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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON SCHOOLS RISK
MANAGEMENT POOL,

Plaintiff,

v.

AMERICAN RE-INSURANCE
COMPANY et al.,

Defendants.

Case No. C21-0874-LK

AMENDED REPORT AND
RECOMMENDATION

I. INTRODUCTION

This is an insurance dispute concerning Plaintiff Washington Schools Risk Management Pool's ("WSRMP") entitlement to reinsurance payments from Defendants Sompo International Reinsurance and American Re-Insurance Company. *See* Dkt. 27. Defendant Sompo moves to compel arbitration and dismiss WSRMP's claims pursuant to an arbitration clause in Sompo's reinsurance policy with WSRMP. Dkt. 21; Dkt. 32. WSRMP moves on partial summary judgment for an order holding that the arbitration clause is void, confirming that jurisdiction and venue are proper in this Court, and determining that Washington law governs this lawsuit. Dkt. 14.

1 Enforcement of the arbitration clause turns on the relationship between three sources of
2 law: (1) RCW 48.18.200(1)(b), which bars mandatory arbitration clauses in insurance contracts
3 issued for delivery in Washington and covering subjects in this state; (2) the Convention on the
4 Recognition and Enforcement of Foreign Arbitral Awards, Art. II, Sec. 3 (the “Convention”),
5 which requires U.S. courts to enforce arbitration clauses upon request; and (3) the McCarran-
6 Ferguson Act, 15 U.S.C. §§ 1011–1015, which provides that state insurance law reverse-
7 preempts conflicting federal law. The question is whether the Convention—an international
8 treaty implemented by a congressional statute—is reverse-preempted by RCW 48.18.200(1)(b)
9 under the McCarran-Ferguson Act.

10 For the following reasons, the Court finds that the Convention is not reverse-preempted.
11 Accordingly, Sompō’s Motion to Compel Arbitration and Dismiss WSRMP’s Amended Claims,
12 Dkt. 32, should be GRANTED and WSRMP’s Motion for Partial Summary Judgment Re
13 Arbitration and Choice of Law Provisions in Reinsurance, Dkt. 14, should be DENIED.
14 Sompō’s Motion to Compel Arbitration and Dismiss WSRMP’s Claims, Dkt. 21, should be
15 DENIED as moot.

16 II. BACKGROUND

17 A. The Relevant Reinsurance Policy

18 WSRMP is a Washington interlocal cooperative whose membership includes various
19 public school districts, educational service districts, and other public school interlocal
20 cooperatives in Washington. Dkt. 27 ¶ 1. WSRMP is authorized to jointly self-insure risks;
21 purchase insurance and reinsurance; and contract for risk management, claims, and
22 administrative services for the benefit of itself and its member schools. *Id.* at ¶ 18. At all
23 relevant times, Puyallup School District (the “District”) was a member of WSRMP. *Id.*

1 WSRMP issued a series of coverage agreements to the District, including (of relevance)
2 an agreement for the 2003–2004 coverage year, effective from September 1, 2003 to August 31,
3 2004, and an agreement for the 2004–2005 coverage year, effective from September 1, 2004 to
4 September 1, 2005 (the “Coverage Agreements”). Dkt. 27 ¶ 19. WSRMP then procured
5 reinsurance from Defendants Sompo (the “Sompo Policy”) and American Re-Insurance (the
6 “American Re-Insurance Policy”) covering losses that exceeded its self-insured limit. *Id.* at ¶ 30.

7 The Sompo Policy contained an arbitration clause (the “Arbitration Clause”), which
8 provided, in relevant part:

9 If any dispute should arise between the Reinsured and Reinsurer with reference to
10 the interpretation of this Agreement or their rights with respect to any transaction
11 involved whether such dispute arises before or after termination of this Agreement,
such dispute, upon written request of either party, shall be submitted to three
arbitrators, one to be chosen by each party, and the third by the two so chosen

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13 . . . Said arbitration shall take place in Bermuda unless some other location is
14 mutually agreed on by the parties to this Agreement. It is further agreed that the
State of New York shall be deemed the state of jurisdiction in any matters of
15 interpretation of law or disputes which may arise from such arbitration proceedings.

16 Dkt. 15 at 69–70, 79–80.

17 The Sompo Policy also contained a “choice of law” provision, which provided: “This
18 Agreement shall be governed by and construed according to the laws of the State of New York.”
19 Dkt. 15 at 69, 79. Sompo is a citizen of Bermuda, Dkt. 34 ¶ 2, and it is undisputed that the
20 Sompo Policy was issued for delivery to WSRMP in Washington and covers subjects in this
state.

21 B. The Present Dispute

22 Starting in 2005, the District was sued in three lawsuits, each alleging inappropriate
23 relationships and/or sexual misconduct by a former District teacher (the “Underlying Lawsuits”).

1 Dkt. 27 ¶¶ 8–13. The Underlying Lawsuits all settled, with payment by WSRMP pursuant to the
2 terms of the Coverage Agreements. *Id.* at ¶¶ 15–17, 29.

3 Following settlement, WSRMP provided Somo with documents detailing its settlement
4 payments and asked Somo to reimburse it pursuant to the terms of the Somo Policy. Dkt. 27
5 ¶ 37. Somo disputed coverage and demanded arbitration under the Arbitration Clause. *Id.* at
6 ¶ 38. In response, WSRMP asked Somo and American Re-Insurance to participate in
7 alternative dispute resolution with all three parties to avoid the possibility of inconsistent
8 outcomes. *Id.* at ¶ 39. Somo declined this request. *Id.*

9 On June 21, 2021, WSRMP filed suit against Somo and American Re-Insurance in King
10 County Superior Court, seeking a declaration that Somo and American Re-Insurance were
11 obligated to reimburse WSRMP for the amounts paid by WSRMP in settling the Underlying
12 Lawsuits, and bringing claims against them for breach of contract and injunctive relief. *See* Dkt.
13 1-1. On June 28, 2021, Somo removed the action to this Court. *See* Dkt. 1.

14 Subsequently, on July 15, 2021, WSRMP filed a Motion for Partial Summary Judgment,
15 Dkt. 14, asking the Court to rule as a matter of law that the Arbitration Clause and choice of law
16 provision in the Somo Policy are void and inapplicable to this dispute. On August 18, 2021,
17 after Somo filed a Motion to Compel Arbitration and Dismiss WSRMP’s Claims, Dkt. 21,
18 WSRMP filed an Amended Complaint, Dkt. 27, pleading additional claims for bad faith and for
19 violations of the Washington Consumer Protection Act, Chapter 19.86 RCW (“WCPA”), and
20 Washington’s Insurance Fair Conduct Act, RCW 48.30.015 (“IFCA”). Somo then filed a
21 Motion to Compel Arbitration and Dismiss WSRMP’s Amended Claims. Dkt. 32.
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1 Currently before the Court are (1) WSRMP’s Motion for Partial Summary Judgment,
2 Dkt. 14, (2) Sompo’s Motion to Compel Arbitration and Dismiss WSRMP’s Claims, Dkt. 21,¹
3 and (3) Sompo’s Motion to Compel Arbitration and Dismiss WSRMP’s Amended Claims, Dkt.
4 32.

5 III. DISCUSSION

6 The Court must compel arbitration of WSRMP’s claims against Sompo if (1) the
7 Convention controls, (2) the Arbitration Clause is enforceable under the Convention, and (3)
8 WSRMP’s claims are arbitrable under the Arbitration Clause. If RCW 48.18.200(1)(b) controls,
9 however, then the Arbitration Clause is invalid. Thus, the Court must first determine whether
10 RCW 48.18.200(1)(b) reverse-preempts the Convention by operation of the McCarran-Ferguson
11 Act such that the Convention is inapplicable.

12 A. Whether RCW 48.18.200(1)(b) reverse-preempts the Convention under the
13 McCarran-Ferguson Act

14 In most cases involving arbitration agreements, the enforceability of an arbitration clause
15 is governed by Chapter I of the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (“FAA”), which
16 requires courts to order parties to proceed to arbitration in accordance with the terms of a
17 mandatory arbitration agreement. In 1970, however, the U.S. acceded to the Convention. *See*
18 *Convention Done at New York June 10, 1958*, 21 U.S.T. 2517 (entered into force with respect to
19 the United States Dec. 29, 1970). Thereafter, Congress amended the FAA to implement the
20 Convention in Chapter II. *See* 9 U.S.C. §§ 201–208. The Convention applies to disputes that are
21 related to a foreign state or that involve foreign parties like Sompo. *See* 9 U.S.C. § 202. Article
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23 ¹ WSRMP’s filing of its Amended Complaint, Dkt. 27, and Sompo’s filing of its Motion to
Compel Arbitration and Dismiss WSRMP’s Amended Claims, Dkt. 32, obviated the Court’s need to rule
on Sompo’s Motion to Compel Arbitration and Dismiss WSRMP’s Claims, Dkt. 21. Accordingly, this
Motion, Dkt. 21, should be denied as moot.

1 II, Section 3 the Convention provides that “[t]he court of a Contracting State . . . shall, at the
2 request of one of the parties, refer the parties to arbitration”

3 While the FAA requires enforcement of binding arbitration clauses, RCW
4 48.18.200(1)(b) bars their enforcement in insurance contracts that are issued for delivery in
5 Washington and cover subjects in this state. *See State, Dep’t of Transp. v. James River Ins. Co.*,
6 176 Wn.2d 390, 399–400, 292 P.3d 118 (2013) (interpreting RCW 48.18.200(1)(b)). It provides,
7 in relevant part, that “no insurance contract delivered or issued for delivery in this state and
8 covering subjects located, resident, or to be performed in this state, shall contain any condition,
9 stipulation, or agreement . . . depriving the courts of this state of the jurisdiction of action against
10 the insurer”² The FAA would normally preempt this conflicting state law under the
11 Supremacy Clause; however, the McCarran-Ferguson Act creates a system of “reverse-
12 preemption” for insurance law. *See United States Dep’t of Treasury v. Fabe*, 508 U.S. 491, 500–
13 02 (1993).

14 Under the McCarran-Ferguson Act, “[n]o Act of Congress shall be construed to
15 invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the
16 business of insurance . . . unless such Act specifically relates to the business of insurance.” 15
17 U.S.C. § 1012(b). Courts have held that, applying the McCarran-Ferguson Act, RCW
18 48.18.200(1)(b) reverse-preempts Chapter I of the FAA, which does not relate to the business of
19 insurance. *See James River Ins. Co.*, 176 Wn.2d at 402; *Landmark Am. Ins. Co. v. QBE Ins.*
20 *Corp.*, No. C15-1444 RSM, 2015 WL 12631550, at *6 (W.D. Wash. Dec. 9, 2015).

21 WSRMP argues that RCW 48.18.200(1)(b) also reverse-preempts the Convention. Dkt.
22 25 at 4–7. It contends that the Convention is not self-executing, and instead is only enforceable

23 ² RCW 48.18.200(2), in turn, voids any “condition, stipulation, or agreement in violation of this section”

1 through Chapter II of the FAA, which qualifies as an “Act of Congress” within the meaning of
2 the McCarran-Ferguson Act. *Id.* WSRMP therefore contends that because the Convention does
3 not relate to the business of insurance, it, like the FAA, is reverse-preempted by RCW
4 48.18.200(1)(b). *See id.* And because the Sompco Policy qualifies as “insurance” and Sompco as
5 an “insurer” within the meaning of the statute, the Arbitration Clause is void under RCW
6 48.18.200(1)(b). *See* Dkt. 14 at 6–8.

7 Sompco argues that the relevant portion of the Convention—Article II, Section 3—is self-
8 executing, meaning it does not require Chapter II of the FAA or any other “Act of Congress” to
9 be enforceable domestically. Dkt. 24 at 4–5; Dkt. 38 at 3–4. For this reason, Defendant
10 contends the McCarran-Ferguson Act is inapplicable and the Convention preempts RCW
11 48.18.200(1)(b) under the Supremacy Clause, meaning the Court must compel arbitration and
12 dismiss WSRMP’s claims.³ *Id.*

13 The Ninth Circuit’s recent decision in *CLMS Mgmt. Servs. Ltd. P’ship v. Amwins*
14 *Brokerage of Georgia, LLC*, 8 F.4th 1007 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 862, 211 L.
15 Ed. 2d 569 (2022), is dispositive. In that case, the court affirmed a decision from this District in
16 which Judge Leighton held that the Article II, Section 3 of the Convention is (1) self-executing,
17 (2) not an “Act of Congress” that is subject to preemption under the McCarran-Ferguson Act,
18 and (3) not reverse-preempted by RCW 48.18.200(1)(b). *CLMS Mgmt. Servs. Ltd. P’ship v.*
19 *Amwins Brokerage of Georgia, LLC*, No. 3:19-CV-05785-RBL, 2019 WL 7185547, at *5 (W.D.
20 Wash. Dec. 26, 2019), *aff’d*, 8 F.4th 1007 (9th Cir. 2021). As a result, Judge Leighton

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³ Sompco also argues that even if RCW 48.18.200(1)(b) does reverse-preempt the Convention by operation of the McCarran-Ferguson Act, the provision does not apply to reinsurance contracts like the Sompco Policy. Dkt. 32 at 20–24. Because the Court decides this issue on other grounds, it does not address either party’s arguments on this point.

1 determined that the Convention controlled and the parties’ arbitration clause was not barred by
2 Washington law. *Id.*

3 The Ninth Circuit agreed, holding: “Article II, Section 3 of the [Convention] is self-
4 executing, and it requires enforcement of the parties’ arbitration agreement. Because the
5 Convention is not an ‘Act of Congress’ subject to reverse-preemption by the McCarran-Ferguson
6 Act, the district court correctly granted defendants’ motion to compel arbitration.” *CLMS Mgmt.*
7 *Servs.*, 8 F.4th at 1017–18.

8 The Court here holds the same here. Assuming (1) the Arbitration Clause is enforceable
9 under the Convention, and (2) WSRMP’s claims are arbitrable under the Arbitration Clause, the
10 Court must compel arbitration.

11 B. Enforceability of the Arbitration Clause under the Convention

12 The Convention applies to “[a]n arbitration agreement . . . arising out of a legal
13 relationship, whether contractual or not, which is considered as commercial.” 9 U.S.C. § 202.
14 “Courts generally address four factors to determine whether to enforce an arbitration agreement
15 under the Convention.” *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 655 (9th Cir. 2009)
16 (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1294–95 (11th Cir. 2005); *Standard Bent Glass*
17 *Corp. v. Glassrobots Oy*, 333 F.3d 440, 449, 449 n.13 (3d Cir. 2003)). “These four require that
18 (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement
19 provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises
20 out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a
21 party to the agreement is not an American citizen, or that the commercial relationship has some
22 reasonable relation with one or more foreign states.” *Id.* at 654–55 (citation omitted). If an
23 arbitration agreement satisfies all four factors, then a court must enforce it unless the agreement

1 is “null and void, inoperative or incapable of being performed.” Convention, Art. II(3); *see also*
2 *Balen*, 583 F.3d at 654–55.

3 The Arbitration Clause satisfies all four requirements. The parties’ reinsurance
4 relationship is commercial in nature and governed by a written agreement with an arbitration
5 clause that calls for arbitration in Bermuda.⁴ Further, Sompo is a citizen of Bermuda. Dkt. 34
6 ¶ 2. WSRMP does not dispute that the Arbitration Clause meets this standard and that, if the
7 Arbitration Clause is valid, the Convention governs.⁵

8 Moreover, the Arbitration Clause is not “null and void, inoperative or incapable of being
9 performed.” Convention, Art. II(3). For the purposes of the Convention, an arbitration clause is
10 “null and void” in instances of fraud, mistake, duress, and waiver that can be applied “neutrally
11 on an international scale.” *Bautista*, 396 F.3d at 1302; *see also Mitsubishi Motors Corp.*, 473
12 U.S. at 659. WSRMP does not contend that the Arbitration Clause is “null and void” under this
13 standard, nor does it contend that the parties’ agreement to arbitrate is inoperative or incapable of
14 being performed. Instead, WSRMP argues that its rights under the Sompo and American Re-
15 Insurance Policies should be arbitrated together and that it would be against public policy to
16 require WSRMP to arbitrate with Sompo separately. Dkt. 25 at 7–8; Dkt. 36 at 5–9.

17 Article V of the Convention provides, in relevant part, that “[r]ecognition and
18 enforcement of an arbitral award may . . . be refused if the competent authority in the country
19 where recognition and enforcement is sought finds that . . . the recognition or enforcement of the
20 award would be contrary to the public policy of that country.” Convention, Art. V(2)(b). “In
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22 ⁴ Bermuda is a territory of the United Kingdom, which is a signatory to the Convention.

23 ⁵ While WSRMP initially failed to address the Convention in its Motion for Partial Summary
Judgment, instead proceeding as though the FAA governs the Arbitration Clause, Dkt. 14 at 10–13, it
tacitly concedes that the FAA is inapplicable and that the Convention governs. See Dkt. 25 at 4–7. The
Court therefore does not address WSRMP’s arguments pertaining to the FAA.

1 recognition of a presumption favoring upholding international arbitration awards under the
2 Convention, this defense is ‘construed narrowly.’” *Ministry of Def. & Support for the Armed*
3 *Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096–97 (9th Cir.
4 2011) (citation omitted). It applies only when confirmation or enforcement of a foreign
5 arbitration award “would violate the forum state’s most basic notions of morality and justice.”
6 *Id.* at 1097 (citations omitted). Although this defense is frequently raised, it “has rarely been
7 successful.” *Id.* (citation omitted).

8 Sompo argues, as a preliminary matter, that WSRMP cannot invoke this defense because
9 it only applies when a party challenges the enforcement of an arbitration award, not an
10 agreement to arbitrate. Dkt. 38 at 5–6. The Court agrees.⁶

11 By its terms, Article V’s public policy exception only applies when a party seeks to
12 enforce a foreign arbitral award, not an agreement to arbitrate. Convention, Art. V(2)(b)
13 (“[r]ecognition and enforcement of an *arbitral award* may . . . be refused”); *Lindo v. NCL*
14 *(Bahamas), Ltd.*, 652 F.3d 1257, 1280 (11th Cir. 2011) (“Article V has no application in the
15 interlocutory procedural posture of this case, where NCL seeks to enforce arbitration at the
16 outset of the dispute.”); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 372 (4th Cir. 2012)
17 (“The public policy defense, on the other hand, may only be asserted at the second stage of the
18 arbitration-related court proceedings, the ‘award-enforcement stage’—i.e., after an arbitration
19 award has been made and the court is ‘considering whether to recognize and enforce an arbitral
20 award.’”) (citation omitted); *see also Mitsubishi Motors Corp.*, 473 U.S. at 638 (noting that the
21 “Convention reserves to each signatory country the right to refuse enforcement of an award
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23 ⁶ Sompo also argues that this defense only applies in the most egregious of circumstances, which
this is not. Dkt. 38 at 6–9. Because the Court agrees that this defense cannot be invoked to bar arbitration
between the parties, it does not address whether WSRMP’s allegations otherwise satisfy Article V.

1 where the ‘recognition or enforcement of the award would be contrary to the public policy of that
2 country[,]’” and that, “[h]aving permitted the arbitration to go forward, the national courts of the
3 United States will have the opportunity at the award-enforcement stage to ensure that the
4 legitimate interest in the enforcement of the antitrust laws has been addressed.”) (citation
5 omitted).

6 WSRMP is not invoking Article V’s public policy exception in response to Sompo’s
7 attempted enforcement of an arbitral award, as no such award yet exists. Thus, WSRMP’s public
8 policy arguments are premature. If WSRMP’s claims are arbitrable under the Arbitration
9 Clause, the Court must compel arbitration.

10 C. Arbitrability of WSRMP’s Claims

11 The Arbitration Clause provides that “[i]f any dispute should arise between the Reinsured
12 and the Reinsurer with reference to the interpretation of this Agreement or their rights with
13 respect to any transaction involved whether such dispute arises before or after termination of this
14 Agreement, such dispute . . . shall be submitted to three arbitrators” Dkt. 15 at 69, 79. The
15 Ninth Circuit has deemed substantially similar arbitration clauses “broad” in nature. *See, e.g.,*
16 *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1380 (9th Cir. 1997) (concluding arbitration
17 clauses were broad in nature when they provided “if any dispute shall arise between [the parties]
18 with reference to the interpretation of this Agreement or their rights with respect to any
19 transaction involved . . . such dispute shall be submitted to [arbitration]” and “[i]n the event of
20 differences arising between the contracting parties with reference to any transactions under this
21 Agreement, such differences must be submitted to arbitration.”).

22 When an arbitration agreement contains a broad arbitration clause, the test for
23 arbitrability is whether the factual allegations “touch matters” covered by the contract. *See*

1 *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). The existence of an arbitration
2 agreement establishes a federal presumption in favor of arbitration, and any doubts as to the
3 scope of an arbitration agreement should be resolved in favor of arbitrability. *Moses H. Cone*
4 *Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *Simula, Inc.*, 175 F.3d at 719.

5 Thus, the Court must examine the allegations in the Amended Complaint to determine
6 which of WSRMP's claims "touch matters" covered by the Somp Policy such that they are
7 arbitrable. *Simula, Inc.*, 175 F.3d at 721.

8 1. *Declaratory Relief*

9 WSRMP's Amended Complaint provides that an "actual controversy within the
10 jurisdiction of this Court exists between WSRMP and Defendants regarding the existence and
11 scope of coverages under the Somp [Policy] and the American Re [Policy] with respect to
12 reinsurance applicable to the claims and damages alleged in the [Underlying Lawsuits]"
13 Dkt. 27 ¶ 41. Further, it asks the Court to declare that (1) the Somp Policy "reinsures WSRMP
14 for amounts WSRMP paid in defense, judgment, and settlement of claims against the District in
15 the [Underlying Lawsuits]"; and that (2) the arbitration, choice of law, and venue provisions
16 in the Somp Policy are void. *Id.* at ¶¶ 48, 50.

17 These claims for declaratory judgment require the Court to interpret and construe the
18 terms of the Somp Policy. They therefore touch matters covered by the Policy and should be
19 arbitrated.

20 2. *Breach of Contract*

21 WSRMP's breach of contract claim alleges Somp has a contractual obligation to
22 WSRMP to reimburse it for claims paid by WSRMP pursuant to the terms of the Somp Policy.
23 Dkt. 27 ¶ 52. It further alleges that Somp breached the Somp Policy by "disputing coverage,

1 refusing to reimburse WSRMP under the terms of the Sompo [Policy], and demanding
2 arbitration under the void arbitration clause of the Sompo [Policy].” *Id.* at ¶ 53. As a result,
3 WSRMP alleges it is entitled to damages for Sompo’s breach of contract. *Id.*

4 Like its claim for declaratory judgment, WSRMP’s breach of contract claim asks the
5 Court to construe the terms of the Sompo Policy and analyze the parties’ respective rights under
6 the Policy. It therefore touches matters covered by the Policy such that it should be arbitrated.

7 3. *Injunctive Relief*

8 The Amended Complaint includes a claim for injunctive relief, seeking to prohibit any
9 arbitration initiated under the “void” Arbitration Clause. Dkt. 27 ¶¶ 54–56. The Court has
10 already determined that the Clause is enforceable and that claims covered by it are arbitrable.
11 This claim should therefore be DISMISSED.

12 4. *Bad Faith*

13 The Amended Complaint alleges that Sompo “breached its duty to act in good faith by
14 placing its own financial interests ahead of those of WSRMP.” Dkt. 27 ¶ 57. Any duty owed by
15 Sompo to WSRMP to act in good faith arises from the Sompo Policy. *See Microsoft Corp. v.*
16 *Motorola, Inc.*, 963 F. Supp. 2d 1176, 1184 (W.D. Wash. 2013). Thus, WSRMP’s claim that
17 Sompo breached this duty touches the Sompo Policy and is arbitrable.

18 5. *Statutory Claims*

19 In its Amended Complaint, WSRMP brings claims against Sompo for alleged violations
20 of the WCPA and IFCA. Dkt. 27 ¶¶ 58–62. WSRMP alleges these claims are not arbitrable
21 because they pertain to rights created by statute, which “cannot be encompassed in even a broad
22 reading of the arbitration provision.” Dkt. 36 at 9.

1 WSRMP cites *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419–20 (9th Cir.
2 1984), in which the Ninth Circuit distinguished between statutory and contractual claims in the
3 context of arbitration agreements and held that “[a]bsent at least an express provision,” the court
4 would not construe an arbitration agreement as contemplating arbitration of “nonwaivable”
5 statutory rights. The court further determined that even with an express provision, certain
6 statutory claims may still not be properly arbitrated; “[i]t is up to [a] case-by-case interpretation
7 to determine which statutes are such that an arbitrator can consider the statutory claim.” *Id.* at
8 420. WSRMP argues that because the Arbitration Clause does not expressly include statutory
9 claims, they are not arbitrable, and that even if the Clause did include such claims, WSRMP’s
10 WCPA and IFCA claims still may not be subject to arbitration. Dkt. 36 at 10.

11 The Court is not persuaded that *Marchese* controls. Indeed, *Marchese*’s arbitrability
12 analysis is seemingly outdated in light of subsequent Supreme Court case law. In *Mitsubishi*
13 *Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), for example, the
14 Supreme Court held that the federal policy in favor of arbitration applies when a party bound by
15 an arbitration agreement “raises claims founded on statutory rights.” *See also Gilmer v.*
16 *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“It is by now clear that statutory claims
17 may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”); *Green Tree*
18 *Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (“[W]e have recognized that federal
19 statutory claims can be appropriately resolved through arbitration, and we have enforced
20 agreements to arbitrate that involve such claims.”).

21 While the *Mitsubishi* Court recognized that “not all controversies implicating statutory
22 rights are suitable for arbitration[,]” it determined that whether statutory claims are properly
23 arbitrable should be determined by looking to the congressional intention expressed in the statute

1 at issue. *Mitsubishi Motors Corp.*, 473 U.S. at 627. Per the Court, “[h]aving made the bargain to
2 arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude
3 a waiver of judicial remedies for the statutory rights at issue.” *Id.* at 628 (internal citation
4 omitted). *See also Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 725 (9th Cir. 2007)
5 (“Contractual arbitration agreements are equally applicable to statutory claims as to other types
6 of common law claims” unless Congress has “evinced an intent to preclude arbitration of
7 claims.”).

8 The Court will also invalidate on “public policy” grounds ““arbitration agreements that
9 “operat[e] . . . as a prospective waiver of a party’s right to pursue statutory remedies.”” *Am. Exp.*
10 *Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (quoting *Mitsubishi Motors Corp.*, 473
11 U.S. at 637 n.19). But so long as “the prospective litigant effectively may vindicate its statutory
12 cause of action in the arbitral forum,” then the arbitration agreement is valid. *Id.* at 236 (quoting
13 *Mitsubishi Motors Corp.*, 473 U.S. at 637).

14 Here, WSRMP fails to demonstrate that either the WCPA or IFCA contain provisions
15 indicating an intent to preclude a waiver of judicial remedies, and neither statute intimates such
16 an intention. *See* Chapter § 19.86 RCW; RCW 48.30.015; *see also Mendez v. Palm Harbor*
17 *Homes, Inc.*, 111 Wn. App. 446, 457, 45 P.3d 594 (2002), *as amended* (June 6, 2002) (“The
18 Washington Supreme Court held CPA claims arbitrable under the FAA”). Even if they did,
19 however, neither statute was enacted by Congress, but instead by the Washington State
20 Legislature, meaning the Convention would seemingly preempt their attempts to preclude
21 arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (citing *Preston v.*
22 *Ferrer*, 552 U.S. 346, 353 (2008) (“When state law prohibits outright the arbitration of a
23 particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the

1 FAA.”); *CLMS Mgmt. Servs.*, 8 F.4th at 1017–18 (holding that the Convention is not subject to
2 reverse-preemption by operation of the McCarran-Ferguson Act). Finally, nothing in the
3 Arbitration Clause can be construed as a waiver of either parties’ right to effectively pursue
4 statutory remedies in arbitration. Thus, assuming WSRMP’s WCPA and IFCA claims touch the
5 Sompo Policy, they are arbitrable. *See Mitsubishi Motors Corp.*, 473 U.S. at 624 n.13 (noting
6 that “insofar as the allegations underlying the statutory claims touch matters covered by the
7 enumerated articles, [we] properly resolve[] any doubts in favor of arbitrability.”).

8 With regards to the WCPA claim, the Amended Complaint alleges (1) “Sompo’s acts or
9 omissions constitute unfair and deceptive acts or practices, in trade and commerce, that affect the
10 public interest and that have proximately caused damage to WSRMP[,]” and (2) “Sompo’s acts
11 or omissions violate specific unfair claims practices under WAC 284-30, *et seq.* and constitute
12 *per se* violations of the CPA.” Dkt. 27 ¶¶ 58–59. These allegations pertain to Sompo’s handling
13 of WSRMP’s reinsurance claim under the Sompo Policy. They therefore touch the Sompo
14 Policy.

15 Similarly, with regards to the IFCA claim, the Amended Complaint alleges that “Sompo
16 unreasonably denied a claim for coverage” Dkt. 27 ¶ 61. This allegation, which expressly
17 pertains to WSRMP’s coverage claim under the Sompo Policy, also touches the Sompo Policy.

18 Thus, both the WCPA and IFCA claims are arbitrable.

19 D. Choice of Law

20 WSRMP moves the Court for an order holding that the choice of law provision in the
21 Sompo Policy, which provides that New York law governs, is void under RCW 48.18.200(1)(a),
22 which precludes any “insurance contract delivered or issued for delivery in this state and
23 covering subjects located, resident, or to be performed in this state” from containing any

1 provision “requiring [the contract] to be construed according to the laws of any other state or
2 country” Dkt. 14 at 8–10. Sompo, on the other hand, argues that any question as to what
3 law governs the arbitration proceedings is not ripe and should be decided by the arbitrators. Dkt.
4 38 at 12–13. The Court agrees.

5 “In deciding a motion to compel arbitration under the Convention Act, a court conducts
6 ‘a very limited inquiry.’” *Bautista*, 396 F.3d at 1294. “At this interlocutory stage it is not
7 established what law the arbitrators will apply to petitioner’s claims” *Vimar Seguros y*
8 *Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995). Instead, “when parties agree to
9 submit disputes to arbitration, it is presumed that the arbitrator is authorized to determine all
10 issues of law and fact necessary to resolve the dispute.” *ATSA of Calif., Inc. v. Continental Ins.*
11 *Co.*, 702 F.2d 172, 175 (9th Cir. 1983), *amended*, 754 F.2d 1394 (9th Cir. 1985). Accordingly,
12 the issue of what law applies in the arbitration proceeding—including whether the Sompo
13 Policy’s choice of law clause governs—is for the arbitrators to decide. *Vimar Seguros y*
14 *Reaseguros, S.A.*, 515 U.S. at 540–41 (recognizing that the circuit court “was correct to reserve
15 judgment on the choice-of-law question, as it must be decided in the first instance by the
16 arbitrator.”) (internal citations omitted); *ATSA of Calif., Inc.*, 702 F.2d at 175; *Zurich Ins. Co. v.*
17 *Ennia Gen. Ins. Co.*, 882 F. Supp. 1438, 1440 (S.D.N.Y. 1995).

18 E. Stay or Dismissal of WSRMP’s Claims

19 WSRMP asks the Court to stay its claims pending the outcome of arbitration so that it can
20 raise its Article V public policy arguments in this venue, but offers no authority or argument in
21 support of its request. *See* Dkt. 36 at 9. Sompo argues that enforcement of the Arbitration
22 Clause should result in outright dismissal of WSRMP’s claims under Federal Rule of Civil
23 Procedure 12(b)(3) (“improper venue”). The Court has discretion to grant either relief. *See*

1 *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1242, 1261 (S.D. Cal.
2 2000); *Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1323–25 (M.D. Tenn. 1990);
3 Restatement (Third) of Foreign Relations Law § 487 (1987).

4 Sompo contends that WSRMP’s request for a stay is meritless because only Bermuda
5 courts (the country where arbitration will occur) and New York courts (the state whose
6 procedural law governs the Sompo Policy) can hear challenges to the arbitration award. Dkt. 38
7 at 8 (citing *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 849 (6th Cir. 1996)
8 (“We hold . . . that such a motion to vacate may be heard only in the courts of the country where
9 the arbitration occurred or in the courts of any country whose procedural law was specifically
10 invoked in the contract calling for arbitration of contractual disputes.”)).

11 The Court will not decide the issue on this ground. While the Convention and FAA
12 provide procedures for parties to seek court assistance in setting aside arbitral awards which
13 clearly violate public policy, *see* 9 U.S.C. § 207; Convention, Arts. III, V, the Court “need not
14 and should not automatically anticipate the need for future judicial involvement.” *Tennessee*
15 *Imports, Inc.*, 745 F. Supp. at 1324–25 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 637) (“There
16 is no reason to assume at the outset of the dispute that international arbitration will not provide
17 an adequate mechanism.”)).

18 Because all of WSRMP’s claims against Sompo are arbitrable, dismissal is appropriate.
19 *See Sparling v. Hoffman Constr.*, 864 F.2d 635, 638 (9th Cir. 1988) (holding that the trial court
20 did not err in dismissing the case because plaintiff was required to submit all claims to
21 arbitration); *see also Sharma v. Subway Real Est., LLC*, 793 F. App’x 584 (9th Cir. 2020)
22 (recognizing that district courts may dismiss an action when the plaintiff is required to submit all
23 claims to arbitration); *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1073–04 (9th

1 Cir. 2014) (same); *In re Wyze Data Incident Litigation*, No. C20-0282-JCC, 2020 WL 6202724,
2 at *4 (W.D. Wash. Oct. 22, 2020) (same). WSRMP’s claims against Sampo should be
3 DISMISSED.

4 F. Sampo’s Request for Attorneys’ Fees

5 Sampo moves the Court for an order granting it its fees and costs. Dkt. 32 at 4; Dkt. 38
6 at 6 n.3. Sampo argues only that “sanctions in the form of attorney’s fees” are justified because
7 WSRMP reiterated its public policy arguments in response to Sampo’s Motion to Compel
8 Arbitration and Dismiss WSRMP’s Amended Claims, even though Sampo’s Reply in support of
9 its first Motion to Compel Arbitration explained that Article V defenses cannot be invoked
10 absent an arbitration award. Dkt. 38 at 6 n.3.

11 The Court will not order sanctions on this ground alone. Given the fact that (1) the Ninth
12 Circuit issued its decision in *CLMS Mgmt. Servs.*, and (2) the Supreme Court declined review of
13 that decision after WSRMP filed this lawsuit and brought its Motion for Partial Summary
14 Judgment, fees are not warranted. Sampo’s request for attorneys’ fees and costs is DENIED.

15 IV. CONCLUSION

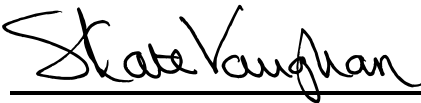
16 For the foregoing reasons, Sampo’s Motion to Compel Arbitration and Dismiss
17 WSRMP’s Amended Claims, Dkt. 32, should be GRANTED and WSRMP’s Motion for Partial
18 Summary Judgment Re Arbitration and Choice of Law Provisions in Reinsurance, Dkt. 14,
19 should be DENIED. Sampo’s Motion to Compel Arbitration and Dismiss WSRMP’s Claims,
20 Dkt. 21, should be DENIED as moot. Sampo’s request for attorneys’ fees and costs is DENIED.

21 V. OBJECTIONS

22 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
23 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and

1 Recommendation is signed. Failure to file objections within the specified time may affect your
2 right to appeal. Objections should be noted for consideration on the District Judge's motions
3 calendar for the third Friday after they are filed. Responses to objections may be filed within
4 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will
5 be ready for consideration by the District Judge on **May 6, 2022**.

6 Dated this 20th day of April, 2022.

7
8 

9
10 S. KATE VAUGHAN
United States Magistrate Judge