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Enforcing International Insurers' Expectations: Can States Unilaterally Quash Commercial Arbitration Agreements Under The McCarran-Ferguson Act?

Cover Page Footnote

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**ENFORCING INTERNATIONAL
INSURERS' EXPECTATIONS:
CAN STATES UNILATERALLY QUASH
COMMERCIAL ARBITRATION AGREEMENTS
UNDER THE MCCARRAN-FERGUSON ACT?**

*Mary Pennisi**

“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”¹

“The greater number of arbitration agreements that federal courts will, in all likelihood, be called upon to enforce, will fall within the scope of the state laws.”²

INTRODUCTION

Commercial parties worldwide rely on arbitration clauses to

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1. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

2. Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. REV. 428, 445 (1931).

mitigate the high risks inherent in international business transactions.³ A split in federal circuit courts has recently emerged and left the validity of arbitration agreements in insurance contracts under the United Nations Convention on the Recognition and the Enforcement of Arbitral Agreements (the “New York Convention” or the “Convention”) in a state of uncertainty.⁴ The New York Convention mandates that United States federal courts enforce arbitration agreements among international parties.⁵ Article II specifically requires signatories to “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 . . . concerning a subject matter capable of settlement by arbitration.”⁶ In the context of insurance, however, numerous states have enacted statutes that render arbitration agreements unenforceable.⁷

3. Geoffrey Robb & Kevin Canty, *Dispute Resolution Developments: Selecting Law, Jurisdiction, and Arbitration in Marine Insurance Policies*, 15 U.S.F. MAR. L.J. 325 (2003).

4. *Compare* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009) with *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995).

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-208 (2002)) [hereinafter New York Convention].

6. *Id.* at 1.

7. See Ark. Code Ann. 16-108-201(b) (arbitration agreements “shall have no application to . . . any insured or beneficiary under any insurance policy”); Ga. Code Ann. § 9-9-2(c)(3) (arbitration agreements “shall not apply” to “any contract of insurance”); Kan. Stat. Ann. § 5-401(c) (arbitration agreements “shall not apply to . . . [c]ontracts of insurance”); Ky. Rev. Stat. Ann. § 417.050(2) (noting that disputes under “insurance contracts” are not arbitrable); La. Rev. Stat. Ann. § 22:629a (“[n]o insurance contract . . . shall contain any . . . agreement . . . depriving the courts . . . of the jurisdiction of action against the insurer”); Mo. Ann. Stat. § 435.350 (excluding “contracts of insurance”); Mont. Code Ann. § 27-5-114(2)(c) (explaining that insurance contracts are not arbitrable); Neb. Rev. Stat. Ann. § 25-2602(f)(4) (“enforcement of written contracts requiring parties to submit to arbitration does not apply to . . . any agreement . . . relating to an insurance policy other than a contract between insurance companies including a reinsurance contract”); Ok. Stat. Ann. tit. 15, § 802 (“shall not apply to . . . contracts with reference to insurance except for those contracts between insurance companies”); S.D. Codified Laws § 21-25A-3 (“does not apply to insurance policies”); Vt. Stat. Ann. tit. 12, § 5653 (“does not apply . . . to arbitration agreements contained in a contract of insurance”). See also MITCHELL F. DOLIN & CATHERINE E. LONG, 1 LAW AND PRAC. OF INS. COVERAGE LITIG. § 11:22 (2010) (“At least eleven states that have enacted laws providing generally for the enforcement of arbitration agreements specifically refuse to allow arbitration of insurance disputes.”).

They have accordingly invalidated international insurers' arbitration agreements under the McCarran-Ferguson Act ("MFA" or the "Act"), which allows state law regulating the "business of insurance" to reverse-preempt federal law.⁸ Under this statute, which Congress originally enacted in 1945 to preserve states' rights to regulate the insurance industry and prevent federal prosecutors from targeting insurers' practices under the federal antitrust laws, states have refused to enforce arbitration clauses in insurance contracts, despite the New York Convention.⁹

On November 9, 2009, *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London* created a split in federal circuit courts over whether the MFA reverse-preempts the New York Convention and allows states to circumvent the United States' national policy favoring arbitration by invalidating global insurers' arbitration agreements.¹⁰ The Fifth Circuit¹¹ and several district courts¹² have held that the MFA does not reverse-preempt any treaty and that the New York Convention therefore protects arbitration agreements in international insurance

8. 15 U.S.C.A. § 1012(b). Typically, under the Supremacy Clause, federal law preempts inconsistent state law. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998); U.S. CONST. art. VI, cl. 2. However, the McCarran-Ferguson Act's reverse-preemption provision enables state law regulating the insurance industry to supersede or "reverse-preempt" federal law. See Elizabeth K. Stanley, *Parties' Defenses to Binding Arbitration Agreements in The Health Care Field & The Operation of The McCarran-Ferguson Act*, 38 St. Mary's L.J. 591, 606 (2007).

9. See, e.g., *Safety Nat'l Cas. Corp.*, 587 F.3d at 724-25.

10. *Id.*

11. *Id.*

12. *In re Arbitration Between The West of England Ship Owners Mut. Ins. Ass'n (Luxembourg) and American Marine Corp.*, 1992 WL 37700 (E.D. La. 1992); *Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins., Ltd.*, No. 02-22196-CIV, 2002 WL 32075793, at *3 (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); *Cont'l 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); *Assuranceforeningen Skuld (Gjensidig) v. Apollo Ship Chandlers, Inc.*, 847 So. 2d 991 (Fla. Ct. App. 2003); *Goshawk Dedicated Ltd v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293, 1297 (N.D. Ga. 2006); *Certain Underwriters at Lloyd's, London v. Simon*, 2007 WL 3047128 (S.D. Ind. Oct. 18, 2007); *Clow v. Ins. Corp. of British Columbia*, 2007 WL 2292689, *4 (D.Or. Aug 06, 2007) ("[M]ore recent and significantly more persuasive authority concludes that the Convention supersedes the McCarran-Ferguson Act.").

contracts. In contrast, the Second Circuit¹³ has held that the MFA reverse-preempts the New York Convention because it is a non-self-executing treaty and it directly preempts the Convention's implementing legislation. As international insurers have increasingly relied on arbitration agreements, this circuit split is timely and likely to impact global business relations.

This Note examines the split in federal circuit courts created by *Safety National Casualty Corp.* on whether the MFA reverse-preempts the New York Convention and allows states to quash arbitration agreements in international insurance contracts. Part I examines the legal framework governing arbitration in the United States, including the New York Convention and Federal Arbitration Act ("FAA").¹⁴ It also explores the current state of insurance arbitration and the MFA.¹⁵ Furthermore, Part I briefly reviews the doctrine of preemption and the status of treaties in United States law. Part II discusses the split in federal authority, particularly both sides' interpretations of United States foreign relations law and the MFA.¹⁶ Part III proposes two possible resolutions to the conflict in authority, both legislative and judicial.¹⁷ Part III.A suggests that Congress should amend the MFA to exempt the New York Convention in light of the United States' national policy favoring arbitration and the importance of arbitration in promoting international business.¹⁸ Part III.B offers a judicial solution.¹⁹ It contends that the Supreme Court should hold that the MFA does not enable state law to reverse-preempt the New York Convention or enable states to thwart arbitrations of disputes concerning insurance contracts.²⁰ This Note concludes that Congress and the Supreme Court should ensure that states do not have unlimited power to preclude international commercial parties from enforcing mutually agreed-upon arbitration clauses in insurance contracts.²¹

13. See *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 41 (2nd Cir. 1995).

14. See *infra* Part I.

15. See *infra* Part I.

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part III.A.

19. See *infra* Part III.B.

20. See *id.*

21. See *infra* Conclusion.

I. BACKGROUND

This Part explains the language and legislative history of the New York Convention, FAA, and MFA. It also briefly reviews United States foreign relations law concerning the status of treaties.

A. THE McCARRAN-FERGUSON ACT

Enacted in 1945, the MFA protects states' rights to regulate the insurance industry.²² The MFA has led the insurance industry to remain the only financial institution exclusively "subject to plenary state regulation."²³

1. Statutory Text

The MFA recognizes that states have power to regulate and tax the insurance industry.²⁴ It states, "Congress hereby declares that the continued regulation and taxation by the several States of the *business of insurance* is in the public interest."²⁵ It therefore provides that, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless* such Act *specifically relates* to the business of *insurance . . .*"²⁶ By precluding an "Act of Congress" from "invalidat[ing], impair[ing], or supersed[ing]" a state law regulating insurance, the MFA enables state law²⁷ to reverse-preempt a federal statute unless the federal statute

22. 15 U.S.C. § 1011.

23. Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving The Federal Role Insurance Regulation*, 68 N.Y.U. L. REV. 13, 14 (1993) ("Among major financial institutions in the United States, only insurance firms are subject to plenary state regulation.").

24. 15 U.S.C. § 1012(a).

25. 15 U.S.C. § 1011.

26. 15 U.S.C. § 1012(b) (emphasis added).

27. The state must have enacted the law for the purpose of regulating the insurance industry. *See, e.g.,* *Autry v. Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1045 (7th Cir. 1998) (finding that an Illinois statute governing insurance premium finance agreements was not "enacted for the purpose of regulating the business of insurance," and the McCarran-Ferguson Act's "protective umbrella" therefore did not apply or reverse-preempt the Federal Truth in Lending Act). The Act only protects state statutes that regulate the "business of insurance." *Sec. and Exch. Comm'n v. Nat'l Sec., Inc.*,

“specifically relates to the business of insurance.”²⁸ In other words, under section 1012, a state law reverse-preempts a federal law if (1) the state law was enacted “for the purpose of regulating the business of insurance,” (2) the federal statute does not “specifically relate to the business of insurance,” and (3) the federal statute would “invalidate, impair, or supersede” the state law.²⁹ All courts agree that the New

393 U.S. 453 (1969). Whether a statute regulates the business of insurance is a threshold question for courts. *Id.* The Supreme Court has explained that Congress only intended the Act to apply to the “relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement.” *Id.* Therefore, state statutes seeking to protect or govern the relationship between the insured and insurer constitute regulations related to the “business of insurance.” *Id.* Courts determine whether a regulated practice constitutes the “business of insurance” by considering whether the practice (1) has the effect of transferring or spreading a policyholder’s risk; (2) is integral in the policy relationship between the insurer and insured; and (3) is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 120 (1982); *see also Fuller v. Olson*, 907 F. Supp. 257 (W.D. Mich. 1995); *United States v. Rhode Island Insurers’ Insolvency Fund*, 892 F. Supp. 370 (D.R.I. 1995), *judgment aff’d*, 80 F.3d 616 (1st Cir. 1996); *CenTra, Inc. v. Chandler Ins. Co., Ltd.*, 248 Neb. 844, 540 N.W.2d 318 (1995). Courts have found that the following practices fall within the “business of insurance”: actual performance of an insurance contract, *United States Dep’t of Treasury v. Fabe*, 508 U.S. 491, 505 (1993), “retirement” certificates of deposit, *American Deposit Corp. v. Schacht*, 84 F.3d 834 (7th Cir. 1996), statutory mandates concerning benefits and liability among insurance carriers, *United of Omaha v. Bus. Men’s Assur. Co. of Am.*, 104 F.3d 1034 (8th Cir. 1997), rate-making activity by insurers, *Uniforce Temp. Pers., Inc. v. Nat’l Council on Comp. Ins., Inc.*, 87 F.3d 1296 (11th Cir. 1996), workers’ compensation reinsurance pools, *id.*, the National Council on Compensation Insurance, *id.* Alternatively, courts have found the following statutes do not relate to the business of insurance: (1) a state law allowing individuals to copy state filed insurance documents, *B & S Underwriters, Inc. v. Clarendon Nat’l Ins. Co.*, 892 F. Supp. 815 (W.D. La. 1995), and (2) a state law allowing a third party to switch insurance beneficiaries under a power of attorney, *Metro. Life Ins. Co. v. Sullivan*, 897 F. Supp. 65 (E.D.N.Y. 1995), *aff’d*, 96 F.3d 18 (2d Cir. 1996). Some courts contend that state statutes prohibiting arbitration do not regulate the business of insurance and the MFA therefore does not protect or enable them to reverse preempt the FAA or the New York Convention. *See, e.g., Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931 (10th Cir. 1992); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821 (8th Cir. 2001). *But see THOMAS H. OEHMKE*, 2 COMMERCIAL ARBITRATION § 32:1 (2010) (“[A] provision in a state’s arbitration code excepting insurance contracts is a law regulating the business of insurance”). Although this view warrants further discussion, it remains outside of this Note’s scope.

28. 15 U.S.C. § 1012(b).

29. *See Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 160 (3d Cir. 2000) (citing

York Convention does not “specifically relate[] to the business of insurance” under the MFA.³⁰ If the application of a federal statute would not interfere or conflict with a state’s regulatory regime, then the federal measure may apply.³¹ Alternatively, if a federal measure specifically relates to the insurance industry, then it may trump state law.³²

2. Legislative History

Congress passed the MFA when panic ran rampant among members of the insurance industry after the Supreme Court declared that insurance constituted interstate commerce subject to the federal Sherman Antitrust Act. The history of state-driven regulation of the insurance industry is unique and starkly contrasts with the regulatory history of related industries such as financial services and banking, which are subject to robust federal regulations.³³ In the mid-nineteenth century, states began regulating the insurance industry to abate the rampant instability and insolvencies that resulted from fierce competition among insurers.³⁴ State regulatory bodies mainly rated insurance bureaus and

Fabe, 508 U.S. at 491 (1993) (quoting 15 U.S.C. § 1012(b)).

30. *Id.*; see also *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 720 (5th Cir. 2009).

31. See *Humana Inc. v. Forsyth*, 525 U.S. 299, 300 (1999).

32. See, e.g., *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 324 (7th Cir. 1998) (finding that the Black Lung Benefits Act (BLBA) specifically relates to the business of insurance and preempts state insurance law).

33. Since 1933, Congress, the courts, and the Securities Exchange Commission have expanded federal regulation over the securities industry, which coexist with state “blue sky” laws. See Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348 (1991); JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* (1984); Paul Curran Kingsbery, *Stakeholder Inclusion and Shareholder Protection: New Governance and The Changing Landscape of American Securities Regulation*, 36 FORDHAM URB. L.J. 913, 922-23 (2009) (explaining options for regulatory change in the securities industry). Likewise, federal regulation in the banking industry grew after Congress enacted the Banking Act in 1863 and national banks emerged. See Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 678 (1988) (“Federal preemption and uniformity, rather than competition and diversity, are the legal norms in banking regulation.”); see also Macey & Miller, *supra* note 23, at 20.

34. See Linda M. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNS. J. 411, 411 (1981) (citing U.S. Dep’t of Justice, *Federal-State Regulation of the Pricing and*

pooled risk data.³⁵ Each state opened an insurance department to formulate regulations.³⁶ In 1868, the Supreme Court acknowledged in *Paul v. Virginia* that the insurance industry was exclusively within the states' domain and declared that the practice of issuing insurance policies did not constitute interstate commerce subject to Congress' commerce power.³⁷ The Supreme Court and lower courts subsequently reaffirmed that the states retained regulatory power over the industry.³⁸

By the early twentieth century, state regulation became the industry norm.³⁹ In 1944, however, the Supreme Court undermined the sound foundation that *Paul* had established in *United States v. South-Eastern Underwriters Ass'n (S.E.U.A.)*.⁴⁰ In this case, the Antitrust Division of the Department of Justice prosecuted the S.E.U.A. along with its 198

Marketing of Insurance 5-8 (1977)).

35. *Id.* at 412.

36. Charles D. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L. J. 587, 589-90 (1978); 90 CONG. REC. A4403-04 (1944); Brook, *Public Interest and the Commissioners-All Industry Laws*, 15 LAW & CONTEMP. PROB. 606 (1950); Lent, *supra* note 34, at 411.

37. 75 U.S. 168, 183 (1868) ("Issuing a policy of insurance is not a transaction of commerce"); *see also* Lent, *supra* note 34, at 411. The Commerce Clause empowers Congress "[t]o regulate commerce with foreign nations, and among the several states . . ." U.S. CONST. ART. I, § 8, cl. 3; Weller, *supra* note 36, at 589 ("In the leading case, *Paul v. Virginia*, Supreme Court dictum that '[i]ssuing a policy of insurance is not a transaction of commerce' was considered by many to mean that the federal government had no authority over the insurance industry under the commerce clause."); Richard C. Reier, Casenote, *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).

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

39. Kimball & Boyce, *supra* note 38, at 553; Steffen, *supra* note 38, at 447; Weller, *supra* note 36, at 589.

40. *United States v. South East Underwriters Ass'n (S.E.U.A.)*, 322 U.S. 533 (1944); Reier, *supra* note 37, at 291; 91 CONG. REC. 1087 (1945) (statements of Rep. Hancock).

member companies in Georgia for violating the Sherman Antitrust Act by allegedly (1) fixing premium rates and agents' commissions, (2) coercing nonmember companies into joining the S.E.U.A., and (3) conspiring to force individuals to buy from members on specified terms.⁴¹ In addition, the Federal Trade Commission ("FTC") alleged that a merger agreement between two insurance companies, the American General Insurance Company and the Deposit Company of Maryland, would substantially diminish competition and create a monopoly in violation of the Clayton Act.⁴² In a swift reverse that "shocked the industry" and contradicted 75 years of practice,⁴³ the Court decided that federal regulations, particularly the Sherman Antitrust Act, applied to the insurance industry because insurance transactions constituted "interstate commerce" under the Commerce Clause of the United States Constitution.⁴⁴ The Court then found that the Sherman Antitrust Act prohibited ratemaking combinations among defendant-insurance companies.⁴⁵

S.E.U.A. thrust "the entire industry [] in[to a state of] turmoil, [as insurance companies] expect[ed] to be abruptly subject to the full onus of federal antitrust legislation and possible federal takeover of insurance." "[S]ome insurance men thought the end of the world was come."⁴⁶ The decision uprooted companies' longstanding expectations of state regulation,⁴⁷ and panic quickly ensued.⁴⁸ Many feared that the Supreme Court would invalidate all state insurance regulations as unconstitutional.⁴⁹ Insurance companies nationwide therefore protested

41. *S.E.U.A.*, 322 U.S. at 535 (1944).

42. *Id.*

43. *See Lent*, *supra* note 34, at 411; *see also* R.K. Powers, *A Year of S.E.U.A.*, 23 CHI.-KENT L. REV. 317, 317 (1945).

44. *S.E.U.A.*, 322 U.S. at 552-56; *see also* Joseph B. Beach, *The South-Eastern Underwriters' Decision and Its Effect*, 1947 WIS. L. REV. 321, 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.").

45. *S.E.U.A.*, 322 U.S. at 552-56.

46. Kimball & Boyce, *supra* note 38, at 554; Powers, *supra* note 43, at 320; Weller, *supra* note 36, at 590 ("The decision precipitated widespread controversy and dismay. Chaos was freely predicted.") (citing NEW YORK INSURANCE DEPARTMENT REPORT 71 (1969)).

47. *See Lent*, *supra* note 34, at 421; Reier, *supra* note 37, at 291; 91 CONG. REC. 1087 (1945) (statements of Rep. Hancock).

48. *See supra* note 46.

49. *See id.*

against paying state taxes.⁵⁰ Indeed, in his dissent in *S.E.U.A.*, Chief Justice Stone even predicted “a flood of litigation and of legislation involving challenges to the tax laws.”⁵¹ Insurance companies also feared imminent criminal prosecution under the Sherman Act for rate-fixing practices.⁵² They vociferously called upon Congress to enact legislation to re-empower states to exclusively tax and regulate the industry.⁵³

S.E.U.A. also shocked Congress and state legislatures.⁵⁴ They feared that the federal government would totally assume the states’ mandate of regulating the insurance industry⁵⁵ and that the Roosevelt administration sought to federalize insurance regulation.⁵⁶ In an address to state insurance commissioners, Senator Ferguson stated, “there is a domination today by the bureaucracy and there were a few people . . . in Washington that were licking their chops when they knew that the United States Supreme Court declared that the insurance business of America was interstate commerce.”⁵⁷ Overall, the fate of insurance regulation remained uncertain.⁵⁸ The resulting widespread concern and

50. *See id.*

51. *S.E.U.A.*, 322 U.S. at 583 (Stone, J., dissenting).

52. *See* Weller, *supra* note 36, at 590.

53. *See* Kimball & Boyce, *supra* note 38, at 554 (“But this emergency is immediate and it is necessary to pass this legislation now. The States do not know what to do -with respect to the collection of taxes and the insurance companies do not know what to do with respect to the payment of taxes.”); *see also* 91 CONG. REC. 1092 (1945).

54. J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, The McCarran-Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT’L L. 1535, 1544 (2008) (“The decision sparked an uproar that resounded through both Congress and state insurance departments.”); Weller, *supra* note 36, at 590 (quoting NEW YORK INSURANCE DEPARTMENT REPORT 71 (1969)) (“The decision precipitated widespread controversy and dismay. Chaos was freely predicted.”); Harrington, *An Exploration of the Effects of the S.E.U.A. Decision*, 1944 INS. L. J. 590 (1944); Kimball & Boyce, *supra* note 38, at 554 (1958); Lent, *supra* note 34, at 412.

55. *See* Murphy, *supra* note 54, at 1545 (“There existed a real fear of a federal takeover of the (previously assumed) state prerogative to regulate the insurance industry.”); *see also* Weller, *supra* note 36, at 591.

56. *See* Weller, *supra* note 36, at 591.

57. *See id.* (quoting 1947 NAIC PAOC. 69, 74 (remarks of Sen. Ferguson, Dec. 11, 1946)).

58. *See* Powers, *supra* note 43, at 320 (quoting *The Nat. Underwriter, Life Ins. Ed.*, June 9, 1944, p. 1.) (“Insurance D Day fell just a few hours before Eisenhower’s D Day . . . the mental commotion of insurance men was pitiable, as their attention was torn

dismay led Congress to take action, which eventually crystallized into the MFA.⁵⁹

In response to the public's outrage and the Supreme Court's upheaval of commercial expectations, Congress swiftly acted to restore certainty in the insurance industry and preserve its century-long norm of state-regulation.⁶⁰ The MFA was a "very hastily formulated response."⁶¹ Anticipating that the Supreme Court would further infringe upon states' rights, Congress agreed that the Act should re-empower state insurance commissioners to tax and regulate the industry.⁶² In articulating the Act's objectives, Congress declared that it should ensure that no other federal law could "invalidate, impair, or supersede any State law which regulates . . . the insurance business, unless such act specifically so provides."⁶³ However, Congress remained divided over how to best achieve the proper balance of power.⁶⁴

The House deliberated over and favored bills that aimed to completely exempt state insurance regulation from federal antitrust law.⁶⁵ Stock insurance companies particularly lobbied for complete-

between invasion headlines and their efforts to apprehend the consequences of the epochal, adverse U.S. Supreme Court decision."); Thomas R. Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937, 988 (1944). *But see* Hugh Evander Willis, *United States of America v. South-Eastern Underwriters Association*, 258 INS. L.J. 390 (1944) ("The present United States Supreme Court has overruled another prior Supreme Court decision . . . and in doing so has done a fine piece of work.").

59. *See* Weller, *supra* note 36, at 589-91.

60. *See* Kimball & Boyce, *supra* note 38, at 554 ("Pending decision of [S.E.U.A.], there were unsuccessful attempts to exempt insurance from all federal regulation . . ."); Powers, *supra* note 43, at 317.

61. *See* Lent, *supra* note 34, at 412.

62. *See* Edwin L. Smith, *McCarran-Ferguson: A Perspective of Current Trends and Issues*, 14 FORUM 1032, 1032 (1979); *see also* Weller, *supra* note 36, at 598 ("[T]he McCarran Act was passed in reaction to the S.E.U.A. litigation."); Murphy, *supra* note 54, at 1544.

63. *See* H.R. REP. NO. 79-143 (1945), *reprinted in* 1945 U.S. Code Cong. Serv. 670, 672.

64. Smith, *supra* note 62, at 1032 ("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.*"); *see also* Weller, *supra* note 36, at 698 ("[T]he McCarran Act was passed in reaction to the S.E.U.A. litigation.").

65. *See* 91 CONG. REC. 1480-1481 (1945) (statements of Sen. Murdock); *see also* Kimball & Boyce, *supra* note 38, at 554; Lent, *supra* note 34, at 412. In particular, these bills sought to exempt the insurance industry from the Sherman Antitrust Act, 15 U.S.C. § 1-7 (2006), the Clayton Antitrust Act of 1915, 15 U.S.C. §§ 12-27, 29, 52-53

exemption bills.⁶⁶ Just 17 days after the *S.E.U.A.* decision, the House passed the Walter-Hancock Bill seeking to completely exempt the insurance industry from federal antitrust laws.⁶⁷ However, on September 21, 1944, the Senate rejected the bill.⁶⁸

The Senate sought to allow federal antitrust law to prevail when state and federal law conflicted.⁶⁹ It advocated for a system of “federal surveillance” in which the states would establish and implement regulations concerning rate-making combinations but the federal government would retain oversight powers.⁷⁰ The Senate predicted that President Roosevelt would veto any complete-exemption bill.⁷¹ The National Association of Insurance Commissioners (“NAIC”) also opposed complete-exemption bills because it maintained that “the insurance business has no more right to ask for a blanket exclusion from those acts than has any other business . . . [constituting] interstate commerce.”⁷² Likewise, the Life Insurance Association of America did not support the complete-exemption bills.⁷³ The Senate therefore

(2006), and the Federal Trade Commission Act of 1914, 15 U.S.C. § 41-58 (2006). *See* Kimball & Boyce, *supra* note 38, at 555; *see also* Weller, *supra* note 36, at 592.

66. *See* Weller, *supra* note 36, at 592. Congress considered the following bills: H.R. 3269, 78th Cong. (1st Sess. 1943); H.R. 3270, 78th Cong. (1st Sess. 1943); H.R. 4444, 78th Cong. (2d Sess. 1944); S.1362, 78th Cong. (1st Sess. 1943); H.R. 1207, 79th Cong. (1st Sess. 1945); H.R. 1590, 79th Cong. (1st Sess. 1945); H.R. 1973, 79th Cong. (1st Sess. 1945); H.R. 2021, 79th Cong. (1st Sess. 1945); S. 12, 79th Cong. (1st Sess. 1945); and S. 340, 79th Cong. (1st Sess. 1945). *See* Weller, *supra* note 36, at 592.

67. H.R. 3270, 78th Cong. (1944); *see also* 90 CONG. REC. 6565 (1944). The Senate also proposed a solution by passing the Bailly-Van Nuys Bill (S. 1362). H.R. 3270, 78th Cong. (1944); *see also* Powers, *supra* note 43, at 322; Weller, *supra* note 36, at 592 n.34; 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 policy by the Congress with respect to the continued regulation of the business of insurance by the respective States.”); H.R. Rep. 873, 78th Cong. (1st Sess. 1943); 89 CONG. REC. A5683-90 (1943) (remarks of Rep. LaFollette).

68. *See* Weller, *supra* note 36, at 592; *see also* 90 CONG. REC. 8054 (1944).

69. *See* Lent, *supra* note 34, at 412.

70. 91 CONG. REC. 1480-1481 (1945) (statements of Sen. Murdock); Kimball & Boyce, *supra* note 38, at 554.

71. Weller, *supra* note 36, at 592 n.34; 91 CONG. REC. 1087-88 (1945) (remarks of Rep. Hancock).

72. *See* Letter from David Forbes to Sen. Vandenberg (Nov. 22, 1944), *reprinted in* 90 CONG. REC. 82; *see also* Weller, *supra* note 36, at 592 n.34.

73. Weller, *supra* note 36, at 592 n.34.

rejected subsequent complete-exemption proposals.⁷⁴

The NAIC formulated an alternative approach that eventually evolved into the MFA.⁷⁵ It focused on both preserving state regulation of insurance and accommodating both state and federal law.⁷⁶ On August 29, 1944, led by President and Massachusetts Commissioner C.F.J. Harrington, the NAIC Subcommittee on Federal Legislation produced a report calling for Congress to declare that (1) states could continue to regulate and tax the insurance industry, (2) the insurance industry was completely exempt from the FTC and Robinson-Patman Acts, and (3) the insurance industry was exempt from the Sherman and Clayton Acts for cooperative procedures related to rates, statistics, and coverage matters.⁷⁷ On November 16, 1944, the Commissioners released a cohesive legislative proposal known as the "Commissioners' Bill,"⁷⁸ which followed the report by (1) preserving the constitutionality of state tax and regulation of the insurance industry, (2) mandating that federal law should not "invalidate, impair, or supersede" state insurance laws, (3) exempting insurance from the FTC and Robinson-Patman Acts, and (4) providing a limited exemption from the "non-regulatory" Sherman and Clayton Acts, including seven cooperative activities.⁷⁹

The NAIC approach ultimately prevailed.⁸⁰ Senators Ferguson and McCarran introduced an amended version of the Commissioners' Bill on December 19, 1944 to replace the unpopular complete-exemption bills.⁸¹

74. *Id.* at 592.

75. *Id.* at 593.

76. *Id.* at 593 (quoting 945 NAIC Proc. 156, 159-60 (interim report of the Subcomm. on Fed. Legis.)) ("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.*"). The Commissioners sought to "preserv[e] state regulation of insurance, not in eliminating the applicability of federal antitrust laws." *Id.*; Murphy, *supra* note 54, at 1544.

77. 90 CONG. REC. A4403-05; Weller, *supra* note 36, at 594; Powers, *supra* note 43, at 323.

78. See 90 CONG. REC. A4406-08 (1944); Weller, *supra* note 36, at 594.

79. See Weller, *supra* note 36, at 594. The seven cooperative activities included including rate making, forms, adjustments, investigations, reinsurance commissions, and statistics from the Sherman Act, but acknowledging that the Sherman Act was applicable to boycotts, coercion or intimidation. *Id.*

80. S. 340, 79th Cong. (1st Sess. 1945); 91 CONG. REC. 330 (1945); Weller, *supra* note 36, at 595-96.

81. Weller, *supra* note 36, at 595-96; McFall, *A Calendar of the S.E.U.A. Case*,

One week later, the Senate debated and passed the bill with two amendments.⁸² The House and Senate later rejected each other's amended versions of the bill and appointed their conference committee members to achieve a compromise.⁸³ The conference committee ultimately reached a compromise bill.⁸⁴ The House accepted the new version of the bill without debate.⁸⁵ The Senate discussed and eventually adopted it on February 27, 1945.⁸⁶ The final version of the bill that Congress passed was nearly identical to the Commissioners' Bill.⁸⁷ President Roosevelt signed the bill into law on March 9, 1945, and it became known as the MFA.⁸⁸ The legislative history does not include any mention of arbitration, ratified treaties, or the FAA.

3. Purpose and Judicial Interpretations

The MFA thereby embodied Congress' ultimate response and solution to *S.E.U.A.*⁸⁹ Congress enacted the MFA to "restore the

265 INS. L.J. 72, 73 (1945); 91 CONG. REC. 330 (1945); Powers, *supra* note 43, at 324.

82. 91 CONG. REC. 464, 478-88 (1945). The Senate Judiciary Committee recommended the first amendment related to the antitrust law's applicability to boycotts, coercion, and intimidation. It was relatively uncontroversial. *Id.* The Senate quickly adopted it. The second amendment concerned whether states should be allowed to pass laws contrary to the Sherman and Clayton Acts while regulating insurance. 91 CONG. REC. 479-87 (1945); Weller, *supra* note 36, at 596. Ultimately, the Senate decided that the states should not be permitted to regulate the insurance industry inconsistently with the antitrust laws. Weller, *supra* note 36, at 596; 91 CONG. REC. 486 (1945).

83. 91 CONG. REC. 1208 (1945); Powers, *supra* note 43, at 325.

84. The compromise bill featured a new clause stating that that the Sherman, Clayton, and FTC Acts "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 91 CONG. REC. 1396 (1945); Powers, *supra* note 43, at 325.

85. See 91 CONG. REC. 1396 (1945).

86. See 91 CONG. REC. 1442-44, 1477-89 (1945); Weller, *supra* note 36, at 597.

87. See Weller, *supra* note 36, at 599; see also Lent, *supra* note 34, at 412 ("The resulting bill came out of the conference committee almost exactly like a bill proposed by the National Association of Insurance Commissioners. ("NAIC") (citing NAIC Proc. 157-60 (1945))).

88. See Powers, *supra* note 43, at 325. The Roosevelt administration had also opposed legislation establishing a federal regulatory agency for insurance and remained hesitant to interfere with states' regulation of the industry. See also Weller, *supra* note 36, at 597; see also 91 CONG. REC. 482 (1945).

89. See Smith, *supra* note 62, at 1032 ("The McCarran-Ferguson Act was enacted

supremacy of the States in the realm of insurance regulation.”⁹⁰ The House and Senate Reports on S. 340 continuously expressed concerns about preserving state insurance regulation and taxation under the Commerce Clause.⁹¹ In 1945, the House Committee on the Judiciary explained that the goal of the Act was to “declare that the continued regulation . . . by the several States of the business of insurance is in the public interest.”⁹² Senator Ferguson stated that the purpose of the MFA was to “establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court . . .”⁹³ Likewise, Senator McCarran stated,

There is a domination today by the bureaucracy and there were few people, I am satisfied, in Washington, that were licking their chops when they know that the United States Supreme Court declared that the insurance business of America was interstate commerce. What a great bureau could be built . . . putting out of business these 48 Commissioners here.⁹⁴

Overall, Congress believed that the states were better equipped to handle insurance regulation⁹⁵ and intended to prevent a federal insurance bureaucracy.⁹⁶

However, Congress did not intend to “entirely overrule *S.E.U.A.*, as the federal law would still apply in certain circumstances.”⁹⁷ The bill did not completely exempt the insurance industry from federal antitrust

in 1945 in response to the Supreme Court’s decision in *United States v. South-Eastern Underwriters Ass’n.*”); see also Weller, *supra* note 36, at 598 (“[T]he McCarran Act was passed in reaction to [the *South-Eastern Underwriters*] litigation.”).

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

91. H.R. REP. NO. 79-68, at 2 (1945); S. REP. NO. 79-20, at 1-2 (1945).

92. H.R. REP. NO. 79-143 (1945), reprinted in 1945 U.S. Code Cong. Serv. 670, 672; Murphy, *supra* note 54, at 1544.

93. See Weller, *supra* note 36, at 599; see also 91 CONG. REC. 478 (1945); Lent, *supra* note 34, at 412 (“[M]aintenance of existing state regulation and taxation was the legislators’ preeminent objective”); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429, 430 (1946); Maryland Cas. Co. v. Cushing, 347 U.S. 409 (1954); Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 348 U.S. 310 (1955).

94. Lent, *supra* note 34, at 413.

95. See *id.* at 412; see also Note, *Applications of Federal Antitrust Laws to the Insurance Industry*, 46 MINN. L. REV. 1088, 1093-94 (1962).

96. See Lent, *supra* note 34, at 413.

97. *Id.*; see also Weller, *supra* note 36, at 602; Smith, *supra* note 62, at 1032-43.

law,⁹⁸ but instead temporarily suspended the application of the Sherman and Clayton Acts to “assure more adequate regulation of this business in the States.”⁹⁹ Overall, under the MFA, Congress intended federal law to apply to the insurance industry only when it directly regulates the industry. Congress only prevented federal “ancillary legislation” from impinging upon states’ regulatory regimes.¹⁰⁰

The Supreme Court has also continuously articulated that Congress designed the Act to preserve state regulation and taxation from constitutional challenge.¹⁰¹ In interpreting the MFA, particularly the provision at issue in the circuit split, the Supreme Court has reserved room for federal regulations. The Court noted that the Act does “not seek to insulate state insurance regulation from the reach of all federal law.”¹⁰² In addition, the Court has reiterated that the Act’s main purpose 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.”¹⁰³ The Act’s application to international commerce remains contested and unclear, particularly its applicability to treaties such as the New York Convention that conflict with state law.¹⁰⁴

98. 1945 U.S. Code Cong. Serv. 670, 672 (1945); Murphy, *supra* note 54, at 1544.

99. 1945 U.S. Code Cong. Serv. 670, 672 (1945).

100. 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”); Murphy, *supra* note 54, at 1544.

101. See Weller, *supra* note 36, at 599; Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946) (“Obviously Congress’ purpose was broadly to give support to existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. Once by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it ‘shall be subject to’ the laws of the several states in these respects.”).

102. Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 39 (1996).

103. *Id.*

104. Compare *In re Arbitration Between W. of Eng. Ship Owners Mut. Ins. Ass’n (Lux.) & 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.

4. *The MFA's Controversial Nature*

The MFA's insulation of the insurance industry has become controversial since several major insurance companies failed in the 1980s.¹⁰⁵ Many characterize the MFA as an "emergency measure" with a broad exemption that favored the insurance industry but has since led to varying applications.¹⁰⁶

The Supreme Court suggested that the exemption should be increasingly narrowed to comport with the Act's intent.¹⁰⁷ Many courts and commentators have even regarded the Act as controversial in its application to antitrust.¹⁰⁸ For instance, Lent states, "A thorough investigation into the McCarran Act and ensuing development cannot help but make one wonder whether it was all "much ado about nothing," in the sense that the antitrust exemption was probably unnecessary in order to provide the limited protection originally intended by Congress."¹⁰⁹ She further explains that "misapplication of the Act . . . has served as a valuable escape for the insurance industry from the heavy burden of defending a federal antitrust suit on the merits." Critics have observed that state standards are too vague, regulatory staffs inadequate, rating bureaus dominated by the industry, and state provisions erratically enforced."¹¹⁰ "The ultimate allocation of authority over the insurance industry must inevitably bear upon our 'delicate

Supp. 2d 1293, 1310 (N.D. Ga. 2006) (rejecting the reasoning of *England Ship Owners*).

105. See, e.g., Macey & Miller, *supra* note 23, at 15-18. From 1985 through 1986, liability insurance rates rapidly increased throughout the United States and limited the availability of insurance, which adversely impacted school boards, municipalities, charities, and smaller businesses. See *id.*; Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L. J. 399 (1987); Susan Pulliam, *Mutual Benefit Life is Expected to Ask State to Take Over as Early as Today*, WALL ST. J., July 15, 1991, at A3.

106. See Lent, *supra* note 34, at 416; see also Rosdeitcher, *Recent Judicial Interpretation of the McCarran Act Antitrust Exemption*, 13 FORUM 867, 875 (1978); *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, The Boycott Exception, and The Public Interest*, 27 RUTGERS L. REV. 140, 140-43 (1973).

107. *St. Paul Fire & Marine Ins. Co v. Barry*, 98 S. Ct. 2923, 2929-30 (1978); see also Lent, *supra* note 34, at 416.

108. Lent, *supra* note 34, at 429.

109. *Id.*; Whiting, *The Case for Retaining the Exemption*, 13 FORUM 917, 933 (1979).

110. Lent, *supra* note 34, at 430 n.289.

balance of federalism.”¹¹¹

Congress has held hearings and submitted legislation to overturn the Act’s antitrust exemption.¹¹² In addition, the General Accounting Office and congressional committees became critical of state regulators handling insurers who face financial difficulty and proposed applying federal regulatory oversight to the industry.¹¹³ Others sought to establish a presidential commission to regularly review the industry.¹¹⁴ Scholars have called for “a comprehensive review of the McCarran-Ferguson Act’s pattern of regulatory federalism.”¹¹⁵ Over the past century, the debate over state versus federal regulation of insurance has continued to rage, but it has now embroiled arbitration.¹¹⁶

B. FEDERAL ARBITRATION LAW AND THE NEW YORK CONVENTION

In the insurance context, parties often elect to resolve disputes through arbitration.¹¹⁷ Insurance parties generally prefer arbitration over traditional litigation because arbitration is more efficient and offers

111. *Id.* at 433 (“[W]e recognize that a national statute affecting the ability of a state to regulate insurance, in the manner of its own choosing poses significant issues of federalism.”).

112. *See, e.g.*, H.R. 4813, 111th Cong. (2d Sess. 2010), 2009 CONG US HR 4813 (Westlaw) (seeking to “restor[e] application of antitrust laws to insurers” by adding a clause in section 3 of the MFA stating, “[n]othing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to price fixing, market allocation, or monopolization (or attempting to monopolize) by a person engaged in the business of insurance”); *see also* H.R. 1081, 110th Cong. (1st Sess. 2007), 2007 CONG US HR 1081 (Westlaw) (seeking to amend the MFA “to further competition in the insurance industry”); Macey & Miller, *supra* note 23, at 15-18; *Compromise Isn’t Imminent on Bill to Alter McCarran-Ferguson Exemption*, 62 ANTITRUST & TRADE REG.REP. (BNA) No. 1569, 757 (June 11, 1992).

113. *See, e.g.*, General Accounting Office, *Insurance Regulation: Assessment of the National Association of Insurance Commissioners* (1991) (testimony before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce); Steven Brostoff, *Feds Unlikely to Pass Insurer Regs in 1993*, NAT’L UNDERWRITER, Mar. 15, 1993, at 4.

114. *See* Macey & Miller, *supra* note 23, at 17; S.1276, 102d Cong. (1st Sess. 1991) (Presidential Insurance Commission Act).

115. *See* Macey & Miller, *supra* note 23, at 17.

116. *Compare* *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 714 (5th Cir. 2009) *with* *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 41 (2d Cir. 1995).

117. Murphy, *supra* note 54, at 1540-41.

several advantages, such as privacy, finality, simplified procedures, cost reduction, and speed.¹¹⁸ Although commercial parties desire and contract for these benefits, many states limit the enforceability of arbitration agreements in insurance contracts.¹¹⁹ For instance, in the Fifth Circuit's recent decision, a Louisiana statute stated that arbitration agreements in reinsurance agreements were unenforceable.¹²⁰

Arbitration remains an integral component in international and domestic business relations. It allows individuals to submit a dispute to one or more impartial adjudicators, who ultimately render a final binding decision.¹²¹ Arbitration promotes international business by (1) assuring businesspeople that a qualified neutral party, whose skill enables him or her to understand their business' intricacies, will adjudicate any dispute arising from their transactions and (2) providing parties with awards that are globally enforceable through the New York Convention, unlike litigation awards, which are not protected by any comparable treaty.¹²² Parties may jointly elect to submit their disputes

118. *Id.*; 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) (“[T]he bulk of authority seems to agree that arbitration is a more efficient dispute resolution process than litigation.”).

119. *See, e.g., supra* note 7.

120. 587 F.3d at 715.

121. AMERICAN ARBITRATION ASSOCIATION, A GUIDE TO MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE 5 (2007), available at <http://www.adr.org/si.asp?id=5010>.

122. *See* Edward Ti Seng Wei, *Why Egregious Errors of Law May Yet Justify a Refusal of Enforcement Under the New York Convention*, 2009 SING. J. LEGAL STUD. 592, 592 (2009); JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION v (2003); ROBIN BURNETT & VIVIENNE BATH, LAW OF INTERNATIONAL BUSINESS IN AUSTRALASIA 451-52 (2009); DAVID K. SCHOLLENBERGER & STEVEN P. FINIZIO, 1 TRANSNATIONAL BUSINESS TRANSACTIONS § 8:1 (2010) (“One key advantage is that, as a result of international conventions, arbitration awards are generally more widely enforceable outside the country of issue than court judgments.”); Daniel M. Kolkey, *Dispute Resolution and International Commercial Agreements*, 676 PLI/Comm 527, 531 (1993); Laure Leservoisier & Clifford Chance, *Enforcing Arbitration Awards and Important Conventions*, in THE ARBITRATION PROCESS: COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 255-56 (Dennis Campbell & S. Meek eds., 2002) (“One of the main advantages of international arbitration over litigation in national courts is that, due to the existence of a number of international conventions on the recognition and enforcement of foreign arbitral awards, foreign arbitral awards are, in principle, readily enforceable in many countries.”); *Baxter Int’l, Inc. v. Abbott Labs.*, 315 F.3d 829 (7th Cir. 2003) (finding that arbitrators are free to

to arbitration in one of two ways. First, from the outset of their dealings, parties may incorporate arbitration clauses in their contracts at the time they enter into the contract, agreeing that any dispute arising out of it “shall be settled by arbitration . . .”¹²³ Alternatively, parties may sign an agreement submitting an existing dispute to arbitration.¹²⁴ When a dispute arises, parties jointly select a neutral arbitrator or panel of arbitrators knowledgeable in their field.¹²⁵ The arbitrator or panel conducts hearings in which the parties present their case and then renders an award.¹²⁶ Both domestic and international parties often prefer to resolve their disputes through arbitration rather than through traditional litigation because arbitration is more efficient and offers several advantages.¹²⁷

This Part explains the current legal framework governing arbitration in the United States, including the New York Convention and the FAA.

I. New York Convention

Drafted under the auspices of the United Nations in 1958, the New York Convention calls upon ratifying States to recognize and enforce foreign arbitral awards.¹²⁸ Acknowledging that arbitration is an integral aspect of international commercial comity,¹²⁹ the Convention sets forth a framework creating global dispute resolution mechanisms for conflicts arising under international agreements.¹³⁰ Ratified by 144 States,¹³¹ the

decide the law and facts in arbitration pursuant to the parties’ agreement); *Sphere Drake Ins. Inc. v. All Am. Life Ins., Co.*, 307 F.3d 617 (7th Cir. 2002) (holding that under an arbitration agreement, parties are free to specify how they will select neutral arbitrators).

123. See AMERICAN ARBITRATION ASSOCIATION, *supra* note 121, at 18.

124. *Id.*

125. *Id.* at 19.

126. *Id.* at 19-25.

127. See Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response* 47 AM. BUS. L.J. 361, 362 (2010); see also Eisenberg & Miller, *supra* note 118, at 340 (“[T]he bulk of authority seems to agree that arbitration is a more efficient dispute resolution process than litigation.”); Edward Brunet, *The Core Values of Arbitration*, in ARBITRATION LAW IN AMERICA 3, 3-28 (2006).

128. See New York Convention, *supra* note 5; McGill, *supra* note 127, at 362.

129. Murphy, *supra* note 55, at 1540-41.

130. See New York Convention, *supra* note 5.

131. See UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/

Convention remains the “backbone” to the acceptance of international arbitration by the business world.”¹³²

a. Text

Article I of the Convention provides for the enforcement of international arbitration agreements.¹³³ Enforcement requires an “agreement in writing” that is “signed by the parties.”¹³⁴ Article II discusses States’ duties to enforce agreements to arbitrate, stating,

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

In Article III, the Convention directs domestic courts to “recognize arbitral awards as binding and enforce them under the rules of procedure of the territory where the award is relied upon.”¹³⁵ It prohibits States from “impos[ing] substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards . . .”¹³⁶

b. Implementing Legislation

Congress implemented the treaty in the Convention Act, which incorporates the FAA to the extent that it does not conflict with the New York Convention.¹³⁷ The Act makes the Convention enforceable in United States federal courts.¹³⁸ The implementing legislation diverges from the treaty only in its language instructing courts to compel

NYConvention_status.html.

132. Wei, *supra* note 122, at 592; LEW ET AL., *supra* note 123, at v.

133. See New York Convention, *supra* note 5, art. I.

134. *Id.*

135. *Id.*

136. *Id.*

137. 9 U.S.C. §§ 201-208 (2006); Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd., 601 F.3d 329, 331 (5th Cir. 2010); Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15, 20 (2d Cir.1997) (“[T]he FAA and the Convention have ‘overlapping coverage’ to the extent that they do not conflict”) (quoting Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir.1983)).

138. 9 U.S.C. § 201 (2006).

arbitration if the parties have a valid arbitration agreement.¹³⁹ It uses permissive language instead of the Convention's mandatory language in Article II, stating that a court "may direct that arbitration be held in accordance with" an agreement¹⁴⁰ 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."¹⁴¹

c. Policy and Judicial Interpretations

Arbitration offers significant benefits to commercial parties engaged in cross-border transactions and promotes their willingness to participate in global business.¹⁴² The Convention provides a neutral forum for international dispute resolution "without the perception of the home court advantage or territorial bias."¹⁴³ Furthermore, foreign companies tend to fear litigation in the American legal system with its prospect of awarding plaintiffs putative damages.¹⁴⁴ Arbitration allows foreign parties to avoid excessive damages and retain more control over the awards system. Conversely, American commercial parties similarly fear litigating in other countries' courts.¹⁴⁵ The Convention therefore

139. Letter from H.G. Torbert, Jr., Acting Assistant Sec'y for Cong. Relations, Dep't of State, to John W. McCormack, Speaker of the 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) ("[S]ection 206 is permissive rather than mandatory.").

140. 9 U.S.C. § 206.

141. 9 U.S.C. § 207. The House Report further explained that section 206 "is simply an instruction to domestic courts regarding venue and concerns inherent to the enforcement of the language of the Convention." H.R. REP. NO. 91-1181, at 2 (1970).

142. Brief for Professors of International Arbitration by Siegfried Wiessner as Amicus Curiae, *Marathon Oil Co. v. Ruhrgas AG*, 9 WORLD ARB. & MEDIATION REPORT 137, 139 (1998) ("[T]he capacity to incorporate in international contracts enforceable obligations to use an agreed-upon neutral forum is a critical part of the willingness of commercial parties to enter into transborder contracts and, in short, to participate in the global economy.").

143. McGill, *supra* note 127, at 364-65; Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1194-99 (2003).

144. *Id.*

145. See Beijing Arbitration Commission, Straus Institute for Dispute Resolution, *East Meets West: An International Dialogue On Mediation and Med-Arb in the United States and China*, 9 PEPP. DISP. RESOL. L.J. 379, 384 (2009) ("American business does

creates more certainty and predictability among commercial parties. Arbitrators are also more likely to understand the nuances of the parties' specialized business relations.¹⁴⁶ By establishing a dispute resolution regime that affords parties a high degree of "neutrality and understanding of the specific issues in conflict" apart from domestic court systems, the Convention allows commercial parties to develop autonomous business relationships independent of their countries, provides them with predictability regarding how they will resolve any potential disputes, and assures parties that their awards will be enforced, unlike litigation awards where no such assurance exists.¹⁴⁷

Federal law strongly favors arbitration in international commercial transactions.¹⁴⁸ In *Scherk v. Alberto-Culver Co.*, the Supreme Court explained the Convention's objectives "to encourage the recognition and enforcement of commercial arbitration agreements in international

not want to be in a foreign court. That's why, in every contract that is drafted, an American business will spend a lot of time drafting a dispute resolution clause setting up a system for resolving the dispute, which more than likely ends up in arbitration."); Ya-Wei Li, *Dispute Resolution Clauses In International Contracts: An Empirical Study*, 39 CORNELL INT'L L.J. 789, 790 (2006) ("[U]nderstanding the language of foreign courts and navigating their complex procedural laws are anathema to many American businesses and their lawyers."); HAROLD BROWN ET AL., *FRANCHISING REALITIES AND REMEDIES* § 5.03A (2003) ("The United States Supreme Court has underwritten the enforceability of international arbitration covenants, particularly as the parties' choice to avoid the uncertainties of litigation in foreign courts."); 1 TRANSNAT'L JOINT VENTURES § 1:22 (2010) ("[H]uge court backlogs and undeveloped legal systems scare off Americans from using courts in many foreign countries, and both parties tend to fear a "home court" advantage going to the other side."); James J. Meyers, *International Construction Dispute Resolutions and New Alternatives*, 3 INT'L CONSTR. L. REV. 221 (1986) (explaining that American construction companies favor arbitration of disputes arising from construction contracts because "[l]itigation of international construction contract disputes in a foreign court often presents serious disadvantages to Americans" in that courts may "openly favor their own nationals," "foreign court procedures are often complex and unpredictable[,] "[f]oreign local counsel will usually not be familiar with the history of the contract and the disputes, lack necessary technical expertise [and] adequate background in the law and public policy with respect to the contact period[,] . . . [and] there are few effective mechanisms for enforcing foreign judgments").

146. See Wei, *supra* note 122, at 592; see also DOMINICO DI PIETRO & MARTIN PLATTE, *ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958* 11 (2001).

147. See *id.*

148. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *Del Orbe v. Royal Caribbean Cruises, Ltd.*, 549 F. Supp. 2d 1365, 1368 (S.D. Fla. 2008).

contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”¹⁴⁹ Congress’ implementation of the Convention further reflects that the federal government supports enforcing arbitral agreements, and awards.¹⁵⁰

In deciding a motion to compel arbitration involving an international commercial agreement under the Convention, courts conduct a “very limited inquiry.”¹⁵¹ Where a dispute arises from an international commercial agreement, a court must enforce the agreement and compel arbitration under the Convention if the agreement meets the following four jurisdictional pre-requisites: (1) it is in writing¹⁵² (2) the agreement provides for arbitration in the territory of a signatory of the Convention,¹⁵³ (3) the agreement arose from a “commercial” legal relationship,¹⁵⁴ and (4) a party to the agreement is not an American citizen¹⁵⁵ or the commercial relationship has some reasonable relation

149. See *Scherk*, 417 U.S. 506, 520 n.15 (1974).

150. See *id.*

151. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005); see also *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002); *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 74 (1st Cir. 2000); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982).

152. New York Convention, *supra* note 5, arts. II(1)-(2); *Bautista*, 396 F.3d at 1294, n.7; *Std. Bent Glass Corp v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *Ledee*, 684 F.2d at 186-87 (“A court presented with a request to refer a dispute to arbitration . . . must resolve four preliminary questions: (1) Is there an agreement in writing to arbitrate the subject of the dispute?”). Article II, section 2 of the Convention provides, “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” New York Convention, *supra* note 5, arts. II(1)-(2).

153. New York Convention, *supra* note 5, arts. I(1), (3); 9 U.S.C. § 206; see also Declaration of the United States upon accession, *reprinted* in 9 U.S.C.A. at 154 n.29 (1982 Supp.); *Bautista*, 396 F.3d at 1294, n.7; *Std. Bent Glass Corp.*, 333 F.3d at 449; *Ledee*, 684 F.2d at 186-87 (“Does the agreement provide for arbitration in the territory of a signatory of the Convention?”).

154. See New York Convention, *supra* note 5, art. I(3); 9 U.S.C. § 202; see also Declaration of the United States upon accession, *reprinted* in 9 U.S.C.A. at 154 n.29 (1982 Supp.); *Bautista*, 396 F.3d at 1294, n.7; *Std. Bent Glass Corp.*, 333 F.3d at 449; *Ledee*, 684 F.2d at 186-87.

155. See New York Convention, *supra* note 5, art. I(3). An “American citizen” for the purpose of commercial entities includes any company incorporated or having its principal place of business in the United States. William W. Park, *When The Borrower And The Banker Are At Odds: The Interaction Of Judge And Arbitrator In Trans-border*

with one or more foreign states.¹⁵⁶ A court must compel arbitration unless the parties do not fulfill one of the four prerequisites or one of the Convention's defenses applies.¹⁵⁷ "The affirmative defenses authorized by the Convention have a 'limited scope' allowing parties to avoid arbitration only where the arbitration is 'null and void, inoperative or incapable of being performed.'"¹⁵⁸ The Courts interpret the null and void clause narrowly and have found that it only encompasses situations that neutrally apply globally, such as fraud, mistake, duress, and waiver.¹⁵⁹

2. Federal Arbitration Act ("FAA")

Domestically, policymakers and legislators also recognize the distinct benefits of arbitration, particularly as a "means of reducing the burden on public courts."¹⁶⁰ Enacted on February 12, 1925, the FAA directs courts to stay any judicial proceeding "referable to arbitration" if the parties present a valid written arbitration agreement.¹⁶¹ Chapter 1, section 2 of the FAA promotes arbitration as an alternative means to resolving disputes, stating that any "written provision . . . to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as

Finance, 65 TUL. L. REV. 1323, 1331 n.25 (1991) (citing A. VAN DE BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 56-71 (1978)); William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 681 n.132 (1989).

156. See 9 U.S.C. § 202; see also Declaration of the United States upon accession, reprinted in 9 U.S.C.A. at 154 n.29; *Bautista*, 396 F.3d at 1294 n.7; *Std. Bent Glass Corp.*, 333 F.3d at 449; *Ledee*, 684 F.2d at 186-87 ("Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?").

157. See *Vacaru v. Royal Caribbean Cruises, Ltd.*, No. 07-23040-CIV, 2008 WL 649178, at *4 (S.D. Fla. Feb.1, 2008); *Bautista*, 396 F.3d at 1294-95; *Std. Bent Glass Corp.*, 333 F.3d at 449; *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004) ("[J]urisdictional prerequisites to an action confirming an award are different from the several affirmative defenses to confirmation."); *DiMercurio v. Sphere Drake Ins.*, 202 F.3d 71, 79 (1st Cir. 2000).

158. See *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293, 1304 (N.D. Ga. 2006) (quoting *Bautista*, 396 F.3d at 1302).

159. See *Bautista*, 396 F.3d at 1302; see also *Del Orbe v. Royal Caribbean Cruises, Ltd.*, 549 F. Supp. 2d 1365, 1369 (S.D. Fla. 2008).

160. See Carbonneau, *supra* note 143, at 1195-99.

161. 9 U.S.C. § 3 (2006).

exist at law or in equity for the revocation of any contract.”¹⁶² Under this provision, the FAA makes pre- and post-dispute arbitration agreements “valid, irrevocable, and enforceable.”¹⁶³

Congress appended the New York Convention’s implementing legislation to the FAA in Chapter 2. Other sections of the FAA primarily relate to federal court.¹⁶⁴ However, section 2 equally applies to state and federal courts because it covers maritime and interstate commercial transactions, which could arise in both.¹⁶⁵

3. Preemption of State Law

In *Southland Corp. v. Keating*,¹⁶⁶ the Supreme Court held that the

162. *Id.*

163. Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of The Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 123 (2002).

164. *Id.* Section 3 provides for stays pending arbitration in “any of the courts of the United States.” *Id.* § 3. Section 4 allows a petition to compel arbitration in “any United States district court.” *Id.* § 4. Section 5 empowers the court to designate and appoint arbitrators, *id.* § 5, and section 6 specifies the applicable procedures for applying to a court. *Id.* § 6. Section 7 deals with petitioning to compel attendance at arbitration proceedings and section 8 addresses cases raised under admiralty jurisdiction. *Id.* § 7. Sections 9 through 11 establish procedures for enforcing and challenging arbitral awards, while also allowing parties to raise actions in “the United States court in and for the district wherein the award was made.” *Id.* §§ 9-11. Sections 12 and 13 set forth procedures for such actions. *Id.* §§ 12-13.

165. *See Sennett v. Nat’l Healthcare Corp.*, 272 S.W.3d 237 (Mo. Ct. App. S.D. 2008) (2008) (explaining that the FAA’s substantive law applies in state courts while its procedural provisions do not necessarily bind state courts); Drahozal, *supra* note 163, at 125; (suggesting that section 2 of the FAA incontrovertibly applies in state court, and the remainder of the Act has a more limited application in state court under a literal reading but may be broader under other interpretations); *Ford Motor Credit Co. v. Cornfield*, 918 N.E.2d 1140 (Ill. App. Ct. 2009). *See generally* PAUL COLTOFF, 3 ILL. LAW AND PRACTICE ARBITRATION AND AWARDS § 2 (2010) (“Federal Arbitration Act created substantive federal law that is applicable in both federal and state courts.”); DAVID E. RIGNEY, 2 S.C. JURY ARBITRATION § 6 (“Unless the parties have contracted to the contrary, the Federal Arbitration Act (FAA) applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”); JOHN R. KENNEL, 3A FLA. JURY 2D ARBITRATION AND AWARD § 6 (2010) (“The Federal Arbitration Act . . . applies to both federal and state court proceedings”); CHARLES ALAN WRIGHT ET. AL., 19 FED. PRAC. & PROC. JURIS. § 4514 (2d ed.) (2010) (“Federal law created under the Federal Arbitration Act applies in both federal and state courts.”).

166. 465 U.S. 1, 15-16 (1984).

FAA applies in state courts and preempts conflicting state law. The Court addressed a state law that conflicted with the FAA and found that it violated the Constitution's Supremacy Clause.¹⁶⁷ The Court stated, "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."¹⁶⁸ Essentially the Court "'federalized' United States arbitration law, 'restrict[ing] state legislative rights' so as 'to guarantee the 'unobstructed enforcement' of arbitration agreements."¹⁶⁹ The majority first reviewed the Act's text and explained that the interstate commerce requirement in the FAA's section 2 indicates that Congress intended the Act to apply in state court.¹⁷⁰ Citing *Metro Indus. Painting Corp. v. Terminal Constr. Co.*,¹⁷¹ the Court further found that "'the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures."¹⁷² Chief Justice Burger also concluded that the FAA's legislative history strongly indicates that Congress intended federal arbitration law to preempt state law.¹⁷³ The

167. *Id.* at 16.

168. *Id.* at 16 (referring to the Arbitration Act).

169. Drahozal, *supra* note 163, at 101 (quoting 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 10.6.1, at 10:25 (Supp. 1999) (describing *Southland* as an "exceptionally important" case)).

170. *Southland*, 465 U.S. at 14-15.

171. 287 F.2d 382, 387 (2d Cir. 1961).

172. *Id.*

173. *Southland*, 465 U.S. at 12 ("Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."). The Court quoted House Report 96, which stated that "[t]he purpose of this bill is to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or [sic] admiralty, or which may be the subject of litigation in the Federal courts." *Id.* at 12-13 (quoting H.R. REP. NO. 68-96, at 1 (1924)). The majority also referred to two statements indicating Congress' objective to overturn the common law's refusal to enforce arbitration agreements, quoting the remarks of Senator Walsh during the 1923 Senate Hearings that the Act "sought to overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement." *Id.* at 13 (quoting *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 6 (1923) (statements of Sen. Walsh)) (alteration in original); H.R. REP. NO. 68-96, at 1-2 (1924) (noting the need for "legislative enactment" to overturn the common law precedent). The opinion also noted that while enacting the Act, Congress was aware that state courts generally remained

Court noted that Congress “contemplated a broad reach of the [Arbitration] Act, unencumbered by state-law constraints.”¹⁷⁴ The majority summarized the FAA’s legislative history, stating,

The problems Congress faced were therefore twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.¹⁷⁵

unwilling to enforce arbitration agreements. *Southland*, 465 U.S. at 13-14. It cited statements in the 1923 Senate Hearings that explained how state courts invalidated and refused to enforce arbitration agreements. *Id.* at 13 (“Some of our courts have held . . . that an agreement to arbitrate and to permit A and B to fix the fees of the arbitrators and so make a final award is invalid, in that it invades the province of the court and sets up another tribunal that is not provided by law, and in a sense, as some people put it, is immoral.”). Some of the legislative history of the FAA directly indicates that Congress intended the FAA to apply to state courts. *See Drahozal, supra* note 163, at 101. Although the FAA’s “primary purpose” was to ensure arbitration agreements were enforceable in federal court, the FAA’s drafter, Julius Henry Cohen, even noted that Congress had power under the Commerce Clause to require state courts to enforce arbitration agreements. *Id.* In 1926, the American Arbitration Association described the FAA’s scope, stating, “The United States Arbitration Act . . . established a national policy and procedure for the settlement by arbitration of controversies arising out of inter-state commerce or maritime transactions, or within the jurisdiction of the federal courts.” Drahozal, *supra* note 163, at 146-47 (citing *Model Arbitration Act* (Am. Arbitration Ass’n 1926), in *Model Arbitration Statute Offered*, 10 J. AM. JUDICATURE SOC’Y 122, 124, 126 (1927)). In a commentary published after Congress enacted the FAA, the ABA’s Committee on Commerce, Trade and Commercial Law discussed the constitutionality of the FAA making arbitration agreements enforceable in state court and reiterated Cohen’s Brief’s argument from the 1924 Hearings. Comm. on Commerce, Trade and Commercial Law, ABA, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153 (1925). It suggested that the FAA applies in state court:

Speaking in general terms, the act provides that written clauses providing for arbitration of future disputes contained in any contract relating to maritime transactions (i.e., matters which would normally be embraced in admiralty jurisdiction) or involving interstate commerce shall be valid, irrevocable and enforceable except on the grounds for which any contract may be revoked. The same rules apply to a submission to arbitration of a controversy already existing.

Id. at 153-54.

174. *Southland*, 465 U.S. at 12.

175. *Id.* at 14.

The Court further supported its conclusion by noting that limiting the FAA to federal courts would otherwise “encourage and reward forum shopping.”¹⁷⁶

Later, the Supreme Court applied *Southland* to find that the FAA preempted section 229 of the California Labor Code, which precluded arbitration of a state law action for wages.¹⁷⁷ In *Allied-Bruce Terminix Cos. v. Dobson*, the Court reaffirmed *Southland* and held that section 2 of the FAA applies in state courts.¹⁷⁸ It found that the FAA extends to the full reach of Congress’s power to regulate interstate commerce and that a contract need only involve “commerce in fact.”¹⁷⁹ Following *Southland* and *Allie-Bruce*, the Court found that the FAA preempted a Montana statute that invalidated arbitration agreements formed without conspicuous notice.¹⁸⁰ Subsequently, while narrowly interpreting the employment exception to the FAA, the Court rejected an argument that “a state statute ought not be denied state judicial enforcement while

176. *Id.* at 14-15.

177. *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987).

178. 513 U.S. 265 (1995). The Court also rejected a request submitted by twenty state attorneys general calling the Court to overrule *Southland* and preserve the “powerful interests of federalism.” *Id.* at 272; see Brief for Attorneys General of Alabama et al. as Amici Curiae Supporting Respondents, *Allied-Bruce*, 513 U.S. at 265 (No. 93-1001). The states that signed on to the brief were Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Illinois, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, Utah, and Vermont. Amici Curiae Brief, *Allied-Bruce*, 513 U.S. at 265. The majority did not delve into the FAA’s legislative history, but explained its reasoning as follows:

The *Southland* Court . . . recognized that the pre-emption issue was a difficult one, and it considered the basic arguments that respondents and amici now raise (even though those issues were not thoroughly briefed at the time). Nothing significant has changed in the ten years subsequent to *Southland*; no later cases have eroded *Southland*’s authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration. For these reasons, we find it inappropriate to reconsider what is by now well-established law.

Id. at 272.

178. *Allied-Bruce*, 513 U.S. at 272.

179. *Id.* at 273-77. It does not require the parties to have “contemplated substantial interstate activity.” *Id.* at 277-80 (quoting *Metro. Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir. 1961)).

180. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

awaiting the outcome of arbitration.”¹⁸¹ It emphasized that *Southland* and *Allied-Bruce* remained the settled standard for preemption doctrine concerning the FAA.¹⁸²

Following *Southland*, lower courts also consistently found that the FAA preempted several state laws.¹⁸³ Some commentators have attributed parties’ increasing use of arbitration clauses in contracts to *Southland*’s assurance that federal courts would allow the FAA to preempt state laws and uphold arbitration clauses and awards.¹⁸⁴

4. National Policy and Presumption Favoring Arbitration

In interpreting arbitration clauses under the FAA and the Convention, the Supreme Court has continuously expressed a strong presumption favoring the enforcement of arbitration provisions in international commercial transactions, which requires courts to resolve any doubts concerning the construction of arbitration clauses in favor of arbitration.¹⁸⁵ “Section 2 is a congressional declaration of a liberal

181. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124-25 (2001). This case, however, did not decide whether the FAA preempted a state statute. *Id.*

182. *Id.*

183. Drahozal, *supra* note 163, at 101 (citing 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 10.8.3, at 10:96-10:101).

184. *Id.* at 101; Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 9 (1997); see also Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1072 (1998) (discussing consumerization of arbitration); Sarah R. Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 786-88 & nn.92-100 (2001) (cataloguing current and pending state laws that restrict consumer and employment arbitration).

185. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983); *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985); *Seafort Shipping Corp. v. The W. of Eng. Ship Owners Mut. Protection and Indem. Ass’n*, No. 88-4605, 1988 WL 135179, at *5 (E.D. La. Dec. 12, 1988) (“[W]here a contract contains an arbitration clause, there exists a strong presumption that arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.”) (internal quotations omitted); *Phillips Petroleum Co. v. Marathon Oil Co.*, 794 F.2d 1080 (5th Cir. 1986); *Houston General Insurance Co. v. Realex Group, N.V.*, 776 F.2d 514 (5th Cir. 1985); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974); *Del Orbe v. Royal Caribbean Cruises, Ltd.*, 549 F. Supp. 2d 1365, 1368 (S.D. Fla. 2008).

federal policy favoring arbitration agreements.”¹⁸⁶ Courts of Appeals “have [also] consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”¹⁸⁷ Some courts have even enforced an arbitration clause after finding the underlying contract void.¹⁸⁸ This national policy promotes and upholds private contractual arrangements.¹⁸⁹ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court “conclude[d] that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability . . . require that we enforce parties’ agreements, even assuming that a contrary result would be forthcoming in a domestic context.”¹⁹⁰ In light of the strong national policy favoring the enforcement of arbitration agreements, courts have created a robust body of federal arbitration law applicable in both federal and state courts.¹⁹¹

C. FOREIGN RELATIONS LAW: SELF-EXECUTING V. NON-SELF-EXECUTING TREATIES

Courts interpret treaties such as the Convention according to the United States’ body of foreign relations law.¹⁹² They will enforce and apply a treaty if it is either self-executing or non-self-executing but implemented by Congress through legislation.¹⁹³ In other words, self-executing treaties do not require any implementing legislation to be enforceable. In contrast, non-self executing treaties require implementing legislation. Categorizing a treaty as either self-executing or non-self executing is a difficult exercise requiring a complicated opaque analysis, and Congress therefore often implements treaties

186. *Moses H. Cone*, 460 U.S. at 23.

187. *Id.*

188. *See, e.g., Lawrence v. Comprehensive Business Serv. Co.*, 833 F.2d 1159 (5th Cir. 1987)).

189. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

190. *Id.* at 629 (emphasis added).

191. *See Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984).

192. *See Jordan J. Paust, Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 371 (2006).

193. *Id.* (“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.”).

through legislation to ensure that they are enforceable.¹⁹⁴ Here, Congress implemented the New York Convention, stating that the Convention “shall be enforced in United States courts.”¹⁹⁵ Under the Constitution’s Supremacy Clause, “all Treaties . . . shall be the supreme Law of the Land” and supersede state law.¹⁹⁶

II. CIRCUIT SPLIT AFTER *SAFETY NATIONAL CASUALTY CORP. v. CERTAIN UNDERWRITERS AT LLOYD’S*

This Part summarizes recent federal cases that have led the circuit courts to diverge over whether the MFA reverse-preempts the Convention and allows states to invalidate arbitration provisions of international insurance contracts. In 2009, the Fifth Circuit decided *Safety National Casualty Corp. v. Certain Underwriters at Lloyd’s, London* and created a federal circuit split over whether the MFA allows a state law to reverse-preempt the Convention in the context of insurance arbitration agreements. The Fifth Circuit and many district courts held that the MFA does not reverse-preempt the Convention and refused to allow states to nullify arbitration agreements in international insurance contracts. In contrast, the Second Circuit held that the MFA protects states’ right to regulate the insurance industry and authorizes state law prohibiting arbitration agreements in insurance contracts to reverse-preempt the Convention and its implementing legislation.

194. Compare *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (finding that a treaty between Japan and the U.S. giving citizens 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 state was self-executing), with *United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir. 1979) (holding Article 6 of the Convention on the High Seas was non-self-executing). See generally *Murphy*, *supra* note 54, at 1544 n.106 (“[D]espite 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.”); THE FEDERALIST NO. 3 (John Jay) (1787), available at http://avalon.law.yale.edu/18th_century/fed03.asp (“Under the national government, treaties and articles of treaties . . . will always be expounded . . . and executed . . .”).

195. 9 U.S.C. §§ 201-208 (2006).

196. U.S. CONST. art. VI, cl. 2.

A. SAFETY NATIONAL AND OTHER FEDERAL CASES
OPPOSING REVERSE-PREEMPTION

The Fifth Circuit and several district courts have opposed applying the MFA's reverse-preemption provision to the New York Convention.

1. The Fifth Circuit

In *Safety National Casualty Corp.*,¹⁹⁷ a dispute arose among three insurers over arbitration agreements in their contracts.

a. Facts

The Louisiana Safety Association of Timbermen-Self Insurers Fund ("LSAT") provides workers' compensation insurance and entered into reinsurance agreements with Certain Underwriters at Lloyd's, London ("Underwriters").¹⁹⁸ Safety National Casualty Corporation ("Safety National") also provides excess insurance coverage and alleged that LSAT assigned its rights under the agreements to Safety National.¹⁹⁹ Underwriters refused to acknowledge this assignment and maintained that LSAT's rights were non-assignable.²⁰⁰ The agreement included arbitration provisions, stating that an arbitrator would resolve any legal disputes between the contracting parties.²⁰¹

Safety National filed suit against Underwriters, which then filed a motion to stay the proceeding and compel arbitration.²⁰² The district court granted the motion and the arbitration commenced.²⁰³ The three parties, however, failed to agree on selecting an arbitrator. Underwriters then returned to the district court and filed a motion to lift the stay to join LSAT as a party to the litigation.²⁰⁴ LSAT moved to intervene, lift the stay, and quash the arbitration, contending that the arbitration agreements were invalid under Louisiana state law.²⁰⁵

197. 587 F.3d 714 (5th Cir. 2009).

198. *Id.* at 717.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

The District Court for the Middle District of Louisiana granted LSAT's motion and held that under the MFA, the Louisiana state law²⁰⁶ prohibiting arbitration agreements in insurance contracts reverse-preempted the New York Convention.²⁰⁷ The Fifth Circuit later reversed the District Court's decision and held that the MFA did not allow the Louisiana state law to reverse-preempt the New York Convention or the FAA.

b. Holding

The Fifth Circuit subsequently reheard the case *en banc*.²⁰⁸ It again reversed the District Court's decision, recognized that the New York Convention applied, and held that the arbitration provisions among the companies in different countries were enforceable.²⁰⁹ Writing for the majority, Judge Priscilla Owen maintained that the Louisiana state law did not reverse-preempt the Convention because the MFA does not apply to the Convention.²¹⁰

Following the interpretive framework established by *Medellin v. Texas*,²¹¹ the court reviewed the text of the Convention, the Convention

206. The Louisiana statute stated:

No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation, or agreement . . . [d]epriving the courts of this state of the jurisdiction of action against the insurer . . . Any such condition, stipulation, or agreement in violation of this Section shall be void

LA. REV. STAT. ANN. § 22:868 (2009). Louisiana courts have held that arbitration agreements are not enforceable under this statute. *See Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982) (“Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable under [LA. REV. STAT. ANN. § 22:868 (2009)].”); *see also* *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir.1997) (“Compulsory arbitration clauses in certain insurance contracts are unenforceable in Louisiana because of [LA. REV. STAT. ANN. § 22:868]”); *W. of Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) v. Am. Marine Corp.*, 981 F.2d 749, 750 n.5 (5th Cir.1993) (“Louisiana has prohibited arbitration clauses in insurance policies.”) (citing LA. REV. STAT. ANN. § 22:868; *Doucet*, 412 So. 2d at 1384).

207. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 717-18 (5th Cir. 2009).

208. *Id.* at 718.

209. *Id.*

210. *Id.* at 717.

211. 552 U.S. 491, 506 (2008) (“The interpretation of a treaty, like the interpretation

Act, and the MFA.²¹² It found that the Louisiana state statute conflicted with the United States' commitments under the Convention because the Convention contains mandatory language, stating that signatory nations “shall recognize any agreement in writing under which the parties undertake to submit to arbitration” and directing “court[s] of a Contracting State . . . [to] refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”²¹³ In addition, the court noted that the Convention Act similarly contains mandatory language, stating that the Convention “shall be enforced in the United States courts.”²¹⁴

While reviewing the applicability of the MFA, the court emphasized that the statute only requires courts to construe “Act[s] of Congress” not to “invalidate, impair, or supersede” state law regulating insurance unless the Act specifically relates to the business of insurance. The majority conceded that the Convention and its implementing legislation do not explicitly relate to the business of insurance,²¹⁵ but then reasoned that the Convention does not constitute an “Act of Congress” under the MFA because it is a treaty.²¹⁶ Judge Owen remained reluctant to categorize the Convention as a self-executing or non-self-executing treaty, and acknowledged that the Convention’s current status remains “unclear.”²¹⁷ However, she sidestepped categorizing the treaty by focusing on whether “Act of Congress” encompasses non-self-executing treaties implemented by Congress.

The majority maintained that the treaty’s categorization as non-self-executing or self-executing is irrelevant because a treaty such as the Convention is not an Act of Congress.²¹⁸ It contended that “[t]he fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an ‘Act of Congress.’”²¹⁹ In reaching this conclusion, the court analyzed the commonly understood meaning of

of a statute, begins with its text.”).

212. 587 F.3d at 718.

213. *Id.* at 719 (quoting New York Convention, *supra* note 5).

214. 9 U.S.C. § 201 (2006).

215. 587 F.3d at 720. In footnote 21, however, the court contemplated the possibility of the FAA relating to the business of insurance because it diminishes business risk. 587 F.3d at 720 n.21. However, it neglected to further opine on that issue. *Id.*

216. *Id.* at 721-22.

217. *Id.*

218. *Id.* at 722.

219. *Id.* at 723.

“Act of Congress” and found that it does not include *treaties*, even non-self-executing treaties that require implementing legislation.²²⁰ In the court’s view, Acts of Congress include neither self-executing nor non-self-executing treaties because “a treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress” regardless of its execution status.²²¹ In other words, Congress’ implementation of a treaty does not transform it into an Act of Congress. The court also reviewed the MFA’s legislative history and found that nothing suggests that Congress distinguished between self-executing and non-self-executing treaties at the time while generally referencing treaties in statutes.²²² It additionally noted that the Convention Act only operates with reference to the Convention itself, directing courts to the treaty in resolving disputes.²²³ To further support its view, the court cited several cases suggesting that courts may recognize implemented provisions of non-self-executed treaties as federal law.²²⁴

After determining that “Act of Congress” does not include treaties, the court then addressed whether Congress intended state law to reverse preempt an implemented non-self-executing treaty while enacting the MFA.²²⁵ Citing *Missouri v. Holland*,²²⁶ the court found that historically

220. *Id.* at 722-23

221. *Id.* at 723.

222. *Id.* at 730-31.

223. 9 U.S.C. § 202.

224. *Safety Nat’l Cas. Corp.*, 587 F.3d at 727 n.54 (5th Cir. 2009) (citing *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902–03 (5th Cir.2005) (“It goes without saying that, upon the United States signing a treaty and Congress adopting enabling legislation, the treaty becomes the supreme law of the land.”); *McDermott Int’l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir. 1997) (refusing to decide “whether the Convention preempts LA. R.S. 22:629”); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985); *Whitney v. Robertson*, 124 U.S. 190 (1888)).

225. *Id.* at 727-28.

226. 252 U.S. 416 (1920). In this landmark case delineating Congress’ constitutional powers under United States foreign relations law, the court held that Congress’ implementation of a non-self-executed treaty, which the United States had entered into with Great Britain to protect migratory birds and Congress implemented, was constitutional under the Necessary and Proper Clause. It held the validity of the implementing legislation turned on the constitutionality of the treaty. *Id.* at 432. The court stated, “Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.” *Id.* at 433.

courts have analyzed treaties as distinct from their implementing legislation and generally do not equate them with "Acts of Congress."²²⁷ Furthermore, because treaties occupy a superior position in preemption doctrine, the court found that when enacting the MFA, Congress unlikely intended the Act to enable state law to reverse-preempt a treaty or to restrict the United States' ability to negotiate and implement a treaty that has a wide-ranging application.²²⁸

Furthermore, the majority declined to apply the last-in-time rule²²⁹ because the doctrine only resolves conflicts between a treaty and its implementing legislation.²³⁰ Here, the court found that this case does not feature such a conflict because the Convention does not conflict with its implementing legislation, the Convention Act.²³¹

Finally, the court further supported its interpretation of the MFA by stressing the United States' policy favoring arbitration in international commercial agreements.²³² It cited *Mitsubishi Motors Corp* in which the Supreme Court considered the arbitrability of Sherman Act claims where parties entered into a valid arbitration agreement.²³³ In *Mitsubishi Motors Corp.*, the Court reasoned "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."²³⁴ The Fifth Circuit relied on the Supreme Court's assertion that arbitration is fundamental to the nation's success in the "international legal order" and that domestic courts must therefore "subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."²³⁵

The Fifth Circuit applied the Supreme Court's analytical framework, which directs courts to review a statute's legislative history

227. *Safety Nat'l Cas. Corp.*, 587 F.3d at 728.

228. *Id.* at 729.

229. Under the last in time rule, when a statute and treaty conflict, the court will follow the rule set forth in whichever document Congress adopted last. *See Whitney v. Robertson*, 124 U.S. 190 (1888) (enforcing a later-enacted law exempting Hawaiian sugar from duty despite its conflict with an earlier treaty with the Dominican Republic); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987).

230. *Safety Nat'l Cas. Corp.*, 587 F.3d at 728-29.

231. *Id.* at 729.

232. *Id.* at 730.

233. *Id.*

234. 473 U.S. 614 (1985).

235. *Id.* at 638-39.

when a controversy involving arbitration implicates statutory rights to discern whether Congress meant to exclude arbitration as a means to resolve a particular type of dispute.²³⁶ Under this analysis, if Congress intended to exclude a category of disputes from arbitration, then courts must assume that Congress would have indicated its intention in the statute.²³⁷ In the MFA, the court found no indication that Congress sought to exclude disputes involving insurance agreements from arbitration or that Congress intended to distinguish between self-executing and non-self-executing-but-implemented treaties.²³⁸ The court relied on *Stephens v. National Distillers & Chemical Corp.*²³⁹ in which the Second Circuit held that the MFA did not allow a state law requiring out-of-state insurers to post security before a court proceeding to preempt the Foreign Sovereign Immunities Act, and noted that the Act does not “force federal law that clearly intends to preempt altogether state laws to give way simply because the insurance industry is involved.”²⁴⁰ The majority therefore found that the MFA does not enable states to circumvent the Convention and prohibit arbitration agreements in the insurance context.²⁴¹

c. Concurrence

While the majority remained unwilling to address whether the Convention is self-executing, Judge Edith Brown Clement’s concurrence embraced the question and took a more constitutional approach.²⁴² She affirmatively maintained that Article II of the Convention is self-executing and preempts Louisiana state law under the Supremacy Clause.²⁴³ Judge Clement supported this conclusion through the interpretative analysis established in *Medellin*.²⁴⁴ Under the *Medellin* framework, a court must review a treaty’s text, its “negotiation and

236. See *Safety Nat’l Cas. Corp.*, 587 F.3d 714, 730 (5th Cir. 2009) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

237. *Id.*

238. *Id.*

239. 69 F.3d 1226 (2d Cir. 1995).

240. In this case, however, the Second Circuit declined to opine on or overrule *Stephens v. American Int’l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995). *Id.*

241. *Safety Nat’l Cas. Corp.*, 587 F.3d at 730-31.

242. *Id.* at 732.

243. *Id.* at 732-33.

244. *Id.* (citing *Medellin v. Texas*, 552 U.S. 491 (2008)).

drafting history” and the signatories’ “post-ratification understanding.”²⁴⁵ Judge Clement reasoned that Article II(3) of the Convention is self-executing because it directly addresses the Contracting States’ domestic courts rather than the States themselves, and uses mandatory language that imposes affirmative obligations on domestic courts, instead of leaving decisions about arbitration enforcement to the States’ discretion.²⁴⁶ Because Article II does not require Congress to pass implementing legislation, Judge Clement concluded that Article II is enforceable in United States courts on its own terms.²⁴⁷

d. Dissent

The dissent presented the opposite argument of the concurrence’s reasoning. Writing for the dissent and joined by Judges Jerry E. Smith and Emilio M. Garza, Judge Jennifer Walker Elrod maintained that the Convention is non-self-executing and that the majority erred in formulating the question before the court as whether the Convention is an “Act of Congress” under the MFA.²⁴⁸ Judge Elrod suggested that the proper question was whether the FAA, as the Convention’s implementing legislation, constitutes an Act of Congress.²⁴⁹ The dissent concluded that the FAA is indeed an Act of Congress to which the MFA applies and enables state law to reverse-preempt because the FAA does not relate to the business of insurance.²⁵⁰ The dissent also noted that the Underwriters failed to preserve their argument that Article II is self-executing before the en banc court, but regarded the treaty as non-self-executing.²⁵¹

245. *Medellin v. Texas*, 552 U.S. 491, 506-07 (2008) (citations omitted).

246. 587 F.3d at 734-35.

247. *Id.* at 734.

248. *Id.* at 737.

249. *Id.* at 737-38.

250. *Id.* at 747-49. This is a question outside the scope of this Note.

251. *Id.* at 738, 742, 752 n.31. The concurrence maintained that Underwriters focused their argument before the en banc court on the question presented by the panel, and thus did not waive the argument that Article II is self-executing. *Id.* at 733 n.2.

2. Lower Federal Court's Interpretations of the MFA and Convention

Several district courts arrived at the same conclusion as the majority of the Fifth Circuit in *Nat'l Safety* under two different approaches.

a. The MFA Legislative History Approach

In *Matter of Arbitration between the West of England Ship Owners Mutual Insurance Ass'n (Luxembourg) & American Marine Corp.*,²⁵² the Eastern District of Louisiana found that the MFA only applies to interstate commerce, not international agreements. The West Of England Ship Owners Mutual Insurance Association filed a motion to order arbitration of a dispute with one of its members, Oil Transport Group, pursuant to its governing rules.²⁵³ The Oil Transport Group argued that the Convention did not apply because Louisiana law invalidated the arbitration agreement.²⁵⁴ It further argued that under the

252. *In re Arbitration Between W. of Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) & Am. Marine Corp.*, Nos. 91-3645, 91-3798, 1992 WL 37700 (E.D. La. Feb. 18, 1992).

253. *Id.* at *1-2. Rule 62 "Arbitration" stated,

If any difference or dispute shall arise between a member or former member or any other person claiming under these Rules and the Association out of or in connection with these Rules or any bye law made thereunder or arising out of any contract between the Member or former Member and the Association as to the rights or obligations of the Association or the Member or former Member thereunder or in connection therewith or as to any other matter whatsoever, such difference or dispute shall be referred to the Arbitration in London of a sole legal Arbitrator. Such Arbitrator shall be a practicing Queen's Counsel of the Commercial Bar and if unavailable any other practicing Queen's Counsel and a submission to arbitration in all the proceedings therein shall be subject to the provisions of the Arbitration Act 1950 and any Statutory modification or re-enactment thereof. In any such Arbitration any matter decided or stated in any Judgment or Arbitration Award (or in any reasons given by an Arbitrator or Umpire for making Award) relating to proceedings between the Member or former Member and any third party, shall be admissible in evidence. No Member or former Member may bring or maintain any action, suit or other legal proceedings against the Association in connection with any such difference or dispute unless he has first obtained Arbitration Award in accordance with this Rule.

Id. at *2.

254. *Id.* at *4. The Louisiana statute R.S. 22:629 states,

No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . regardless of where

MFA, the Louisiana statute preempted the FAA and Convention.²⁵⁵ The court disagreed and determined that the Convention should apply and preempt state law because Congress did not intend the MFA to cover international arbitration agreements.²⁵⁶ Citing *Triton Lines, Inc. v. Steamship Mutual Underwriting Ass'n*,²⁵⁷ the court reasoned that Congress intended the MFA to only cover interstate commerce, not foreign commerce.²⁵⁸ The court referenced the Supreme Court's "strong presumption favoring the enforcement of arbitration provisions whenever possible."²⁵⁹ It also noted the trend of courts of appeals' decisions emphasizing that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . [so that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."²⁶⁰

The court further reasoned that "jurisprudence is clear that when state law conflicts with the Convention, the Supremacy Clause mandates the application of the Convention."²⁶¹ Citing *Southland Corp.*, it explained that Congress sought to prevent states from "undercut[ting] the enforceability of arbitration agreements."²⁶² It therefore upheld the arbitration agreement between the Association and the Oil Transfer Group and found that their dispute must be resolved through arbitration pursuant to English law under their agreement.²⁶³ The court concluded that federal arbitration law, not Louisianan law, applied because federal law preempted state law despite the MFA.²⁶⁴

Relying on the reasoning in *West of England Ship Owners*, several

made or delivered shall contain any condition, stipulation, or agreement . . . (2)
Depriving the courts of this state of the jurisdiction of action against the insurer . . .

255. *Id.* at *4-5.

256. *Id.*

257. *Triton Lines, Inc. v. Steamship Mut. Underwriting Ass'n (Bermuda)*, 707 F. Supp. 277, 278-79 (S.D. Tex. 1989).

258. 1992 WL 37700, at *4 ("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.").

259. *Id.* at *2 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) ("Section 2 [of the Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements.")).

260. *Id.*

261. *Id.* at *4.

262. *Id.* at *4 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984)).

263. *Id.* at *2.

264. *Id.* at *5.

other district courts have reached similar conclusions and enforced international arbitration agreements under the Convention despite anti-arbitration state statutes covered by the MFA.²⁶⁵ These courts have consistently found that reverse preemption under the Act did not apply to international insurance contracts because the MFA was only designed to apply to interstate commerce, not foreign commerce.²⁶⁶ They also

265. See *Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins., Ltd.*, No. 02-22196-CIV, 2002 WL 32075793, at *3 (S.D. Fla. Oct. 31, 2002) (relying on *West of England Ship Owners* and stating that the McCarran-Ferguson Act “does not apply to international insurance contracts made under the Convention” because it provides that “the states, and only the states, can regulate the substantive content of insurance contracts,” which “was intended to apply only to interstate commerce, and not foreign commerce”); *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). 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 that a portion of the Georgia Arbitration code was “law regulating the business of insurance” and 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).

266. *Id.*

emphasized the national policy favoring arbitration.²⁶⁷

b. The International Arbitration Policy Approach

Likewise, in *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*,²⁶⁸ the Northern District of Georgia found that the Convention supersedes the MFA, but took a different approach. Goshawk, a British insurer, sought to compel arbitration of a dispute with a Georgia-based investment company under their reinsurance contract.²⁶⁹ Goshawk argued that the Convention and its implementing legislation controlled the parties' contract and required the court to enforce their arbitration agreement.²⁷⁰ A Georgia statute, however, prohibited courts from enforcing arbitration agreements in "[a]ny contract of insurance."²⁷¹ The Georgia reinsurer contended that Georgia law invalidated the arbitration agreement because the state law reverse-preempted the Convention under the MFA.²⁷² Although the court agreed that the arbitration agreement would have been invalid domestically because the MFA allowed the Georgia statute to reverse-preempt the FAA,²⁷³ it held that the arbitration agreement was enforceable under the Convention due to "policies recognized in the context of international commerce that strongly favor enforcement of arbitration clauses."²⁷⁴

The court found that the Convention "supersedes" the MFA and

267. *Id.*

268. 466 F. Supp. 2d 1293, 1297 (N.D. Ga. 2006).

269. *Id.* at 1296.

270. *Id.*

271. GA. CODE ANN. § 9-9-2(c)(3). The Court of Appeals for the Eleventh Circuit and Supreme Court of Georgia previously found that this statute reverse-preempted federal law because it was aimed at protecting or regulating the "relationship between insurer and insured." *See* SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 (1969); *see also McKnight*, 358 F.3d at 858; *Love*, 614 S.E.2d at 479-80.

272. 466 F. Supp. 2d at 1297.

273. The District Court of Georgia previously held that the Federal Arbitration Act does not preempt Georgia's anti-arbitration statute under the McCarran-Ferguson Act because of the FAA's strong policy favoring the enforcement of arbitration agreements in insurance contracts. *McKnight*, 358 F.3d at 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*, 614 S.E.2d at 49 (holding that the McCarran-Ferguson Act "prohibits the [Federal Arbitration Act] from preempting" Georgia's anti-arbitration statute).

274. 466 F. Supp. 2d at 1306.

noted that the Eleventh Circuit recognized that the Convention generally prevails over previously enacted domestic inconsistent rules of law.²⁷⁵ It found that the Eleventh Circuit limited the defenses available in international arbitration to those recognized in the Convention, excluding the MFA.²⁷⁶ Finally, the court noted that the Supreme Court has repeatedly held that the importance of international comity and ensuring predictability in international commerce require courts to enforce international agreements to arbitrate, even if the agreements would otherwise be invalid domestically.²⁷⁷ The court therefore concluded that the Convention trumps the MFA due to the “strong international policy it expresses in favor of enforcing commercial arbitration agreements” and applied to the agreement because “state law defense[s] are] outside the scope of the affirmative defenses allowed under the Convention.”²⁷⁸

Other district courts have adopted the reasoning and international policy approach articulated in *Goshawk*.²⁷⁹ One commentator also proposed that the Supreme Court should adopt and expand *Goshawk* and suggested more international law based solutions.²⁸⁰

B. THE SECOND CIRCUIT APPROACH SUPPORTING REVERSE-PREEMPTION

In contrast, in *Stephens v. American Int’l Ins. Co.*, the Second Circuit held that foreign reinsurers could not compel arbitration because the MFA enables state law to reverse-preempt the Convention.²⁸¹

1. Facts

Delta America Reinsurance Company, a Kentucky-chartered

275. *Id.* at 1309.

276. *Id.*

277. *Id.* at 1309-10.

278. *Id.* at 1303 n.8, 1311.

279. *See, e.g.*, *Certain Underwriters at Lloyd’s, London v. Simon*, No. 1:07-cv-0899-LJM-WTL, 2007 WL 3047128, at *6-7 (S.D. Ind. Oct. 18, 2007); *Clow v. Ins. Corp. of B. C.*, No. 07-403-ST, 2007 WL 2292689, at *4 (D. Or. Aug 06, 2007) (“[M]ore recent and significantly more persuasive authority concludes that the Convention supersedes the McCarran-Ferguson Act.”).

280. Murphy, *supra* note 54, at 1544.

281. 66 F.3d 41, 43 (2d Cir. 1995).

reinsurer, became insolvent.²⁸² Under the Kentucky Insurers Rehabilitation and Liquidation Law,²⁸³ the Commissioner of Insurance oversaw the company's liquidation.²⁸⁴ The Commissioner filed suit against various companies that had transferred risk to Delta, seeking to both recover premiums owed to Delta and to obtain an order requiring specific performance of the company's remaining obligations to pay all future premiums.²⁸⁵ The companies refused to pay the premiums, contending they were entitled to set off the premiums against losses owed to them by Delta.²⁸⁶ The Commissioner claimed that Kentucky state law prohibited such setoffs.²⁸⁷

All of the reinsurance contracts included broad arbitration clauses.²⁸⁸ The British Aviation Insurance Company moved to compel arbitration abroad under Chapter 2 of the FAA, which implements the Convention.²⁸⁹ The Commissioner argued that Kentucky law prohibited compelling a liquidator to arbitrate, invalidated the arbitration clauses, and preempted the FAA and the Convention under the MFA.²⁹⁰

2. Holding

The Second Circuit agreed with the Commissioner.²⁹¹ It explained that the Supremacy Clause and rules of statutory construction would normally allow the FAA and Convention to preempt state law.²⁹² However, the MFA protects state statutes "enacted 'for the purpose of regulating the business of insurance' from preemption and leaves the

282. *Id.* at 42.

283. KY. REV. STAT. ANN. 304.33-010 (1994).

284. 66 F.3d at 42.

285. *Id.*

286. *Id.* at 42-43.

287. *Id.* at 43.

288. *Id.*

289. *Id.*

290. *Id.* The Kentucky Liquidation Act states:

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 between the insurer which is subject to the delinquency proceeding and any third party, including, but not limited to, the choice of law or arbitration provisions, shall be deemed subordinated to the provisions of this subtitle.

KY. REV. STAT. ANN. § 304.33-010(6) (1994).

291. 66 F.3d at 45.

292. *Id.* at 43.

regulation of the business of insurance to the states.”²⁹³ In a terse opinion, the court found that the FAA and the Convention do not specifically relate to the business of insurance under the Supreme Court’s three-part test for determining whether a particular practice constitutes the business of insurance.²⁹⁴ The court found that reinsurance practices are part of the business of insurance because “[a]ny transaction between an insurer and a reinsurer is principally the same as a transaction between an original policyholder and an insurer, as both center around the transfer of risk.”²⁹⁵ Furthermore, the court found that the Kentucky Liquidation Act regulates the business of insurance.²⁹⁶

The foreign reinsurance corporations argued that even if the Kentucky statute preempted the FAA, the Convention still requires arbitration of their claims because it trumps the state statute under the Supremacy Clause.²⁹⁷ The court rejected this argument.²⁹⁸ It instead found that the Convention is non-self-executing and relies upon the FAA, which is an Act of Congress, for its implementation.²⁹⁹ Citing *Foster v. Neilson*, the Second Circuit reasoned that a treaty is not a legislative act, but instead a contract between two nations.³⁰⁰ It explained that a treaty is equivalent to a legislative act when it operates itself without any implementing legislation.³⁰¹ The court concluded that the MFA allowed state law to reverse-preempt the Convention because the FAA, as the Convention’s implementing legislation, does not preempt the Kentucky statute.³⁰² It further determined that the Convention itself does not apply.³⁰³ The court therefore held that the Convention was reverse-preempted under the MFA by the Kentucky state law, which rendered the arbitration agreement between the parties

293. *Id.*

294. *Id.* at 44.

295. *Id.*

296. *Id.* at 44-45.

297. *Id.* at 45.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. Reinsurance refers to the practice whereby primary insurers, who have assumed the risk from their policy holders in exchange for premiums, transfer portions of that risk to reinsurers in exchange for premiums pursuant to reinsurance agreements. *Id.* at 42. Reinsurers then transfer portions of the assumed risk to their own reinsurers, thereby spreading the risk of one policyholder among a variety of insurers. *Id.*

unenforceable.³⁰⁴

III. A RESOLUTION IN FAVOR OF ARBITRATION

This Part proposes a legislative and judicial solution to the split in authority over whether the MFA allows state law prohibiting arbitration agreements to reverse-preempt the Convention. Part A suggests that Congress should incorporate an arbitration exemption into the MFA, providing that state law cannot reverse-preempt the Convention. Part B suggests how the Supreme Court should interpret the MFA and the Convention to resolve the split in authority in favor of arbitration.

A. LEGISLATIVE SOLUTION: PROPOSAL TO AMEND THE MFA

Congress should amend the MFA to ensure the validity of arbitration agreements in international insurance contracts and protect the United States' economic competitiveness. The amendment should accommodate both insurers and states and strike an appropriate balance between their interests. States have a recognized interest in continuing to regulate the insurance industry as they have done for over a century.³⁰⁵ However, the international business community has an

304. *Id.* at 45.

305. *See supra* notes 31-38, 61-65 and accompanying text. Whether the MFA may reverse-preempt the FAA in the domestic context and the balance that Congress should strike between insurers and states in the domestic context is outside the scope of this Note. Instead, this Note focuses on the delicate balance that Congress must strike between states and international insurers in the context of the Convention. Courts and commentators have debated on the extent to which the MFA should or should not reverse preempt the FAA. *Compare, e.g.,* American Bankers Ins. Co. of Florida v. Inman, 436 F.3d 490, 494 (5th Cir. 2006) (finding that the MFA allowed a Mississippi statute, which prohibited arbitration of disputes regarding uninsured motorist and underinsured motorist coverage provisions of personal automobile insurance policies, to reverse-preempt the MFA, where an automobile insurer filed a motion to compel arbitration of an underinsured motorist coverage dispute) and National Home Ins. Co. v. King, 291 F. Supp. 2d 518, 530 (E.D. Ky. 2003) (finding that the MFA enabled a Kentucky statute, which invalidated arbitration clauses in insurance contracts, reverse-preempted the FAA because the FAA did not specifically relate to the business of insurance) with Axa Equitable Life Ins. Co. v. Infinity Financial Group, LLC, 608 F. Supp. 2d 1330, 1341 (S.D. Fla. 2009) (holding that Florida law did not reverse-preempt the FAA under the MFA and that the FAA applied to life insurer's claims against insurance brokers for fraud, negligence, and disgorgement of commissions).

interest in being able to flexibly formulate their relationships, protect its expectations, and autonomously define dispute resolution mechanisms in its contracts.³⁰⁶ The MFA currently under-protects insurers' interests and over-protects states' interests. Congress should therefore adopt an exemption to the reverse-preemption provision precluding state law from preempting international treaties concerning arbitration or other alternative dispute mechanisms.

1. Drafting the Proposed Amendment

Congress should amend the MFA to protect commercial parties' ability to effectively structure their transactions and employ efficient dispute resolution mechanisms. It may accomplish this objective in one of two ways. First, it may expressly exclude the Convention and other treaties concerning arbitration from being considered "Acts of Congress." Recognizing the unique importance of enforcing arbitration awards, Congress may adopt a provision and codify it in 15 U.S.C.A. § 1012 (c), stating, "For the purposes of this Act, the Convention on the Recognition and Enforcement of Arbitral Awards, *codified at* 9 U.S.C. §§ 201-208, and any other treaties calling for the enforcement or recognition of arbitration awards shall not be construed to be an Act of Congress subject to section (b)." At minimum, the amending provision should exempt the Convention, stating in § 1012 (c), "Nothing contained in this chapter shall render the Convention on the Recognition and Enforcement of Arbitral Awards, *codified at* 9 U.S.C. §§ 201-208, inapplicable to agreements entered into by commercial parties."

Congress may instead include a more wide-sweeping provision in section 1012 to clarify and narrowly define what constitutes "Acts of Congress" in subsection (b). However, that possibility warrants further discussion outside the scope of this Note.

Alternatively, Congress should append the exemption to section 1014, which explains the MFA's affect on other laws and currently exempts the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act from reverse-preemption.³⁰⁷ Congress should amend it to read as follows:

306. See *supra* notes 122-28 and accompanying text.

307. See 15 U.S.C.A. § 1014 (West 2010).

§ 1014 Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act [29 U.S.C.A. 151 et seq.], or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 [29 U.S.C.A. 201 et seq.], or the Act of June 5, 1920, known as the Merchant Marine Act, 1920, or the Convention on the Recognition and Enforcement of Arbitral Awards, as implemented known as the Convention Act [9 U.S.C.A. § 201 et seq.].

Incorporating such an exemption to section 1014 may be more appropriate than appending it to section 1012 because section 1014 currently contains exemptions for other statutes.

2. Balancing Competing Interests

Adopting an amendment to protect the Convention against reverse-preemption will effectively balance the interests of states, insurers, and the federal government.

a. Promoting International Commerce and Insurers' Expectations

An amendment exempting the Convention from the MFA's reverse-preemption provision would protect business parties' expectations and promote international commerce. The Convention embodies the international business community's expectation that parties may settle any disputes arising from their transactions in a manner specified in their arbitration clauses.³⁰⁸ The ability of state law to reverse-preempt the Convention and invalidate mutually agreed upon arbitration clauses under the MFA poses risks for foreign insurers transacting business in the United States by jeopardizing their expectations.³⁰⁹ Both foreign commercial parties and their American counterparts are apprehensive of litigating in foreign court systems with different standards, procedures, and awards from those with which they are familiar.³¹⁰ For instance, foreign parties often opt to include arbitration clauses in their contracts

308. See *supra* notes 122-29, 143-58 and accompanying text.

309. See *supra* notes 3, 122-28 and accompanying text.

310. See *supra* notes 143-49.

because they generally fear a possible award of punitive damages by American courts,³¹¹ find the broad discovery procedures in American courts daunting,³¹² and harbor misgivings about the jury system.³¹³ They use arbitration clauses as a vehicle to transact business with American

311. See Michael F. Hoellering, *International Arbitration Agreements: A Look Behind the Scenes*, 53 DISP. RESOL. J. 64, 68 (1998) (“In revising the IAR, the AAA was mindful that many foreign parties often fear a possible award of punitive damages by American tribunals.”); Jimmie O. Clements, Jr., *Limiting Punitive Damages: A Placebo For America’s Ailing Competitiveness*, 24 ST. MARY’S L.J. 197 (1992); Kerry A. Jung, *How Punitive Damage Awards Affect U.S. Businesses in the International Arena: the Northcon I v. Mansei Kogyo Co. Decision*, 17 WIS. INT’L L.J. 489, 502 (1999) (“There is a second use of arbitration clauses: to protect . . . against the possibility of punitive damages in an international relationship.”); Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. TIMES, Mar. 26, 2008, at A1; U.S. Dep’t of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness By Reducing Legal Costs And Uncertainty*, INVEST IN AMERICA (Oct. 2008), www.investamerica.gov.

312. John M. Clark & Erin E. Nulty, *Depositions Of Foreign Party Witnesses*, NATIONAL INSURANCE ATTORNEYS 2 (2008), available at www.nldhlaw.com/CM/Articles/FTD%20Article.pdf; Steven C. Nelson, *Alternatives To Litigation Of International Disputes*, 23 INT’L L. 187, 197 (1989); Gerald Aksen, *The Need To Utilize International Arbitration*, 17 VAND. J. TRANSNAT’L L. 11, 13 (1984); ROBERT F. CHUSHMAN ET. AL., CONSTRUCTION LITIGATION: REPRESENTING THE OWNER 297 (1995) (“American discovery practice is largely misunderstood in foreign nations and has been condemned as overbroad and unduly disruptive of normal business activities. Civil law countries (such as France and German) generally view gathering evidence as a function of the courts rather than the litigants.”); *Reports on the World of the Special Commission on the Operation Of The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 17 INT’L LEGAL MATERIALS 1417, 1427 (1978).

313. *Juries In Business Lawsuits*, BUSINESS EXCHANGE, <http://bx.businessweek.com/juries-in-business-lawsuits/news/> (“Others view juries in civil cases as easily confused and manipulated, especially in big commercial disputes.”); George Kimball, *Risk Allocation, Liability Limits and Disputes in Outsourcing*, 1018 PLI/PAT 257, 297 (2010) (“[F]oreign companies have as many misgivings about U.S. juries as U.S. companies do about proceedings abroad.”); Richard E. Donovan, *Explaining the U.S. Commercial Litigation System To Foreign Executives and Lawyers*, THE METROPOLITAN CORPORATE COUNSEL 21 (Feb. 2004), available at <http://www.metrocorpocounsel.com/pdf/2004/February/21.pdf>; Robert E. Litan, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System*, U.S. CHAMBER INST. FOR LEGAL REFORM 13 (Aug. 2007), available at www.instituteforlegalreform.com/get_ilr_doc.php?id=1059.

companies and eliminate such risks.³¹⁴ In an arbitration setting, parties are free to agree on dispute resolution procedures and types of awards.³¹⁵ Indeed, Congress originally sought to mitigate business risks by federalizing arbitration law and adopting the Convention.³¹⁶ By enabling parties to create mechanisms for dispute resolution through arbitration, parties avoid expenses associated with subjecting themselves to unfamiliar legal systems.³¹⁷ Therefore, insulating the Convention from the MFA will promote international business and serve the interests of both domestic and foreign insurers.

314. See *supra* note 3, 122-28 and accompanying text.

315. See Hoellering, *supra* note 311, at 67-68; Article 28(5) of the American Arbitration Association International Arbitration Rules (as amended and effective June 1, 2009) ("Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.").

316. See *supra* Part I.

317. See, e.g., Omar T. Mohammedi, *International Trade and Investment in Algeria: An Overview*, 18 MICH. ST. J. INT'L L. 375, 407 (2010) ("Algeria's enforcement of international arbitration clauses protects the rights of foreign investors who are unfamiliar with the Algerian legal system. It provides investors with the confidence that disputes will be judiciously heard and enforced."); see also Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid of?*, 7 PEPP. DISP. RESOL. L.J. 269, 286 (2007) ("Traditionally, arbitration has been the favored means for settling international commercial disputes as it provides parties with the ability to bypass foreign legal systems, and the difficulties related to litigating in unfamiliar forums."); Cindy G. Buys, *The Arbitrators' Duty To Respect The Parties' Choice Of Law In Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 66 (2005) ("One of the primary incentives for parties to agree to arbitration in the international business context is to avoid being subjected to a potentially hostile foreign forum and an unfamiliar legal system."); Rachel Engle, Note, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L LAW. 323, 345 (2002) ("[M]ultinational corporation may seek arbitration as a means of avoiding the other country's legal system, but also, it may seek arbitration in order to avoid being subject to provisions of unknown foreign law."); Claudia T. Salomon et al., *Arbitrator's Disclosure Standards: The Uncertainty Continues*, 63 DISP. RESOL. J. 76, 77 (2008); Claire Morel de Westgaver, *Arbitration of Joint Venture Disputes* (Jan. 8, 2008), available at http://www.twobirds.com/English/News/Articles/Pages/Arbitration_of_joint_venture_disputes.aspx; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 99 (4th ed. 2004).

b. Maintaining Market Competitiveness

Such an amendment is also likely to enhance the American market's competitiveness and ability to attract foreign insurers. The insurance industry has dramatically grown since Congress enacted the MFA.³¹⁸ Like other industries, insurance has rapidly globalized over the past century, as foreign insurers created and entered new markets and domestic markets increasingly demand new and varied insurance products.³¹⁹ Due to the General Agreement on Trade and Tariffs (GATT) and the World Trade Organization (WTO), foreign insurers are now even entering burgeoning markets in developing countries in Latin America, the Middle East, Eastern Europe, and Asia.³²⁰ Along with opportunities presented by globalization, the insurance community also faces increased risks, such as those posed by terrorism.³²¹ The United States must keep pace with emerging markets by maintaining a competitive market that protects foreign insurers' expectations and helps them reduce their risk in international transactions. Enforcing arbitration agreements will help international parties reduce the risk inherent in their transactions and thereby maintain market competitiveness.

318. Shanil R. Vitarana, *Are The Regulatory Frameworks in Asian Emerging Markets Equipped to Handle the Influx of Foreign Insurers?*, 12 CONN. INS. L.J. 207, 209 (2006); Julia F. Chu, Milliman USA, *The Makings of Imminent Insurance Markets in Asia* (2001), available at <http://www.milliman.com/pubs/InsuranceMktsAsia.pdf>; see Swiss Re, *Exploiting the Growth Potential of Emerging Insurance Markets-China and India in the Spotlight* (2004), available at <http://www.swissre.com>.

319. Vitarana, *supra* note 318, at 209. American International Group (AIG), the leading insurance firm in the world, has an international business network that includes China, Africa, Latin America, Asia, and the Middle East. See AIG, <http://www.aigcorporate.com> (last visited Nov. 10, 2010).

320. See Vitarana, *supra* note 318, at 209; Swiss Re, *Exploiting the Growth Potential of Emerging Insurance Markets-China and India in the Spotlight* (2004), <http://www.swissre.com>; W. Jean Kwon, Sch. of Risk Mgmt., St. John's Univ., *Toward Free Trade in Services: Emerging Insurance Markets in Asia* (2001), <http://www.iisonline.org/pdf/W.pdf>.

321. Elizabeth Pietanza, *Winning the Risky Global Business Game: Parrying the Thrusts of Terrorism with an International Insurance Coalition*, 34 CAL. W. INT'L L.J. 85 (2003) (explaining the impact of the 9/11 attacks on the globalization of the insurance industry).

c. Protecting States' Rights

In addition, exempting the Convention from the MFA would not unduly infringe upon states' power to regulate the insurance industry because the Convention only focuses on dispute resolution mechanisms. Originally, Congress intended the MFA to insulate the insurance industry from federal antitrust law and preserve states' right to regulate it.³²² Application of the federal antitrust laws jeopardized several practices at the industry's heart, such as rate-making and other customs that states had exclusively regulated.³²³ The Convention focuses on arbitration and does not regulate the business of insurance, but instead regulates general methods of handling contract disputes.³²⁴ It does not alter substantive remedies available under state law, but merely requires parties to seek state relief through arbitration instead of traditional litigation.³²⁵ Indeed, the Convention and rules governing arbitration in general do not impact states' ability to substantively regulate insurance practices or the industry's structure. States' interest in regulating insurance therefore does not extend to arbitration or methods of seeking relief from contractual disputes arising from insurance agreements. Enforcing arbitration clauses under the Convention would thus not impair any state interest in regulating the operation of the insurance business.

322. See *supra* notes 55-81 and accompanying text.

323. See *supra* notes 27-30 and accompanying text.

324. See, e.g., *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir.1971) ("None of the provisions of the Montana, Illinois, and Colorado statutes to which our attention has been called regulate the business of insurance. Instead, they are laws of general applicability pertaining to the method of handling contract disputes . . . Accordingly, the McCarran-Ferguson Act does not bar the application of the Federal Arbitration Act and the arbitration provisions are enforceable in the case at bar."); *Ainsworth v Allstate Ins. Co.*, 634 F Supp 52 (W.D. Mo. 1985); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (1969) (rejecting a McCarran Act challenge to an arbitration clause by concluding that arbitration statutes do not regulate the insurance business, but instead "regulat[e] the method of handling contract disputes generally"); *Miller v. Nat'l Fid. Life Ins. Co.*, 588 F.2d 185, 187 (5th Cir.1979) ("The test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superceded by application of federal law.").

325. J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1762 (2006) ("[T]he switch from a courtroom to an arbitral forum still leaves intact an effective alternative means of enforcing private rights.").

d. Fulfilling Treaty Obligations

Furthermore, Congress should enact this exemption to ensure that the United States fulfills its treaty obligations. Nothing in the MFA's legislative history suggests that Congress intended to allow state statutes to reverse-preempt treaties.³²⁶ The United States should strive to fulfill its treaty obligations in good faith.³²⁷ It ratified the Convention in 1958 and is therefore under an international obligation to fulfill the treaty's objective of enforcing arbitral awards arising from disputes involving international commercial agreements.³²⁸ Therefore, incorporating an exemption for the Convention into the MFA would help the United States satisfy its treaty obligations.

e. Promoting Arbitration

Finally, insulating the Convention from reverse-preemption under the MFA furthers the objective of Congress and the courts to promote arbitration. The Supreme Court has reiterated its policy of favoring and enforcing arbitration agreements throughout the past century. Both the Court and Congress have recognized the benefits of arbitration in helping parties achieve quicker and more cost-effective results and in easing the already over-burdened court system.³²⁹ The Court has also

326. See *supra* Part I.A.2.

327. See Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 388 n.294 (2008) ("The President might yet try to construe U.S. statutory law in a manner consistent, if possible, with the results of dispute settlement process."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (explaining that that Acts of Congress "ought never to be construed to violate the law of nations if any other possible construction remains"); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (reaffirming the *Charming Betsy* canon); *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) ("While the question of the construction of treaties is judicial in its nature, . . . courts when called upon to act should be careful to see that international engagements are faithfully kept and observed . . ."); *Grin v. Shine*, 187 U.S. 181, 184 (1902) (explaining that treaties "should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers"); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 68 (1821) (emphasizing a principle of good faith related to the interpretation of treaties "which our Government could not violate without disgrace, and which [the Supreme] Court could not disregard without betraying its duty"); *Hyundai Elecs. Co. v. United States*, 53 F. Supp. 2d 1334, 1343-44 (Ct. Int'l Trade 1999); NANDA & PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 10:9 (2010).

328. See *supra* notes 138-42 and accompanying text.

329. See *supra* notes 138-42, 148-64, 184-90 and accompanying text.

reiterated the federal nature of arbitration law and the importance of providing a robust uniform system of arbitration throughout the country, particularly to prevent forum shopping and to fulfill parties' expectations.³³⁰ If some states prohibit arbitration agreements in insurance contracts and others allow it and the MFA allows anti-arbitration state law to overtake the Convention, then parties are more likely to shop for a forum in which to raise their disputes according to whether or not they desire to enforce their arbitration agreement.³³¹ In addition, the unavailability of arbitration and resulting litigation may make foreign commercial parties more reluctant to transact with American businesses in light of the increased risk of litigation in United States courts and thereby disadvantage American businesses.³³² Preventing state laws from invalidating arbitration agreements will thus further Congress' goal to promote arbitration as a means of effective alternative dispute resolution.

Therefore, in order to achieve an appropriate balance between the interests of the international business community, states, and federal

330. See *supra* notes 184-94 and accompanying text.

331. See *supra* notes 144, 175 and accompanying text; Milo Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 HONG KONG L. J. 161, 173 (2007); Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 218-25 (1983) (contending that arbitration reduces forum shopping, concurrent jurisdiction, and limited access to pretrial discovery inherent in international litigation).

332. See HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 2-4 (1989); see also Melissa Gerardi, *Jumpstarting APEC In The Race To "Open Regionalism": A proposal For The Multilateral Adoption Of UNCITRAL's Model Law On International Commercial Arbitration*, 15 NW. J. INT'L L. & BUS. 668, 684 (1995) ("When business people are exposed to risk in an international business transaction due to the absence of effective dispute resolution procedures, they can undertake one of two responses. They can either 1) refrain from engaging in the transaction or 2) assume the risk by increasing the price of the transaction accordingly."); Kenneth T. Ungar, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 717 (1987) ("The arbitral clause specifies the manner in which are the place where contracting parties are to settle any future disputes. It has been referred to as 'an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.' If contracting parties contemplate a long-term business relationship together, mutual self-interest necessitates a quick and amiable settlement of any disputes between them through arbitration.") (internal citations omitted); *supra* notes 143-49.

government, Congress should adopt an amendment exempting the Convention from the MFA's reverse-preemption provision.

B. JUDICIAL SOLUTION: INTERPRETING THE STATUTE
TO UPHOLD PARTIES' EXPECTATIONS

This Part suggests how the Supreme Court should interpret the MFA to resolve the split in authority over whether the statute allows anti-arbitration state law to reverse-preempt the Convention.³³³ Based on the MFA's text and legislative history, the national policy favoring arbitration, and the United States' treaty obligations, the Supreme Court should adopt the Fifth Circuit's approach and hold that "Act of Congress" in section 1112 of the MFA does not encompass treaties such as the Convention. The Supreme Court should recognize that Congress did not intend to include treaties within the scope of an "Act of Congress" and find that state law does not reverse-preempt implemented treaty provisions, whether self-executing or not. The MFA's text, legislative history, and purpose indicate that the Act does not apply to treaties or foreign commerce in general.³³⁴ In addition, the United States has a strong interest in satisfying its duties under the Convention and promoting arbitration as a means for commercial parties to effectively resolve their disputes.³³⁵ Finally, the status of the Convention as self-executing or non-self-executing is immaterial because it nevertheless remains a treaty in federal law under the doctrine of preemption.³³⁶

1. *The Plain Meaning of "Act of Congress"*

The Fifth Circuit appropriately found that the plain meaning of "Act of Congress" did not include treaties but instead only contemplated legislation when Congress originally enacted the MFA. Before Congress drafted the MFA, the Supreme Court distinguished between Acts of Congress and treaties.³³⁷ For instance, in *Missouri v. Holland*,

333. The Supreme Court recently denied a petition for writ of certiorari and declined to hear a case that may have resolved the split in authority. *Safety National*, 79 U.S.L.W. 3195 (2010).

334. See *infra* notes 363-86 and accompanying text.

335. See *supra* notes 138-42, 148-64, 184-90 and accompanying text.

336. See *infra* notes 341-61 and accompanying text.

337. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call For Resurrection*, 93 GEO. L.J. 1885 (2005) (explaining the fundamental

the Supreme Court recognized that a treaty only has domestic effect through Congress' enactment of implementing legislation.³³⁸ However, the Court drew a distinction between treaties and Acts of Congress, explaining that even if Congress could not accomplish a particular objective through a general "Act of Congress," it could achieve the same goal through a treaty.³³⁹ Likewise, both earlier and subsequent decisions of the Supreme Court have distinguished treaties from Acts of Congress.³⁴⁰ Statutes have also referenced treaties as a distinct category from congressional Acts.³⁴¹ Here, for instance, the Convention's implementing legislation explicitly provides that the "Convention . . . shall be enforced in United States courts"³⁴² The Convention Act itself refers to Acts of Congress and treaties separately, stating that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."³⁴³ Therefore, the Supreme Court should hold that treaties do not constitute "Acts of Congress" covered by the MFA and find that the Convention preempts anti-arbitration state statutes.

2. "Act of Congress" in the MFA's Legislative History

The Fifth Circuit properly noted that the MFA's legislative history

distinction between treaties and statutes).

338. *Missouri v. Holland*, 252 U.S. 416, 443 (1920).

339. *Id.* at 432-33 (upholding constitutionality of Migratory Bird Act and associated treaty).

340. *Moser v. United States*, 341 U.S. 41, 45 (1951) ("[A] treaty may be modified by a subsequent act of Congress"); *Higuera v. United States*, 72 U.S. 827, 830 (1864) ("[T]here can be no doubt that the several documents are sufficient to give to the donee an inchoate right to the tract, within the meaning of the treaty of cession and the act of Congress subsequently passed to carry the provisions of the treaty into effect."); *Frevall v. Bache*, 39 U.S. 95 (1840) ("There is a difference in the words used in the Treaty and Act of Congress"); Daniel Cordalis, *The Effects of Climate Change on American Indian And Alaska Native Tribes*, 22 NAT. RESOURCES & ENV'T 45, 45 (2010) ("Tribes retain inherent sovereign powers that predate the formation of the United States and which are recognized in a complex body of federal law that includes treaties, acts of Congress, executive branch policies and regulations, and federal court decisions.").

341. *See, e.g.*, Indian Reorganization Act, 25 U.S.C. § 461 (defining reservation "created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase or otherwise").

342. 9 U.S.C.A. § 201 (1970).

343. 9 U.S.C.A. § 203 (1970).

reflects that “Act of Congress” does not contemplate treaties. In discussing the meaning of Section 2(b), Senator Ferguson stated:

I think an explanation of paragraph (b) of section 2 should be made at this time. The purpose of that provision is very clear, that Congress did not want at the present time to take upon itself the responsibility of interfering with the taxation of insurance or the regulation of insurance by the States. . . . If there is on the books of the United States a legislative act which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected, because the Congress had not, under subdivision (b), said that the new law specifically applied to insurance.³⁴⁴

In other words, Senator Ferguson explained that “Act of Congress” is a “legislative act” passed by Congress. In addition, nothing suggests that Congress intended to surrender its power to implement treaties that tangentially affect insurance to the MFA’s reverse-preemption provision.³⁴⁵ The MFA’s legislative history thereby suggests that Acts of Congress do not include treaties such as the Convention.

3. Irrelevance of the Convention’s Executing Status

The current status of the Convention as executing and non-self-executing remains unknown, but is irrelevant for this analysis because treaties as a category distinct from Acts of Congress include both non-self-executing and self-executing treaties. The Second Circuit erred in

344. 91 CONG. REC. 481 (1945). During the same colloquy, Senator Ferguson made two other statements concerning the meaning of section 2(b). “[Section 2(b)] provides that no Federal legislation relating to interstate commerce shall by implication repeal any existing State law unless such act of Congress specifically so provides.” *Id.* at 483. “In other words, the case before the Supreme Court (SEUA) was a case applying the Sherman Act and the Clayton Act. We wanted to have the Clayton Act and the Sherman Act apply to insurance, but we did not want to go back into all the laws which had been enacted respecting interstate commerce and apply them to the business of insurance.” *Id.* at 486. Senator Revercomb, also a member of the Senate Judiciary Committee, made a statement to the same effect during the same debate. *See id.* at 485.

345. *See supra* notes 33-88 and accompanying text.

summarily characterizing the Convention as non-self-executing. Determining whether a treaty is self-executing requires a complex analysis. In its terse opinion, the Court concluded that the Convention was non-self-executing because it “relies upon an Act of Congress for its implementation.”³⁴⁶ However, the Court failed to explain how the Convention “relies upon an Act of Congress.”³⁴⁷ It simply cited *Foster v. Neilson* for the proposition that a treaty is self-executing “whenever it operates of itself, without the aid of any legislative provision.”³⁴⁸ The Court’s analysis is deficient and tautological in that it explains that the treaty is non-self-executing because the treaty relies on an Act of Congress, which is the definition of non-self-execution.³⁴⁹ In addition, the Second Circuit oversimplified the analysis courts employ in determining whether a treaty “relies upon” legislation for its implementation. As the Fifth Circuit properly noted, the fact that Congress adjusted United States law to fulfill its international obligations or the mere existence of implementing legislation alone is insufficient to indicate whether a treaty such as the Convention is self-executing.³⁵⁰ Because the analysis for determining whether a treaty is self-executing is complicated, Congress often passes legislation to implement a treaty as a precaution to ensure the treaty’s effectiveness in United States law.³⁵¹ The Second Circuit provides no other reasons to support its conclusion that the Convention is non-self-executing.³⁵²

Subsequent to the Second Circuit’s decision, the Supreme Court provided courts with more precise guidance on how to determine whether a treaty is self-executing in *Medellin*.³⁵³ Under this framework, courts must “interpret a treaty like interpret[ing] a statute, begin[ing] with its text[t].”³⁵⁴ Using the *Medellin* analysis, however, the treaty’s text and legislative history both present equally compelling but opposing arguments for the Convention’s status.³⁵⁵ As the concurrence in *Safety*

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

347. *Id.*

348. *Id.* (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313-14 (1829)).

349. *Id.*

350. *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 714 (5th Cir. 2009).

351. Murphy, *supra* note 54, at 1552.

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

353. *Medellin v. Texas*, 552 U.S. 491 (2008).

354. *Id.* at 506.

355. *Id.*

National emphasizes,³⁵⁶ the treaty's text in Article II contains mandatory language that indicates the provision is self-executing, explicitly directing domestic courts to enforce arbitration rights by referring the parties to arbitration.³⁵⁷ Alternatively, the Convention's legislative history indicates that it may be non-self-executing or contain some non-self-executing provisions because the Senate consented to the treaty in 1968 but the United States did not accede to it until 1970 after Congress enacted implementing legislation.³⁵⁸ The Convention's status therefore still remains unclear.

The Supreme Court should instead follow the Fifth Circuit in holding that the Convention's status as self-executing or non-self-executing is irrelevant in determining whether it is an Act of Congress under the MFA because neither non-self-executing nor self-executing treaties constitute Acts of Congress. Implementing legislation that does not conflict with a treaty does not displace or substitute it in the hierarchy of preemption law.³⁵⁹ Regardless of its categorization, a treaty remains an international agreement negotiated by the Executive Branch and ratified by the Senate.³⁶⁰ Congress' implementation of a treaty does not supplant the treaty or transform it into an "Act of Congress."³⁶¹ Furthermore, Congress did not distinguish between self-

356. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 752 (5th Cir. 2009).

357. *See* New York Convention, *supra* note 5, art. II.

358. 134 CONG. REC. S6700-01 (daily ed. May 26, 1988) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 (1987)); *see* Federal Judiciary Oversight: Protecting Small Business: *Testimony on H.R. 3578 Before the H. Judiciary Comm., Subcomm. on Courts and Intellectual Prop.*, 1998 WL 307174 (F.D.C.H.) (statement of Jeffrey D. Kovar, Assistant legal Advisor, Office of the Legal Advisor, Department of State) ("To implement this requirement, Congress amended the Federal Arbitration Act, 9 U.S.C. §§ 101-307, to add language that expressly provides that the New York Convention 'shall be enforced in United States courts.'"); *see also* 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, 1070 (1961).

359. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

360. *See id.*

361. *See* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 922-24 (2004) (maintaining that Acts of Congress do not necessarily impact treaties' status or relevance in US law); *see also infra* note 363 and accompanying text.

executing treaties and implemented but non-self-executing treaties when using the term “treaty” in various statutes contemporary with the MFA.³⁶² Restricting the term “treaty” to self-executing treaties would be impractical because categorizing a treaty is often difficult and requires judicial interpretation.³⁶³ To further complicate the analysis, single treaties may contain both self-executing and non-self-executing provisions.³⁶⁴ In addition, self-executing and implemented but non-self-executing treaties occupy the same status in preemption hierarchy.³⁶⁵

362. See Revenue Act of 1941, Pub.L. No. 77-250 § 109, 55 Stat. 687, 695 (1941) (amending certain provisions of the Internal Revenue Code to exclude the application of those sections to residents of certain countries “so long as there is in effect with such country a treaty which provides otherwise”); Farm Labor Supply Appropriation Act, Pub.L. No. 78-229 § 3, 58 Stat. 11, 13 (1944) (authorizing the War Food Administrator to enter into agreements with agricultural extension services of State colleges to furnish certain services to domestic interstate and foreign agricultural workers and to “require the modification or termination of any agreement with any such extension service whenever he finds such action to be necessary in order to carry out the terms of any treaty or international agreement to which the United States of America is signatory”).

363. See Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 20 YALE L. & POL’Y REV. 427, 468 n.255 (2002) (“It is difficult to tell which treaties will be declared non-self-executing.”); Murphy, *supra* note 54, at 1552 (“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.”). Compare *United States v. Percheman*, 32 U.S. 51, 89 (1833) (declaring a treaty to be self-executing) with *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (declaring the same treaty to be non-self-executing).

364. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1986) (“Some provisions of an international agreement may be self-executing and others non-self-executing.”); see also *United States v. Postal*, 589 F.2d 862, 884 n.35 (5th Cir.1979) (“A treaty need not be wholly self-executory or wholly executory.”). Sometimes, select provisions of treaties will be determined to be self-executing or non-self-executing. See *Warren v. United States*, 340 U.S. 523, 526 n.2 (1951); *Lidas, Inc. v. U.S.*, 238 F.3d 1076, 1079–81 (9th Cir. 2001), *cert. denied*, 533 U.S. 903 (2001) (“[I]t is far from uncommon for a treaty to contain both self-executing and non-self-executing provisions.”); *United States v. Noriega*, 808 F. Supp. 791, 797 n.8 (S.D. Fla.1992) (holding that some provisions of the Geneva Convention Relative to the Treatment of Prisoners of War are self-executing while others are not); *Fujii v. State*, 242 P.2d 617, 619-21 (Cal. 1952); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 (1996); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1117-18 (1992) (contending that parts of the Constitution may be both self-executing and non-self-executing).

365. See HENKIN, *supra* note 364, at 203-04; Brenton T. Culpepper, *Missed Opportunity: Congress’s Attempted Response to the World’s Demand for the Violence*

Congress and the courts do not treat them differently after implementation.³⁶⁶ The Supreme Court should therefore recognize that a treaty's status as self-executing or non-self-executing does not bear on the distinction between treaties and Acts of Congress. Therefore, regardless of whether the Convention is self-executing, the Supreme Court should recognize that it is not an "Act of Congress" subject to the MFA's reverse-preemption provision.

Even if the Supreme Court finds that the MFA applies to the Convention and the Convention is non-self-executing, the Supreme Court should still prevent state anti-arbitration statutes from reverse-preempting the Convention under the MFA because the "last in time rule" of foreign relations law dictates that the Convention must

Against Women Act, 43 VAND. J. TRANSNAT'L L. 733, 751 (2010) ("[B]oth self-executing and non-self-executing treaties are U.S. law upon ratification."); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2095 (1999); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 631 (1986); Virginia H. Johnson, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 CARDOZO L. REV. 347, 347-51, 349 n.5 (2001) ("Whether self-executing or non-self-executing, the Supremacy Clause renders all treaties 'the Law of the Land' [P]er the Supremacy Clause, virtually all treaties should be interpreted as self-executing."); See generally Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571(1992); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999). But see Susanna Y. Chung, *Prison Overcrowding: Standards In Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2381 (2000) ("[B]oth self-executing and non-self-executing--are considered to be the supreme law of the land."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091-93 (1999) (propounding an unpopular view that the Framers intended non-self-executing treaties to be a limitation on treaty power); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). The doctrine of *pacta sunt servanda* requires the United States to implement non-self-executing treaties in good faith. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331. The Vienna Convention on the Law of Treaties requires Congress to enact legislation implementing treaty obligations stating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.* art. 27. "Both self-executing and non-self-executing treaties are made via explicit action by the political branches." Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1261 (2007).

366. *Supra* note 365.

supersede the MFA. “Where a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the courts have held that the one later in point of time must prevail.”³⁶⁷ Here, Congress implemented the Convention in 1970, twenty-five years after it passed MFA. Therefore, because the MFA preceded the Convention, the Supreme Court should recognize that the Convention prevails over the MFA.

4. The Distinction Between Foreign Commerce and Interstate Commerce

The Supreme Court should also recognize that the MFA does not cover the Convention as an “Act of Congress” because the MFA only applies to interstate commerce and does not apply to international arbitration agreements under the Convention. As properly noted by several district courts, the MFA only removed domestic Commerce Clause restrictions from states’ power to tax and regulate the insurance business, not Foreign Commerce Clause limitations.³⁶⁸ The MFA’s text and legislative history along with the Supreme Court’s interpretation of its preemptive effect strongly indicate that the Act only applies to interstate commerce.

The MFA’s text suggests that its preemptive effect is limited to interstate commerce. It provides that states can exclusively regulate the substantive content of insurance contracts.³⁶⁹ As explained below, legislative history suggests that Congress envisioned the substantive content of insurance contracts as only relating to interstate not foreign commerce.³⁷⁰ Therefore, the Act does not apply to international insurance contracts.

Several district courts properly noted that the Act’s legislative history indicates that Congress did not intend the MFA to regulate foreign commerce, but instead only intended it to apply to interstate commerce.³⁷¹ While discussing the bill, the Senate continuously

367. HENKIN, *supra* note 364, at 222; *See also* Rainey v. United States, 232 U.S. 310 (1914); Chae Chan Ping v. United States 130 U.S. 581 (1889); The Cherokee Tobacco, 78 U.S. 616 (1871).

368. *See supra* Part II.A.2.

369. 15 U.S.C. § 1012 (b).

370. *See supra* notes 341-61 and accompanying text.

371. *See supra* Part II.A.2.

referred to the “business of insurance” as “interstate” commerce.³⁷² In discussing the purpose of section 2(b) of the Act, Senator Ferguson stated, “What we have in mind is that the insurance business, being *interstate commerce*, if we merely enact a law relating to *interstate commerce*, or if there is a law now on the statute books relating in some way to *interstate commerce*, it would not apply to insurance.”³⁷³

The Act’s principal drafter, Senator Ferguson, thereby defined “the business of insurance” as interstate commerce. Furthermore, in discussing *S.E.U.A.*, Senator Pepper emphasized that the Supreme Court recognized insurance as “*interstate commerce* within the meaning of the commerce clause of the Constitution.”³⁷⁴ In addition, Senator Pepper asked Senator McCarran whether “states can regulate the business of insurance in a way inconsistent with the Sherman Act,” and Senator McCarran responded that “[i]f they do it, they do it at their own hazard . . . [because] Congress has always had the power over *interstate commerce*.”³⁷⁵ Furthermore, Senator Barkley also explained he believed that “insurance was interstate commerce,” stating,

I then expressed myself as believing . . . that insurance was interstate commerce; for I have always believed that a policy of insurance issued in the city of New York and sent to Kentucky or to San Francisco is just as much interstate commerce as is a certificate of stock issued in New York and sent to Kentucky or San Francisco or any other State.³⁷⁶

He further emphasized, “[W]e can enact such legislation as we may deem proper and wise to have enacted in connection with the regulation of this business, *which clearly is interstate commerce*.”³⁷⁷ The legislative history thereby contains numerous references to the “business of insurance” as interstate commerce.

While the senators continuously described the “business of

372. 91 CONG. REC. 1471-1488 (1945).

373. *Id.* at 1487 (statement of Sen. Ferguson); *see also* United States Dep’t of Treasury v. Fabe, 508 U.S. 491, 508 n.7 (1993) (quoting 91 CONG. REC. 1487 (daily ed. Feb. 27, 1945) (statement of Sen. Ferguson)) (emphasis added); *Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 n.5 (2d Cir. 1996) (quoting 91 CONG. REC. 1487 (daily ed. Feb. 27, 1945) (statement of Sen. Ferguson)).

374. 91 CONG. REC. 1477 (1945) (statement of Sen. Pepper).

375. *Id.* at 1478 (statement of Sen. McCarran) (emphasis added).

376. *Id.* at 1487 (statement of Sen. Barkley).

377. *Id.* at 1488 (statement of Sen. Barkley) (emphasis added).

insurance” under the MFA as interstate commerce, the legislative record is devoid of any mention of foreign or international commerce with respect to the “business of insurance.” Alternatively, a statement by Senator O’Mahoney explicitly suggests that the Senate did not intend the Act to apply to foreign commerce. While discussing the bill’s proposed moratorium on federal antitrust law, Senator O’Mahoney stated,

[T]here is not a line or sentence in the proposed act, as I have read it, would delegate to any State the power to legislate in the field of . . . foreign commerce. State regulation must be for the State and not for the United States. The bill does not sacrifice the power of Congress to regulate in the field of interstate commerce, but wisely . . . undertakes to say in effect to the State, ‘For this period, take the responsibility and regulate in the interest of the public.’³⁷⁸

Because the legislative history contains numerous references to the business of insurance as interstate commerce, the Supreme Court should hold that the Act does not apply to foreign commerce.

Finally, subsequent Supreme Court decisions interpreting the Act and its legislative history strongly indicate that the MFA only applies to interstate commerce. In *Metropolitan Life Insurance Co. v. Ward*, the Court held that the MFA’s reverse-preemptive effect only “exempts the insurance industry from Commerce Clause restrictions.”³⁷⁹ The Supreme Court found that the Act does not preempt the application of the Constitution and other federal laws beyond the interstate commerce limitation.³⁸⁰ Here, Congress derived the power to regulate international arbitration agreements and implement the Convention under the Foreign Commerce Clause, which empowers Congress “[t]o regulate Commerce with foreign Nations . . .”³⁸¹ The Convention called for the enforcement of arbitration agreements in transactions involving commerce and contracts performance abroad.³⁸² The Convention was also negotiated

378. *Id.* at 1483.

379. 470 U.S. 869, 880 (1985).

380. *Id.*

381. U.S. CONST. art. I, § 8, cl. 3.

382. *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476 (7th Cir. 1997) (“[T]he statute is comfortably within Congress’s commerce power.”). Article I(3) requires a country “on the basis of reciprocity [to] declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.” U.S. CONST. art. I, § 8, cl. 3.

under the Treaty power.³⁸³ The Foreign Commerce Clause and Treaty power are distinct from Congress' power to regulate commerce "among the several states" domestically.³⁸⁴ Therefore, the Supreme Court's precedent establishes that the MFA's reverse-preemption provision is limited to interstate commerce.

The relationship between the MFA and the Convention is analogous to the relationship between the MFA and the Foreign Sovereign Immunity Act "FSIA", which courts have found to be exempt from the MFA's reverse-preemptive effect. The FSIA regulates commerce with foreign nations and establishes rules governing the use of federal courts to adjudicate conflicts involving foreign sovereigns.³⁸⁵ It provides that "a foreign state shall be immune from attachment, arrest and execution."³⁸⁶ In *Moore v. National Distillers & Chemical Corporation*,³⁸⁷ a federal magistrate judge in the Southern District of New York held that the FSIA preempted section 1213(c)(1) because the Act exempts the business of insurance only from commerce clause limitations. The Second Circuit and Southern District of New York later affirmed the magistrate's order and re-asserted the interstate commerce clause limitation of the MFA reverse-preemption provision.³⁸⁸ The New York Supreme Court, Appellate Division, also found that the FSIA preempted the MFA and recognized the interstate commerce clause limitation, stating, "(i)n enacting the FSIA, 'Congress expressly exercised its power to regulate foreign commerce, along with other specified Art. I powers(.)'"³⁸⁹ The state court further found that the

383. *In re Sedco, Inc.*, 767 F.2d 1140, 1145 (5th Cir 1985) ("The Convention was negotiated pursuant to the Constitution's Treaty power. Congress then adopted enabling legislation to make the Convention the highest law of the land. As such, the Convention must be enforced according to its terms over all prior inconsistent rules of law.").

384. U.S. CONST. art. I, § 8, cl. 3.

385. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2898 (codified at 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611 (1994)); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983); *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1996).

386. Foreign Sovereign Immunities Act, 90 Stat. at 2898.

387. 143 F.R.D. 526, 533 (S.D.N.Y. 1992), *aff'd sub nom.*, *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226 (2d Cir. 1996).

388. *Stephens v. Nat'l Distillers & Chem. Corp.*, No. 91 CIV 2901, 1993 WL 228851, at *3 (S.D.N.Y. June 18, 1993).

389. *Moore v. Aegon Reinsurance Co. of America*, 196 A.D.2d 250, 261 (N.Y. App. Div. 1994), *cert. dismissed sub nom.*, *Stephens v. Instituto de Resseguros do Brasil (IRB)*, 512 U.S. 1283 (1994) (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461

federal magistrate judge properly concluded that “[i]n view of the paramount importance of the U.S. foreign policy concerns embodied in the FSIA . . . the preemptive effect of the McCarran-Ferguson Act does not extend to the FSIA.”³⁹⁰ Similarly, here, in implementing the Convention, Congress exercised its power to regulate foreign commerce, as distinct from interstate commerce.³⁹¹ As other courts have found that the MFA does not allow state law to preempt the FSIA, the Supreme Court should hold the MFA does not enable anti-arbitration state law to reverse-preempt the Convention.

Therefore, based on the MFA’s text, legislative history, and subsequent interpretations of the Act, the Supreme Court should recognize that the MFA is limited to Commerce Clause-based legislation. The Court should thus hold that the MFA does not allow state law to reverse-preempt the Convention because the Act only applies to domestic interstate commerce and not foreign commerce.

5. *The MFA’s Purpose of Restoring the Pre-S.E.U.A. Status Quo*

Furthermore, Congress did not intend the MFA’s reverse-preemption provision to apply to arbitration or dispute resolution because in enacting the MFA, Congress sought to restore the insurance industry to its pre-S.E.U.A. state, which included being subject to federal arbitration law. In *SEC v. National Securities, Inc.*, the Supreme Court explained that “[t]he McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation.”³⁹² Congress sought to “restore to the States’ broad authority to *tax* and *regulate* the insurance industry,”³⁹³ but did not define the “business of insurance” or “regulation.”³⁹⁴ To illuminate the meaning of these phrases, one must refer to the history behind the Act, including legislative history along with the general history of federal and state

U.S. 480, 496 (1983)).

390. *Id.*

391. *See supra* notes 360-74 and accompanying text.

392. 393 U.S. 453, 568 (1969).

393. *United States Dep’t of Treasury v. Fabe*, 508 U.S. 491, 507 (1993).

394. *See* 15 U.S.C. § 1011 (1994); *see also* Raymond A Guenter, *Rediscovering the McCarran-Ferguson Act’s Commerce Clause Limitation*, 6 *CONN. INS. L.J.* 253, 297 (2000).

regulation of insurance.³⁹⁵

Nothing in the MFA's text or legislative history suggests that the reverse-preemption provision encompasses methods of alternative dispute resolution such as arbitration, but instead indicates that the provision targeted areas of law that would substantively impact the insurance industry's practices. The legislative history primarily focuses on the Act's impact on trade regulation.³⁹⁶ Nearly all of the floor debates and amendments made to the legislation related to the extent to which the MFA would allow state law to insulate the insurance business from federal antitrust law.³⁹⁷ The hearings³⁹⁸ and committee reports³⁹⁹ similarly focused on antitrust. Therefore, the MFA's legislative history suggests that Congress was primarily concerned with preventing federal law from substantively altering the practices and structure of the insurance industry, not its methods of dispute resolution.

The expressed purpose of the MFA further confirms that it does not apply to arbitration law. House Reports on S. 340 indicate that Congress did not enact the statute to provide the states with *limitless* authority over the insurance business, but instead intended to maintain the *status quo* of the regulatory system before *S.E.U.A.* disrupted the industry.⁴⁰⁰ The House stated,

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the Southeastern Underwriters Association case. Briefly, your Committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346) and *Connecticut General Insurance Co. v.*

395. Guenter, *supra* note 394, at 297.

396. *See supra* Part I.B.

397. *See* 91 CONG. REC. 478-88, 1477-88 (1945) (statement of Rep. Russell); 90 CONG. REC. 6551-56, A 3020 (1944) (statement of Rep. Walter); Guenter, *supra* note 394, at 297.

398. *Judiciary Committee Hearings on S. 1362, H.R. 3269 and H.R. 3270 Before the Committees on the Judiciary*, 78th Cong. 25, 2-8, 31-65 (1943) (statements of Sen. Josiah W. Bailey & Att'y Gen. Francis Biddle).

399. *See* H.R. REP. NO. 79-143, at 2-3 (1945); S. REP. NO. 79-20, at 1-2 (1945); S. REP. NO. 78-1112 at 2-6 (1944); H.R. REP. NO. 78-873, at 1-8 (1943).

400. Guenter, *supra* note 394, at 297; H.R. REP. NO. 79-143, at 3 (1945).

Johnson (303 U.S. 77) (which hold, inter alia, that a State does not have the power to tax contracts of insurance or reinsurance entered into outside of its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way).⁴⁰¹

Senator McCarran read the statement into the record before the Senate voted on the final version of S. 340, and then stated: “In other words, we give to the states *no more powers than those they previously had*, and we take none from them.”⁴⁰² These illuminating statements indicate that Congress did not intend to surrender any power that it wielded before the *S.E.U.A.* decision.⁴⁰³ The Federal Arbitration Act was passed in 1923 and predates the MFA, enacted in 1945. By the time the Supreme Court decided *S.E.U.A.* and Congress deliberated over the MFA, the FAA had already established that arbitration law was primarily federal.⁴⁰⁴ The FAA contained no exemption for the insurance industry.⁴⁰⁵ The states thus did not “possess” the power to exclusively regulate arbitration in the insurance industry prior to *S.E.U.A.*, but instead shared that power with the federal government. Therefore, because Congress expressed that it did not seek to provide states with any power to regulate the insurance industry beyond that which it already enjoyed prior to the *S.E.U.A.* decision and the FAA’s federalization of arbitration occurred before the decision, the Supreme Court should recognize that MFA’s reverse-preemption provision does not include arbitration law and Congress did not intend states’ “regulation” to encompass arbitration. The stated purpose for the Act—returning the insurance industry to its status quo— may be accomplished without reverse-preempting the Convention or the FAA.

6. Policy Implications

This resolution would enable the United States to both promote its national policy favoring arbitration and fulfill its international

401. See *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 455-56 (1962) (relying on this report, the Court determined that Congress intended that the Court’s pre-SEUA decisions would continue to control the authority of the states to tax foreign insurance companies).

402. 91 CONG. REC. 1442 (1945) (emphasis added).

403. See Guenter, *supra* note 394.

404. 9 U.S.C. § 3 (2006).

405. *Id.*

obligations under the Convention.

a. National Policy Favoring Arbitration

Recognizing that the Convention is not subject to the MFA's reverse-preemption provision will promote the United States' national policy favoring arbitration. As explained above,⁴⁰⁶ the Supreme Court has recognized that the federal policy favoring arbitration "applies with special force in the field of international commerce."⁴⁰⁷ The United States adopted the Convention "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."⁴⁰⁸ Commercial parties transacting business among countries with different legal traditions particularly find arbitration clauses helpful to facilitate their relationships.⁴⁰⁹ A neutral third-party forum resolves any dispute that arises "free from the biases of local courts and the vagaries of an unresponsive judiciary."⁴¹⁰ Here, preventing states from nullifying arbitration clauses in international insurance contracts will promote arbitration in international commerce by respecting and upholding the agreements of commercial parties transacting globally. Therefore, excluding the Convention from the MFA's reverse-preemption provision would align with century-long federal policy favoring arbitration.

b. Fulfilling International Treaty Obligations

The United States should ensure that anti-arbitration state law does not reverse-preempt the Convention to fulfill its international obligations. The Convention's effectiveness depends upon its signatories' commitment to ensuring that their domestic courts enforce arbitration clauses and awards.⁴¹¹ When a signatory nation thwarts parties' abilities to enforce awards, commercial parties find themselves unable to achieve justice, collect their remedies, and effectively do

406. See Part III.A.

407. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

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

409. 143 CONG. REC. E1438-01 (1997).

410. *Id.*

411. *Id.*

business in the nation.”⁴¹² Furthermore, if Congress violates treaties or fails to fulfill international obligations, “the Nation will be none the less exposed to all the international consequences of such a violation”⁴¹³ Under Article III of the Convention, the United States has a duty to “recognize arbitral awards as binding.”⁴¹⁴ Allowing state arbitration statutes to reverse-preempt the Convention and stymie arbitration among international insurers would prevent the United States from satisfying this international obligation. Failing to enforce and recognize arbitral awards among international insurers may eventually lead to backlash from other countries, which may disadvantage and overturn the investment expectations of American businesses.

CONCLUSION

As the MFA continues to provide states with a tool to invalidate arbitration agreements in international insurance contracts, commercial parties' expectations and relations in the industry remain in jeopardy. To adequately protect the interests of both states and commercial parties, Congress and the Supreme Court should resolve the split in authority by recognizing that the MFA does not enable anti-arbitration state laws to reverse-preempt the Convention and invalidate mutually-agreed upon arbitration clauses. This resolution would effectively prevent states from thwarting commercial parties' expectations as embodied in their arbitration agreements under the guise of regulating the insurance industry. Upholding international parties' arbitration agreements under the Convention would also comport with the United States' duty to fulfill its international obligations and its overall national policy favoring arbitration as an effective dispute resolution mechanism.

412. *Id.*

413. *See* HENKIN, *supra* note 364 at 222 (citing Memorandum for President Harding, October 8, 1921, Sec'y of State Charles Evans Hughes, 5 Hackworth at 324-25).

414. New York Convention, *supra* note 5, art. III.