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## Preventing Reverse-Preemption of the United States' Obligations Under the New York Convention

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## NOTES

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### *INTRODUCTION*

In an address to the World Economic Forum in 1999, Kofi Annan noted that “[g]lobalization is a fact of life. But . . . we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take.”<sup>1</sup> The evidence of economic globalization is undeniable, as parties from various countries increasingly engage in global commerce.<sup>2</sup> Given the increase of international trade, it is plain that “[g]ood, bad, and ugly—the effects of our supposedly ‘flattened’ world are undeniable.”<sup>3</sup>

As a safeguard in the globalized economy, parties to international commercial agreements have increasingly relied

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1. Kofi Annan, U.N. Sec’y Gen., Address to the World Economic Forum (Jan. 31, 1999).

2. See Vidya S. A. Kumar, *A Critical Methodology of Globalization: Politics of the 21st Century?*, 10 *IND. J. GLOBAL LEGAL STUD.* 87, 97 (2003) (noting the economic evidence of globalization, such as the growth in global trade, foreign direct investment, capital flows (i.e. portfolio investments), global production and consumption, global competition, and increasingly liberal international trade policies); James C. Moore, *Economic Globalization and Its Impact Upon the Legal Profession*, 79 *N.Y. ST. B.J.* 35, 35 (2007) (defining economic globalization as “increasing integration of large segments of the economies of the nations of the world into a few economies—some might even say a single economy—so that many goods and services may be supplied and sold throughout the world rather than just within the producer’s nation state”).

3. *The Globalization Index 2007*, FOREIGN POL’Y, Nov.–Dec. 2007, at 68 (discussing the expansion of the global economy).

upon arbitration as the preferred mechanism for international dispute resolution.<sup>4</sup> The United States, as a signatory to the United Nations Convention on the Recognition and the Enforcement of Foreign Arbitral Awards (the “N.Y. Convention” or the “Convention”),<sup>5</sup> has an international obligation to enforce international arbitration agreements, as well as international arbitral awards rendered by tribunals in other signatory countries.<sup>6</sup> In line with US foreign policy, Congress also enacted the Federal Arbitration Act (“FAA”), which provides for liberal enforcement of domestic arbitral agreements and awards.<sup>7</sup> In addition to Congress, the state legislature plays pivotal role in defining US domestic policy.”<sup>8</sup>

Most states have followed the federal government’s lead and enacted statutes broadly enforcing arbitral agreements and awards.<sup>9</sup> At least eleven states, however, have passed statutes

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4. Jennifer Bagwell, *Enforcement of Arbitration Agreements: The Severability Doctrine in the International Arena*—Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991), 22 GA. J. INT’L & COMP. L. 487, 504 (1992) (“The inclusion of an arbitration clause in an international commercial contract is now almost universal practice.”); see also Janet A. Rosen, *Arbitration Under Private International Law: The Doctrine of Separability and Compétence de la Compétence*, 17 FORDHAM INT’L L.J. 599, 601 (1994) (“Arbitration clauses are now routinely included in international commercial contracts.”).

5. Due to the differing meanings of the term “state” in international and US domestic contexts, “state” will be exclusively used to refer to states of the United States.

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter N.Y. Convention]. The N.Y. Convention was drafted in 1958 to unify global standards by which arbitration agreements and arbitral awards were enforced in the signatory countries. See Michael J. Rosenhouse, *Annotation, Confirmation of Foreign Arbitral Award Under Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 194 A.L.R. FED. 291, I, §2 [a] (2004); 1958: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the “New York” Convention*, UNITED NATIONS COMM’N ON INT’L TRADE LAW, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (last visited Jan. 29, 2013).

7. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

8. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

9. Thomas J. Stipanowich, *Punitive Damages in Arbitration* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U. L. REV. 953, 976 (1986) (explaining that most states have enacted statutes modeled on the Uniform Arbitration Act, which is very similar to the Federal Arbitration Act (“FAA”)); Paul Turner, *Preemption: The United States Arbitration Act, the Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts*, 26 PEPP. L. REV. 519, 519–20 (1999) (explaining that as of 1999, thirty-five states have adopted the Uniform Arbitration Act, while others have adopted statutes substantially similar to the Uniform Arbitration Act).

barring arbitration of insurance disputes.<sup>10</sup> Typically, under the Supremacy Clause, state laws that frustrate federal laws are preempted, and thus rendered invalid.<sup>11</sup> The McCarran-Ferguson Act (the “MF Act”), however, removes the insurance industry from normal Supremacy Clause preemption analysis.<sup>12</sup> The MF Act allows states to reverse-preempt federal laws tangentially related to insurance, with legislation directly regulating the insurance industry.<sup>13</sup> Thus, the MF Act reverses Supremacy Clause preemption, and gives the states the supreme authority to tax and regulate the US insurance industry.<sup>14</sup>

Three federal appellate courts have been asked whether the MF Act allows a state to reverse-preempt the obligation to enforce arbitration agreements in international insurance disputes. In 1995, the Second Circuit held that the MF Act allows states to reverse-preempt the obligation to enforce arbitration agreements in international insurance contracts.<sup>15</sup> In 2009, however, the Fifth Circuit diverged and applied the N.Y. Convention to an international insurance contract, despite contrary state law.<sup>16</sup> In 2012, the Fourth Circuit joined the Fifth Circuit in enforcing arbitration agreements under the N.Y. Convention notwithstanding the MF Act.<sup>17</sup> In sum, the three Circuits have created a split in outcome and theory, which should be addressed by the Supreme Court.

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10. Peter A. Halprin & John G. Nevius, *Will Policyholders be Compelled to Arbitrate International Coverage Disputes?*, EXECUTIVE COUNS. MAG., Feb.–Mar. 2010, at 3 (“At least eleven states have enacted laws that specifically refuse to allow the arbitration of insurance disputes.”). *But see* Memorandum from Richard Mancino & Joseph G. Davis of Willkie Faar & Gallagher LLP (July 30, 2012), *available at* [http://www.willkie.com/files/tbl\\_s29Publications%5CFileUpload5686%5C4157%5CFourth\\_Circuit\\_Issues\\_Important\\_Decision.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C4157%5CFourth_Circuit_Issues_Important_Decision.pdf) (suggesting that currently, there are fifteen states which bar insurance arbitration).

11. U.S. CONST. art. VI, cl. 2; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985) (“It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that ‘interfere with, or are contrary to,’ federal law.”) (citations omitted); *Hamm v. Rock Hill*, 379 U.S. 306, 315 (1964).

12. McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (2006).

13. *See United States Dep’t of Treasury v. Fabe*, 508 U.S. 491, 499–500 (1993).

14. *Id.*

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

16. *Safety Nat’l Cas. Corp. v. Certain Underwriters*, 587 F.3d 714, 717 (5th Cir. 2009).

17. *ESAB Grp. v. Zurich Ins.*, 685 F.3d 376, 390–91 (4th Cir. 2012).

The three majority opinions have based their analysis on the premise that the N.Y. Convention is a non-self-executing treaty. Fifth Circuit Judge Edith Clement reached an alternative conclusion. Her concurrence in *Safety National Casualty Corp. v. Certain Underwriters* concludes that Article II of the N.Y. Convention is a self-executing provision, and thus falls outside the scope of the MF Act.<sup>18</sup> Judge Clement's unique conclusion is important because it avoids placing the United States in default of an international obligation, without reaching and attempting to unilaterally solve difficult constitutional questions.<sup>19</sup>

This Note navigates, rather than wades into, the "murky waters" of self-execution analysis to demonstrate the validity of Judge Clement's argument.<sup>20</sup> Part I of this Note explores background materials relating to foreign relations law, state and federal insurance regulation, as well as an overview of the history of international arbitration. Part II of this Note explores the differing views presented by the judges of the Second, Fourth, and Fifth Circuits. Part III compares the differing theories, and concludes that the Supreme Court should either hold that Article II of the N.Y. Convention is self-executing, or that the states lack the authority to abrogate implemented international agreements through the MF Act.

### I. A BROKEN TRAFFIC LIGHT: THE INTERSECTION OF US FOREIGN RELATIONS LAW, US INSURANCE LAW, AND US ARBITRATION POLICY

This Part begins by explaining US foreign relations law with respect to the execution status of treaties. Specifically, this Part discusses the distinction between self-executing and non-self-executing treaties in light of *Foster v. Neilson* and its progeny. This Part then explores regulation of the insurance industry in

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18. *Safety Nat'l Cas. Corp.*, 587 F.3d at 732 (Clement, J., concurring) (holding that the N.Y. Convention cannot be reverse-preempted through the McCarran-Ferguson Act ("MF Act")).

19. *Id.* (finding that "the conclusion that Article II is self-executing possesses the added benefit of avoiding a difficult constitutional question").

20. The Fourth Circuit characterized the discussion of the law of self-executing treaties as "wad[ing] into . . . murky waters." *ESAB Grp.*, 685 F.3d at 387. Likewise, the Court noted that this area of the law has "long confused courts and commentators." *Id.* (citing *United States v. Postal*, 589 F.2d 852, 876 (5th Cir. 1979); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540 (2008)).

the United States, with emphasis on how state legislatures have become virtually supreme authorities in this area. This Part then tracks the movement toward global acceptance of arbitration, and the adoption of the N.Y. Convention and the FAA. Finally, this Part sets out the issue presented by the circuit split and asks whether it is possible to avoid placing the United States in default of the N.Y. Convention.

*A. US Foreign Relations Law: Self-Execution of International Agreements*

The Constitution mentions the word “treaty” four times. First, the Constitution prohibits individual states from entering into treaties.<sup>21</sup> Second, it grants the President the power to enter into treaties, with the advice and consent of the Senate.<sup>22</sup> Third, it gives the judicial branch the power to interpret treaties entered into by the United States, as they arise in cases or controversies.<sup>23</sup> Finally, it provides that

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States*, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.<sup>24</sup>

Together, these constitutional provisions give the federal government considerable and supreme authority over international agreements.<sup>25</sup>

21. U.S. CONST. art. I, § 10.

22. *Id.* art. II, § 2.

23. *Id.* art. III, § 2.

24. *Id.* art. VI, cl. 2 (emphasis added).

25. In 1937, Justice Southerland expanded on the supreme role of the federal government with respect to international agreements, stating that

“[p]lainly, the external powers of the United States are to be exercised without regard to states laws or policies . . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State[s] . . . do[] not exist.” *United States v. Belmont*, 301 U.S. 324, 331 (1937) (citations omitted).

While the Constitution dictates that all treaties entered into by the United States are to be treated as the supreme law of the land, the Supreme Court has long recognized that there are two types of treaties: self-executing treaties and non-self-executing treaties.<sup>26</sup> The difference between the two is traced to Justice Marshall's opinion in *Foster v. Neilson*.<sup>27</sup> In this case, the Court held that a treaty that operates of itself by addressing the judicial branch, should be regarded as the equivalent of an act of the federal legislature.<sup>28</sup> In contrast, if the treaty addresses itself to the political branches, it is to be regarded as a contract that must be executed before becoming operative in US courts.<sup>29</sup> In *Foster*, the Court concluded that the disputed treaty was non-self-executing, relying in part on the fact that Congress had apparently assumed as much by passing implementing legislation.<sup>30</sup> Although the Court later reversed itself and held that the treaty was self-executing, after reading the Spanish version of the text, the reasoning remains good law.<sup>31</sup>

Generally, US courts consider treaties to be non-self-executing if any of three conditions are met: (1) the treaty's text indicates that it will not become operative without implementing legislation; (2) the Senate mentions during its

26. See *Foster v. Neilson*, 27 U.S. 253, 314 (1828) (discussing the difference between treaties that operate of themselves, and treaties that need implementing legislation to operate). But see *Safety Nat'l Cas. Corp. v. Certain Underwriters*, 587 F.3d 714, 739 n.10 (5th Cir. 2009) (Elrod, J., dissenting) (noting that there is an unpopular interpretation of the words "all treaties made" in the supremacy clause which indicate that the Constitution should not "recognize two species of treaty").

27. *Foster*, 27 U.S. at 314 (establishing the difference between self-executing and non-self-executing treaties).

28. *Id.* (noting that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision").

29. *Id.* ("But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

30. *Medellin v. Texas*, 522 U.S. 491, 514 (2008) (discussing the origin of treaty execution law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1965) [hereinafter RESTATEMENT] (citing *Foster*, 27 U.S. 253) (explaining the history of treaty execution law).

31. *United States v. Percheman*, 32 U.S. 51, 52 (1833) (noting that the treaty would have been treated differently in *Foster v. Neilson* if the Spanish version had been brought to the attention of the court); see *Medellin*, 522 U.S. at 514 (citing this reversal as evidence that the text of the treaty is controlling over other factors for treaty execution analysis).

advice and consent that implementing legislation is required for the treaty to become operative; or (3) the Constitution requires implementing legislation.<sup>32</sup> The execution status of the treaty in another nation is not controlling in the United States.<sup>33</sup> Finally, and to complicate matters, case law tends to show that a single treaty can contain both self-executing and non-self-executing provisions.<sup>34</sup>

In 2008, the Supreme Court decided *Medellin v. Texas*, its most recent opinion with respect to the execution status of a treaty.<sup>35</sup> The Court was asked to determine whether judgments of the International Court of Justice (“ICJ”) were immediately binding upon US courts.<sup>36</sup> Reaffirming the conservative majority’s dedication to textualist construction, Justice Roberts declared that “[t]he interpretation of a treaty, like the

32. RESTATEMENT § 111(4) (laying out the three elements); *United States v. Noriega*, 808 F. Supp. 791, 798 (S.D. Fla. 1992) (noting scholarly agreement with the three elements of the Restatement (Third) of Foreign Relations Law (“Restatement”)). Senatorial declaration that an international agreement needs implementing legislation has rendered many treaties and executive agreements non-self-executing. For example, the Uruguay Round Agreements, which establish the World Trade Organization, have been rendered non-self-executing by senatorial declaration. See J.J. GRIMMETT, CONG. RESEARCH SERV., RS22154, WORLD TRADE ORGANIZATION (WTO) DECISIONS AND THEIR EFFECT IN U.S. LAW 2 (2011); Patrick C. Reed, *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality*, 38 GEO. J. INT’L L. 209, 214–15 (2007). The Uruguay Round Agreements Act implemented the Uruguay Round Agreements. Uruguay Round Agreements Act, 19 U.S.C. § 3512(a) (2006).

33. RESTATEMENT § 111 cmt. H. (“Whether an agreement is or is not self-executing in the law of another state party to the agreement is not controlling for the United States.”).

34. *Id.* (“If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement”); see *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing . . . they have the force and effect of a legislative enactment.”); *Medellin*, 552 U.S. at 514 (“Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue.”).

35. *Medellin*, 552 U.S. 491.

36. *Id.* at 498 (posing the question, “[I]s the ICJ’s judgment in *Avena* directly enforceable as domestic law in a state court in the United States?”). The International Court of Justice (“ICJ”) is “the principal judicial organ of the United Nations.” U.N. Charter art. 92.

interpretation of a statute, begins with its text.”<sup>37</sup> For guidance, the Court looked to Article 94 of the United Nations Charter, which governs the legal effect of ICJ opinions.<sup>38</sup> The Article provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”<sup>39</sup> The Court noted that the words “undertakes to comply” indicate that ICJ opinions create an international commitment for the political branches to comply with the ICJ opinion, but they do not create an immediate legal effect in United States courts.<sup>40</sup> Notably, the words “shall” and “must” are absent from the provision, and it lacks an explicit directive to the courts of UN Members.<sup>41</sup>

Finally, the Court explained that the UN Charter grants aggrieved nations a diplomatic remedy against another nation that ignores an ICJ judgment.<sup>42</sup> The remedy, a referral to the United Nations Security Council for a measure to effectuate a judgment, is subject to the United States’ “unqualified right to exercise its veto,” which effectively makes the United States judgment-proof within the UN System.<sup>43</sup> The Court notes that both the President and the Senate were “undoubtedly aware” of this option.<sup>44</sup> To give ICJ judgments automatic effect in US courts would frustrate this political safeguard.<sup>45</sup>

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37. *Medellin*, 552 U.S. at 506 (citing *Air France v. Saks*, 470 U.S. 392, 396–97 (1985)).

38. *Id.* at 508 (“The obligation on the part of signatory nations to comply with ICJ judgments derives . . . from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions.”).

39. U.N. Charter art. 94, para. 1.

40. *Medellin*, 552 U.S. at 508 (contrasting this language with the language of directives).

41. *Id.* (using “shall” and “must” to demonstrate mandatory directive language).

42. *Id.* at 509 (“The U.N. Charter’s provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts.”).

43. *Id.* at 509–10 (relying in part on this remedy as evidence that Article 94 is non-self-executing); see Johan D. van der Vyver, *The Environment: State Sovereignty, Human Rights, and Armed Conflict*, 23 EMORY INT’L L. REV. 85, 102 (2009) (“The Security Council is admittedly influenced in its decisions by political considerations. To add insult to injury, the veto power of the permanent members of the Council (China, France, Russia, the United Kingdom, and the United States) renders them practically immune from retributory action.”).

44. *Medellin*, 552 U.S. at 509–10.

45. *Id.* at 510–11 (explaining that letting ICJ judgments become automatically enforceable in the United States would leave nothing to veto in the Security Council).

Therefore, the text of the treaty is of particular importance with respect to its execution status.<sup>46</sup> To this end, the Court stated that the textualist standard is based on “clarity” and seeks to find “explicit textual expression about self-execution” in the “language of the treaty.”<sup>47</sup> Given this controversial standard, this Note will emphasize the text of the N.Y. Convention in the hope of finding a solution based on “clarity” derived from “explicit textual expression” by the drafters of the convention.<sup>48</sup>

### B. *The States’ Roles in Insurance Regulation*

The execution status of the N.Y. Convention could play a significant role in how courts evaluate an insurance dispute over a contract containing an executory arbitration agreement.<sup>49</sup> The complexity of this issue is exacerbated by the divergent roles of government in the US federalist system.<sup>50</sup> While foreign relations are conducted at the federal level, many legislative areas are left to the states for regional regulation.<sup>51</sup> Like US foreign relations law, the framework for US insurance law is also based on the Constitution, which vests limited legislative

46. *See id.* at 514 (“Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue.”); RESTATEMENT § 111(4) (stating that the text of a treaty is one of three ways to ascertain its execution status).

47. *Medellin*, 552 U.S. at 514.

48. *Compare Medellin*, 552 U.S. 491 (using textualism to focus on the UN Charter’s wording, or lack thereof), *with id.* at 549 (Breyer, J., dissenting) (using purposivism and explaining that “text and [drafting] history, along with subject matter and related characteristics will help our courts determine whether” a treaty is self-executing or not). Justice Breyer stressed that the Court has found many treaties to be self-executing, without such “clear” textual expression. *See id.* He further suggests that only a minority of treaties speak directly to the courts because domestic status law varies by country, and it is unlikely that the drafters will be able to keep track of the differences. *Id.* Thus, it appears that there is consensus that the text of treaty is relevant, but the degree to which it is controlling is hotly contested.

49. *See ESAB Grp. v. Zurich Ins. PLC*, 685 F.3d 376, 386–88 (4th Cir. 2012) (discussing the implications of execution status and reverse-preemption).

50. *See id.* at 380–83 (discussing how insurance has been relegated to state regulation, while arbitration and foreign relations laws have been federalized).

51. *See* U.S. Const. amend X (granting the states the authority to regulate anything not reserved to the federal government). *But see* *United States v. Pink*, 315 U.S. 203, 233 (1942) (“No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively.”).

authority, known as its “enumerated powers” to the federal bicameral congress.<sup>52</sup> The framers of the Constitution explained Congress’ role in the federalist system by noting that “the powers delegated by the proposed Constitution to the federal government are few and defined. State governments’ powers, however, are numerous and indefinite.”<sup>53</sup> One of Congress’ enumerated powers is the power to regulate “[c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>54</sup> In 1869, the Supreme Court clarified that “[i]ssuing a policy of insurance is not a transaction of commerce.”<sup>55</sup> As such, it was the states, rather than the federal government that largely controlled insurance regulation for nearly a century.<sup>56</sup>

In 1944, however, the Supreme Court in *United States v. South-Eastern Underwriters Ass’n* reversed its prior precedent, and declared that the business of insurance fell within the scope of the commerce clause.<sup>57</sup> Noting that “[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause,” the Court extended the congressional authority to regulate commerce to the insurance industry.<sup>58</sup> By extension, the Supreme Court applied the Sherman Act, a federal antitrust statute, to the insurance industry.<sup>59</sup>

52. U.S. CONST. art. I; see Elizabeth Sampson, *Revisiting Miranda After Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on Consular Relations in the United States*, 29 FORDHAM INT’L L.J. 1068, 1080 (2006) (“These powers are limited by the Constitution, enabling Congress to legislate only in areas in which it has authority.”).

53. THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) (arguing for the adoption of the US Constitution and for a federalist republic).

54. U.S. CONST. art. I, cl. 8.

55. *Paul v. Virginia*, 75 U.S. 168, 183 (1869).

56. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978) (“[I]t had been assumed . . . that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry”).

57. *United States v. S.E. Underwriters Ass’n*, 322 U.S. 533, 553 (1944) (finding that insurance is considered commerce under the commerce clause).

58. *Id.*

59. *Id.* at 556–58 (“We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power.”).

As a result, states and the insurance lobby began to fear that the federal government was not only willing, but able, to threaten the states' role in insurance regulation.<sup>60</sup> Within a year of the 1944 decision, Congress responded by enacting the MF Act.<sup>61</sup> The statute begins by reassuring that the "continued regulation and taxation by the several States of the business of insurance is in the public interest."<sup>62</sup> The MF Act then establishes the doctrine of reverse-preemption by stating 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 . . . unless such Act specifically relates to the business of insurance."<sup>63</sup>

Therefore, under the MF Act, a state statute can reverse-preempt a federal statute or policy if three elements are met.<sup>64</sup> First, a court must determine if there is a state statute that was enacted "for the purpose of regulating the business of insurance."<sup>65</sup> Second, there must be a federal statute that does not "specifically relate to the business of insurance."<sup>66</sup> Finally, the application of this federal statute would "invalidate, impair or supersede" the state insurance statute.<sup>67</sup>

Under the Obama Administration, the federal government has made two incursions into the realm of insurance regulation. Notably, the Patient Protection and Affordable Care Act ("ACA") of 2010 represents a deliberate attempt by the federal

60. US Dep't of Treasury v. Fabe, 508 U.S. 491, 499–500 (1993) (characterizing *United States v. S.E. Underwriters Ass'n* as a "threat to state power to tax and regulate the insurance industry").

61. *Id.* at 500 ("To allay those fears, Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation. It enacted the McCarran-Ferguson Act within a year.")

62. 15 U.S.C. § 1011 (2006).

63. 15 U.S.C. § 1012(b).

64. *Fabe*, 508 U.S. at 501 (1993) (laying out a three part test for MF Act reverse-preemption).

65. *Id.*

66. *Id.* (noting that the parties stipulated that the federal bankruptcy statute in question was not specifically related to the business of insurance). The MF Act, however, does note that the Sherman Act, the Clayton Act, and the Federal Trade Commissioning Act will preempt state statutes, despite the fact that they do not specifically regulate the business of insurance. § 1012(b).

67. *Fabe*, 508 U.S. at 501 (1993) (noting that the parties stipulated that the federal bankruptcy statute, if applied, would impede the state policy).

government to regulate the business of medical insurance.<sup>68</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) is another deliberate attempt at insurance regulation.<sup>69</sup> In the wake of the fall of AIG in 2008, a few commentators called for the repeal of the MF Act.<sup>70</sup> Congress, reluctant to take insurance industry regulation away from the states, however, ignored those calls.<sup>71</sup> This may have been due to the fact that state-regulated insurance companies fared far better than commercial banking and investment banking companies.<sup>72</sup> In any case, the Dodd-Frank Act succeeded in creating a Federal Insurance Office, which monitors the US insurance industry, and makes recommendations to the Financial Stability Oversight Council, in a non-voting capacity.<sup>73</sup> Although in recent years the federal government appears to be

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68. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); see Christopher B. Serak, *State Challenges to the Patient Protection and Affordable Care Act: The Case for a New Federalist Jurisprudence*, 9 IND. HEALTH L. REV. 311, 316-17 (2012) (describing the shift of power to the federal government for regulation of medical insurance); Troy J. Oechsner & Magda Schaler-Haynes, *Keeping it Simple: Health Plan Benefit Standardization and Regulatory Choice Under the Affordable Care Act*, 74 ALB. L. REV. 241, 243 (2011) (“The Affordable Care Act reflects a distinct move towards greater standardization.”). After much political controversy, the Supreme Court held that the individual mandate was constitutional under the Taxing and Spending Clause, while the Act’s Medicaid expansion exceeded Congress’ spending powers. *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

69. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 [hereinafter the Dodd-Frank Act].

70. See NICK PEARSON & GEOFFREY ETHERINGTON, *THE DODD-FRANK ACT: THE U.S. GOVERNMENT TURNS ITS ATTENTION TO INSURANCE REGULATION* 4 (Bloomberg Law Reports 2010) (noting that these calls never resulted in repeal).

71. See PEARSON & ETHERINGTON, *supra* note 70, at 4 (“[A]bsent some early calls for broad federal regulation of insurance companies and the repeal of the McCarran-Ferguson Act by a few legislators, Congress was reluctant to overturn state regulation of the insurance industry.”); BAIRD WEBEL, *CONG. RESEARCH SERV.*, R41372, *THE DODD-FRANK WALL STREET REFORM ACT: INSURANCE PROVISIONS* 2 (2010) (explaining that, although it is contested, many argue that AIG’s failure is best understood as a failure of the federal government to properly regulate the derivatives and securities markets).

72. See PEARSON & ETHERINGTON, *supra* note 70, at 2 (explaining that insurance companies generally remained solvent and avoided excessive risk during 2008 and 2009, which is not true of the other branches of the financial services industry); WEBEL, *supra* note 71, at 1 (“Generally good performance of insurers through the crisis, however, has also provided additional arguments for those seeking to retain the state-based insurance system.”).

73. See 31 U.S.C. § 313 (2006).

increasingly willing to regulate insurance companies, state governments still reign supreme in insurance regulation.<sup>74</sup>

C. *The History of Arbitration, Domestic and International*

While US policy makers have sought to relegate the insurance industry to state-level regulation and taxation, they have sought do the opposite with US arbitration policy.<sup>75</sup> US policy makers have sought to federalize and liberalize the nation's arbitration policies.<sup>76</sup> This divergence in policy is complicated by an international commercial trend favoring arbitration as the preferred dispute resolution mechanism in the insurance industry.<sup>77</sup>

The development of modern US arbitration policy tracks a global movement toward the acceptance of international arbitration, typified by the French jurisprudence in the area.<sup>78</sup> Following this global trend, the United States in 1925 enacted Chapter 1 of the FAA, which sets forth a liberal enforcement

74. See Van R. Mayhall III, *A Brief Chronicle Of Insurance Regulation in the United States, Part II: From McCarran-Ferguson To Dodd-Frank*, INSURANCE REGULATORY LAW (May 23, 2011), [http://www.insuranceregulatorylaw.com/2011/05/brief-chronicle-of-insurance-regulation\\_23.html](http://www.insuranceregulatorylaw.com/2011/05/brief-chronicle-of-insurance-regulation_23.html) (detailing the history of federal government "encroach[ments] upon the state regulatory system" for the insurance industry); PEARSON & ETHERINGTON, *supra* note 70, at 4 ("[A]lthough we are not at the end of state regulation, the enactment of the Dodd-Frank Act is the end of the beginning of federal efforts to regulate insurance. Uncharted territory lies ahead.").

75. *ESAB Grp. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (2012) (highlighting the different congressional approaches to insurance and arbitration).

76. *Id.* ("While Congress acted to preserve the states' dominance in insurance regulation, it moved to federalize policy regarding arbitration . . . establishing a liberal federal policy . . .").

77. See Richard R. Ryan, *Enforcement of Foreign Arbitration Agreements and Awards in Insurance Coverage Disputes*, MCCULLOUGH, CAMPBELL & LANE, <http://www.mcandl.com/arbitration.html> (last visited Jan. 2, 2013) ("On an increasingly international stage many insurance contracts now provide for arbitration of coverage disputes."); *Much Ado About Nothing? Arbitration Clauses in Insurance and Reinsurance Contracts: Are they Still Effective?*, CROWELL & MORING LLP, <http://www.crowell.com/NewsEvents/AlertsNewsletters/Financial-Lines-Directors-Officers-Management-Liability-Alert/Much-Ado-About-Nothing-Arbitration-Clauses-in-Insurance-and-Reinsurance-Contracts-Are-They-Still-Effective> (Jun. 9, 2009) (stating that it is rare to find an international insurance contract without an arbitration clause).

78. See *ESAB Grp.*, 685 F.3d at 380 (explaining domestic and international efforts to liberalize arbitration policy); Arthur T. von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1048 (1986) (noting that the French trend was "certainly the line of development [followed] in the United States").

policy for domestic arbitral agreements.<sup>79</sup> The United States also signed and ratified the N.Y. Convention, and passed Chapter 2 of the Federal Arbitration Act (the “Convention Act”), which collectively set forth a liberal enforcement policy for international arbitral agreements.<sup>80</sup>

Though arbitration predates national court systems, the introduction of national courts relegated arbitration to a subservient role among litigation-oriented dispute resolution mechanisms.<sup>81</sup> *L’Alliance v. Prunier*, an 1843 decision of the French Cour de Cassation, exemplifies the historical judicial hostility toward arbitration.<sup>82</sup> The *Prunier* Court nullified a *clause compromissoire* because it neither specified the names of the arbitrators to be used in case of an eventual dispute, nor specified the subject matter of the dispute, should such a dispute arise.<sup>83</sup> Because naming arbitrators in a *clause compromissoire* was very difficult, and it was almost impossible to divine the nature of a dispute before it arose with the requisite specificity desired by French courts, domestic and international arbitration in France was virtually impossible.<sup>84</sup> The Cour de

79. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

80. See N.Y. Convention, *supra* note 6; Federal Arbitration Act, 9 U.S.C. §§ 201–07.

81. Tibor Várady, *The Standing of Arbitration Within the Legal System*, in LAW & REALITY: ESSAYS ON NATIONAL AND INTERNATIONAL PROCEDURAL LAW 351 (Mathilde Sumampouw et al. eds., 1995) (“Arbitration is an institution which preceded courts; yet shortly after the appearance of the latter, arbitration assumed the position of the younger (and weaker) brother.”); Georgios I. Zekos, *Is the Arbitration Fairness Act of 2007 the Right Way for Justice or a Wrong Turn?*, 6 RUTGERS CONFLICT RESOL. J. 69 (2008) (“It is worth noting that private arbitration predates the public court system.”).

82. Cour de cassation [Cass.][supreme court for judicial matters], civ., July 10, 1843, D. 1843.I.343, S. 1843.I.561 (Fr.). The Cour de Cassation is the highest court in the French Judiciary. See THE COUR DE CASSATION, *About the Court*, [http://www.courdecassation.fr/about\\_the\\_court\\_9256.html](http://www.courdecassation.fr/about_the_court_9256.html) (last visited May 16, 2013).

83. Cour de cassation [Cass.][supreme court for judicial matters], civ., July 10, 1843, D. 1843.I.343, S. 1843.I.561 (Fr.) (finding that the names of the arbitrators and the dispute were required to be in the arbitration agreement by the French Civil Code). A *clause compromissoire* is a prior agreement to arbitrate found in the contract before the dispute arises, whereas a *compromis* is an agreement to arbitrate once the arbitration agreement has already been signed. See Joseph M. Matthews, *Are Florida Courts Really Parochial When It Comes to Arbitration? A Rebuttal*, 81 FLA. B.J. 28, 32 n.16 (2007) (defining the French terms); Jean-François Poudret & Sébastien Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 150 (2d ed. 2007) (defining the arbitration terms).

84. See Arthur von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1048 (1986) (characterizing the *Prunier* rule as harmful to French international commerce); Arthur von Mehren, *Theory and*

Cassation realized that the *Prunier* rule was disastrous to French international commerce and gradually created a distinct legal regime for international commercial arbitration.<sup>85</sup> First, the French courts began to enforce *clause compromissoires*, where the parties had agreed to a foreign substantive law that recognized arbitration agreements.<sup>86</sup> Then, the Cour de Cassation began recognizing and enforcing arbitration agreements, so long as they met the broad standard of “involv[ing] the interests of interstate commerce.”<sup>87</sup>

Much like the French courts following *Prunier*, the English courts did “little or nothing to prevent or make irksome the breach of [arbitration] agreements when they were still executory.”<sup>88</sup> Nineteenth century US courts largely adopted the policy of the English courts to refrain from ordering specific performance or imposing a stay of court proceedings on the basis of executory arbitration agreements.<sup>89</sup> In 1925, however, the US view of arbitration changed with the enactment of the FAA, which established a liberal national policy of enforcing domestic arbitration agreements arising from maritime and commercial transactions.<sup>90</sup> In the domestic realm, the FAA provides that “[a] written [contractual] provision . . . to settle [disputes] by arbitration . . . shall be valid, irrevocable, and

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*Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems*, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 270, (1996) (characterizing the *Prunier* rule as unexpected and sensational for doctrinal and practical reasons).

85. See von Mehren, *supra* note 84, at 1048 (noting that the *Prunier* case led to a movement in the nineteenth century by the French courts to create a “distinct and special legal regime for arbitration in matters of international commerce”); see also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 564 (Kluwer Law International 2009) (“[The] historic mistrust of the arbitral process gradually eroded in the United States, France and other democracies over the course of the 20th century.”).

86. Cour d’appel [CA][regional court of appeal], Paris, Jan. 11, 1865, D.1865.II.188, S.1866.II.147 (Fr.).

87. Cour de Cassation [Cass.][supreme court for judicial matters], Civ., Feb. 16, 1930, S.1933.I.41 (Fr.).

88. Kulukundis Shipping Co., S.A. v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942).

89. *Id.* at 984 (describing the English judicial treatment of arbitration and its similarity to early American arbitration jurisprudence).

90. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006); ESAB Grp. v. Zurich Ins. PLC, 685 F.3d 376, 380–81 (4th Cir. 2012) (describing the history of the FAA).

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>91</sup>

Many states followed the federal government’s lead, and enacted statutes favoring arbitration.<sup>92</sup> While the state policies to enforce arbitration were likewise liberal, many states enacted provisions barring arbitration of insurance disputes.<sup>93</sup> South Carolina, for example, provided that its liberal enforcement rule would “not apply to . . . any insured or beneficiary under any insurance policy.”<sup>94</sup> Vermont also declared that its liberal enforcement rules would “not apply to . . . arbitration agreements contained in a contract of insurance.”<sup>95</sup>

Since the enactment of Chapter 1 of the FAA and the MF Act, state and federal courts have held that state-level anti-arbitration statutes reverse-preempt the FAA through the MF Act.<sup>96</sup> The courts noted that state anti-arbitration statutes relate to the “business of insurance,” when they specifically exempt insurance disputes from a general policy to enforce arbitration

91. 9 U.S.C. § 2 (2006).

92. *See, e.g.*, S.C. CODE ANN. § 15-48-10(a) (2012) (establishing that written arbitration agreements are “valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

93. *See* Peter A. Halprin & John G. Nevius, *Will Policyholders be Compelled to Arbitrate International Coverage Disputes?*, ANDERSON KILL & OLICK, P.C., (Feb./Mar. 2010), <http://www.andersonkill.com/webpdfext/AKO-WillPolicyholdersBeCompelled.pdf> (noting the number of states barring arbitration of insurance disputes); *Fourth Circuit Issues Important Decision on Enforceability of Arbitration Agreements in International Insurance Contracts*, WILKIE FARR & GALLAGHER LLP (Jul. 30, 2012), [http://www.willkie.com/files/tbl\\_s29Publications%5CFileUpload5686%5C4157%5CFourth\\_Circuit\\_Issues\\_Important\\_Decision.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C4157%5CFourth_Circuit_Issues_Important_Decision.pdf) (naming Alabama, Arkansas, Hawaii, Kansas, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, Oklahoma, South Carolina, South Dakota, Vermont, Virginia, and Washington as states that bar arbitration disputes).

94. S.C. Code Ann. § 15-48-10(b)(4) (2012).

95. Vt. Stat. Ann. tit. 12, § 5653 (2012).

96. *See, e.g.*, *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 824 (8th Cir. 2001) (reverse-preempting the FAA with the Missouri Arbitration Act’s bar to insurance arbitration); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 934 (10th Cir. 1992) (allowing the Kansas Arbitration Act to reverse-preempt the FAA); *Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 581–83 (D.S.C. 2003) (reverse-preempting the FAA with the South Carolina statute); *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397, 399–402 (2001) (allowing the South Carolina statute to reverse-preempt the FAA).

agreements.<sup>97</sup> Because the FAA is an “Act of Congress,” that does not “specifically relate to the business of insurance,” and its application would frustrate the state statutes barring arbitration of insurance disputes, it is reverse-preempted through the MF Act.<sup>98</sup>

While the United States was molding its domestic arbitration policy, international actors gradually created a globalized, cohesive, and liberal policy of enforcing arbitration agreements.<sup>99</sup> In the early 1950s, the newly established Economic and Social Council of the United Nations responded to a request from the International Chamber of Commerce to create a convention on the “recognition and enforcement of foreign arbitral awards and, further, ‘to consider, if time permits, other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes’ . . . .”<sup>100</sup> Forty-five nations, including the United States, joined the drafting conference of what would become the N.Y. Convention.<sup>101</sup>

97. *Am. Health & Life Ins. Co.*, 272 F. Supp. 2d at 582 (“S.C.Code § 15-48-10(b) (4) was ‘enacted . . . for the purposes of regulating the business of insurance’ because it exempts insurance contracts from arbitration.”).

98. *Id.* at 581 n.1, 582 (reverse-preempting the FAA in domestic insurance disputes). Unlike the FAA, the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Patient Protection and Affordable Care Act both deliberately regulate the business of insurance, and are exempt from the MF Act’s reverse-preemption.

99. 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, 1059–60 (1961) (providing background on international efforts to find a “multilateral solution” to the enforcement issues); see Rachael D. Kent, *Legislative Threats to the Historically Strong Relationship between Domestic and International Arbitration in the U.S.*, 4 *WORLD ARB. & MEDIATION REV.* 107, 107 (2010) (“Many of the important steps in the development of a vibrant arbitration culture in the U.S.—including passage of the [Federal Arbitration Act] itself—were preceded by major international efforts to encourage development of an effective system for the resolution of cross-border commercial disputes. These efforts include the adoption of . . . the New York Convention in 1958.”).

100. Quigley, *supra* note 99, at 1059–60 (quoting U.N. E.S.C., 21st Sess., 1st mtg. at 6, U.N. Doc. E/CONF.26/SR.1 (May 3, 1956)); see Kofi Annan, Sec’y Gen. of the U.N., Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration (June 10, 1998), *reprinted in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE & PROSPECTS, at 1–3, U.N. Sales No. E.99.V.2. (1999).

101. Quigley, *supra* note 99, at 1060.

The N.Y. Convention obligates signatories to (1) enforce written international arbitration agreements; and (2) enforce awards issued by arbitrators in foreign nations.<sup>102</sup> Article II of the N.Y. Convention provides that

[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration . . . . [and] [t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>103</sup>

Article III of the N.Y. Convention provides that:

[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.<sup>104</sup>

Subject to few exceptions, these two provisions demonstrate the obligations that countries take by becoming signatories.

In 1958, the N.Y. Convention was adopted by the Drafting Committee.<sup>105</sup> President Nixon, however, only proclaimed the United State's accession to the N.Y. Convention in 1970, after receiving the advice and consent of the Senate in 1968.<sup>106</sup> The delay was attributed to a sense in the Senate and the executive branch that certain provisions of the US Code had to be

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102. *ESAB Grp. v. Zurich Ins. PLC*, 685 F.3d 376, 381 (4th Cir. 2012).

103. N.Y. Convention, *supra* note 6, art. II, 21 U.S.T. 2517, 330 U.N.T.S. 3., art. II (emphasis added); *see supra* notes 28, 41 and accompanying text (noting the importance of the words "the court").

104. *Id.* art. III.

105. *See ESAB Grp.*, 685 F.3d at 381 (noting that the N.Y. Convention was "crafted during a 1958 United Nations conference").

106. *Id.* (discussing the history of US accession to the N.Y. Convention).

amended before adopting the N.Y. Convention.<sup>107</sup> Congress had recently enacted the Convention Act, which provided that the “[N.Y. Convention] shall be enforced in United States courts in accordance with this chapter.”<sup>108</sup> The Convention Act gave federal district courts the power of jurisdiction over the Convention, and the ability to order arbitrations and appoint arbitrators.<sup>109</sup>

After the adoption of the N.Y. Convention and the Convention Act in the United States, US courts continued to favor the enforcement of arbitration agreements in international commercial disputes. Justice Blackmun’s 1985 opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* widely expanded the role of international arbitration.<sup>110</sup> The case concerned a dispute between a Japanese-Swiss joint venture and a Puerto Rican car dealership.<sup>111</sup> The contract between the parties contained a provision that mandated that “[a]ll disputes, controversies or differences which may arise . . . out of or in relation to . . . this agreement or for breach thereof, shall be finally settled in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.”<sup>112</sup> In addition to numerous contractual breaches, the dealership asserted Sherman Act counterclaims against the joint venture.<sup>113</sup>

Justice Blackmun enforced the arbitration agreement broadly, noting that “[t]here is no reason to depart from [the federal policy of enforcing arbitration agreements] where a party bound by an arbitration agreement raises claims founded on statutory rights.”<sup>114</sup> Further, he ordered district courts “to

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107. *See id.* at 381–82 (noting, for example, that “a representative of the State Department’s Office of the Legal Advisor requested changes to the US Code ‘to insure the coverage of the [FAA] extends to all cases arising under the treaty and some changes in Federal civil procedure to take care of related venue and jurisdictional requirement problems’” (quoting S. Exec. Rep. No. 90-10, at 6 (1968) (statement of Richard D. Kearney, Ambassador, Office of the Legal Adviser); S. Exec. Rep. No. 90-10, at 1 (1968) (“[T]he American delegation . . . felt certain provisions of the [C]onvention were in conflict with some of [the United States’] domestic laws.”)).

108. 9 U.S.C. §§ 201–07 (2006).

109. *Id.*

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

111. *Id.* at 616–17 (describing the facts of the case).

112. *Id.* at 617.

113. *Id.* at 620 (listing the Sherman Act counterclaims).

114. *Id.* at 626.

subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”<sup>115</sup> Justice Blackmun noted that

[t]he Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public’s interest. The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme . . . . The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court.<sup>116</sup>

In this spirit, he concluded, “national courts will need to ‘shake off the old judicial hostility to arbitration,’” as well as the “unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.”<sup>117</sup>

Thus, there is a breadth of law controlling the potential reverse-preemption of the N.Y. Convention. Primarily, US foreign relations law, and the framework needed to classify Article II of the N.Y. Convention as self-executing or non-self-executing, is particularly relevant to whether there is an “Act of Congress” for the states to reverse-preempt.<sup>118</sup> Secondly, this issue sits between two policy trends. In the United States, federal policy has relegated insurance regulation to the state governments. At the same time, federal policy has tracked a global movement to federalize and standardize arbitration law.

## II. THE NEXUS OF THE N.Y. CONVENTION, THE CONVENTION ACT, THE MF ACT AND STATE ANTI ARBITRATION STATUTES

Despite the line of cases, including *Mitsubishi*, favoring the enforcement of arbitration agreements, US Circuit Courts have disagreed over how and if the MF Act should be applied to the

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115. *Id.* at 639.

116. *Id.* at 635 (internal citations omitted).

117. *Id.* at 638 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

118. *See supra* notes 32–48 (discussing the self-execution framework).

N.Y. Convention and the Convention Act.<sup>119</sup> The remainder of this Note reconciles the national policy favoring international arbitration, and the potential reverse-preemption of US obligations under the N.Y. Convention.

This Part outlines the three prevailing judicial views on how the MF Act should be applied to the N.Y. Convention and the Convention Act. The views are expressed in three circuit court decisions. The first, *Stephens v. American International Insurance Co.*, concerned a Kentucky statute barring arbitration of insurance disputes.<sup>120</sup> The second, *Safety National Casualty Corp v. Certain Underwriters*, concerned a Louisiana statute barring arbitration of insurance disputes.<sup>121</sup> Finally, the third, *ESAB Group, Inc. v. Zurich Insurance PLC*, considered a South Carolina statute barring arbitration of insurance disputes.<sup>122</sup>

#### A. *Stephens v. American International Ins. Co.*

In 1995, the Second Circuit held in a brief opinion in *Stephens v. American International Insurance Co.* that state-level statutes barring arbitration of insurance disputes reverse-

119. Compare *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 45–46 (2d Cir. 1995) (holding that the Convention Act may be reverse-preempted through the MF Act), with *Safety Nat'l Cas. Corp. v. Certain Underwriters*, 587 F.3d 714, 717 (5th Cir. 2009) (concluding that the N.Y. Convention cannot be reverse preempted through the MF Act), and *ESAB Grp. v. Zurich Ins. PLC*, 685 F.3d 376, 390 (4th Cir. 2012) (explaining that the MF Act can only reverse-preempt domestic commerce legislation, so the Convention Act lies outside of its scope).

120. *American Int'l Ins. Co.*, 66 F.3d 41; see Ky. Rev. Stat. Ann. § 304.33-010(6) (West 1994) (“[A]ll conflicting contractual provisions contained in any contract between the insurer . . . 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.”).

121. *Safety Nat'l Cas. Corp.*, 587 F.3d at 717; see La. Rev. Stat. Ann. § 22:868 (2013) (“A. No insurance contract . . . shall contain any condition, stipulation or agreement: (2) depriving the courts of this state of the jurisdiction of action against the insurer; C. Any such condition, stipulation or agreement in violation of this section shall be void, [without] voiding . . . the other provisions of the contract.”). The Fifth Circuit noted that although, from the statute’s text, it is questionable that arbitration agreements are voided, the Louisiana courts have held that such agreements are unenforceable. *Safety Nat'l Cas. Corp.*, 587 F.3d at 719 (citing *Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So.2d 1383, 1384 (La. 1982)).

122. *ESAB Grp.*, 685 F.3d 376; see S.C. Code Ann. § 15–48–10(b)(4) (1976) (providing that the South Carolina policy of liberally enforcing arbitration agreements does “not apply to . . . any insured or beneficiary under any insurance policy”).

preempt the Convention Act through the MF Act.<sup>123</sup> Applying the MF Act test, the court held that reinsurance was a practice within the “business of insurance” and that the Kentucky statute was enacted to regulate such activity.<sup>124</sup> Then, citing *Foster v. Neilson*, the court declared that the N.Y. Convention was non-self-executing, without any analysis of the text of the treaty, and held that the “[c]onvention itself is inapplicable in this instance.”<sup>125</sup> In the second case, the Court considered whether the Foreign Sovereign Immunities Act (“FSIA”) was reverse-preempted by a state law compelling foreign insurers to post security before participating in a lawsuit.<sup>126</sup> In one of two alternate holdings, the Court held that courts must apply federal law whenever it clearly intends to displace all state laws to the contrary, despite the MF Act.<sup>127</sup> Because the second alternate holding was based on the premise that international law preempted the state statute before either the MF Act or the FSIA was passed, the court reasoned that it need not reconsider American International Insurance Co.<sup>128</sup>

While the Second Circuit has not yet overruled its decision in American International Insurance, its precedent has been rejected in other circuits.<sup>129</sup> Nonetheless, other judges have

123. *American Int'l Ins. Co.*, 66 F.3d at 45–56 (“Because the Kentucky Liquidation Act is a state statute enacted ‘for the purpose of regulating the business of insurance’ and is ‘designed to protect policyholders’ under the McCarran-Ferguson Act, it is not preempted by the Federal Arbitration Act.”).

124. *Id.* at 44 (utilizing a three part test to show that this statute regulates the “business of insurance”).

125. *See id.* at 45 (holding that “the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation”); *see supra* notes 31–35 (discussing *Foster v. Neilson*, 27 U.S. 253 (1828)).

126. *Stephens v. Nat'l Distillers & Chemical Corp.*, 69 F.3d 1226, 1227 (2d Cir. 1995) (framing the issue before the court as reconciling the demands of the seemingly inconsistent McCarran-Ferguson Act and the Foreign Sovereign Immunities Act).

127. *Id.* at 1233.

128. *Id.* at 1233 n.6 (“Because the decision in the case before us is fully supported by the fact that international law preempted the relevant state insurance law before the passage of both the McCarran-Ferguson Act and the [Foreign Sovereign Immunities Act], we need not consider whether the alternative ground discussed above is in conflict with the holding of *American Distillers*.” (citations omitted))

129. *See, e.g.*, *Goshawk Dedicated v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1304 n.9 (N.D. Ga. 2006) (declining to follow *American International Insurance* because precedent in the Eleventh Circuit mandates enforcing the N.Y. Convention over all prior contrary laws); *see also* *Pinnoak Res., LLC v. Certain Underwriters at Lloyd's*, 394 F. Supp. 2d 821, 827–28 (S.D.W. Va. 2005) (noting the split of authority between the Second Circuit and several district courts as of 2005).

advocated for the Court's reasoning and disposition in *American International Insurance*, and it remains controlling law in the Second Circuit.<sup>130</sup>

### B. *Safety National Casualty Corp. v. Certain Underwriters*

Over a decade later, in 2009, the Fifth Circuit was presented with the same question. After a complicated procedural history, the District Court for Middle District of Louisiana held that a Louisiana statute reverse-preempted the N.Y. Convention through the MF Act. The District Court, however, certified an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).<sup>131</sup> The Fifth Circuit initially reversed the district court, before granting a re-hearing *en banc* to evaluate this issue.<sup>132</sup>

#### 1. The Majority Opinion: Upholding the Treaty

The Fifth Circuit's analysis began with the text of the relevant statutes and treaty.<sup>133</sup> The Court assumed that the state statute regulated the "business of insurance" and that, for the purposes of the MF Act, neither the N.Y. Convention nor the Convention Act regulated the "business of insurance."<sup>134</sup> The court's analysis was limited to whether the state statute, through the MF Act, could override the N.Y. Convention's obligation to enforce arbitration agreements.<sup>135</sup>

As such, the Fifth Circuit turned to the question of whether Article II of the N.Y. Convention was self-executing. Noting that the Article's execution status was "unclear," the Court's opinion

130. See *infra* notes 144–53 for a discussion of the dissent in *Safety National Casualty Corp. v. Certain Underwriters*, which would have held in accordance with the Second Circuit.

131. *Safety Nat'l Cas. Corp. v. Certain Underwriters*, 587 F.3d 714, 717–18 (5th Cir. 2009) (discussing the procedural history of the case).

132. *Safety Nat'l Cas. Corp. v. Certain Underwriters*, 543 F.3d 744 (5th Cir. 2008), *vacated and reh'g en banc granted*, 558 F.3d 588 (5th Cir. 2009).

133. *Safety Nat'l Cas. Corp.*, 587 F.3d at 718–19 (examining the Louisiana anti-insurance-arbitration statute and the N.Y. Convention).

134. *Id.* at 720 ("[W]e will assume, without deciding, that the Louisiana statute regulates the business of insurance.").

135. *Id.* at 720–21 ("We, therefore, limit our analysis to whether Louisiana law overrides the Convention's requirement that the present dispute be submitted to arbitration because we construe an act of Congress to invalidate, impair, or supersede state law.").

punted the issue, and instead turned to whether a non-self-executing treaty and its implementing legislation are within the scope of the MF Act.<sup>136</sup> The Court held that a non-self-executing treaty's implementing legislation was outside the scope of the MF Act because Congress did not wish to include any treaty within the scope of the term "Act of Congress."<sup>137</sup> Thus, the N.Y. Convention superseded the contrary state law.<sup>138</sup>

The Fifth Circuit placed particular emphasis on the meaning of the words "Act of Congress" in the MF Act. Further, the Court noted that it was untenable to believe that when Congress used "Act of Congress" in the MF Act, it intended that phrase to exclude self-executing treaties, but to include treaty provisions that are implemented through federal legislation.<sup>139</sup> The Fifth Circuit then clarified that it was utilizing the N.Y. Convention, rather than the Convention Act, to supersede the contrary state law.<sup>140</sup> Noting that the Convention Act "directs [courts] to the treaty it implemented," the Court concluded that the N.Y. Convention "requires that each signatory nation 'shall recognize an agreement in writing under which the parties undertake to submit to arbitration.'"<sup>141</sup>

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136. *Id.* at 721–22 (noting that textually, Article II "expressly states that courts 'shall' compel arbitration agreements," however also noting that the Supreme Court in the dicta of *Medellin v. Texas* listed at least Article III, the article governing arbitral awards, of the N.Y. Convention as a successfully implemented non-self-executing treaty provision) ("This reference in *Medellin* could be read to imply that the [N.Y.] Convention in its entirety is not self-executing, although such a conclusion cannot be drawn with any certainty from the brief discussion in the Court's opinion."); see *Medellin v. Texas*, 552 U.S. 491, 521 (2008) ("Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress.") (emphasis added) (citations omitted)).

137. *Safety Nat'l Cas. Corp.*, 587 F.3d at 718 ("We are persuaded that state law does not reverse-preempt federal law in the present case . . . [because] Congress did not intend to include a treaty within the scope of an 'Act of Congress.'").

138. *Id.* at 718 ("[T]he [MF] Act does not apply to the [N.Y.] Convention.").

139. *Id.* at 723 ("[To] conclude that when Congress used 'Act of Congress' in the McCarran-Ferguson Act, it intended that phrase to exclude self-executing treaty provisions but to include treaty provisions that are implemented by federal legislation . . . is untenable.").

140. *Id.* at 724 (explaining that the legal issue falls under the N.Y. Convention rather than the Convention Act because the Convention Act merely refers to the N.Y. Convention).

141. *Id.* at 725.

In its opinion, the Fifth Circuit explicitly acknowledged that it was creating a circuit split with the Second Circuit.<sup>142</sup> The Fifth Circuit agreed that non-self-executing treaties needed implementing legislation to become operative in United States courts, but disagreed in that “Act of Congress” could be extended to “a treaty implemented by an Act of Congress.”<sup>143</sup> As such, the Fifth Circuit became the first appellate court to uphold the N.Y. Convention’s obligations in the face of the MF Act and contrary state law.

## 2. The Dissent: Agreement with the Second Circuit

The dissent, penned by Judge Elrod, in *Safety National* characterized the majority’s opinion as a “trail blazing holding [that] also creates a circuit split with the Second Circuit.”<sup>144</sup> The dissent concluded that whether the Convention was self-executing or not was not before the Court, because neither party preserved the issue for appeal.<sup>145</sup> As such, the court considered the treaty non-self-executing, and proceeded with an MF Act analysis.<sup>146</sup> The dissent questioned the wisdom of framing the issue before the court as whether the N.Y. Convention is an “Act of Congress” within the scope of the MF Act, and instead focused on whether the Convention Act was an “Act of Congress”.<sup>147</sup>

The dissent explained that the majority’s opinion essentially boiled down to the view that “a treaty is a treaty” and that once a non-self-executing treaty has been implemented, it is

142. *Id.* at 731 (“We are aware that our decision conflicts with that of the Second Circuit in *Stephens v. American International Insurance Co.*”).

143. *Id.* (implying that the main disagreement with the Second Circuit’s theory was over which legal source is relevant to the term “Act of Congress”: the implementing legislation or non-self-executing treaty).

144. *Safety Nat’l Cas. Corp.*, 587 F.3d 714, 738 (5th Cir. 2009) (Elrod, J., dissenting).

145. *See id.* at 751 n.31 (concluding that neither party preserved the self-execution issue).

146. *See id.* (concluding that the N.Y. Convention, for the purposes of this lawsuit, was non-self-executing, and proceeding to ask whether the Convention Act, failing to regulate the “business of insurance,” would frustrate the state law that does regulate the “business of insurance”).

147. *See id.* at 738 (“[T]he court’s failure to ask the right question at the outset inevitably leads to its incorrect conclusion—that the Convention itself, a non-self-executing treaty, preempts the Louisiana statute.”).

the equivalent of a self-executing treaty under the Supremacy Clause.<sup>148</sup> However, the dissent extrapolated that the non-self-executing treaty, even when implemented by legislation that merely references the treaty, remains “as inert as a model code,” similarly incorporated by reference.<sup>149</sup> Ultimately, it characterized the majority’s treatment of the Convention Act as “legal alchemy.”<sup>150</sup> According to Judge Elrod, the majority’s treatment bestowed the benefit of a statute, the ability to implement a non-self-executing treaty, but not detriment, the subjugation to the MF Act.<sup>151</sup> For these reasons, the dissent analyzed whether the Convention Act, rather than the N.Y. Convention, can be reverse-preempted by a state statute through the MF Act.<sup>152</sup> Like the Second Circuit, the dissent would have held that the state statute barring arbitration was enacted to “regulate the business of insurance;” and that the Convention Act, which would frustrate the state legislation, was not enacted to “regulate the business of insurance,” and was, thus, reverse-preempted.<sup>153</sup>

### 3. The Clement Concurrence: Article II is Self-Executing

Unlike the other judges of the Fifth Circuit, Judge Clement was unconvinced by the arguments set forth in the majority and dissenting opinions.<sup>154</sup> For the supremacy question with respect to non-self-executing treaties, Judge Clement mostly agreed with the dissent’s argument that the Convention Act, rather than the N.Y. Convention, is the necessary authority to examine for MF

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148. *See id.* at 740 (“Under this view, a non-self-executing treaty requires an additional step to become binding, but once that step is passed—once the treaty is implemented—it is the Supremacy Clause equivalent of a self-executing treaty.”).

149. *Id.* at 740–41 (“As a source of law, the implementing legislation is the alpha and omega of what may constitute a rule of decision in U.S. courts.”).

150. *Id.* at 745 (criticizing the majority opinion).

151. *See id.* (explaining what is meant by “legal alchemy”).

152. *See id.* at 741 (“[T]here can be no preemption in this case without construing an Act of Congress the Convention Act rather than the treaty.”).

153. *Id.* at 752.

154. *See id.* at 733 (Clement, J., concurring) (“The opinions’ contrasting interpretations of the Supremacy Clause are unnecessary to decide the case because the plain text of Article II of the Convention compels a finding of self-execution.”).

Act analysis.<sup>155</sup> She determined, however, that reaching such a difficult constitutional question was unnecessary in light of an alternative ground upon which the case may be disposed.<sup>156</sup>

In light of *Medellin v. Texas*, Judge Clement saw Section 3 of Article II of the N.Y. Convention as a directive to courts and not to the political branches of the US government.<sup>157</sup> She emphasized that a “court . . . shall . . . refer parties to arbitration” when operating under the treaty.<sup>158</sup> She found this language consistent with the type of directive specifically contemplated by the *Medellin* Court.<sup>159</sup>

Judge Clement then turned to the dictum of *Medellin*, which utilized the Convention Act as a positive example of Congress’ ability to pass legislation implementing a statute to give effect to the judgments of international tribunals.<sup>160</sup> She then explained that because the *Medellin* Court was concerned with the enforceability of a judgment of the ICJ, this sentence merely implies that Congress is historically capable of affording the *awards* of other international tribunals immediate domestic legal effect through legislation.<sup>161</sup> Notably, Article III, unlike Article II, fails to address courts.<sup>162</sup> Thus, the fact that Congress perceived the need to fulfill its international obligation from Article III to enforce arbitral awards, fails to speak to Article II’s

155. *See id.* (“The dissent . . . persuasively refutes the majority’s answer to the constitutional question, but . . . [n]either opinion confronts the important antecedent question whether Article II is in fact self-executing.”).

156. *See id.* at 733 n.2 (challenging the dissent’s view that the question of self-execution is not before the court, by explaining that “[i]n their opening brief to the panel, [the defendant] contended that the treaty provision was self-executing”).

157. *See id.* at 734 (examining Article II’s directive to “the court[s] of a contracting state”).

158. *Id.* at 735.

159. *See id.* (contrasting Article II’s language with the words “undertakes to comply” as analyzed by the Supreme Court in *Medellin*).

160. *See id.* at 736 (citing *Medellin v. Texas*, 552 U.S. 491, 521 (2008)) (stressing the difference between judgments and agreements).

161. *See id.* (noting that the majority relied on this dictum to justify its finding that the N.Y. Convention is non-self-executing as a whole, where Judge Clement interprets the dictum as only applicable to Article III, and not Article II of the N.Y. Convention).

162. *See id.* (“Article III lacks an explicit directive to ‘[t]he court of a Contracting State.’”); *see supra* notes 105–06 and accompanying text (quoting Articles II and III of the N.Y. Convention).

self-execution status with its directive to courts regarding arbitral agreements.<sup>163</sup>

Relying on *Medellin*, the State Department advocated for this exact position when appealing *Safety National* to the Supreme Court.<sup>164</sup> The government compared the Convention Act to legislation used to facilitate implementation of certain extradition treaties, which are clearly self-executing.<sup>165</sup> While the State Department ultimately expressed the view that the Supreme Court should deny the writ of certiorari, its opinion was given substantial weight in previous decisions where the execution status of a treaty has been at issue.<sup>166</sup>

### C. ESAB Group v. Zurich Insurance PLC: *Perhaps, a New Direction*

In 2012, the Fourth Circuit became the third circuit court to be presented with this issue.<sup>167</sup> Due to the issue's complexity, the Fourth Circuit began by providing a helpful and instructive overview of the relevant history and policies, as well as judicial treatment of the issue thus far.<sup>168</sup> As a whole, the language used in the decision reinforced the idea that “[it is important to] preserv[e] the United States’ ability to ‘speak with one voice’ in regulating foreign commerce.”<sup>169</sup>

163. See *Safety Nat'l Cas. Corp.*, 587 F.3d at 736–37 (Clement, J., concurring) (contrasting Article II and Article III).

164. See Brief for the United States as Amicus Curiae Supporting Respondents, *Louisiana Safety Ass'n of Timbermen—Self Insurers Fund v. Certain Underwriters*, 130 S. Ct. 3311 (2010) (No. 09-945), 2010 WL 3375626 (U.S.) \*7–8 [hereinafter Amicus Brief] (endorsing the Fifth Circuit's judgment in *Safety National*, but explaining that “[t]he better view of the matter, however, is that Article II is self-executing”).

165. See *id.* at \*11 n.1 (“[I]n relation to 28 extradition treaties that the ‘legal procedures for extradition are governed by both federal statute and self-executing treaties. Subject to a contrary treaty provision, existing federal law implements aspects of these treaties.’” (citing S. Exec. Rep. No. 12, (2008))).

166. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (citing Amicus Brief for the Executive Branch's view of treaty status and concluding that the government's view of a treaty's execution status is persuasive authority); *Abbott v. Abbott*, 560 U.S. 1, 1993 (2010) (giving the Executive Branch's interpretation of treaty “great weight”). In its brief, the government clarified that “the State Department's view—as articulated in this brief—is that Article II is self-executing.” Amicus Brief, *supra* note 164 at \*11.

167. See generally *ESAB Grp. v. Zurich Ins. PLC*, 685 F.3d 376 (4th Cir. 2012).

168. *Id.* at 380–82, 385–86 (detailing relevant case law and history of the MF Act, the N.Y. Convention, the FAA, and the Convention Act and the various opinions of the judges from the Second and Fifth Circuits).

169. *Id.* at 379 (quoting *Michelin Tire Corp v. Wages*, 423 U.S. 276, 285 (1976)) (introducing the opinion with this theme).

The court quickly found that the South Carolina law at issue was enacted to regulate the business of insurance, and turned to the question of self-execution.<sup>170</sup> Briefly noting that Article II at least textually appeared self-executing, the Court nonetheless abided by an “emerging presumption against finding treaties to be self-executing,” because nothing in the Convention Act or the legislative history differentiates between Article II and the rest of the treaty.<sup>171</sup> Instead, the Fourth Circuit preserved the heart of the treaty by interpreting the MF Act in light of its relation to the United States’ ability to engage in foreign relations.<sup>172</sup>

Citing *American Insurance Association v. Garamendi*, a 2003 Supreme Court decision, the Fourth Circuit held that the MF Act was enacted to prevent the implied preemption through the Supremacy Clause of domestic commerce regulation.<sup>173</sup> *Garamendi* concerned the interaction between a state law and an executive agreement, but the domestic congressional intent informed the Fourth Circuit on how to proceed with another instrument of foreign relations law, the N.Y. Convention.<sup>174</sup> The Court concluded that by enacting the MF Act, Congress did not intend to give the states the power to abrogate international agreements, and subsequently rendered them enforceable in US courts.<sup>175</sup>

170. *Id.* at 386–88 (rejecting the contention that the South Carolina Law fails to regulate insurance and concluding that the case could be disposed of without deciding if Article II was self-executing).

171. *Id.* at 387 (citing *Safety Nat'l Cas. Corp. v. Certain Underwriters*, 587 F.3d 714, 737 (5th Cir. 2009) (Clement, J., concurring)) (noting that the legislative history of the Convention Act implies that Congress intended it to be, at least in part, implementing legislation).

172. *Id.* at 388 (“[E]ven assuming Article II of the Convention is non-self-executing, the Convention Act, as implementing legislation of a treaty, does not fall within the scope of the McCarran–Ferguson Act.”).

173. *Id.* at 388, 389 (citing and examining the facts and precedent set by *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003)).

174. *Id.* at 389 (“Although in *Garamendi* the Court was examining the interaction between state law and an executive agreement, the Court’s statements regarding congressional intent guide our understanding of Congress’s intent to limit the Act’s scope.”); see Edwin M. Borchard, *Treaties and Executive Agreements A Reply*, 54 YALE L.J. 616, 628, 629 (1945) (detailing the difference between treaties and executive agreements, two types of international agreements entered into by the United States).

175. *ESAB Grp. v. Zurich Ins.*, 685 F.3d 376, 390 (4th Cir. 2012) (“Because the Supreme Court [in *Garamendi*] has made clear that McCarran–Ferguson is limited to domestic affairs, we hold the Convention Act falls outside of its scope.”).

The competing public policies in this area are likely the source of the circuit disagreement. On the one hand, the Second Circuit and the Fifth Circuit dissent favored state supremacy in insurance regulation by rendering the N.Y. Convention inapplicable in the face of state statutes barring arbitration of insurance disputes.<sup>176</sup> On the other hand, the majority and concurrence of the Fifth Circuit, and the Fourth Circuit have favored the international public policy in favor of arbitration, and all presented different theories for applying the N.Y. Convention in spite of the MF Act and contrary state law. The Fifth Circuit majority argued that self-executing treaties and implemented non-self-executing treaties should be treated the same under the Supremacy Clause.<sup>177</sup> The concurrence in the Fifth Circuit argued that Article II of the N.Y. Convention was self-executing, and thus fell outside the scope of the MF Act.<sup>178</sup> Finally, the Fourth Circuit argued that the MF Act's scope is limited to *domestic*, rather than *international*, commerce regulation.<sup>179</sup>

### III. ARTICLE II OF THE NEW YORK CONVENTION SHOULD BE TREATED AS SELF-EXECUTING, OR THE MF ACT'S SCOPE SHOULD BE LIMITED TO DOMESTIC COMMERCE LEGISLATION

With respect to framing the issue, the Fourth Circuit is correct that the end result must consider the United States' ability to present a cohesive and uniform legal framework when operating under foreign relations law.<sup>180</sup> The dynamics of our global economy, and the role of the United States within it, depend on commercial parties' confidence that their interests

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176. See *supra* notes 123–30 and 144–53 and accompanying text (discussing the legal reasoning of the Second Circuit and the dissent of the Fifth Circuit).

177. See *supra* notes 133–43 and accompanying text (discussing the majority opinion of the Fifth Circuit).

178. See *supra* notes 154–66 and accompanying text (discussing the concurring opinion from the Fifth Circuit).

179. See *supra* notes 167–79 and accompanying text (discussing the Fourth Circuit's majority opinion).

180. See *supra* notes 169, 172 and accompanying text (describing the need to speak with one voice in the execution of foreign policy).

will be protected, regardless of national borders.<sup>181</sup> For these reasons, the Supreme Court should address this issue and strive to adhere to the obligations of the United States under the N.Y. Convention, regardless of the subject matter of the dispute.

This Part argues that the Supreme Court should reject the analysis presented by the Second Circuit, and both the Fifth Circuit Majority and Dissent. This part further concludes that the Supreme Court should either: (1) adopt the view of the concurrence in the Fifth Circuit that Article II of the N.Y. Convention is self-executing, or in the alternative, (2) adopt the view of the Fourth Circuit and limit the scope of the MF Act to domestic commerce regulation.

*A. The Views of the Second Circuit, and the Majority and Dissent of the Fifth Circuit are Untenable*

The Supreme Court should immediately reject the views of the Second Circuit, and the dissent of the Fifth Circuit. Allowing states to abrogate US international obligations is unwise.<sup>182</sup> Adopting this approach would frustrate the nation's ability to speak with a unified voice with respect to foreign relations, and essentially leave the United States in breach of a major international agreement.<sup>183</sup>

While the Fifth Circuit majority properly sets its goal as enforcing the N.Y. Convention, its method remains flawed. The "legal alchemy" of giving the Convention Act the benefits, but none of the detriments, of a statute is impractical.<sup>184</sup> Additionally, giving any treaty Supremacy Clause status, regardless of whether it's self-executing or not, ignores the precedent of *Foster* and its progeny.<sup>185</sup> The United States has adopted the view that there is a fundamental difference between

181. See *supra* notes 1–7, 77 and accompanying text (discussing the important role arbitration plays in international commerce and the international insurance industry).

182. See *supra* notes 4, 169–72 and accompanying text (emphasizing the importance of internationalism in the modern global economy).

183. See *supra* note 169–72 and accompanying text (noting the theme of globalism throughout the Fourth Circuit's opinion).

184. See *supra* notes 148–50, 155–56 and accompanying text (discussing the agreement among the concurring and dissenting judges of the Fifth Circuit that viewing a treaty as a treaty regardless of execution status should be avoided).

185. See *supra* notes 26–31 and accompanying text (discussing the origin of treaty execution law in the United States and *Foster v. Neilson*).

self-executing and non-self-executing treaties, and this theory does not comport with that stance.<sup>186</sup>

*B. Article II of the N.Y. Convention is Self-Executing*

The ideal solution to this issue is to hold that Article II of the N.Y. Convention is self-executing. First and foremost, case law shows that certain provisions of a non-self-executing treaty can be considered self-executing, and thus the Supreme Court could limit its analysis solely to Article II.<sup>187</sup> Second, this reasoning fulfills the goal of protecting US foreign relations interests with respect to international commerce.<sup>188</sup> It also provides an avenue that allows the Supreme Court to apply the *Medellin* test, and textually demonstrate the difference between self-executing and non-self-executing treaties.<sup>189</sup> Article II gives an explicit directive to US courts.<sup>190</sup> It speaks in mandatory language, rather than discretionary language.<sup>191</sup> The difference between Article II and Article III, with respect to the governmental branches that they address, explains why Congress sought to enact the Convention Act.<sup>192</sup> Given all of the relevant law, this option ensures the best outcome by the least convoluted means.

*C. The MF Act Does Not Allow States to Abrogate International Agreements Which Have Been Rendered Judicially Enforceable*

While the Fourth Circuit did not explicitly say so, it presented a novel interpretation of this issue. Like the majority

186. See *supra* notes 26–31, 148–50, 155–56 and accompanying text (expressing disagreement with the conflict between the Fifth Circuit’s majority opinion, and the *Foster v. Neilson* progeny).

187. See *supra* note 34 and accompanying text.

188. See *supra* notes 4, 77, 169–72 and accompanying text (describing the important role of arbitration in the global economy and the insurance industry).

189. See *supra* notes 35–48 and accompanying text (detailing *Medellin v. Texas* and the role of textualism in treaty construction); see also *supra* notes 157–63 and accompanying text (applying the *Medellin* test to Article II of the N.Y. Convention).

190. See *supra* note 102–04 and accompanying text (quoting and contrasting the language of Articles II and III of the N.Y. Convention).

191. See *supra* note 41 and accompanying text (detailing the *Medellin* court’s emphasis on words like “shall” and “must”); notes 157–63 and accompanying text (applying the *Medellin* test).

192. See *supra* notes 159–62 and accompanying text (distinguishing from the *Medellin* dictum reference to the N.Y. Convention as an implemented treaty).

and concurrence of the Fifth Circuit, the court's finding guarantees the United States' ability to speak with a unified voice in international commerce.<sup>193</sup> However, the Fourth Circuit avoided a difficult constitutional question by framing the issue in terms of the scope of the MF Act, rather than by focusing on whether an implemented non-self-executing treaty should be treated with Supremacy Clause status.<sup>194</sup>

Should the Supreme Court give way to the growing judicial presumption against self-execution, it should adopt the Fourth Circuit's garden-variety statutory construction.<sup>195</sup> *Garamendi* already held that the MF Act could not allow a state to reverse-preempt an executive agreement because Congress intended the MF Act to apply exclusively to domestic commerce legislation.<sup>196</sup> Accordingly, since neither the Convention Act nor the N.Y. Convention can be considered "Acts of Congress" enacted to regulate domestic commerce, they are outside the scope of the MF Act.<sup>197</sup>

### CONCLUSION

Given the increase in global trade and the increasingly integrated world economy, the United States' compliance with international legal and economic commitments is of paramount importance. Accordingly, the Supreme Court should hold that Article II of the N.Y. Convention is self-executing, and not an "Act of Congress" within the scope of the MF Act. Should the Court conform to the growing judicial presumption against self-execution, it should reiterate the *Garamendi* holding, and limit the MF Act to "Act[s] of Congress" that regulate domestic

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193. See *supra* notes 4, 77, 169–72 and accompanying text (asserting the importance of a unified arbitration policy in the global economy and insurance industry).

194. Compare *supra* notes 148–50 and accompanying text (criticizing the Fifth Circuit's interpretation of a treaty as a treaty, regardless of execution status), with *supra* notes 173–79 and accompanying text (limiting the scope of the MF act to domestic commerce legislation, without handling a treaty as a treaty, regardless of execution status).

195. See *supra* notes 173–79 and accompanying text (limiting the MF Act's scope to domestic, rather than international, commerce legislation).

196. See *supra* notes 173, 174 (discussing *Garamendi*).

197. See *supra* note 175 (applying *Garamendi*'s holding to enforce the Convention Act and the N.Y. Convention, despite the MF Act and contrary state law).

commerce. Above all, the Supreme Court should avoid placing the United States in default of its international obligations under the N.Y. Convention.