

2008

Law Triangle: Arbitrating International Reinsurance Disputes

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Recommended Citation

J. L. Murphy, Law Triangle: Arbitrating International Reinsurance Disputes, 41 *Vanderbilt Law Review* 1535 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol41/iss5/7>

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Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law

ABSTRACT

The McCarran-Ferguson Act was enacted to preserve the longstanding prerogative of the States to regulate the insurance industry. States have acted in accordance with this statute to declare arbitration agreements in insurance contracts invalid. However, the Senate has since ratified the New York Convention and appended implementing legislation to the Federal Arbitration Act that obligates domestic courts to recognize arbitration agreements in all international contracts. In an odd convergence of authority, a functional conflict arises between these three bodies of law: the federal law says that state law controls in this area, even over other federal law that might incidentally cover the subject of insurance; the reverse-preemptive state law instructs that arbitration agreements are void in all circumstances; and a later-in-date treaty and corresponding implementing legislation purportedly compel enforcement of the agreement. A resolution of this conflict is required.

In a recent case in the district court for the Northern District of Georgia, a British insurer attempted to enforce an arbitration agreement contained within a reinsurance agreement with a Georgia-based investment company. The reinsurer resisted, invoking the McCarran-Ferguson Act and arguing that Georgia law quite clearly states that arbitration agreements in insurance contracts are void as a matter of public policy. The court held that even though the arbitration agreement would be invalid in a domestic setting, special considerations pertaining to international commercial arrangements counseled that this arbitration agreement should be enforced.

This Note argues that the outcome in Goshawk was the correct one, but expands the doctrinal basis on which courts should rely when faced with this conflict. Courts should invoke any of four doctrines to enforce arbitration agreements in

international reinsurance contracts: (1) pacta sunt servanda and the corresponding obligation to abide by the text of a ratified treaty; (2) the Charming Betsy canon's teaching that domestic law should not be interpreted in a manner that conflicts with international law and obligations; (3) the last-in-time rule, which gives the force of law to the latest expression of the state's will in a certain area; and (4) the Supreme Court's jurisprudence enforcing international arbitration agreements in a host of situations based on notions of international commercial comity, cooperation, and efficiency.

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I. INTRODUCTION

The aim of Congress was clear when it enacted the McCarran-Ferguson Act¹ in 1945: “The business of insurance . . . shall be subject to the laws of the several States.”² This provision arose from a surprising coup by the Supreme Court that usurped the long-standing prerogative of the States to regulate the insurance industry.³ By generally exempting the “business of insurance” from federal regulation, Congress intended to repudiate the Court’s decision and return regulatory control over the insurance business to state capitols.⁴ Despite the overarching federalist nature of the McCarran-Ferguson Act,⁵ Congress deliberately retained the power to regulate the “business of insurance” through legislation that “specifically relates to the business of insurance.”⁶ In other words, federal oversight was to have effect only if specifically enacted to regulate the business of insurance. Ancillary legislation could not indirectly influence the manner in which the States oversaw the business of insurance.⁷

1. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2006)).

2. 15 U.S.C. § 1012(a) (2006).

3. Compare *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (holding that the issuance of insurance policies is not a transaction in interstate commerce, and, thus, not subject to federal regulation), with *United States v. S.E. Underwriters Ass’n*, 322 U.S. 533 (1944) (holding that the insurance business is subject to federal regulation under the Commerce Clause).

4. See Edwin L. Smith, *McCarran-Ferguson: A Perspective of Current Trends and Issues*, 14 FORUM 1032, 1032 (1979) (“The McCarran-Ferguson Act was enacted in 1945 in response to the Supreme Court’s decision in *United States v. South-Eastern Underwriters Ass’n*.”); Charles D. Weller, *The McCarran-Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 598 (“[T]he McCarran Act was passed in reaction to [the *South-Eastern Underwriters*] litigation.”); *id.* (noting that one of the insurance industry’s great successes in passing the McCarran-Ferguson Act was “the preservation of state insurance commissioners’ powers of regulation and taxation”).

5. See Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. REV. 13, 20 (1993) (“The McCarran-Ferguson Act is unusual—perhaps unique—in the extraordinary deference it displays towards state regulation.”); Weller, *supra* note 4, at 598 (“[T]he primary purpose of the McCarran Act was federalist . . . in nature.”).

6. 15 U.S.C. § 1012(b) (2006).

7. See H.R. REP. NO. 79-143 (1945), reprinted in 1945 U.S. CODE CONG. SERV. 670, 672 (stating that one of the purposes of the McCarran-Ferguson Act is that “no act of Congress shall be construed to invalidate, impair, or supersede any State law which regulates . . . the insurance business, unless such act specifically so provides.”) (emphasis added).

In its own path of development, arbitration has emerged as a preferred method of resolving disputes the world over.⁸ Defined as “a device whereby the settlement of a question . . . is entrusted to . . . the arbitrator . . . who derive[s] their powers from a private agreement . . . and who . . . decide[s] the case on the basis of such an agreement,”⁹ arbitration is now the “accepted method for resolving transnational commercial disputes.”¹⁰ However, arbitration has not always enjoyed such prominence. Many judicial and legislative bodies have historically been averse to arbitration.¹¹ This suspicion migrated into American courts on the coattails of British common law.¹² The U.S. Judiciary’s distaste for arbitration and the enforcement of “future dispute” clauses was regularly on display until the latter half of the twentieth century.¹³ Nonetheless, jurists’ thoughts on alternative dispute resolution have progressed since the time of judicial acrimony, and legislation at both the state and federal levels now evinces an attitude of acceptance, if not encouragement, toward the recognition of arbitration as a valid mechanism for dispute resolution.¹⁴

The “drive”¹⁵ toward the apotheosis of arbitration as a method of dispute resolution began with the enactment of the Federal Arbitration Act (FAA) in 1925.¹⁶ Section 3 of the FAA mandates that all federal courts stay any trial or proceeding and refer the dispute to

8. See SIMON ROBERTS & MICHAEL PALMER, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING* 264, 269 (2005).

9. OKEZIE CHUKWUMERIJE, *CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 1–2 (1994) (quoting R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 5 (1985)).

10. ROBERTS & PALMER, *supra* note 8, at 270 (quoting Y. DEZALAY & B. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 311 (1996)); see also Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1281 (2000) (“The use of arbitration to resolve international business disputes has become commonplace. Indeed, most international contracts now contain an arbitration clause, making arbitration . . . the most common form of dispute resolution for these transactions.”)

11. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1049 (1961). For a discussion of the evolution of arbitration, see generally Robert B. von Mehren, *From Vynior’s Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. J. INT’L L. 583, 583–93 (1986).

12. Quigley, *supra* note 11, at 1049.

13. See *id.* (commenting that in 1961, “this hostility remain[ed] the judicial attitude of most of the states”).

14. For a comprehensive listing of relevant state statutes, see Quigley, *supra* note 11, at 1050 n.5.

15. Quigley, *supra* note 11, at 1050.

16. United States Arbitration Act, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 *et seq.* (2006)). Though the original legislation titled the Act the “United States Arbitration Act,” it is commonly referred to as the “Federal Arbitration Act.” See Quigley, *supra* note 11, at 1050.

arbitration when presented with a valid arbitration agreement regarding that issue.¹⁷ The FAA's purpose "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."¹⁸ Moreover, the original text of the legislation indicated a specific congressional intent to enforce arbitration agreements in contracts arising out of interstate and international commerce.¹⁹

The ascent of arbitration was not unique to the United States. Recognizing the trend toward the use of extra-judicial proceedings for the settlement of disputes, countries around the world solidified their commitment to international arbitration as an efficient means of dispute resolution.²⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention)²¹ in 1958 was a bellwether for the acceptance of international dispute resolution. The New York Convention, as it is commonly referenced,

17. § 3, 43 Stat. at 883. The full text of the section reads:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id.

18. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); see also William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 610 (2006) (noting that the Federal Arbitration Act was "focused . . . upon commercial agreements and arrangements and designed to both confront and diminish judicial hostility toward arbitration").

19. See pmb1, 43 Stat. at 883 ("An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of . . . commerce among the States or Territories or with foreign nations.").

20. See, e.g., Gesetz zur Neuregelung des Schiedsverfahrensrechts [Arbitral Proceedings Reform Act], Dec. 22, 1997, BGBl. I at 3224, art. 1, no. 7, § 1032(1) (F.R.G.), translation available at <http://www.dis-arb.de/materialien/schiedsverfahrensrecht98-e.html> ("A court before which an action is brought in a matter which is the subject of an arbitration agreement shall . . . reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."); see also von Mehren, *supra* note 11, at 593 ("Arbitration has become a welcome method of resolving disputes in almost all the legal systems of the world.").

21. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (1958) [hereinafter Convention]. As of October 2008, 142 countries had ratified the Convention. 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 Oct. 27, 2008) [hereinafter Status].

represented international recognition of the importance of arbitration to international commercial comity and codified a necessary framework for consistent dispute resolution for international agreements. The Convention was a logical extension of U.S. arbitration policy, and, after overcoming its initial reticence, the United States affirmed its commitment toward international commercial arbitration by ratifying the Convention in 1970.²² Soon after, implementing legislation brought the provisions of the Convention into the full force of law.²³

Today, insurance disputes are increasingly resolved through the use of binding arbitration.²⁴ Arbitration is generally recognized as providing significant advantages over traditional litigation, including privacy, finality, cost reduction, and speed.²⁵ Parties are able to preserve the privacy of their circumstances through the use of a private adjudicator and forum—whereas courts rarely deny public access to proceedings.²⁶ Most arbitration decisions are final, and the

22. See H.R. REP. NO. 91-1181, at 1 (1970), as reprinted in 1970 U.S.C.C.A.N. 3601, 3601.

23. See Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified as amended at 9 U.S.C. §§ 201–208 (2006)).

24. See Robert M. Magino & Anne M. Flynn, *Alternative Dispute Resolution: A Reinsurance Perspective*, in RESOLVING REINSURANCE DISPUTES: CONTRACTS, ARBITRATION, LITIGATION 73, 76 (Tort & Insur. Practice Sec., Am. Bar Ass'n ed., 1989) (“Voluntary, ad hoc arbitration is the type [of alternative dispute resolution] most commonly utilized by reinsurers . . .”); Vincent J. Vitkowsky, *Whither Reinsurance?: A Guide to International Reinsurance Litigation*, in RESOLVING REINSURANCE DISPUTES: CONTRACTS, ARBITRATION, LITIGATION, *supra*, at 147, 150–51 (“[M]ost reinsurance disputes have been, and continue to be, arbitrated.”).

25. ROBERTS & PALMER, *supra* note 8, at 268; see Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly-Held Companies*, 56 DEPAUL L. REV. 335, 340 (2007) (“Notwithstanding these skeptical views [about the advantages of arbitration], the bulk of authority seems to agree that arbitration is a more efficient dispute resolution process than litigation.”). It should be noted that whether arbitration *actually* provides these advantages is the subject of great debate, but not an issue for discussion in this Note. See, e.g., ROBERTS & PALMER, *supra* note 8, at 268 (“[I]n well-developed systems of arbitration this ideology may have little to do with reality. Costs can escalate quickly . . . A ‘queue’ may well develop.”); John Nonna, *Reinsurance Arbitration: Boon or Bust?*, in RESOLVING REINSURANCE DISPUTES: CONTRACTS, ARBITRATION, LITIGATION, *supra* note 24, at 177, 179–80 (noting that critics recognize certain downfalls of arbitration: “lengthy delays in selection . . . ; a tendency by arbitrators to compromise rather than reach a reasoned decision based upon legal principles . . . ; satellite legislation . . . ; and the lack of opportunity for discovery”). For an extensive overview of the relative advantages and disadvantages of arbitration as compared to public courts and citation to voluminous literature on the subject, see Eisenberg & Miller, *supra*, at 336–41.

26. ROBERTS & PALMER, *supra* note 8, at 268. See generally MARTIN DOMKE, COMMERCIAL ARBITRATION 10–11 (1965); George T. Yates III, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 224, 231–32 (1984).

majority of arbitration agreements do not provide for an appeal.²⁷ Cost reduction is achieved through simplified procedures—particularly those where representation by attorneys is not necessary.²⁸ Finally, the parties to arbitration do not have to be worked into a court's busy docket; they may proceed to arbitration whenever they are ready.²⁹

Despite the perceived benefits of arbitration, many states have seen fit to curtail its use in various contexts because of public policy concerns.³⁰ Such was the decision of Georgia when it exempted “[a]ny contract of insurance” from a general statutory mandate to enforce valid arbitration agreements.³¹ The implication of this provision was recently contested in the federal district court for the Northern District of Georgia when a party invoked the Georgia statute to preclude the court from issuing an order compelling arbitration in *Goshawk Dedicated Lmt'd. v. Portsmouth Settlement Co. I*.³² Goshawk, a British insurer, brought suit seeking an order compelling arbitration pursuant to a provision in its reinsurance contract with Portsmouth, a Georgia-based investment company.³³ Goshawk contended that the Convention and its implementing legislation “control the parties’ agreement and require [the] enforcement [of the arbitration agreement].”³⁴ Portsmouth responded that any arbitration agreement was unenforceable because, under the McCarran–Ferguson Act, Georgia Code § 9-9-2(c)(3) reverse-preempts any federal legislation which incidentally regulates the business of insurance, including the Convention, its implementing legislation, and the Federal Arbitration Act.³⁵

The district court found for Goshawk and held that the Convention controlled pursuant to the “policies recognized in the

27. ROBERTS & PALMER, *supra* note 8, at 268.

28. *Id.* See generally DOMKE, *supra* note 26, at 9; Yates, *supra* note 26, at 224, 226–28, 226 n.7.

29. ROBERTS & PALMER, *supra* note 8, at 268. See generally DOMKE, *supra* note 26, at 8; Yates, *supra* note 26, at 228–29.

30. See, e.g., GA. CODE ANN. § 9-9-2(c)(3) (West 2007) (stating that GA. CODE ANN. § 9-9-3, which codifies the enforceability of any agreement to arbitrate, does not apply to “[a]ny contract of insurance”); KY. REV. STAT. ANN. § 304.33-010(6) (West 2007) (“If there is a delinquency proceeding under this subtitle, the provisions of this subtitle shall govern those proceedings, and all conflicting contractual provisions contained in any contract . . . shall be deemed subordinated to the provisions of this subtitle.”).

31. GA. CODE ANN. § 9-9-2(c)(3). Georgia defines insurance as “a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies.” GA. CODE ANN. § 33-1-2(2) (West 2007).

32. 466 F. Supp. 2d 1293, 1297 (N.D. Ga. 2006).

33. *Id.* at 1296.

34. *Id.* at 1301; see 9 U.S.C. §§ 202–208 (2006).

35. *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1301 (N.D. Ga. 2006).

context of international commerce that strongly favor enforcement of arbitration clauses.”³⁶ In so concluding, the court specifically rejected a prior decision of the Second Circuit, which held that the Convention was not self-executing, and, therefore, did not preempt a similar anti-arbitration statute in Kentucky.³⁷ Thus, reasoned the Second Circuit, the implementing legislation of the Convention—as a part of the Federal Arbitration Act—was reverse-preempted pursuant to the McCarran–Ferguson Act.³⁸

The Northern District of Georgia reached these results even though it was clear at the time that “despite the [Federal Arbitration Act’s] strong policy favoring the enforcement of arbitration agreements, arbitration clauses in insurance contracts—at least in the domestic context—are generally unenforceable in Georgia.”³⁹ Both the Court of Appeals for the Eleventh Circuit and the Supreme Court of Georgia concluded that the Georgia anti-arbitration statute was aimed at the “relationship between insurer and insured,”⁴⁰ and thus reverse-preemptive of federal law because “[s]tatutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the ‘business of insurance.’”⁴¹

Despite the generally preemptive effect given to Section 9-9-2 by the McCarran–Ferguson Act and the decisions of the Eleventh Circuit and Supreme Court of Georgia, the *Goshawk* opinion focused on two reasons why the Convention should nonetheless control. As a precursor, the court rejected the postulate that the Convention should apply because the McCarran–Ferguson Act was not intended to apply to international arbitration agreements.⁴² The court then held, first, that “[t]he Convention [s]upersedes the McCarran–Ferguson Act” and, second, that the Convention applies to the agreement because Portsmouth’s “state law defense [of the anti-arbitration clause falls]

36. *Id.* at 1306.

37. *See* *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995).

38. *See id.*

39. *Goshawk*, 466 F. Supp. 2d at 1302; *see* *McKnight v. Chicago Title Ins. Co.*, Inc., 358 F.3d 854, 858–59 (11th Cir. 2004) (concluding that the Federal Arbitration Act does not preempt Georgia’s anti-arbitration statute due to the McCarran–Ferguson Act); *Love v. Money Tree, Inc.*, 614 S.E.2d 47, 49 (Ga. 2005) (holding that the McCarran–Ferguson Act “prohibits the [Federal Arbitration Act] from preempting” Georgia’s anti-arbitration statute).

40. *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 460 (1969); *see McKnight*, 358 F.3d at 858; *Love*, 614 S.E.2d at 479–80.

41. *Nat’l Sec., Inc.*, 393 U.S. at 460.

42. *Goshawk*, 466 F. Supp. 2d at 1302–03; *see In re Arbitration Between West of Eng. Ship Owners Mut. Ins. Ass’n (Luxembourg) & Am. Marine Corp.*, Nos. 91-3645, 91-3798, 1992 WL 37700, at *4–5 (E.D. La. Feb. 18, 1992) (“The McCarran–Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce.”).

outside the scope of the affirmative defenses allowed under the Convention."⁴³

This Note will focus only on the former conclusion: that the Convention does indeed "supersede[]" the McCarran-Ferguson Act and applies due to the "strong international policy it expresses in favor of enforcing commercial arbitration agreements."⁴⁴ The discussion of affirmative defenses allowed under the Convention and their application in U.S. courts is a worthwhile topic, but this Note leaves it open for further debate at another time.

This Note analyzes the friction between a unique federal statute, a widely accepted international treaty, and aggressive state legislation and determines whether the outcome in *Goshawk* was the correct one; namely, whether the Convention should be given deference over state anti-arbitration statutes notwithstanding the federalist mandate of the McCarran-Ferguson Act. Part II presents a complete discussion of the pertinent legislation, including the McCarran-Ferguson Act, the Convention, and the legislation implementing the Convention. Part III briefly discusses the necessary assumption that the arbitration of a reinsurance contract of the sort addressed in *Goshawk* constitutes the business of insurance as envisioned in the McCarran-Ferguson Act. Part IV presents the issue in the context of three traditional doctrines concerned with international law: *pacta sunt servanda*,⁴⁵ the *Charming Betsy* canon,⁴⁶ and the last-in-time rule.⁴⁷ Despite the voluminous commentary regarding each of these doctrines, this Note will succinctly review their basic application in federal courts and, accordingly, present the manner in which they should be applied in the context of a conflict between purportedly reverse-preemptive state statutes and the Convention. Part V assumes that none of these traditional doctrines are available for use and constructs a rubric by which courts can enforce agreements to arbitrate in international reinsurance contracts based solely upon the jurisprudence of the U.S. Supreme Court concerning international commercial arbitration. This Part will also examine the Court's use of international policy and comity to justify the enforcement of these agreements notwithstanding the general proscription against their enforcement in a domestic context. Finally, Part VI concludes the discussion.

43. *Goshawk*, 466 F. Supp. 2d at 1311.

44. *Id.* at 1303 n.8.

45. *See infra* Part IV.A.

46. *See infra* Part IV.B.

47. *See infra* Part IV.C.

II. THE ACT, THE CONVENTION, AND IMPLEMENTING LEGISLATION

A. *The McCarran-Ferguson Act*

In *Paul v. Virginia*,⁴⁸ the U.S. Supreme Court upheld a state scheme regulating foreign insurers and declared that “[i]ssuing a policy of insurance is not a transaction of commerce,” thereby obviating any claim that regulation of the insurance industry was the exclusive domain of the federal government.⁴⁹ For seventy-five years, *Paul* was cited for the proposition that regulation of the business of insurance was to be left to the states.⁵⁰ Indeed, state regulation of the insurance industry was the norm during that span. Later Supreme Court decisions confirmed *Paul* and the general practice of local regulation.⁵¹ It was widely acknowledged during this interval that the federal government “had no authority over the insurance industry under the commerce clause.”⁵²

Paul's pronouncement was the prevailing standard until the Court decided *U.S. v. South-Eastern Underwriters Association (S.E.U.A.)* in 1944.⁵³ In an opinion that “shocked the industry,”⁵⁴ the Court held both that the insurance industry was subject to federal regulation under the Commerce Clause, and that the Sherman Act applied to insurance transactions because they were “commerce” as contemplated in Article I of the Constitution.⁵⁵ The decision sparked an uproar that resounded through both Congress and state insurance departments. “The decision precipitated widespread controversy and dismay. Chaos was freely predicted.”⁵⁶ There existed a real fear of a

48. 75 U.S. 168 (1868).

49. *Id.* at 183; see U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states . . .”).

50. See Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 553 (1958) (“From 1868 to 1944 it was generally assumed that insurance was not commerce, and was not subject to federal regulation.”); Peter B. Steffen, Note, *After Fabe: Applying the Pireno Definition of “Business of Insurance” in First-Clause McCarran-Ferguson Act Clauses*, 2000 U. CHI. LEGAL F. 447, 447 (“[T]he *Paul* Court likened issuing an insurance policy to agreeing to a personal contract, describing both as distinctly local transactions.”).

51. Joseph B. Beach, *The South-Eastern Underwriters’ Decision and Its Effect*, 1947 WIS. L. REV. 321, 321; see *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 502 (1913).

52. Weller, *supra* note 4, at 589.

53. See *United States v. S.E. Underwriters Ass’n*, 322 U.S. 533 (1944).

54. Linda M. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNS. J. 411, 411 (1981).

55. *S.E. Underwriters Ass’n*, 322 U.S. 533, 552–56 (1944); see Beach, *supra* note 51, at 322 (“The decision is very clear on the point that insurance is commerce and, insofar as transactions which cross state lines are concerned, interstate commerce.”).

56. Weller, *supra* note 4, at 590 (quoting NEW YORK INSURANCE DEPARTMENT REPORT 71 (1969)).

federal takeover of the (previously assumed) state prerogative to regulate the insurance industry.⁵⁷ This concern, however, was not the only problem created by the *S.E.U.A.* decision. Insurance companies around the country refused to pay state-mandated taxes, or paid them under protest, because of the concern that the Court would soon find all state insurance regulation schemes to be unconstitutional.⁵⁸ Driven by the prospect of a brusque and precipitous change in the landscape of insurance regulation and facing mutiny by insurance companies across the country, Congress acted quickly to devise a solution that would restore a long-standing core competency to the States. The response evolved into the McCarran–Ferguson Act.⁵⁹

The McCarran–Ferguson Act represented Congress' swift reaction to the Court's usurpation of States' rights.⁶⁰ Congress, anticipating the judicial about-face from the Court, had begun considering a legislative rejoinder even before the Court handed down the *S.E.U.A.* decision.⁶¹ From the outset, the impetus behind the majority of proposals was the exemption of state insurance regulation from *all* federal interference, including federal antitrust laws.⁶² In 1943, Congress began to hold hearings on various schemes that "would have provided a complete exemption for the insurance industry from the Sherman and Clayton Acts."⁶³

A decisive attitude prevailed in the House, resulting in the passage of the Walter–Hancock Bill in 1944.⁶⁴ The Bill was widely perceived as a much-needed suture for a deep gash in the corpus of states' rights.⁶⁵ However, the Senate decided that this remedy was

57. *Id.* at 591.

58. Richard C. Reier, Case Note, *Debate on State Versus Federal Regulation of Insurance Continues: American General Insurance Co. v. FTC*, 359 F. Supp. 887 (S.D. Tex. 1973), 53 NEB. L. REV. 289, 291 (1974) (citing 91 CONG. REC. 1087 (1945) (remarks of Rep. Hancock)).

59. See Beach, *supra* note 51, at 323.

60. McCarran–Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2006)).

61. See Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 554 (1958) ("Pending decision of [*S.E.U.A.*], there were unsuccessful attempts to exempt insurance from all federal regulation . . .").

62. Specifically mentioned as legislative acts offensive to the purpose of exempting state insurance regulators from federal interference were The Sherman Antitrust Act, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 *et seq.* (2006)), The Clayton Antitrust Act of 1915, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27, 29, 52–53 (2006)), and The Federal Trade Commission Act of 1914, 38 Stat. 717 (1914) (codified at 15 U.S.C. § 41 *et seq.* (2006)). Kimball & Boyce, *supra* note 61, at 555.

63. Weller, *supra* note 4, at 592.

64. *Id.*; see H.R. 3270, 78th Cong. (1944).

65. See H.R. REP. NO. 79-143 (1945), *reprinted in* 1945 U.S. CODE CONG. SERV. 670, 671 ("Your committee believes there is *urgent need* for an immediate expression of

not what the doctor ordered for this Bill, much to the dismay of all who had hoped for a complete abeyance of federal regulation from the field of insurance—it was quickly rejected by the Senate.⁶⁶ The rejection ended the hope of a full exemption bill, and subsequent efforts to enact such legislation failed.⁶⁷ Despite their eventual downfall, these efforts reflect the true visage of insurance regulation reform at the time. Recognizing the impact of the Walter–Hancock Bill and other like-minded reforms is important for understanding the congressional backdrop and intent when a viable solution was ultimately devised and passed.

The proposal that eventually became the McCarran–Ferguson Act originated from the National Association of Insurance Commissioners.⁶⁸ Known as the Commissioner’s Bill, its essential principles and language were eventually adopted as the McCarran–Ferguson Act.⁶⁹ The commissioners declared that they were particularly interested in “preserving state regulation of insurance, not in eliminating the applicability of federal antitrust laws.”⁷⁰ The influence of the state insurance commissioners can be seen throughout the legislative history of the McCarran–Ferguson Act.

McCarran–Ferguson was promulgated to “restore the supremacy of the States in the realm of insurance regulation.”⁷¹ The House Committee on the Judiciary stated that the purpose of the Act was to “declare that the continued regulation . . . by the several States of the business of insurance is in the public interest.”⁷² The only direct federal control to be retained by Congress was the prohibition against antitrust measures inherent in the Sherman and Clayton Acts.⁷³ However, even those provisions were suspended for a short time to allow for state antitrust regulation of insurance entities.⁷⁴

policy by the Congress with respect to the continued regulation of the business of insurance by the respective States.”) (emphasis added).

66. Weller, *supra* note 4, at 592 (citing 90 CONG. REC. 8054 (1944)).

67. *See id.* at 592.

68. *Id.* at 593.

69. *Id.*

70. *Id.*; see *Interim Report of the Subcommittee on Federal Legislation of the Executive Committee of the National Association of Insurance Commissioners*, 1945 NAT’L ASS’N. INS. COMM’RS PROC. 156, 159–60 (“The decision of the United States Supreme Court in the South-Eastern Underwriters case confronted Congress, the State Legislatures and the Insurance Commissioners with a problem—the task of preserving state regulation and at the same time not emasculating the federal anti-trust laws.”).

71. U.S. Dep’t of Treasury v. Fabe, 508 U.S. 491, 500 (1993).

72. H.R. REP. NO. 79-143 (1945), reprinted in 1945 U.S. CODE CONG. SERV. 670, 672.

73. *See id.* at 672 (“It should be noted that this bill . . . does not repeal the Sherman and Clayton Acts.”).

74. *Id.* at 672 (“The purpose of the bill is . . . to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the States legislatures . . .”).

Given its purpose, and the goal of this Note, one specific provision of the Act merits special scrutiny:

No 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.⁷⁵

Though the intended scope of this provision has sparked much disagreement, the Supreme Court has dictated some guidelines. The Court has been clear that, however expansive the section may seem on its face, it does “*not* seek to insulate state insurance regulation from the reach of all federal law.”⁷⁶ Instead, its primary function is to “protect state regulation . . . against inadvertent federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part.”⁷⁷ While the Act quite clearly applies to instances where the federal government has unintentionally trodden onto state grounds, its application to international commerce is far from settled.⁷⁸ This is particularly true where the United States has ratified a treaty that possibly impinges on the parameters of state law, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

B. *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

A resurgence of international commerce following World War II and the insufficiency of pre-war multilateral agreements⁷⁹ led the

75. 15 U.S.C. § 1012(b) (2006).

76. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996) (emphasis added).

77. *Id.*

78. *Compare In re Arbitration Between West of Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) & Am. Marine Corp.*, Nos. 91-3645, 91-3798, 1992 WL 37700, at *4-5 (E.D. La. Feb. 18, 1992) (“The McCarran-Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce.”), with *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1310 (N.D. Ga. 2006) (rejecting the reasoning of *England Ship Owners*).

79. Both the 1923 Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157, and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302, were concluded on an international scale and were in effect at the time of the New York Conference which resulted in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The United States, however, was not a party to either instrument. Gerald Aksen, *American Arbitration Accession Arrive in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1, 4 (1971).

International Chamber of Commerce (ICC) to ask the United Nations to explore the possibility of a convention concerned with the enforcement of arbitral awards.⁸⁰ The UN obliged the request, and the Economic and Social Council convened an ad hoc committee to review the draft convention submitted by the ICC in 1954.⁸¹ Comments by the committee, member states, and non-governmental organizations led to a decision to convene a conference to draft a final convention.⁸² The original purpose of the conference in New York was to consider only the recognition and enforcement of awards conferred in arbitrations.⁸³ However, the conference decided "to consider, if time permits, other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes."⁸⁴ One of those "other possible measures" was to strengthen the ability of states to enforce arbitration agreements contained in international agreements.

The inclusion of a provision regarding the *enforcement* of arbitration agreements—as compared to the *recognition* of arbitral awards—was a contentious decision at the New York Conference. The original proposal by Sweden for such a provision in the draft convention was rejected.⁸⁵ The intention of the conference was to leave such matters for an additional protocol to the final convention.⁸⁶ However, the proposal was reintroduced and gained majority support on the reasoning that "the purpose of the Convention would be defeated if a court, petitioned to enforce an arbitral award under the Convention, was permitted to refuse to recognize the validity of the arbitration agreement on which the award was based."⁸⁷ Commentators at the time recognized that the inclusion of provisions with the purpose of enforcing arbitration clauses in contracts governed by the Convention was of the utmost importance.⁸⁸ The

80. Quigley, *supra* note 11, at 1059; see also Martin Domke, Note, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT'L L. 414, 414 (1959).

81. *Id.*

82. Domke, *supra* note 80, at 414.

83. *Id.*

84. *Id.*

85. Paolo Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 296 (1959).

86. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 56 (1981).

87. *Id.* (citing United Nations Conference on International Commercial Arbitration, May 20–June 10, 1958, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Sweden, Amendments to the Draft Convention*, U.N. Doc. E/CONF.26/L.8 (May 22, 1958)).

88. James van R. Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAW. 320, 322 (1968).

eventual assimilation of this provision into the final Convention affirmed that Contracting States are indeed bound to recognize an arbitration agreement that falls within the parameters of the Convention in addition to any award conferred by the arbitral body.⁸⁹

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed by twenty-four states by the end of 1958.⁹⁰ Though a party to the New York negotiations, the United States took "little and grudging part" in the conception and formulation of the instrument.⁹¹ In fact, the members of the U.S. delegation to the United Nations recommended against signing the Convention.⁹² They posited four main reasons for this recommendation:

The title Convention on the Recognition and Enforcement of Foreign Arbitral Awards is actually a misnomer, since the Convention covers not only the enforcement of arbitral awards but also the very important matter of giving effect to agreements to arbitrate existing and future disputes. To some extent, the latter aspect of the Convention was an afterthought, a fact that shows up in the problems . . . about the scope and meaning of the provisions on agreements to arbitrate.

Id.

89. *Id.* Albert Jan van den Berg notes that the definition of which arbitration agreements actually fall under the auspices of the Convention is somewhat obtuse. VAN DEN BERG, *supra* note 86, at 56. Article II of the Convention directs the courts of Contracting States to the Convention to refer parties to arbitration when presented with a valid arbitration agreement "in writing" between any two parties. Convention, *supra* note 21, art. II. It seems apparent that any arbitration agreement providing for arbitration in another state than the one in which the court is sitting falls under the Convention. VAN DEN BERG, *supra* note 86, at 57. As for agreements providing for arbitration in the same state as the one in which the court sits, or those where the place of arbitration is not specified, van den Berg suggests that the enforceability of the agreement depend on the internationality of the parties to the agreement and the subject matter of the dispute. *Id.* at 63-69. The United States, however, has one of the most liberal interpretations of agreements which fall under the Convention. *Id.* at 69. The implementing legislation of the Convention codified at 9 U.S.C. § 201 *et seq.*, indicates that even an arbitration agreement between two American parties will fall under the Convention "if it involves a legal relationship which has a relation with one or more foreign States." VAN DEN BERG, *supra* note 86, at 69.

For the purposes of this Note, we will assume, and properly so, that the *Goshawk* arbitration agreement properly fell within the framework of the Convention and, thus, was susceptible to enforcement by an American court.

90. Status, *supra* note 21. Belgium, Costa Rica, El Salvador, Germany, India, Israel, Jordan, the Netherlands, the Philippines, and Poland signed the Convention on June 10, 1958, the day it was opened for signature. *Id.* The remaining states which signed the Convention by the end of the year were Argentina, Belarus, Bulgaria, Ecuador, Finland, France, Luxembourg, Monaco, Pakistan, the Russian Federation (then the United Soviet Socialist Republic), Sri Lanka, Sweden, Switzerland, and Ukraine. *Id.*

91. Hans Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703, 703 (1983).

92. Aksent, *supra* note 79, at 4. As unusual as this refusal to sign the document may seem, Italy played a much more significant role in the drafting of the Convention, yet its representatives also refused to sign the document at the close of the Convention.

First, it was stated that if the Convention was accepted in a manner that would avoid conflicting with state laws, it would offer no meaningful advantages to the United States; second, if accepted in a manner that assured such advantages it would override the arbitration laws of a majority of the states; third, the United States lacked a sufficient domestic legal basis for acceptance of an advanced international convention dealing with this subject matter; and lastly, the Convention embodied principles of arbitration law that would not be desirable for the United States to endorse.⁹³

Though the Convention was signed on June 10, 1958, and took effect on June 7, 1959, it was not originally ratified by the United States.⁹⁴ However, over the next ten years the United States recognized the relative benefits of accession, and President Johnson sent the Convention to the Senate for its advice and consent in the spring of 1968 after an outpouring of popular support.⁹⁵ According to the House Report, the Convention was ratified despite initial trepidation because it would "serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration . . . which can be enforced in both U.S. and foreign courts."⁹⁶ The benefits of the Convention were recognized by not only the U.S. Senate, but also many non-governmental entities. The ratification of the Convention had the support of the American Bar Association, the Association of the Bar of the City of New York, the American Arbitration Association, the Inter-American Commercial Arbitration Commission, the International Chamber of Commerce, the Office and Professional Employees International Union, the Department of State, the Department of Justice, and the Bureau of the Budget.⁹⁷ At the time of ratification, there was "no opposition" to the terms of the Convention.⁹⁸

Article II of the Convention discusses the nature of agreements to arbitrate and the related obligations of states party to the Convention:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in

See Eugenio Minoli, *L'Italie et la Convention de New York pour la Réconnaissance et l'exécution des Sentences Arbitrales Étrangères* [Italy and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards], in INTERNATIONAL ARBITRATION LIBER AMERICUM FOR MARTIN DOMKE 199, 199 (Pieter Sanders ed., 1967).

93. Aksen, *supra* note 79, at 4 (citing United Nations Conference on International Commercial Arbitration, May 20–June 10, 1958, *Official Report of the United States Delegation* 22 (1958)); Quigley, *supra* note 11, at 1074 n.108.

94. H.R. REP. NO. 91-1181, at 1 (1970), as reprinted in 1970 U.S.C.C.A.N. 3601, 3601.

95. *Id.* at 2; Aksen, *supra* note 79, at 6.

96. H.R. REP. NO. 91-1181, at 2.

97. *Id.*

98. *Id.*

respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

....

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁹⁹

It is evident from the language of the treaty that arbitration agreements between “Contracting States” must be enforced unless a court holds the agreement to be “null and void, inoperative or incapable of being performed.”¹⁰⁰ This clause indicates that the enforcement of an arbitration agreement may be refused only if a party can prove that the “arbitration agreement is contrary to the public policy of the country in which it is sought to be enforced.”¹⁰¹

The Supreme Court of the United States has previously addressed the purposes of the Convention and its role in arbitral disputes:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.¹⁰²

Though the Court in that instance refused to place exclusive reliance on the Convention, or even determine whether the Convention in and of itself would require enforcement of the arbitration agreement, the Court nevertheless held that the Convention and its implementing legislation were “strongly persuasive evidence” of a policy supporting the enforcement of arbitral agreements—even in the face of contrary domestic law.¹⁰³

C. *The Implementing Legislation*

When Congress implements a treaty that has garnered the signature of the President and the advice and consent of the Senate through legislation, it is the language of that implementing legislation that controls the treaty’s enforcement in domestic courts,

99. Convention, *supra* note 21, arts. II(1), II(3).

100. *Id.* art. II(3).

101. Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. ON DISP. RES. 365, 371 (1986).

102. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

103. *Id.*

not the original text of the instrument.¹⁰⁴ Absent implementing legislation, treaties are enforceable in domestic courts only if they are found to be “self-executing.”¹⁰⁵ The self-executing determination, however, is complicated and nuanced, and Congress will often bypass any chance of doubt concerning the force of a treaty by enacting implementing legislation.¹⁰⁶

In the case of the Convention, Congress enacted implementing legislation in order to make the provisions of the Convention enforceable in the courts of the United States.¹⁰⁷ The implementing legislation placed the force of law behind the Convention by stating that the Convention “shall be enforced in United States courts” according to the provisions of the implementing legislation.¹⁰⁸ Because the Convention could not have been fully enforced to effectuate its object and purpose without the implementing legislation, exclusive reliance on the language of the Convention is impermissible.¹⁰⁹ Disputes are governed by the implementing legislation insofar as it applies.

Importantly, the implementing legislation states that a court “*may* direct that arbitration be held in accordance with” an agreement falling under the Convention¹¹⁰ and that any award conferred under such an agreement “*shall* [be] confirm[ed] unless [the court] finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention.”¹¹¹ The legislative instruction that domestic courts “*may* direct” arbitration when there exists a valid arbitration agreement represents a slight

104. This is due to the “last-in-time” rule discussed *infra*. See *infra* Part IV.C; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the [C]onstitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . [T]he one last in date will control will control the other.”).

105. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 371 (2006) (“Since early in U.S. history, . . . the Supreme Court has . . . held that, in the absence of implementing legislation, only self-executing treaties are judicially enforceable.”).

106. Compare *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (holding to be self-executing a bilateral treaty between Japan and the U.S. which gave citizens of both countries the ability “generally to do anything incident to or necessary for trade upon the same terms as native citizens” while within the borders of the foreign state), with *United States v. Postal*, 589 F.2d 862, 876–77 (5th Cir. 1979) (holding to be non-self-executing Article 6 of the Convention on the High Seas, a multilateral Convention to which the U.S. was a party). Despite the difficulties of the determination of treaty of self-execution, some trends do emerge: Bilateral treaties tend to be found to be self-executing more often than multilateral conventions, and provisions of a treaty affecting or prescribing specific, individual rights tend to be found to be self-executing more often than those providing for general obligations of the state-party.

107. See Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified as amended at 9 U.S.C. §§ 201–208 (2006)).

108. 9 U.S.C. § 201 (2006).

109. Aksen, *supra* note 79, at 16.

110. 9 U.S.C. § 206 (2006).

111. 9 U.S.C. § 207 (2006).

change from the original text of Article II(1) of the Convention, which is mandatory in its instruction, rather than permissive.¹¹² The House Report confirmed this distinction by indicating that “section 206 is permissive rather than mandatory.”¹¹³ Though the permissive nature of the implementing legislation would seem at first glance to mirror the “null and void” clause of the original Convention¹¹⁴—providing an escape clause where domestic policy renders an arbitration agreement unenforceable—the House Report indicated otherwise:

Section [206] permits a court to direct that arbitration be held at the place provided for in the arbitration agreement. Since there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, section 206 is permissive rather than mandatory.¹¹⁵

Therefore, Section 206 is not a duplicative acknowledgement of the “null and void” clause; rather, it is simply an instruction to domestic courts regarding venue and concerns inherent to the enforcement of the language of the Convention.

Despite the permissive text of Section 206, purely international arbitration agreements, such as the one in *Goshawk*, should be consistently enforced. Foundational interpretive techniques counsel against a permissive reading of the language of Section 206, except in those situations explicitly set forth in the House Report. Congress chose new language for Section 206 not to allow judges discretion in enforcing international arbitration agreements, but to encourage the arbitrability of transnational disputes. Thus, the language and intent of both the Convention and the implementing legislation suggest that purely international arbitration agreements must be enforced by the courts of the United States.

III. ARBITRATION OF A REINSURANCE CONTRACT AS THE “BUSINESS OF INSURANCE”

For the reverse-preemptive effect of the McCarran–Ferguson Act to take hold in a case similar to *Goshawk*, the arbitration of a

112. Article II(1) of the Convention reads as follows: “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen . . .” Convention, *supra* note 21, art. II (1) (emphasis added).

113. Letter from H.G. Torbert, Jr., Acting Assistant Sec’y for Cong. Relations, Dep’t of State, to the Speaker, House of Representatives (Dec. 3, 1969) (requesting the enactment of the implementing legislation for the Convention), *attached to and made a part of* H.R. REP. NO. 91-1181 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 3601, 3604.

114. See Convention, *supra* note 21, art. II(3).

115. H.R. REP. NO. 91-1181, at 2 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 3601, 3603.

reinsurance contract must first constitute the "business of insurance."¹¹⁶

The *Goshawk* court assumed that the arbitration of the reinsurance contract was indeed the business of insurance as contemplated in the McCarran-Ferguson Act based upon two previous decisions of the Georgia Supreme Court and the Court of Appeals for the Eleventh Circuit.¹¹⁷ Nonetheless, the definition of "business of insurance" is so central to the analysis of the implications of the Act that it warrants a brief review.

The first interpretation of the phrase "business of insurance" by any member of the U.S. Supreme Court occurred in Justice Douglas's plurality opinion for the Court in *Securities & Exchange Commission v. Variable Annuity Life Insurance Co. of America*.¹¹⁸ Justice Douglas focused his inquiry on the essential element of insurance—namely, the transfer of risk from the policyholder to the insurer.¹¹⁹ Accordingly, he concluded that any contract or function of an insurance company that was not involved in removing a significant amount of risk from the policyholder or insured entity did not constitute the business of insurance.¹²⁰

The first Supreme Court majority opinion addressing the definition of business of insurance in a non-antitrust setting was *S.E.C. v. National Securities*.¹²¹ There, the Court rejected the contention that the reverse-preemption mechanism of the McCarran-Ferguson Act operates upon a state statute protecting the interests of individuals owning stock in insurance companies.¹²² Instead, the Court concluded that statutes that regulate the business of insurance are those focusing on "the relationship between the insurance company and the policyholder."¹²³ This definition constituted a significant narrowing of the existing definition of "business of

116. See 15 U.S.C. § 1012(b) (2006); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

117. *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1302 (N.D. Ga. 2006) (citing *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854 (11th Cir. 2004); *Love v. Money Tree, Inc.*, 614 S.E.2d 47 (Ga. 2005)).

118. *Sec. & Exch. Comm'n (SEC) v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 71 (1959). A concurring opinion written by Justice Brennan, in which Justice Stewart joined, was necessary for the decision of reversal. See *id.* at 73.

119. *Id.* at 71 ("[W]e conclude that the concept of 'insurance' involves some investment risk-taking on the part of the company. . . . We deal with a more conventional concept of risk-bearing when we speak of 'insurance.'").

120. Robert P. Rothman, Note, *The Definition of "Business of Insurance" under the McCarran-Ferguson Act after Royal Drug*, 80 COLUM. L. REV. 1475, 1480 (1980); see *S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. at 72-73 ("The companies that issue these annuities take the risk of failure. But they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities—an interest that has a ceiling but no floor.").

121. 393 U.S. 453 (1969).

122. *Id.* at 457.

123. *Id.* at 460.

insurance” as it was understood at the time of the *National Securities* decision.¹²⁴

The Supreme Court set out a new definition of the “business of insurance” in non-antitrust settings¹²⁵ in *U.S. Department of the Treasury v. Fabe*.¹²⁶ The majority wrote that “[t]he broad category of laws enacted ‘for the purpose of regulating the business of insurance’ consists of laws that possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance.”¹²⁷ The definition was intended for application only in a non-antitrust context.¹²⁸ The Court had previously set forth a separate test for defining “business of insurance” as it was intended in an antitrust setting in *Union Labor Life Insurance Co. v. Pireno*.¹²⁹ Moreover, lower courts have explicitly acknowledged the dichotomous definitions of the term and that the correct definition depends upon whether it is used in an antitrust or non-antitrust setting.¹³⁰

The *Goshawk* court was correct in concluding that state regulation of arbitration agreements in reinsurance contracts is uniquely concerned with the business of insurance. Laws regulating the arbitration of insurance contracts surely fall within the category of those laws possessing the “end, intention, or aim” of managing the business of insurance.¹³¹

124. Steffen, *supra* note 50, at 454.

125. The latest pronouncement of the Court’s definition of the “business of insurance” in the antitrust context was in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982):

There are three criteria relevant in determining whether a particular practice is part of the “business of insurance” exempted from the antitrust laws by § 2(b) [of the McCarran–Ferguson Act, codified at 15 U.S.C. § 1012(b)]: *first*, whether the practice has the effect of transferring or spreading a policyholder’s risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself

Id. at 120 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)) (emphasis added).

126. *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491 (1993); Steffen, *supra* note 50, at 463.

127. *Fabe*, 508 U.S. at 505.

128. *Id.* at 504 (“Both *Royal Drug* and *Pireno* . . . involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* clause, which is not so narrowly circumscribed.”).

129. *Pireno*, 458 U.S. 119, 129 (1982).

130. *See Pireno v. N.Y. State Chiropractic Ass’n*, 650 F.2d 387, 394 (2d Cir. 1981) (“*Royal Drug* [an antitrust case] sets forth a substantially narrower scope for the ‘business of insurance’ exception than its approving citation of *National Securities* [a non-antitrust case] might suggest.”), *aff’d sub nom Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119; Steffen, *supra* note 50, at 458 n.89 (same).

131. *Fabe*, 508 U.S. at 505.

IV. DOCTRINES REGARDING THE USE AND IMPLEMENTATION OF INTERNATIONAL LAW

Once it has been determined that the state anti-arbitration statutes regulate the business of insurance, the operative conflict with which courts struggle arises. Under the standard operation of the McCarran–Ferguson Act, the state anti-arbitration laws would reverse-preempt any federal regulation incidental to the realm of insurance regulation. Theoretically, this would include the Convention’s implementing legislation. However, the Convention provides an impediment to the normal operation of the preemption mechanism. A treaty on a specific topic occupies a peculiarly supreme position within the hierarchy of controlling law.¹³² Courts must then decide between enforcing the Convention, which makes no specific reference to insurance regulation, or deferring to the state anti-arbitration statute. Additionally, even if the court decides that the McCarran–Ferguson Act supersedes any state regulation due to its status as the supreme law of the land, the plain language of the implementing legislation still does not mandate the enforcement of arbitration agreements. Recall that Section 206 states that courts “may” order arbitration to be held upon finding a valid arbitration agreement.¹³³ Because the implementing legislation controls where a treaty is not self-executing, it seems that judges have only the *option* of enforcing the agreement—an outcome that raises doubt and uncertainty, neither of which benefits international commerce.¹³⁴

If the goal is to ensure the enforcement of the arbitration agreement, two solutions may be found to the problem that this conflict presents. First, under two canons of statutory construction and a basic doctrine of international obligation, courts should interpret the implementing legislation consistently with the Convention in order to implement its object and purpose. The result would be mandatory arbitration when the parties are bound by an otherwise valid arbitration agreement. Under the *pacta sunt servanda* doctrine, the *Charming Betsy* canon, and the last-in-time rule, courts are bound to enforce the implementing legislation of the Convention over any contrary state law that might be preemptive under the McCarran–Ferguson Act.¹³⁵ Moreover, they must enforce

132. U.S. CONST. art. VI, § 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

133. 9 U.S.C. § 206 (2006).

134. See Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT’L L. 647, 647–48 (1999) (“[W]hen public policy demands that certain kinds of contracts not be enforced, it is important that parties know what these restrictions are in advance.”).

135. See *infra* Part IV.A–C.

the implementing legislation in a manner that is consistent with the original language of the Convention.

Second, the U.S. Supreme Court has developed jurisprudence over the last fifty years that speaks specifically to this issue. The Court has manifested its intent to raze any barriers to international commerce, including courts' reluctance to implement valid arbitration agreements. Resting on principles of international economic efficiency and comity, the Court has forcefully stated that relying solely on domestic law for disputes in international commerce is insufficient and impracticable.¹³⁶ Based on these precedents, the Court has expressed a clear preference for interpreting the implementing legislation and state laws in a manner that advances international commercial cooperation. Each solution is examined in turn.¹³⁷

A. *Pacta Sunt Servanda*

One of the most basic principles of international law is embodied in the doctrine of *pacta sunt servanda*.¹³⁸ The doctrine is based on the ancient ideal¹³⁹ of the sanctity of contract, and has been espoused by Hobbes,¹⁴⁰ Aquinas,¹⁴¹ von Martens¹⁴² and others.¹⁴³ The generally accepted terms of this doctrine are codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT):¹⁴⁴ "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹⁴⁵ Moreover, a state "may not

136. See *infra* Part V.

137. See *infra* Parts IV, V. The first solution is examined in the remainder of Part IV, and the second in Part V.

138. See Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180, 180 (1945) ("The norm *pacta sunt servanda*, which has constituted since times immemorial the axiom, postulate and categorical imperative of the science of international law and has very rarely been denied on principle, is undoubtedly a positive norm of generally international law.") (internal quotations and citation omitted).

139. The origins of the doctrine can be traced back to the cultural influences of the Chaldeans, Egyptians and Chinese, and the basic religious doctrine of both Islam and Christianity. See Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 775 (1959).

140. See *id.* at 778 (recalling that Hobbes recognized as a "natural law" the obligation that agreements are to be kept unless the security of the state—*raison d'État*—so required).

141. See *id.* at 176 (noting that Thomas Aquinas demanded on principle that "contracts be performed even with regard to enemies").

142. See *id.* at 779–80 ("[A] valid and binding contract creates, for nations and individuals alike, the complete right to demand from the other party the performance of the contract . . .").

143. See *generally id.* at 776–82.

144. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

145. *Id.* art. 26.

invoke the provisions of its internal law as justification for its failure to perform a treaty."¹⁴⁶ As a corollary to that directive, states are generally bound to interpret treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁴⁷ *Pacta sunt servanda*, and the corresponding respect accorded to obligations arising under international conventions, is "perhaps the most important principle of international law."¹⁴⁸

The United States signed the VCLT less than one year after its drafting;¹⁴⁹ however, as is well known, the United States has not yet ratified the VCLT, though the convention has been awaiting the Senate's advice and consent since 1972.¹⁵⁰ Despite the Senate's non-acquiescence to the VCLT, the positive obligation of *pacta sunt servanda* binds the United States as customary international law and a general principle of international law recognized by nations throughout the world.¹⁵¹

Though its application in domestic courts sparks consternation in commentators,¹⁵² customary international law remains a rule of decision for contests of an international nature.¹⁵³ Customary

146. *Id.* art. 27.

147. *Id.* art. 31.

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321-cmt. a (1987).

149. United Nations Treaty Collection, Vienna Convention on the Law of Treaties Status, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=467&chapter=23&lang=en> (last visited Oct. 27, 2008).

150. *Id.*; see Richard M. Nixon, U.S. President, Letter of Transmittal of the Vienna Convention on the Law of Treaties to the United States Senate (Nov. 22, 1971), reprinted in *United States: Transmittal of Vienna Convention of the Law of Treaties to U.S. Senate*, 11 INT'L LEGAL MATERIALS 234, 234 (1972) [hereinafter Nixon's Letter of Transmittal]. It is clear that signature of the concluding treaty document by the plenipotentiaries of a State participating in the drafting of the treaty is not sufficient to oblige the respective State under the terms of the treaty. Ratification is a "condition *sine qua non* of the validity of treaties." Kunz, *supra* note 138, at 185.

151. See generally Statute of the International Court of Justice arts. 38(1)(b), 38(1)(c), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 (listing "international custom, as evidence of a general practice accepted by law" and "the general principles of law recognized by civilized nations," respectively, as sources of international law). The doctrine of *pacta sunt servanda* is customary international law. Kunz, *supra* note 138, at 180; Wehberg, *supra* note 139, at 782. Customary international law is binding upon U.S. courts as a rule of substantive law. See *infra* notes 153–57 and accompanying text. Therefore, *pacta sunt servanda* is a rule of decision for domestic courts, and binding upon them.

152. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997) ("This critique reveals that the modern position [that customary international law is binding, substantive law] is founded on a variety of questionable assumptions and that it is in tension with fundamental constitutional principles. We conclude that, contrary to conventional wisdom, [customary international law] should not have [supreme status].").

153. BRADLEY & GOLDSMITH, *supra* note 105, at 485; see also The Paquete Habana, 175 U.S. 677, 700 (1900).

international principles have “the force of law . . . from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.”¹⁵⁴ Even critics recognize that courts have almost unanimously endorsed the idea of customary international law as binding and substantive.¹⁵⁵ Therefore, as perhaps the most basic tenet of customary international law, *pacta sunt servanda* deserve a corresponding degree of deference.¹⁵⁶

Moreover, U.S. Executive Branch has already recognized the customary international law implications of the doctrine of *pacta sunt servanda*. In his Letter of Transmittal to the Senate accompanying the Vienna Convention on the Law of Treaties, President Nixon recognized that the VCLT represented the “codification of international” and “treaty law.”¹⁵⁷ The letter also specifically mentioned the doctrine of *pacta sunt servanda* and the VCLT’s “strong reaffirmation of [that] basic principle.”¹⁵⁸ Moreover, the Secretary of State lauded the codification of “the long-standing principle of customary international law that a party may not invoke

International law is part of our law, and must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination. . . . [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations

The Paquete Habana, 175 U.S. at 700; see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 884–85 (2d Cir. 1980) (holding that customary international law is enforceable as federal common law); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984).

“International law is part of our law.” Justice Gray’s much-quoted pronouncement in *The Paquete Habana* was neither new nor controversial when made in 1900, since he was merely restating what had been established principle for the fathers of American jurisprudence and for their British legal ancestors. And Gray’s dictum remains unquestioned today.

Henkin, *supra*, at 1555 (internal citations omitted). Justice John Marshall spoke not of “international law,” but of “the law of nations” when making a similar statement as Justice Gray. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). The term “law of nations” is probably analogous to Justice Grey’s “international law,” both of which would encompass more than what is conceived as “international law” today, arguably including customary international law. Henkin, *supra*, at 1555 n.1.

154. *Lauritzen v. Larsen*, 345 U.S. 571, 581–82 (1953).

155. See, e.g., *Bradley & Goldsmith*, *supra* note 152, at 817 (“[A]lmost every federal court that has considered the modern position has endorsed it. Indeed, several courts have referred to it as ‘settled.’”).

156. See *Kunz*, *supra* note 138, and accompanying text.

157. Nixon’s Letter of Transmittal, *supra* note 150, at 234.

158. *Id.* (emphasis added).

the provisions of its internal law as justification for its failure to perform a treaty.”¹⁵⁹

Therefore, even though the United States has not yet ratified the VCLT, the doctrines of *pacta sunt servanda* and faithful observation of treaties represent customary international law binding upon the United States.¹⁶⁰ Accordingly, under *pacta sunt servanda*, U.S. courts must directly enforce the provisions of the Convention, including those mandating the enforcement of arbitration agreements that fall within the auspices of the Convention. This includes those agreements contained in contracts between citizens of states who are party to the Convention¹⁶¹—the United States and Great Britain among them.¹⁶²

Domestic courts may refuse to enforce arbitration agreements only upon a showing that the agreement would be “null and void”¹⁶³ or contrary to the public policy of the state of one of the parties to the agreement.¹⁶⁴ This public policy exception has been interpreted narrowly,¹⁶⁵ usually requiring the dissolution of an arbitration agreement only where the agreement violates basic notions of “morality and justice.”¹⁶⁶ In *Goshawk*, the arbitration agreement did not fall under either of the exceptions, and the court was, therefore, bound to enforce the arbitration agreement faithfully and in accordance with the terms of the Convention. Moreover, recall that

159. William P. Rogers, U.S. Sec’y of State, Letter of Submittal of the Vienna Convention on the Law of Treaties to the President of the United States (Oct. 18, 1971), reprinted in *United States: Transmittal of Vienna Convention of the Law of Treaties to U.S. Senate*, *supra* note 150, at 235.

160. This Note does not purport to be comprehensive on the topic of *pacta sunt servanda* or the obligations of the United States arising under customary international law. Indeed, volumes have been prepared on the subject. What this Author has intended is a cursory examination of the basic principle of customary international law and its basic application. However, there are those that disagree with the enforceability of customary international law. Moreover, the recognition by the United States of the binding nature of treaty obligations has recently been questioned by the International Court of Justice. See *Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 12 (Mar. 31) (finding that the United States derogated its responsibilities under the Vienna Convention on Consular Relations). See generally Houston A. Stokes, Note, *Broadening Executive Power in the Wake of Avena: An American Interpretation of Pacta Sunt Servanda*, 63 WASH. & LEE L. REV. 1219 (2006) (arguing that though U.S. foreign policy supports the stance of *Avena*, unilateral executive withdrawal from the optional protocol harms the foreign policy interests of the United States).

161. See Convention, *supra* note 21, arts. II(1), II(3) (“The court of a Contracting State . . . shall . . . refer the parties to arbitration . . .”).

162. Status, *supra* note 21 (stating that Great Britain acceded to the Convention on Sept. 24, 1975).

163. Convention, *supra* note 21, art. II(3).

164. *Id.* art. V(2)(b). See generally Cole, *supra* note 101.

165. See *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974) (noting that the purposes of the Convention permitted only a “narrow reading of the public policy defense”).

166. *Fotochrome Inc. v. Copal Co. Ltd.*, 517 F.2d 512, 513 (2d Cir. 1975).

states cannot invoke provisions of internal law as justification for failure to perform a treaty.¹⁶⁷ Therefore, domestic courts may not invoke state law provisions that hinder the performance of the Convention. State anti-arbitration statutes fall squarely into this category. Under a strict interpretation of *pacta sunt servanda*, courts may not ignore the obligations conferred by the Convention by relying on conflicting state anti-arbitration laws.

Some may, however, see this conclusion as inconsistent with the basic principle that implementing legislation controls over the express language of a treaty. This is particularly evident in this case, where adherence to *pacta sunt servanda* would require enforcement of all valid arbitration agreements, but the implementing legislation allows courts discretion in making that judgment. In a case such as this, courts must, at the least, interpret the implementing legislation and domestic law consistently with the intended object and purpose of the Convention.¹⁶⁸ The *travaux préparatoires* reveal that the drafters of the Convention believed that a provision requiring the enforcement of arbitration agreements was of the utmost importance to the successful operation of the treaty.¹⁶⁹ They understood that the original object and purpose of the treaty—the recognition and enforcement of arbitral awards—could be effectuated only if courts enforced the agreements under which the awards would be promulgated. The Convention was thus concluded with a dual purpose—to enforce both awards *and* agreements.¹⁷⁰ Domestic court judgments must reflect this intent, and, therefore, must enforce valid arbitration agreements that they are presented with. Indeed, the Federal Arbitration Act to which the legislation implementing the Convention was appended, states that courts must stay any judicial proceeding “referable to arbitration” when presented with a valid arbitration agreement in writing.¹⁷¹

Despite the preeminence of *pacta sunt servanda*, some courts are hesitant to rely squarely on the doctrine due to its sparse treatment in the context of domestic law by the Supreme Court. As an alternative, courts may base their obligation to enforce arbitral agreements upon two rules of statutory construction devised by the Court: the *Charming Betsy* canon and the last-in-time rule.

167. See VCLT, *supra* note 144, art. 27.

168. *Id.* art. 31; *supra* note 151 and accompanying text.

169. See *supra* Part II.B.

170. Convention, *supra* note 21, arts. I(1), II(1).

171. 9 U.S.C. § 3 (2006).

B. *The Charming Betsy Canon*

The Supreme Court has always interpreted domestic statutes in a manner such that they do not conflict with international law.¹⁷² This canon of statutory construction has been memorialized as the *Charming Betsy* canon.¹⁷³ It is so named from the first invocation of the canon by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*.¹⁷⁴ There, the Court held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁷⁵ Since its inception, the *Charming Betsy* canon “has been reaffirmed” consistently, often without reconsideration.¹⁷⁶ Along with the interpretation ascribed to the *Charming Betsy* case, courts have typically extended the canon by applying the general presumption that “statutes do not apply

172. BRADLEY & GOLDSMITH, *supra* note 105, at 575; see Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 383, 400 n.9 (1987) (“It was expected quite early that statutes should be interpreted so as to be consistent with international law.”).

173. BRADLEY & GOLDSMITH, *supra* note 105, at 576.

174. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The case arose out of the conflict with France at the turn of the 19th century. Congress had passed the Non-Intercourse Act of 1800, which prohibited commerce between U.S. and French citizens. Act of Feb. 27, 1800, 2 Stat. 7. Enforcement of the statute was vested in the U.S. Navy, which was under orders to capture any ship suspected of trading with France. The *Charming Betsy* had sailed from Baltimore under a U.S. flag and U.S. captain to St. Thomas, where it was purchased by Mr. Shattuck. Shattuck was born in the U.S., but had moved to St. Thomas, a Danish territory, when he was very young and had thence become a Danish citizen. While captained by Shattuck, the *Charming Betsy* was captured by the U.S. Navy under suspicion of trading with Guadeloupe, a French dependency, in violation of the Non-Intercourse Act. Shattuck argued that the seizure violated international law because he was a citizen of a neutral country. The Court agreed, and construed the Act as not applying to Shattuck because he was not a U.S. citizen—the result of a contrary construction being that the application of the Act would have violated international laws of neutrality. See *Charming Betsy*, 6 U.S. at 64–67. See generally BRADLEY & GOLDSMITH, *supra* note 105, at 575–80.

175. *Charming Betsy*, 6 U.S. at 118; see also *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). It should be noted that the Court set forth a similar proposition in its little-known decision in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801). There, the Court, also through the pen of Chief Justice Marshall, construed a statute such that it would not violate customary international law. *Id.* at 43 (“[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”); *id.* at 44 (“By this construction the act of Congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.”).

176. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1110 (1990); see, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953). It is also worth noting that the principle, though seemingly unanimously adopted by lower courts, is often subject to criticism and “dismissed easily by some critics as innocuous or meaningless.” Steinhardt, *supra*, at 1110 (footnotes omitted).

extraterritorially, particularly where doing so might conflict with international law.”¹⁷⁷

The canon has been recognized as a method of interpretation of substantive law, not just a jurisdictional limit on federal courts.¹⁷⁸ Moreover, the Court has reinterpreted the canon over time to incorporate both customary international law and U.S. treaties within the collection of substantive international law with which federal statutes should not be construed to conflict.¹⁷⁹ Thus federal law may not be construed incongruously with both the Convention and the customary law obligation to effectuate its object and purpose.

The *Charming Betsy* canon encourages the enforcement of international arbitration agreements in cases such as *Goshawk* for three reasons. First, the canon instructs courts to interpret the McCarran–Ferguson Act in such a manner that it does not violate international law. Because treaties are binding codifications of international law as conceived by the canon, the McCarran–Ferguson Act must be interpreted in a manner that does not contravene the Convention. The simplest method of construction to achieve consistency would be for courts to hold that international arbitration agreements in insurance contracts do not constitute the business of insurance; state statutes applied to these agreements would lack preemptive effect under the McCarran–Ferguson Act.¹⁸⁰ The agreements would then be governed by federal law—namely, the implementing legislation of the Convention—which would encourage their enforcement. However, because the *Goshawk* court, the Eleventh Circuit, and the Supreme Court of Georgia have all previously recognized that arbitration agreements are indeed included within the business of insurance, an alternative solution is required.¹⁸¹

Urging courts to hold that the Convention and its implementing legislation constitute federal legislation with a direct aim of

177. Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 302, 302 n.48 (2004) (“[S]tating that ‘[w]ithout clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law.’” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991))).

178. See Steinhardt, *supra* note 176, at 1161 (“[I]t operates to inform the substantive interpretation of federal statutes.”).

179. *Id.* at 1160–61; accord RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1986) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

180. See 15 U.S.C. § 1012(a) (2006) (“The business of insurance . . . shall be subject to the laws of the several States”); 15 U.S.C. § 1012(b) (2006) (“No 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”).

181. See *supra* notes 40–41 and accompanying text.

regulating the business of insurance, not ancillary legislation with an incidental impact on the field of insurance regulation, provides this alternate solution. Under Section 1012(b) of the McCarran–Ferguson Act, no federal legislation may supersede any state law concerning insurance “*unless* such [legislation] specifically relates to the business of insurance.”¹⁸² Construing the Convention and its implementing legislation to fall within this exculpatory clause would avoid conflict and thrust the implementing legislation to the top of the hierarchy of governing law concerning agreements to arbitrate in international reinsurance contracts.

Once it is established that the Convention and its implementing legislation directly regulate the business of insurance, the courts must interpret the Federal Arbitration Act, including the implementing legislation, in a manner consistent with the obligations set forth in the Convention. This requires courts to interpret the rather ambiguous permissive language in Section 206 in accordance with the affirmative obligation of the Convention to enforce arbitral agreements in international commercial transactions. Though Section 206 states that courts “*may*” enforce arbitration agreements, courts are bound by the *Charming Betsy* canon to interpret this provision as *requiring* the enforcement of arbitration agreements unless they run afoul of the affirmative defenses prescribed by the Convention. While judicial sleight of pen transmuting permissive language into mandatory language may seem counterintuitive, it is a fairly standard practice. Courts regularly interpret the term “*may*” as a mandatory instruction to bring legislation within constitutional bounds or effectuate the overarching object and purpose of the act.¹⁸³

The final instruction of the *Charming Betsy* canon is that courts may not interpret the state anti-arbitration statutes and the McCarran–Ferguson Act to apply extraterritorially where such application would violate principles of international law embodied in the Convention.¹⁸⁴ As mentioned earlier, this canon is most often

182. 15 U.S.C. § 1012(b) (2006).

183. See, e.g., *Citizens & Southern Nat’l Bank v. Bogas*, 434 U.S. 35, 38 (1977) (“The word ‘*may*,’ when used in a statute, usually implies some degree of discretion[, but] [t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.”); *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198–200 (Fla. 2007) (holding that “*may*” implies mandatory action when reading one section of a statute *in pari materia* with related sections to effectuate the purpose of the statute and maintain the constitutionality of the statute as a whole).

184. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 489 (1997) (“It is fairly well accepted that customary international law imposes limits on the authority of nations to regulate extraterritorially.”). For an example of this principle and its application, see Casey Reeder, Note, *Zeroing in on Charming Betsy: How an Antidumping Controversy Threatens to Sink the Schooner*, 36 STETSON L. REV. 255 (2006).

invoked to limit the potential jurisdiction of the courts in applying U.S. federal law extraterritorially.¹⁸⁵ This concept might be applied to prevent American judicial interference with a privately conducted and agreed-upon method of resolution in an international commercial venture. Thus, this application of the canon would require courts to enforce the arbitration agreement according to the intent of the private contracting parties, and not to apply conflicting federal or state legislation extraterritorially to a contract of a truly international nature. Proper application of the *Charming Betsy* canon leads to the conclusion that the McCarran–Ferguson Act cannot preclude the enforcement of valid arbitration agreements which fall within the framework of the New York Convention.

C. Last-in-Time Rule

The Supreme Court has always recognized a distinction between self-executing and non-self-executing treaties, holding that only the former are judicially enforceable absent implementing legislation.¹⁸⁶ Congress eliminated a potentially troubling analytical hurdle in this case when it enacted legislation to implement the Convention in 1970.¹⁸⁷ Therefore, the Convention has the status accorded to treaties under the Constitution as the “supreme law of the land,” subject only to any restrictions imposed by the implementing legislation.¹⁸⁸

Congress has the inherent ability to override treaties by enacting domestic laws.¹⁸⁹ This proposition is in accord with the treatment of federal law as compared to treaties ratified with the advice and consent of the Senate; each is treated on par with the other.¹⁹⁰ Such

185. See *supra* note 177 and accompanying text.

186. BRADLEY & GOLDSMITH, *supra* note 105, at 371; see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

A treaty is . . . not a legislative act. . . . [I]t is carried into execution by the sovereign power of the respective parties to the instrument. . . . [W]hen the terms of the stipulation import a contract, when either of the parties engages 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.

Id.

187. 9 U.S.C. §§ 201–208 (2006); see *supra* Part II.C.

188. U.S. CONST. art. VI, para. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

189. BRADLEY & GOLDSMITH, *supra* note 105, at 385.

190. *Id.*; see *Breard v. Greene*, 523 U.S. 371, 376 (1998) (“We have held that an Act of Congress is on a full parity with a treaty . . .”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing . . . with an act of legislation. Both are declared by that instrument to be the supreme law of the land.”).

equality introduces the question of which body of law should apply if a federal statute and a ratified treaty concerning the same subject are in conflict with each other. It is well settled that, where conflict arises, courts are bound to “construe and give effect to the latest expression of the sovereign will.”¹⁹¹ Therefore, when a statute and treaty conflict, the legal principle that is “last in date”¹⁹² will control and serve as the applicable substantive law.¹⁹³

This rule of decision is commonly known as the “last-in-time” rule and has been upheld and reaffirmed in many contexts.¹⁹⁴ Most commonly, the principle is invoked to support the proposition that Congress has the ability to override treaties through federal law.¹⁹⁵ This congressional prerogative is not subject to doubt. However, only once has the Supreme Court applied the last-in-time rule to hold that a treaty can override an earlier federal statute, and despite its apparent viability, the application of the rule in such a manner has been exceedingly rare in the lower courts.¹⁹⁶

In the context of international reinsurance contracts, the difficult question is whether the Convention conflicts with either the McCarran–Ferguson Act or the state anti-arbitration statute that provides the actual substantive rule of decision. If the controlling law is actually state law, then there would be little doubt as to the superiority of the Convention and its implementing legislation, and the last-in-time rule would not be necessary.¹⁹⁷ But, if the

191. *Whitney*, 124 U.S. at 195; *see also id.* at 194 (“[I]f the two are inconsistent, the one last in date will control the other . . .”).

192. *Id.*

193. *But see* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 326 (2005) (“Thus, despite its acceptance by courts, the last-in-time rule suffers from near unanimous criticism in the academy accompanied by periodic calls for its abandonment.”).

194. *See, e.g.*, Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1012(aa)(1), 102 Stat. 3343, 3531 (1988) (indicating that the last-in-time rule must be applied to all conflicts between tax treaties and the Internal Revenue Code); *Breard*, 523 U.S. at 376–77 (noting alternatively that the Anti-Terrorism and Effective Death Penalty Act, enacted in 1996, would have force over the Vienna Convention on Consular Relations, ratified in 1969, due to the last-in-time rule).

195. BRADLEY & GOLDSMITH, *supra* note 105, at 385; *see, e.g.*, *Breard*, 523 U.S. at 376 (1998) (holding that a subsequently enacted procedural rule serves to obviate *Breard*’s claim of relief based on violations of the Vienna Convention on Consular Relations due to the last-in-time rule); *Chae Chan Ping v. U.S.*, 130 U.S. 581, 600–01 (1889).

196. BRADLEY & GOLDSMITH, *supra* note 105, at 386; *see* *Cook v. U.S.*, 288 U.S. 102, 118–19 (1933) (“The [self-executing] Treaty, being later in date than the act of 1922, superseded, so far as inconsistent with the terms of the act, the authority which has been conferred . . . upon officers of the Coast Guard to board, search, and seize beyond our territorial waters.”).

197. *See* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 (2003) (noting that treaties generally preempt state law, and characterizing that mechanism as “straightforward”); Ku, *supra* note 193, at 334, 334 n.83 (noting that the “subordination of state law to treaties has never been seriously disputed”).

McCarran–Ferguson Act is controlling and determinative, then the important issue is whether the Convention and the Act truly conflict.¹⁹⁸ There can be no preemption of the McCarran–Ferguson Act by the Convention under the last-in-time rule unless the “statute cannot be enforced without antagonizing the treaty.”¹⁹⁹ Under this formulation, the Convention is predominant.

The enforcement of the reverse-preemption mechanism of McCarran–Ferguson “antagoniz[es]” the Convention. The application of the Act creates a functional conflict whereby the McCarran–Ferguson Act and the Convention are irreconcilable. The McCarran–Ferguson Act serves as a vehicle through which state substantive law voiding arbitration agreements emerges as a federal rule of decision when that law regulates the business of insurance. The Convention is quite clear that arbitration agreements must be enforced unless the agreement falls under one of the affirmative defenses provided by the Convention.²⁰⁰ Because the business of insurance does not fall within those defenses, enforcement of the McCarran–Ferguson Act frustrates the operation of the Convention.

In *Goshawk*, Georgia Code § 9-9-2 was propelled to the forefront as law binding upon federal courts through the McCarran–Ferguson Act. Juxtaposition with the Convention reveals an incontrovertible conflict between the two. The anti-arbitration statute—by way of the McCarran–Ferguson Act—seeks to preclude arbitration; the Convention seeks to facilitate it. Therefore, the last-in-time rule would be applied to resolve the conflict between the *McCarran–Ferguson Act* (not the state statute) as the vehicle for substantive law and the Convention. The Convention was ratified in 1970, the McCarran–Ferguson Act in 1945, so the Convention is the expression of congressional will “last in date” and thus should serve as the rule of decision for courts where a conflict presents itself.

Even if the express language of Convention does not control because it is not self-executing, the same interpretation results from the conflict between the implementing legislation and the McCarran–Ferguson Act. When Section 206 is read in a mandatory manner consistent with the *Charming Betsy* canon, the same conflict arises between the mandatory instruction of the implementing legislation

198. The Court has minced no words in making it clear that for a treaty to preempt a federal statute, or vice-versa, there must be a clear conflict between the two provisions. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (recalling that it is a “firm and obviously sound canon of construction” that both statutory and treaty preemption do not exist absent a clear conflict). The principle is based in the generally disfavored act of implicit repeal. See *Johnson v. Browne*, 205 U.S. 309, 321 (1907) (“Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible . . .” (citing *U.S. v. Lee Yen Tai*, 185 U.S. 213 (1902))).

199. *Johnson*, 205 U.S. at 321.

200. Convention, *supra* note 21, arts. II(1), II(3).

and the preemptive mechanism of the Act.²⁰¹ Because the implementing legislation is the last in date of all of the documents considered, it controls vis-à-vis the McCarran-Ferguson Act.²⁰²

Thus, under the last-in-time rule and the practice of treaty preemption, the Convention (or its implementing legislation interpreted consistently with the Convention) should control over the McCarran-Ferguson Act. This conclusion is consistent with the application of *pacta sunt servanda* and the *Charming Betsy* canon.

V. ENFORCEMENT OF ARBITRATION AGREEMENTS FOR THE PURPOSES OF INTERNATIONAL COMMERCIAL COMITY AND COOPERATION

In addition to the support various canons of interpretation provide for the enforcement of international arbitration agreements, the jurisprudence of the U.S. Supreme Court also supports enforcement of an agreement like that in *Goshawk*. Because of the above-described difficulties with invoking international doctrines or applying various canons of statutory interpretation, it may be easier to rely upon the language and precedent of the Court to reach the same conclusion.

Both federal and state court precedent support the application of, and adherence to, functional decisional principles that reinforce overarching commercial public policy goals in the face of contrary state law. *Milliken v. Pratt*, a Massachusetts state court decision from 1878,²⁰³ was the first to recognize the importance of facilitating multi-state and interstate transactions.²⁰⁴ In *Milliken*, the Supreme Judicial Court of Massachusetts applied the substantive law of Maine to “validate a contract which would be otherwise invalid under the

201. Various courts have found that the express language of the Convention controls directly, and that reference to the implementing legislation is unnecessary. See, e.g., *Sedco, Inc. v. Petroleos Mexicanos Mex. Nat'l Oil Co.*, (PEMEX), 767 F.2d 1140, 1145 (5th Cir. 1985) (holding that “the Convention must be enforced according to its terms over all prior inconsistent rules of law”); *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974) (holding that the Convention controls and that it is unnecessary to look to the language of the Federal Arbitration Act). A determination of whether the Convention is self-executing necessarily plays into this discussion and the holdings of these courts, but it is outside of the scope of consideration for this Note. For a discussion of the factors that may play into a court's determination of whether a treaty is self-executing, see generally Leslie Henry, *When Is a Treaty Self-Executing*, 27 MICH. L. REV. 776 (1928–1929); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); and Carlos Manuel Vázquez, *Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

202. The implementing legislation was passed on July 31, 1970. Pub. L. No. 91-368, 84 Stat. 692.

203. *Milliken v. Pratt*, 125 Mass. 374 (1878).

204. *Id.* at 382–83; see also HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 175 (1992).

personal Massachusetts law of one of the parties.”²⁰⁵ One commentator has concluded that this decision can be interpreted as the functional subordination of a state rule for the purpose of “facilitating certainty and predictability in multi-State transactions.”²⁰⁶ This conclusion is important because the Supreme Court has similarly gone to great lengths to subordinate American rules to facilitate certainty and predictability in multi-national transactions.

More recently, the U.S. Supreme Court indicated a similar willingness to acquiesce to general notions of commercial policy in *The Bremen v. Zapata Off-Shore Co.*²⁰⁷ There, the Court vacated a Fifth Circuit decision²⁰⁸ that all forum-selection clauses were unenforceable as contrary to public policy.²⁰⁹ In a decision “inspired by the need of furthering a general policy facilitating international economic relations,”²¹⁰ the Court held that despite the general unenforceability of the forum-selection clause, lower courts should adopt a doctrine whereby “such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”²¹¹ The Court went on to explain the basis for its decision:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.²¹²

The Bremen evinced a judicial predilection for rules of decision that further international commercial comity and cooperation. Thus, the decision helped to develop international law and comity as cognizable

205. *Id.* at 175

206. *Id.*; cf. *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961) (applying Nevada law over California law to further a multi-State policy common to both California and Nevada to protect the expectations of the parties to a multi-State transaction).

207. 407 U.S. 1 (1972); see also GRIGERA NAÓN, *supra* note 204, at 177–78.

208. *Zapata Off-Shore Co. v. M/S Bremen* (In re Unterweser Reederei, GmbH), 428 F.2d 888 (5th Cir. 1970), *rehearing en banc denied* *Zapata Off-Shore Co. v. M/S Bremen* (In the Matter of the Complaint of Unterweser Reederei, GmbH), 446 F.2d 907 (5th Cir. 1971).

209. *The Bremen*, 407 U.S. at 2.

210. GRIGERA NAÓN, *supra* note 204, at 177.

211. *The Bremen*, 407 U.S. at 10.

212. *Id.* at 6.

reasons to uphold and enforce clauses in purely international agreements.

Milliken and *The Bremen* alone provide a sufficient basis on which courts may decide that notions of commercial comity trump domestic laws to the contrary. The U.S. Supreme Court, however, has been much more specific in its acceptance of general principles of international law and comity in the enforcement of international arbitration agreements. On at least three occasions, the Court has relied on principles of international commercial comity and predictability to enforce an international arbitration agreement, even though a similar agreement would have been unenforceable in the domestic context.²¹³

Two years after *The Bremen*, the Court enforced an arbitration agreement in what it termed a "truly international agreement."²¹⁴ Although the lower courts had interpreted the Court's own precedent to preclude the arbitration of conduct purportedly in violation of the Securities Exchange Act of 1934,²¹⁵ the Court distinguished situations where the concerned agreement was international in nature.²¹⁶ In *Scherk v. Alberto-Culver Co.*,²¹⁷ the Court held that an arbitration agreement in a contract between an American company and a German citizen owning business entities incorporated in Germany and Lichtenstein was enforceable, despite the fact that a similar agreement in a domestic context was probably invalid on a public policy basis.²¹⁸ The Court recognized that the enforcement of an agreement to arbitrate was "indispensable . . . in international trade, commerce, and contracting"—in much the same manner as the enforcement of forum-selection clauses in *The Bremen*—due to the necessity of eliminating uncertainties.²¹⁹ The language of the opinion appeared to acquiesce to notions of international comity, subjugate domestic courts to overarching commercial ideals, and recognize that domestic law could not always properly resolve international disputes.²²⁰

213. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537–38 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 517–19 (1974); cf. *Missouri v. Holland*, 252 U.S. 416, 435 (1920) ("[H]ere a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . We are of the opinion that the treaty and statute must be upheld [over a conflicting state statute].").

214. *Scherk*, 417 U.S. at 515 (1974).

215. Securities Exchange Act of 1934, 48 Stat. 881, codified at 15 U.S.C. § 78a et seq. (2006).

216. *Scherk*, 417 U.S. at 515–16.

217. *Id.*

218. *Id.* at 515, 519–21.

219. *Id.* at 518–19.

220. See, e.g., *id.* at 519.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²²¹ the Court again encountered seemingly intransigent precedent inimical to the enforcement of agreements to arbitrate in international contracts.²²² In a prior decision, the Second Circuit had held that conflicts regarding purported violations of American antitrust laws could not be arbitrated because “the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to” disallow the arbitration of rights conferred by antitrust statutes.²²³ The Court went straight to the heart of the issue, granting certiorari on the single question of “whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.”²²⁴

The Court asserted that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”²²⁵ Moreover, it noted that the major concern of Congress when it passed the Federal Arbitration Act was “to enforce private agreements into

The invalidation of [an agreement to arbitrate] in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Id. (internal quotations omitted).

To determine that American standards of fairness must nonetheless govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries.

Id. at 517 (internal citations omitted).

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man’s-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Id. at 516–17 (footnote omitted).

221. 473 U.S. 614 (1985).

222. See *Mitsubishi Motors*, 473 U.S. at 623 (“[T]he Court of Appeals concluded that neither this Court’s decision in *Scherk* nor the Convention required abandonment of that doctrine in the face of an international transaction.”).

223. *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968).

224. *Mitsubishi Motors*, 473 U.S. at 624 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 469 U.S. 916 (1984) (granting writ of certiorari to the U.S. Court of Appeals for the First Circuit)).

225. *Id.* at 626.

which parties had entered, a concern which requires that [the Court] rigorously enforce agreements to arbitrate."²²⁶ The Court again distinguished the instant case as one that concerned international commerce, and refused to follow the doctrine of non-arbitrability in antitrust conflicts relied upon by the Court of Appeals, because it applied uniquely to domestic transactions.²²⁷ Writing for the Court, Justice Blackmun concluded, similarly to the Northern District of Georgia in *Goshawk*, that concerns of an international nature played a major role in the decision:

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.²²⁸

Specifically citing *The Bremen*²²⁹ and *Scherk*,²³⁰ the Court reaffirmed the "strong presumption in favor of enforcement of freely negotiated" contractual provisions.²³¹

Conspicuously missing from the Court's opinion in *Mitsubishi Motors*, however, is a strict reliance on the terms of the Convention. Though the Court offers the Convention as further evidence of a federal policy in favor of the enforcement of arbitration agreements, particularly "in the field of international commerce," it invokes neither the articles of the Convention nor the implementing legislation as federal law to be enforced in domestic courts.²³² While the outcome generally encourages proponents of international arbitration, the analysis must be discouraging to those who extol the provisions of the Convention and its implementing legislation as binding, supreme law.

Mitsubishi Motors stands as a strong indication of Supreme Court sentiment regarding international commercial arbitration because of the nature of the domestic policy concern overridden in that case. Soler, the plaintiff to the original action that resulted in *Mitsubishi Motors*, claimed that the arbitration agreement violated certain antitrust rights conferred by the Sherman Act. The Supreme Court has described the Sherman Act as "the Magna Carta of free enterprise."²³³ It has analogized the protections of economic freedom

226. *Id.* at 625–26 (citing *Dean Witter Reynolds Inc. v. Byrd*, 479 U.S. 213, 221 (1985)).

227. *Id.* at 629.

228. *Id.*

229. *Id.* at 630.

230. *Id.*

231. *Id.* at 630–31.

232. *Id.* at 631.

233. *U.S. v. Topco Assoc.*, 405 U.S. 596, 610 (1972); see Jill A. Pietrowski, Comment, *Enforcing International Commercial Arbitration Agreements Post Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 77 (1986).

provided by the Sherman Act to those protections of fundamental personal freedoms provided by the Bill of Rights.²³⁴ The antitrust principles and rights prescribed by the Sherman Act are undoubtedly some of the most important in the hierarchy of U.S. domestic policy.²³⁵

If the Court sees fit to supersede such staid standards with policy favoring the enforcement of arbitration agreements, then the standards and policies behind legislation granting the states the privilege of regulating the business of insurance can be overcome by similar reasoning. So far, the Supreme Court has not ruled on a single situation in which domestic policy would give rise to sufficient concern to require the voiding of an agreement to arbitrate a truly international contract.²³⁶ Such strong judicial endorsement of contract policy should be followed in and of its own accord.

These cases illustrate that international agreements to arbitrate are enforceable despite public policy concerns that might warrant a contrary decision if the agreement were purely domestic.²³⁷ This conclusion offers great prospective benefit to courts faced with conflicting precedent with regard to public policy concerns and arbitration agreements. Those courts may undertake an analysis of the persuasive Supreme Court precedent in favor of the enforcement of agreements to arbitrate, notwithstanding any proposed domestic obstacles. The subsequent outcome, preferably enforcing the agreement to arbitrate, will be based not only upon general ideals of international comity and international commercial policy, but also on the specific recognition by the Supreme Court of the importance of equilibrium and consistency within the international commercial realm.

VI. CONCLUSION

A national policy favoring the arbitration of international commercial agreements will become increasingly important in the coming years. The President and the Senate of the United States

234. *Topco Assoc.*, 405 U.S. at 610; see Pietrowski, *supra* note 233, at 77.

235. See *Mitsubishi Motors*, 473 U.S. at 634 (1985) (noting the "fundamental importance to American democratic capitalism of the regime of antitrust laws").

236. *But see id.* at 637 n.19 ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.")

237. See Pietrowski, *supra* note 234, at 59-60 ("United States courts have frequently determined . . . that domestic public policy exceptions are inapplicable when the parties' claims are based on an international contract. Courts reason that the arbitration of international claims raises vital concerns of international comity that purely domestic cases do not.")

recognized this trend thirty-eight years ago, and such foresight should not be curtailed. Many federal courts have recognized that the enforcement of international arbitration agreements follows necessarily from the Supreme Court's jurisprudence, and that pattern should not change.²³⁸

Under the doctrine of *pacta sunt servanda*,²³⁹ the *Charming Betsy* canon,²⁴⁰ and the last-in-time rule,²⁴¹ the Convention and its implementing legislation should be enforceable over a state anti-arbitration statute empowered as reverse-preemptive by the McCarran-Ferguson Act. Moreover, proper construction of both the Convention and implementing legislation leads to the conclusion that valid international arbitration agreements falling under the Convention should be enforced. However, even if none of those canons are applied, the purpose underlying the Convention still applies to purely international disputes. This is true even in the face of considerable and significant domestic policy concerns such as antitrust rights. The Supreme Court has held that international comity and policy dictate that private international arbitration agreements must be enforced in order to secure the international commercial order and to encourage international discourse and trade.

This analysis may be unique, but its outcome is not. It has not been rare for lower courts to enforce international arbitration agreements under the Convention notwithstanding an anti-arbitration statute falling under the auspices of the McCarran-Ferguson Act.²⁴² In *Goshawk*, the Northern District of Georgia

238. See *infra* note 242.

239. See *supra* Part IV.A.

240. See *supra* Part IV.B.

241. See *supra* Part IV.C.

242. See, e.g., *Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins., Ltd.*, No. 02-22196-Civ., 2002 WL 32075793 (S.D. Fla. Oct. 31, 2002); *Jantran, Inc. v. Sphere Drake Ins., P.L.C.*, No. Civ.A.2:96CV085-D-B, 1997 WL 88259 (N.D. Miss. Feb. 18, 1997); *Continental Ins. Co. v. Jantran, Inc.*, 906 F. Supp. 362 (E.D. La. 1995); *McDermott Int'l, Inc. v. Underwriters at Lloyd's of London*, Civ. A. No. 91-841, 1992 WL 37695 (E.D. La. Feb. 14, 1992); see also *Assuranceforeningen Skuld (Gjensidig) v. Apollo Ship Chandlers, Inc.*, 847 So. 2d 991 (Fla. Ct. App. 2003). However, in the domestic context, the results of the lower courts are more varied in deciding whether the McCarran-Ferguson Act enables state anti-arbitration statutes to reverse preempt federal law in the insurance context. Compare *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969) (holding that the McCarran-Ferguson Act does not preclude the application of the Federal Arbitration Act because the state arbitration statute was not one regulating the business of insurance, but a method of handling contract disputes generally), *Triton Lines, Inc. v. S.S. Mut. Underwriting Assoc.*, 707 F. Supp. 277 (S.D. Tex. 1989) (holding that the Federal Arbitration Act preempted a state anti-arbitration provision in the insurance code because a disputed claim, and its subsequent resolution, is not the business of insurance), and *Bernstein v. Centaur Ins. Co.*, 606 F. Supp. 98 (S.D.N.Y. 1984) (holding that the Federal Arbitration Act preempted a state policy against arbitrating insurance claims because the state did not have a statute that specifically prohibited arbitration in the insurance industry), with *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854 (11th Cir. 2004) (holding

followed the path trodden by previous pioneers to conclude that the international instrument controls in a conflict between a Convention vital to the successes of international commerce and a federal statute committed to retaining the long-preserved sovereignty of the Several States in an area of regulation that is unmistakably committed to them. The conclusion was the correct one, and future courts faced with the same conflict should take heed of *Goshawk* and *Mitsubishi Motors* in the enforcement of international arbitration agreements under the Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

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that a portion of the Georgia Arbitration code was “law regulating the business of insurance” and thus reverse-preempted the Federal Arbitration Act by way of the McCarran–Ferguson Act), *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931 (10th Cir. 1992), *cert denied* 506 U.S. 1001 (1992) (holding that an arbitration clause in a Kansas reinsurance agreement was unenforceable under a Kansas statute excluding insurance contracts as valid arbitration agreements because the McCarran–Ferguson Act precluded application of the Federal Arbitration Act), *and* *Eden Financial Group, Inc. v. Fidelity Bankers Life Ins. Co.*, 778 F. Supp. 278 (E.D. Va. 1991) (holding that the Federal Arbitration Act does not preempt a state receivership statute concerned with the arbitration of insurance company disputes because the McCarran–Ferguson Act provides that it is the province of the states to regulated the business of insurance).

* J.D. Candidate, Vanderbilt University Law School, May 2009; B.S. University of Florida 2006. The Author would like to thank Professor Ingrid Brunk Wuerth of Vanderbilt University Law School, Professor Melissa Waters of the Washington University School of Law at St. Louis, John H. Fleming, Georgia Hamann, Drew Hughes, and the Editorial Staff of the VANDERBILT JOURNAL OF TRANSNATIONAL LAW for their insightful and invaluable comments and suggestions. This Note is dedicated to Mom, Dad, Lauren, and Patrick, whose undying love and support has made it all possible.
