142. *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) (stating that “[i]n our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states”); see also *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 379 (4th Cir. 2012) (citing *Pink* in the international insurance context).

143. See STRONG, GUIDE, *supra* note 10, at 84; see also *infra* notes 209-11 and accompanying text (discussing the need to rely on international, not domestic, public policy).

144. See INSURANCE INFORMATION INSTITUTE, THE INSURANCE FACT BOOK 3 (2015) (suggesting that 62% of U.S. insurance premiums were ceded to offshore companies, although that number rises to 92% if the fact that many U.S. reinsurers are owned by foreign companies is taken into account).

145. See Jerry, *supra* note 1, at 279 (regarding the size of the international insurance market); see also *supra* note 89-143 and accompanying text.

146. See Jerry, *supra* note 1, at 279-280.

147. Arbitration can only generate conflicts between international and constitutional law in cases where a party seeks to enforce an international arbitration agreement or award in the United States, and most parties comply voluntarily with such agreements and awards. See New York Convention, *supra* note 43, arts. II-III; BLACKABY ET AL., *supra* note 10, ¶ 11.02; see also *Masters*, *supra* note 17, at *14 (noting that most parties to international insurance disputes used to simply settle their cases).

148. See *Masters*, *supra* note 17, at *5 (noting the need to compare “the different regulatory or national environments” in which an insured operates to understand scope of coverage and related issues).

rather than the laws of different countries.¹⁴⁹ Some distinction can also be made with respect to the type of legal tension that arises in international and domestic matters. For example, in interstate disputes, the conflict is between two different sources of substantive law (since the procedural law is always supplied by the forum),¹⁵⁰ while in international disputes the tension is between substantive and procedural law.

The best way to illustrate these types of concerns is by putting the discussion into context. One excellent example involves arbitration under the Bermuda Form, which is a popular type of excess insurance policy featuring an innovative dispute resolution mechanism that has been widely copied.¹⁵¹

The Bermuda Form was developed in the mid-1980s as a result of the worldwide “‘tort-insurance’ crisis” which saw the number and type of tort claims expanding at such a rate and to such an extent that liability insurance was only “available, if at all, at high premiums and with numerous exclusions.”¹⁵² The crisis generated a number of different national responses, although

the response of the United States was of an entirely different order. A series of cases in the 1980s established that liability policies which covered personal injury property damage occurring during their currency were required to respond on a “continuous” or “triple trigger” basis. The most important of those cases, involving liability for injuries resulting from exposure to asbestos, was *Keene Corp v Insurance Co of North America* 667 F. 2d 1034 (D.C. Cir. 1981), which held that a liability policy in force on any of exposure, injury or manifestation of injury was required to respond, and that each insurer faced joint and several liability. (These rulings are still impacting on the English reinsurance market) It became all but impossible for US manufacturing companies to obtain insurance at affordable rates. This led to an initiative spearheaded by leading brokers, banks and insurers to establish and capitalise two new insurers, Ace and XL, to act as high-level excess-layer insurers. The new companies were located in Bermuda, and policy wordings were developed to ensure that appropriate coverage was provided. Those wordings, . . . have changed over time but . . . have become known as the Bermuda Form.¹⁵³

149. See, e.g., *Allstate Ins. v. Hague*, 449 U.S. 302 (1981) (considering a conflict between Wisconsin and Minnesota law); Main, *supra* note 67, at 600 (suggesting that the case required the U.S. Supreme Court to consider “the principal constitutional underpinnings of conflicts doctrine, namely the Due Process and Full Faith and Credit Clauses”).

150. See S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027, 1030 (2014).

151. See Masters, *supra* note 17, at *14; McLauchlan, *supra* note 12, at *2 (noting that “excess and surplus lines of insurance” cover specialized risks and are generally individually negotiated); see also *supra* note 19 and accompanying text (defining excess liability insurance).

152. Rob Merkin, Book Review, *Liability Insurance in International Arbitration: The Bermuda Form*, 2 J. BUS. L. 161, 161 (2012).

153. *Id.* (citations omitted). The English insurance and reinsurance market is expected to change radically, including with respect to dispute resolution matters, as a result of the English Insurance Act 2015, which comes into effect in August 2016. See Holman Fenwick Willan, DISP. RESOL. BULL., 2-3 (July 2015), available at <http://www.hfw.com/downloads/HFW-Dispute-Resolution-Bulletin-July-2015.pdf>.

As this passage suggests, the Bermuda Form focuses on liability for large-scale, catastrophic loss such as that arising out of mass tort scenarios.¹⁵⁴ The Bermuda Form was in many ways revolutionary¹⁵⁵ and attempts to provide a relatively balanced approach to the interests of policyholders and investors while also avoiding various substantive problems associated with traditional modes of insurance coverage.¹⁵⁶

Although the Bermuda Form has been adapted a number of times over the years, certain core attributes have remained constant.¹⁵⁷ For example, the Bermuda Form operates as a single contract rather than a series of annual contracts, with an “occurrence” under the Form arising upon the first claim from a policyholder.¹⁵⁸

As interesting as these and other substantive features are, the most intriguing point for the purposes of the current discussion involves the way in which the Bermuda Form splits jurisdictional competency over matters of procedural and substantive law.¹⁵⁹ In particular, the Bermuda Form requires the substantive dispute to be decided pursuant to a modified version of New York law, but requires the matter to be heard by arbitration seated in London and governed by the English Arbitration Act 1996.¹⁶⁰ Thus, the arbitration provision found in most the recent iteration of the Bermuda Form (Form XL XS-004) indicates that

[a]ny dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975 and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows¹⁶¹

Form XL XS-004 also states that

This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws:

154. See RICHARD JACOBS ET AL., *LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION: THE BERMUDA FORM 1* (2004); see also DAVID SCOREY ET AL., *THE BERMUDA FORM: INTERPRETATION AND DISPUTE RESOLUTION OF EXCESS LIABILITY INSURANCE* (2011); Thomas Brusstar et al., *Key Issues in Bermuda Form Arbitrations*, AMERICAN BAR ASSOCIATION SECTION OF LITIGATION INSURANCE COVERAGE LITIGATION COMMITTEE (Mar. 5, 2011), http://apps.americanbar.org/litigation/committees/insurance/docs/2011-cle-materials/17-KeyIssuesBermudaArbitration/17a_Key_Issues_In_Bermuda-Form_Arbitrations.pdf.

155. See John Fellas, *International Arbitration Under the Bermuda Form*, 8 DISP. RESOL. INT'L 129, 132 (2014).

156. See JACOBS ET AL., *supra* note 154, at 12-14.

157. See Merkin, *supra* note 152, at 161.

158. See Fellas, *supra* note 155, at 132.

159. See *id.*

160. See Arbitration Act 1996 (Eng.); JACOBS ET AL., *supra* note 154, at 16-17; Fellas, *supra* note 155, at 132.

161. Fellas, *supra* note 155, at 132-33 (quoting article VI.N(1) of Bermuda Form XL XS-004); see also *C v. D*, [2007] EWCA Civ. 1282 [2] (Eng.) (quoting portions of the conditions section of a Bermuda Form policy dealing with arbitration).

- (1) may prohibit payment in respect of punitive damages hereunder;
- (2) pertain to regulation under the New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or
- (3) are inconsistent with any provisions of this Policy;

provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the Insured and the Insurer; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Insurer or reference to the “reasonable expectations” of either thereof or to contra proferentem and without reference to parole or other extrinsic evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Condition N, the internal laws of England and Wales shall apply.¹⁶²

Arbitration and choice of law provisions in other Bermuda Forms feature slightly different language but establish the same basic structure.¹⁶³ Notably, this split between procedural and substantive competence has been adopted in other types of international insurance and reinsurance matters.¹⁶⁴

The developers of the Bermuda Form adopted this type of dual competency for very specific reasons. First, adoption of an even-handed approach to resolution of the substantive dispute was vital to widespread acceptance of the Bermuda Form, and New York law was thought to be relatively neutral as between insurers and policyholders.¹⁶⁵ Second, developers of the Bermuda Form wanted to protect the procedural process from judicial interference as much as possible, and London was known as one of the best jurisdictions for arbitration, even in the 1980s.¹⁶⁶

162. Fellas, *supra* note 155, at 134-35 (quoting article VI.O of Bermuda Form XL XS-004); *see also* C, [2007] EWCA Civ. 1282 at [2] (quoting portions of the conditions section of a Bermuda Form policy dealing with governing law).

163. Fellas, *supra* note 155, at 133. Notably, Form XL XS-004 and similar forms incorporate the Arbitration Act 1996 through language referring to “any statutory modifications or amendments thereto.” *Id.* *See* Arbitration Act 1996 (Eng.); JACOBS ET AL., *supra* note 154, at 30, 272. Some policies indicate that Bermuda is another possible situs for the arbitration. *See* Dolin & Posner, *supra* note 38, at 79.

164. *See* Masters, *supra* note 17, at *14.

165. *See* JACOBS ET AL., *supra* note 154, at 16-17.

166. *See* Jan Paulsson, *Arbitration-Friendliness: Promises of Principle and Realities of Practice*, 23 *ARB. INT’L* 477, 477-78 (2007). Although English courts were not as supportive of international arbi-

Another more pragmatic consideration involved the fact that a significant number of entities involved in the excess insurance market (including, most notably, Lloyd's) were based in London and would benefit from a rule requiring local proceedings.¹⁶⁷

Although this sort of split competency may have been somewhat unusual at the time the Bermuda Form was initially developed, the practice of separating procedural and substantive law has become quite common in international arbitration.¹⁶⁸ Indeed, the principle of party autonomy has developed to the point where parties to international arbitration are free not only to have their substantive disputes governed by a national law different than that of the country where the arbitration is seated, but also to have their substantive disputes governed by general principles of commercial or international law rather than the law of a particular country.¹⁶⁹

Although the Bermuda Form's dispute resolution mechanism is not problematic from a jurisprudential perspective,¹⁷⁰ certain practical issues can arise as a result of the split of jurisdictional competency.¹⁷¹ For example, Bermuda Form arbitrations give rise to a number of conflict of laws concerns, including those relating to:

- the law governing the interpretation of the arbitration agreement (generally accepted to be English law pursuant to the leading decision of *C v. D*),¹⁷²

tration in the 1980s as they are now, the development of arbitration law in England at that time was nevertheless far ahead of that of United States. See BORN, *supra* note 10, at 35-39, 41-50. For example, in the 1980s U.S. courts were still considering whether "manifest disregard" of the law could operate as a means of overturning awards rendered or enforced in the United States. See *id.* at 159.

167. See Dolin & Posner, *supra* note 38, at 70 n.5 (noting that ACE, one of the entities responsible for developing the Bermuda Form, includes a British subsidiary (ACE UK) that was at one time "the largest managing agency at Lloyd's"); see also *ACE Global Markets*, ACE GROUP, <http://www.acegroup.com/uk-en/about-ace-in-the-uk/ace-global-markets.aspx> (last visited Nov. 2, 2015) (noting ACE is currently the managing agency of Syndicate 2488 at Lloyd's); *About Lloyds*, LLOYDS, <https://www.lloyds.com/lloyds> (last visited Nov. 2, 2015) (describing function of Lloyd's).

168. Such mechanisms are more problematic in litigation. See Marta Pertegás & Brooke Adele Marshall, *Party Autonomy and Its Limits: Convergence Through the New Hague Principles on Choice of Law in International Commercial Contracts*, 39 BROOK. J. INT'L L. 975, 995-1002 (2014). Parties in international arbitration may also have a bit more flexibility with respect to the application of mandatory principles of law, although such laws may not be evaded altogether. See *id.*

169. See *id.*

170. See BORN, *supra* note 10, at 473.

171. See JACOBS ET AL., *supra* note 154, at 29-43.

172. See *C v. D*, [2007] EWCA Civ. 1282 [16] (Eng.). The question of which law governs the interpretation of the arbitration agreement is different than the question of which law governs the merits of the dispute or which law controls arbitral procedure. See BORN, *supra* note 10, at 473-74. When seeking to identify the law that governed the interpretation of the arbitration provision in *C v. D* (a Bermuda Form case), the English Court of Appeal

concluded that whilst it was possible to find examples of a situation where the law governing the arbitration agreement was different from the law of the place where the reference was conducted, it would be a rare case in which those two systems of law were not the same. This was because an agreement to arbitrate will normally have a closer and more real connection with the place chosen as the seat of the arbitration than the place of the law governing the underlying contract. However, agreeing with the approach of Cooke J. [below], the Court of Appeal emphasised that these general factors were less important than the indications to be found in the terms of the arbitration agreement itself. The provisions of the arbitration clause identified by Cooke J. as indicat-

- the law governing the internal processes of the arbitration (determined to be English law pursuant to the explicit language of the Bermuda Form, although arbitrators wield a great deal of discretion in matters of procedure);¹⁷³
- the law governing choice of law concerns (generally deemed to be English law);¹⁷⁴
- the law governing the substantive dispute (determined to be modified New York law pursuant to the explicit language of the Bermuda Form, but with some concerns, such as the extent to which the Bermuda Form purports to exclude various regulatory laws and public policies regarding the interpretation of the Bermuda Form);¹⁷⁵
- the law governing the underlying insurance claim (which can involve jurisdictions other than England or New York);¹⁷⁶ and
- the division between procedural law and substantive law, particularly with respect to issues relating to the burden of proof, contract interpretation, various types of estoppel, statutes of limitation, remedies, costs and attorneys' fees, and legal privilege.¹⁷⁷

These types of questions are routine in other types of international commercial arbitration and therefore raise few questions within the international arbitral community.¹⁷⁸ However, parties and practitioners who specialize in domestic insurance do not routinely face these types of issues. This lack of familiarity with standard international procedural and conflict of laws concerns can lead to unwarranted criticism of international insurance and reinsurance arbitration on both a practical and jurisprudential level.¹⁷⁹

ing a desire by the parties for the finality of any award would be rendered meaningless if either party could instigate review proceedings in the court of New York, and this was a strong pointer towards English law being the applicable law. For these reasons, D's contention that the law of New York governed the agreement to arbitrate was again rejected.

David Foster, *C v D: The English Court of Appeal Upholds an Anti-Suit Injunction in Support of Arbitral Proceedings*, 11 INT'L ARB. L. REV. 104, 108 (2008); see also C, [2007] EWCA Civ. at 1282. Notably, the fact that both parties in *C v D* were U.S. corporations did not affect the English Court of Appeal's determination. See *id.*; Hew R. Dundas, *C v D: The USA Conquers England – Or Does It? The Law of the Arbitration Agreement, Challenges to Awards, and Abuse of Process*, 73 ARB. 431, 439 (2007).

173. See BORN, *supra* note 10, at 2123; Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 FORDHAM URB. L.J. 83, 84 (2008) (discussing arbitral discretion in the area of reinsurance arbitration).

174. English choice of law rules may differ than those applicable in the United States. See JACOBS ET AL., *supra* note 154, at 32-33; Masters, *supra* note 17, at *3-4.

175. See JACOBS ET AL., *supra* note 154, at 33-36.

176. See *id.* at 36-37.

177. See *id.* at 43-50, 308-33.

178. See BORN, *supra* note 10, at 472-635.

179. See DiUbaldo, *supra* note 173, at 84; Masters, *supra* note 17, at *4, 15. Arbitration under the Bermuda Form also departs from established insurance law in some substantive regards, although that issue is beyond the scope of the current discussion. See Fellas, *supra* note 155, at 134-35 (noting that

A lack of understanding of the standard norms of international arbitration can also lead to expensive and unnecessary litigation. For example, a dispute arose recently as to which court has proper jurisdiction over matters ancillary to a Bermuda Form arbitration – the court in London, which was where the arbitration was seated, or the court in New York, which was the place of the law governing the substantive dispute.¹⁸⁰ The question was addressed by the English Court of Appeal in the context of an application for an anti-suit injunction seeking to halt the judicial proceedings in New York.¹⁸¹ In its decision, the English Court of Appeal indicated that English courts retain curial jurisdiction over all Bermuda Form arbitrations, stating

that the central point at issue was whether or not, by choosing London as the seat of the arbitration and consequently English law as the law applicable to the conduct of the arbitration, the parties must be taken to have agreed that proceedings to challenge or review the award should be those, and only those, permitted by English law. The Court of Appeal held that the parties must be taken to have agreed this, largely adopting the reasoning of Cooke J. [below].

The whole purpose behind the Bermuda Form, according to the Court, with its dispute resolution procedure providing for English arbitration applying New York's substantive law to issues arising under the policy, was that judicial remedies in respect of the award should be those allowed by the Arbitration Act 1996, and nothing more. If New York judicial remedies were to be imported into this scheme, that would . . . be a recipe for confusion which could not have been intended by the parties. The agreement on the seat of an arbitration was analogous to an exclusive jurisdiction clause, and any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction, or the validity of an interim or final award, should only be made in the courts of the place specified as a seat of the arbitration. C was accordingly entitled to the permanent anti-suit injunction restraining D from initiating proceedings in the US courts.¹⁸²

This determination is consistent with the standard understanding of jurisdictional competence in international commercial arbitration, which gives courts at

questions of privilege may be applied differently in Bermuda Form arbitration, since insurers do not have a duty to defend the policyholder under the Bermuda Form).

180. See JACOBS ET AL., *supra* note 154, at 29.

181. The suit in New York involved a challenge to a partial award for manifest disregard of New York law. See *C v. D*, [2007] EWCA Civ. 1282 (Eng.); see also *C v. D*, [2007] EWHC 1541 [12] – [13] (Comm) (Eng.). The application to the New York court faced a number of difficulties, including (1) the fact that it was a partial, as opposed to a final, award; (2) the fact that it alleged the arbitration was outside the scope of the New York Convention; and (3) the fact that it sought to invoke the concept of “manifest disregard of law,” which has been determined to be largely, if not entirely, inapplicable in matters involving international arbitration. See *id.*; see also STRONG, GUIDE, *supra* note 10, at 62-63 (regarding problems enforcing partial awards); *id.* at 28-29 (regarding the scope of the New York Convention, including in matters arising entirely between U.S. parties); *id.* at 85 (regarding “manifest disregard” in cases involving foreign arbitral awards).

182. Foster, *supra* note 172, at 106; see also *C*, [2007] EWCA Civ. at 1282.

the seat of arbitration the exclusive power to hear certain matters that arise before, during and after the arbitral proceedings.¹⁸³ However, parties to international disputes are becoming increasingly litigious, and *C v. D* may herald a more contentious era in Bermuda Form arbitration.¹⁸⁴

The outcome in *C v. D* does not suggest that the courts of New York or any other U.S. jurisdiction cannot ever be implicated in Bermuda Form disputes.¹⁸⁵ According to well-established principles of international arbitration law, a party who prevails in a Bermuda Form arbitration in London may bring an action in the United States to recognize or enforce the arbitral award.¹⁸⁶ U.S. courts may properly accept jurisdiction over this type of matter, a feature that is important in addressing certain doubts about the propriety of Bermuda Form disputes, since this procedure allows a non-prevailing party to resist enforcement proceedings.¹⁸⁷ Although the party objecting to a Bermuda Form award in a New York court may only do so on a limited number of grounds established as a matter of international law, the states parties to the New York Convention have agreed that this approach is both fair and appropriate.¹⁸⁸

One of the most common criticisms of Bermuda Form arbitration involves the apparent lack of judicial scrutiny of the merits of the award due to the absence of an appellate mechanism.¹⁸⁹ Although the English Arbitration Act 1996 does allow for substantive appeals in certain circumstances, that provision only applies to points of English law, which means that it is inapplicable in Bermuda Form cases, which are governed by foreign (i.e., New York) law.¹⁹⁰ Appeals to English courts are also prohibited as a matter of contract under policies that explicitly waive the right to an appeal under the Arbitration Act 1996.¹⁹¹

183. See STRONG, GUIDE, *supra* note 10, at 33-36 (discussing principle of primary jurisdiction and secondary jurisdiction); see also *C*, [2007] EWCA Civ. 1282 at [17] (analogizing the choice of the arbitral seat as akin to an exclusive jurisdiction provision). The court at the seat also has the exclusive power to annul or set aside the award. See STRONG, GUIDE, *supra* note 10, at 34. However, any court in the world has the ability to recognize or enforce an arbitral award once it has been rendered, even if the award has been annulled or set aside by a court at the seat. See *id.*; see also New York Convention, *supra* note 43, art. V(1)(e).

184. See Masters, *supra* note 17, at *14 (noting that whereas parties to a Bermuda Form dispute used to simply settle their cases, they are now going through with arbitration); S.I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures*, 7 WORLD ARB. & MED. REV. 117, 117 (2013) (noting an increase in litigiousness of international commercial arbitration as a general matter).

185. See *C*, [2007] EWCA Civ. at 1282.

186. Enforcement proceedings in a foreign state are seldom required, since the vast majority of parties comply voluntarily with international awards. See BLACKABY ET AL., *supra* note 10, ¶ 11.02. However, a party may bring enforcement proceedings in any state it wishes. See STRONG, GUIDE, *supra* note 10, at 33.

187. Other jurisdictional requirements must still be met. See STRONG, GUIDE, *supra* note 10, at 35-36.

188. See New York Convention, *supra* note 43, art. V; see also *infra* notes 218-38 and accompanying text. Non-prevailing parties cannot bring an affirmative action to annul an arbitral award in any country other than the arbitral seat. See STRONG, GUIDE, *supra* note 10, at 34.

189. Some commentators claim this approach “disadvantages policyholders who do not engage in these kinds of arbitrations regularly.” Masters, *supra* note 17, at *16. Similar concerns are occasionally raised in other types of international commercial arbitration. See Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL’Y 1109, 1111 (2012).

190. See Arbitration Act 1996 § 69 (Eng.); see also JACOBS ET AL., *supra* note 154, at 15 (noting also that this provision is similar to that developed as a matter of case law under section 1 of the Arbitration Act 1975).

191. See JACOBS ET AL., *supra* note 154, at 15 n.44.

These provisions have effectively precluded the appeal of any Bermuda Form arbitration, which means that there are essentially no judicial decisions relating to the substantive provisions of a standard Bermuda Form policy. Indeed, the only two Bermuda Form cases to have ever reached the English courts are *C v. D*, which addressed choice of law and jurisdictional issues,¹⁹² and *AstraZeneca Insurance Co. v. XL Insurance Co.*, which involved a somewhat unusual policy that was governed by English rather than New York law and that allowed judicial determination of any disputes that arose between the parties.¹⁹³

The lack of judicial scrutiny of Bermuda Form arbitration has met with a mixed reception. For example, some commentators have praised the Bermuda Form process for fostering finality and avoiding the awkwardness of asking an English court to take responsibility for determining and applying New York law.¹⁹⁴ However, other observers have criticized Bermuda Form arbitration as hindering the development of the law¹⁹⁵ and insulating important matters of public policy from public view.¹⁹⁶

In many ways, these criticisms appear off-point.¹⁹⁷ For example, concerns about the development of the law appear to suggest that the absence of judicial consideration of Bermuda Form arbitration precludes the possibility of “uniformity and predictability in interpretation of policies and contracts.”¹⁹⁸ In fact, the history of Bermuda Form arbitration suggests that this type of consistency does in fact exist, largely as a result of the small, close-knit nature of the insurance arbitration world.¹⁹⁹ Furthermore, while arbitral awards do not constitute formal precedent, they are often highly persuasive to other tribunals, particularly on matters of procedural law, and are published far more frequently than non-specialists realize.²⁰⁰ Finally, the continuing use of Bermuda Form arbitration suggests that arbi-

192. See *C v. D*, [2007] EWCA Civ. 1282 (Eng.).

193. See *AstraZeneca Ins. Co., Ltd. v. XL Ins. Co., Ltd.*, [2013] EWCA Civ. 1660 [8] (Eng.). As a result, *AstraZeneca* cannot be considered an arbitration case. See *id.*; see also Masters, *supra* note 17, at *15-16 (discussing the trial court opinion rather than the Court of Appeal decision).

194. See also Dundas, *supra* note 172, at 439 (discussing English treatment of Bermuda Form disputes).

195. See Randall, *supra* note 9, at 262-63; Larry P. Schiffer, *How Court Decisions Can Help Improve Arbitration Clauses in Reinsurance Contracts*, 40 BRIEF 54, 54-61 (2011) (addressing a number of issues that are also relevant to Bermuda Form arbitration).

196. See Jeffery B. Struckhoff, *The Irony of Uberrimae Fidei: Bad Faith Practices in Marine Insurance*, 29 TUL. MAR. L.J. 287, 311-12 (2005). That, of course, was the precise intent of the drafters of the Bermuda Form, who viewed U.S. judges and juries as largely suspect in disputes involving tort insurance. See JACOBS ET AL., *supra* note 154, at 14. Furthermore, commentators who argue that “U.S. courts should refuse to enforce choice of law, forum selection, and London arbitration clauses when they are used to contravene public policy or deprive an insured of a remedy” fail to take into account decades of U.S. Supreme Court precedent providing for party autonomy in the area of international dispute resolution. Struckhoff, *supra*, at 311-12; see also *infra* note 222 and accompanying text.

197. These criticisms are also highly reminiscent of the types of objections that were set aside long ago in other forms of international arbitration. See BORN, *supra* note 10, at 35, 38, 41-42.

198. McLauchlan, *supra* note 12, at *11.

199. See JACOBS ET AL., *supra* note 154, at vii (noting practitioners and arbitrators are drawn from a small cadre of insiders); Merkin, *supra* note 152, at 162; see also Masters, *supra* note 17, at *14 (noting that parties to a Bermuda Form dispute have traditionally settled their cases, which suggests a standard understanding of the relative merits of particular issues).

200. See STRONG, GUIDE, *supra* note 10, at 21-23; Fellas, *supra* note 155, at 134; see also *supra* notes 59-64 and accompanying text.

trators are doing a better job at promoting predictability than judges and juries once did.²⁰¹

Concerns about public policy also fall short, since such comments fail to appreciate the extent to which U.S. courts are capable of addressing matters that are truly relevant to U.S. public policy. According to the “second look doctrine” enunciated by the U.S. Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, courts are entitled to take a “second look” at certain public law claims at the end of the proceedings, when the award is being enforced.²⁰² This principle is based on Article V(2)(b) of the New York Convention, which indicates that judges can consider matters of public policy in any action to enforce or recognize a foreign arbitral award.²⁰³ Although *Mitsubishi* arose in the context of antitrust claims, some people view insurance and reinsurance law as reflecting a number of important public law issues, even in the international realm, and U.S. courts could very well decide that the second look doctrine applies to Bermuda Form and other types of international insurance arbitrations to the same extent it does to international arbitration of antitrust disputes.²⁰⁴

Although courts are expressly allowed to consider public policy when considering the enforcement of a foreign arbitral award, specialists in insurance law would do well to recognize that such arguments seldom prevail in the international realm due to the extremely narrow interpretation of “public policy” in international commercial arbitration.²⁰⁵ For example, courts agree that

[e]ven though the Convention refers clearly to the public policy of the enforcing state, it has been a consistent theme of recognition decisions under Article V(2)(b) to interpret national public policies in a manner that is consistent, insofar as possible, with the objectives of the Convention and the public policies and interests of other Contracting States. This approach has manifested itself in two principal ways: (a) the application of “international” public policies, rather than domestic public policies, under Article V(2)(b), and (b) the exercise of a substantial degree of

201. See JACOBS ET AL., *supra* note 154, at vii-viii.

202. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (“Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”); see also BORN, *supra* note 10, at 3689.

203. See New York Convention, *supra* note 43, art. V(2)(b) (“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”). Matters arising under Article V(2) of the New York Convention can be raised on the application of a party or *sua sponte*. See *id.*; STRONG, GUIDE, *supra* note 10, at 73 (noting that outcome arises because of the absence of language relating to proof being submitted by a party and because of the public nature of the issues at stake).

204. See *Mitsubishi Motors*, 473 U.S. at 638. One interesting counterargument might be based on the allegation that the McCarran-Ferguson Act constitutes a legislative grant of antitrust immunity. See 15 U.S.C. § 1012(b) (2012); Susan Beth Farmer, *Competition and Regulation in the Insurance Sector: Reassessing the McCarran-Ferguson Act*, 89 OR. L. REV. 915, 948 (2011).

205. See BORN, *supra* note 10, at 3689 (noting courts operating under the second look doctrine are highly deferential to arbitral tribunals); STRONG, GUIDE, *supra* note 10, at 84.

restraint and moderation in the application of public policies under Article V(2)(b).²⁰⁶

Thus, U.S. courts have limited application of Article V(2)(b) to “only those circumstances where enforcement would violate our most basic notions of morality and justice.”²⁰⁷ Furthermore, Article V(2)(b) does not permit non-enforcement based on “erroneous legal reasoning or misapplication of law,” two theories that are reminiscent of the highly controversial principle of “manifest disregard of law,” which, if allowed, would effectively permit substantive review of the award.²⁰⁸

At this point, there has been no major U.S. decision relating to the enforcement of an arbitral award involving the Bermuda Form.²⁰⁹ However, it is possible to contemplate certain public policy arguments arising in the future. For example, a party might object to enforcement of a Bermuda Form award based on language indicating that arbitrators are prohibited from considering principles that

pertain to regulation under the New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York.²¹⁰

Although this sort of challenge is in many ways predictable, it will face a number of difficulties. First, the public policy of New York cannot necessarily be considered the public policy of the United States, particularly given the state-centric nature of the policies in question (which explicitly refer only to matters internal to New York).²¹¹ Furthermore, New York public policy likely cannot be considered to rise to the level of an international public policy.

Second, although some Bermuda Form arbitrations may appear to be exclusively between U.S. parties, many of those matters will nevertheless have significant foreign connections.²¹² This type of international nexus can be problematic

206. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004); STRONG, GUIDE, *supra* note 10, at 84.

207. *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009) (citation omitted).

208. *Karaha Bodas Co.*, 364 F.3d at 306; see also *supra* note 181 and accompanying text (regarding *C v. D* and arguments based on manifest disregard of law).

209. See JACOBS ET AL., *supra* note 154, at 15. This phenomenon may largely be the result of the fact that, until recently, most Bermuda Form arbitrations settled. See *Masters*, *supra* note 17, at *14.

210. Fellas, *supra* note 155, at 134-35 (quoting article VI.O of Bermuda Form XL XS-004); see *C v. D*, [2007] EWCA Civ. 1282 [2] (Eng.) (quoting portions of the conditions section of a Bermuda Form policy dealing with governing law). The exclusion of punitive damages in international commercial arbitration is not problematic as a matter of public policy. See BORN, *supra* note 10, at 355; see also *supra* note 162 and accompanying text (noting punitive damages are excluded from Bermuda Form arbitration).

211. See *supra* notes 55, 143 and accompanying text.

212. See *C*, [2007] EWCA Civ. 1282 at [2] (noting that although the named parties were from the United States, “[t]he claimant was the named insured but the definition of the insured included any subsidiary, affiliate or associated company of the claimant as listed in the Schedule to the Policy. That list included 303 companies incorporated outside the United States of America so the policy offered world-wide cover.”).

from a public policy perspective, since U.S. courts are extremely hesitant to give extraterritorial effect to U.S. laws.²¹³

Third, some criticism of Bermuda Form arbitration appears to focus on the need to protect the proper development of New York law.²¹⁴ However, there is no need to correlate the modified form of New York law used in Bermuda Form arbitration with the law applied in New York state courts, since arbitral awards have no formal precedential power and thus cannot be used to inform the development of case law in New York or the United States more generally.²¹⁵ Furthermore, neither U.S. nor New York courts can be in any way “offended” by the way in which arbitrators or foreign courts interpret the Bermuda Form’s modified form of New York law, just as various international bodies such as the International Institute for the Unification of Private Law (UNIDROIT) cannot be offended if an arbitrator or court misapplies general principles of international law such as the UNIDROIT Principles on International Commercial Contracts.²¹⁶

Many of these concerns appear to arise as a result of a misunderstanding about the way in which party autonomy and public policy interact in international arbitration.²¹⁷ As the following section shows, numerous courts, including those in the United States, have protected procedural and substantive freedom in arbitration even in matters that can be seen as affecting public values.

213. See Strong, *Regulatory Litigation*, *supra* note 33, at 915, 917 n.94.

214. See Randall, *supra* note 9, at 262-63; Schiffer, *supra* note 195, at 54-61.

215. See *supra* note 200 and accompanying text. Critics who enunciate concerns about the way in which arbitration precludes the “proper development” of the law tend to ignore the fact that arbitral decisions do not affect judicial standards of interpretation. See *supra* note 200 and accompanying text. However, arbitrators can and often do take other arbitral awards into account in their determinations, which suggests the potential for development of various principles within the arbitral realm, thereby ensuring consistency and predictability as a matter of substance and procedure. See *supra* notes 66, 199 and accompanying text. Internal consistency is particularly likely to arise in fields where practitioners and arbitrators share a common legal background, as is the case with international insurance and reinsurance law. See *supra* notes 199 and accompanying text.

216. See Principles of Commercial Contracts, UNIDROIT, <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>; see also Charles N. Brower & Jeremy K. Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator’s Perspective*, 45 VA. J. INT’L L. 199, 205 (2004) (discussing choice of law in arbitration).

217. The Bermuda Form arbitration has also been subject to several other types of criticism, although those concerns are equally misplaced. For example, some people criticize Bermuda Form arbitration for not being significantly less expensive than litigation. See Masters, *supra* note 17, at *4, *15. However, this criticism not only misses the major rationales supporting arbitration in the international arena, it also fails to appreciate how international disputes differ from domestic disputes. See *supra* notes 41-42 and accompanying text. Commentators adopting this perspective also object to the possibility of “a series of arbitrations . . . to go up the ‘chain’ of insurance companies, with the attendant risk of inconsistent results and increased costs.” Masters, *supra* note 17, at *15. However, this type of “batching” (also known as “occurrence integration”) is expressly required in Bermuda Form arbitration. See JACOBS ET AL., *supra* note 154, at 18-19; Masters, *supra* note 17, at *17. Such problems can also be avoided by consolidating proceedings or engaging in various types of large-scale arbitration. See S.I. STRONG, MASS, CLASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 18, 22, 123-24, 240, 349 (2012) (discussing large-scale arbitration in the insurance context); Mitchell S. King & John E. Matosky, *Considering Consolidation*, 78 DEF. COUNS. J. 70, 71 (2011) (discussing consolidation of insurance and reinsurance arbitration under U.S. law).

V. INTERNATIONAL INSURANCE AND REINSURANCE ARBITRATION –
TENSIONS BETWEEN PARTY AUTONOMY AND PUBLIC POLICY

Although international insurance and reinsurance are not subject to the same level of formal regulation as domestic insurance, critics of international insurance and reinsurance arbitration nevertheless invoke various types of public policy concerns as grounds for challenging the use of arbitration in international insurance disputes.²¹⁸ For example, commentators have suggested that arbitration is used as a means for unscrupulous parties to evade their legal obligations.²¹⁹ These types of concerns are not unique to the insurance industry and have often been raised (and overcome) in other types of international arbitration.²²⁰

Although public policy issues can be raised in international arbitration, the calculus is somewhat different than in the domestic context, as discussed previously.²²¹ Furthermore, the fact that Congress has allowed states to limit arbitration of domestic insurance disputes under the McCarran-Ferguson Act does not necessarily mean that the same result will or should occur in international disputes, since the U.S. Supreme Court and numerous lower courts have all “articulate[d] a uniform policy in favor of enforcing agreements to arbitrate internationally, *even when ‘a contrary result would be forthcoming in a domestic context.’*”²²²

Some experts maintain that this pro-arbitration policy is based on the fact that international commercial arbitration provides “a neutral, speedy and expert dispute resolution process, largely subject to the parties’ control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions.”²²³ However, that rationale focuses on why parties and practitioners might want to engage in international arbitration and does not explain why courts and legislatures are willing to allow parties to exercise an extremely high degree of substantive and procedural autonomy in cross-border business disputes in matters that may affect the public interest.²²⁴

The most popular explanation for why states support of international commercial arbitration is economic in nature.²²⁵ Conventional wisdom suggests that allowing parties to an international transaction to choose the substantive and pro-

218. See McLauchlan, *supra* note 12, at *3; see also Masters, *supra* note 17, at *3 (discussing regulatory regime).

219. See Randall, *supra* note 9, at 257-64; Struckhoff, *supra* note 196, at 311-12

220. See Luca G. Radicati di Brozolo, *Mandatory Rules and International Arbitration*, 23 AM. REV. INT’L ARB. 49, 50-51, 73 (2012) (discussing concerns in international commercial arbitration more generally).

221. See *supra* notes 143, 205 and accompanying text.

222. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (emphasis added); see also 15 U.S.C. §1012(b) (2012); *ESAB Group, Inc. v. Zurich Ins. plc*, 685 F.3d 376, 390 (4th Cir. 2012); STRONG, GUIDE, *supra* note 10, at 37.

223. BORN, *supra* note 10, at 73.

224. Some analysis has been conducted in this regard. See S.I. Strong, *Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 347-50 (2013) [hereinafter Strong, *Discovery*] (discussion public grants of jurisdiction); *id.* at 360-67 (discussing state interest in international commercial arbitration).

225. See Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1345 (2009). Closer examination might reveal some additional justifications, although that analysis is beyond the scope of the current discussion. See Strong, *Discovery*, *supra* note 224, at 347-50, 360-67.

cedural law applicable to their dispute promotes international trade and commerce in a way that would not be possible if national courts retained exclusive jurisdiction over such matters.²²⁶ Although this hypothesis has not been empirically proven, it has also not been effectively challenged,²²⁷ and the numerous benefits associated with robust international trade has led the vast majority of developed and developing countries to grant parties a significant amount of autonomy relating to the resolution of cross-border commercial disputes, even at the cost of certain domestic interests, so as to maximize national economic growth.²²⁸

These sorts of commercial rationales may be particularly persuasive in international insurance and reinsurance arbitration. Not only does the international insurance industry constitute a significant and expanding part of the U.S. and global economy, but international markets are far better at allocating and absorbing the risk of catastrophic risk than domestic markets would be.²²⁹ Furthermore, the economic benefits associated with international insurance arbitration extend not only to governments but also to individual policyholders, since the process of spreading the risk internationally helps protect the viability of the insurer and increases the likelihood of a full pay-out to an individual policyholder in cases of catastrophic loss.²³⁰

Allowing a high degree of procedural and substantive autonomy in international insurance and reinsurance arbitration also makes sense given that the vast majority of participants are sophisticated commercial entities negotiating at arm's length.²³¹ Furthermore, the sums at issue in international insurance disputes tend

226. See BORN, *supra* note 10, at 77; see also Strong, *Discovery*, *supra* note 224, at 347-50, 360-67 (discussing jurisdictional issues in international arbitration).

227. No known study has ever considered whether the autonomy granted in international commercial arbitration results in a net gain or a net cost to countries participating in the international arbitral regime. See S.I. Strong, *International Litigation – Arbitration*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Jürgen George Backhaus ed., 2014) (outlining major law and economics analyses concerning international commercial arbitration). However, there are a number of law and economics analyses relating to the choice of arbitration in the domestic realm. See *id.*; see also Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs From Arbitration Clauses*, 66 *FLA. L. REV.* 1945, 1948 n.15 (2014) (discussing procedural choice from a law and economics perspective). Furthermore, the large number of signatories to the New York Convention (currently 156) and the depth of national legislation on international commercial arbitration demonstrates the extent to which countries support international arbitration as a means of promoting trade. See *New York Convention*, *supra* note 43; *New York Convention Status*, *supra* note 45; Carbonneau, *supra* note 225, at 1345-46.

228. See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 2-20, 26-19 to 26-22 (2003); BLACKABY ET AL., *supra* note 10, at ¶¶ 1.220 to 1.224; Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri"*, 17 *AM. REV. INT'L L.* 155, 178 (2006) (suggesting commercial interests overcome state interests in "subjecting arbitration proceedings to national law").

229. See INSURANCE INFORMATION INSTITUTE, *supra* note 144, at 3 (suggesting that 62% of U.S. insurance premiums were ceded to offshore companies, although that number rises to 92% if the fact that many U.S. reinsurers are owned by foreign companies is taken into account).

230. See Randall, *supra* note 9, at 259-60.

231. See *supra* notes 29, 39 and accompanying text. While some questions have been raised about the propriety of allowing international insurance and reinsurance claims to be heard in a process that is controlled by the parties, particularly those who operate as "repeat players," parties who believe themselves relatively inexperienced in either a negotiation or dispute resolution process can always consult with expert advisors, including counsel. See Masters, *supra* note 17, at *16 (claiming Bermuda Form arbitration injures policyholders); see also Struckhoff, *supra* note 196, at 311-12 (discussing alleged problems of arbitration).

to be significant, running into the millions or billions of dollars.²³² As a result, international insurance arbitration can be easily distinguished from domestic forms of insurance arbitration, where protectionist policies aimed at protecting particularly vulnerable parties in relatively small disputes often justify the limitation of party autonomy.²³³

Given these features, it is not surprising that courts and legislatures around the world have supported party autonomy in international insurance and reinsurance arbitration. As a result, parties are generally free to decide a variety of matters for themselves, including “the disputes to be arbitrated, the parties to the arbitration, the mode of constituting the arbitral tribunal, the selection of the arbitral seat, the language of the arbitration, the arbitral procedures and the choice of the applicable law(s).”²³⁴

This is not to say that party autonomy will prevail over the public interest in all regards. To the contrary, established principles of international arbitration identify when and how party autonomy may be limited to protect the parties, the process or the public interest. These mechanisms typically come into play at the end of the procedure, when parties attempt to enforce an arbitral award.²³⁵ Thus, the second look doctrine protects against attempts to evade the various public policies embedded in various substantive laws²³⁶ while other aspects of the New York Convention preclude efforts to circumvent basic principles of procedural fairness.²³⁷ These devices have proven extremely effective and have led to arbitration’s becoming the preferred means of resolving disputes in a wide variety of cross-border business matters.²³⁸

VI. CONCLUSION

Experts agree that “[t]he topic of international insurance is more important than ever due to the increasing internationalization of business, the cross-border nature of employment, and drastic changes in the types of risks companies face and the types of insurance that mitigate those risks.”²³⁹ However, insurance law

232. The underlying figures can be astronomical. For example, international “[s]porting events like the 2014 World Cup in Brazil generate around \$2 billion in cancellation insurance.” Carolyn Cohn, *World Cup Insurers Face Many Claims, Disputes Over Russia, Qatar*, INS. J. (June 19, 2015), available at <http://www.insurancejournal.com/news/international/2015/06/19/372424.htm>. Similarly, large amounts can arise in other types of insurance disputes. See *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373 (5th Cir. 2006) (involving a claim involving over 2,000 victims of a mustard gas release and determining that the action fell within the scope of the New York Convention).

233. See Randall, *supra* note 9, at 259-60 (discussing small individual claims in the domestic context).

234. BORN, *supra* note 10, at 1257 (footnotes omitted). These and other issues are typically decided at the time the arbitration agreement is drafted. See Labes, *supra* note 14, at 896-902 (containing various suggestions on drafting arbitration agreements relating to insurance disputes).

235. This approach is considered an appropriate balance between the need for a speedy resolution of the dispute and the need to avoid procedural improprieties. See BORN, *supra* note 10, at 3645, 3689.

236. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985); see also *supra* notes 202-04 and accompanying text.

237. See New York Convention, *supra* note 43, art. V; STRONG, GUIDE, *supra* note 10, at 71-85.

238. See BORN, *supra* note 10, at 91-92.

239. Mark R. Goodman, *Navigating Ambiguity: Approaches to Dealing with US Regulation of International Insurance*, in INTERNATIONAL INSURANCE LAW CLIENT STRATEGIES: LEADING LAWYERS ON DEVELOPING PURCHASE STRATEGIES AND OVERCOMING REGULATORY CHALLENGES (2015), available at 2015 WL 831984, *1, *4.

does not exist in a vacuum. As Professor Jerry noted, there are an increasing number of convergences between the substantive law of insurance and the procedural law of arbitration.²⁴⁰ These convergences give rise to a number of actual and potential concerns that must be addressed by commentators so as to improve the resolution of insurance disputes on an individual and systemic level.

Although more research is necessary in all types of insurance dispute resolution, this Response has attempted to demonstrate the particular complexity of international insurance and reinsurance arbitration. As this discussion has shown, the current regime gives rise to a wide variety of tensions, including those between national and international law, foreign and domestic law, and public and private interests. While these tensions can be reconciled in a principled manner, that process requires a sophisticated knowledge of insurance law, international law and arbitration law. As a result, experts in insurance and international arbitration must work together to ensure that dispute resolution processes in this field operate in a fair and efficient manner. The hope is that specialists in both fields will heed Professor Jerry's call to action so as to identify new ideas and new insights into this important area of law.

240. See Jerry, *supra* note 1, at 260.