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Which Law Is Supreme? The Interplay Between the New York Convention and The McCarran-Ferguson Act

BRIAN A. BRIZ* & CÉSAR MEJÍA-DUEÑAS*

The McCarran-Ferguson Act was enacted in 1945 to safeguard the rights of the states to regulate the business of insurance. It provides that acts of Congress not specifically related to the business of insurance are superseded by state laws that regulate the business of insurance. In 1970, the United States ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Congress enacted Chapter 2 of the Federal Arbitration Act to implement the New York Convention. The New York Convention requires courts to recognize and enforce both private agreements to arbitrate and arbitration awards made in other contracting states. Because the McCarran-Ferguson Act, on the one hand, provides that general federal laws not related to the business of insurance are superseded by state insurance laws, and the New York Convention, on the other hand, obligates courts to recognize and enforce private arbitration agreements and arbitral awards, courts have struggled with whether the New York Convention preempts state insurance laws that prohibit arbitration of insurance disputes. Indeed, several states have

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enacted legislation prohibiting clauses in insurance contracts divesting the state courts of jurisdiction, while many others have excluded insurance contracts from their corresponding arbitration codes. We address this conflict between the McCarran-Ferguson Act and the New York Convention and, specifically, analyze how courts within the Eleventh Circuit have decided the issue.

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I. INTRODUCTION

A. *Regulation of the Business of Insurance – Enactment of the McCarran-Ferguson Act*

Traditionally, “the States enjoyed a virtually exclusive domain over the insurance industry.”¹ Indeed, in 1869, the U.S. Supreme Court held in *Paul v. Virginia* that “[i]ssuing a policy of insurance is not a transaction of commerce,” and hence not subject to federal regulation.² In 1944, however, the U.S. Supreme Court held that an insurance company that conducted business across state lines was engaged in interstate commerce, and therefore, subject to federal laws (in that case, antitrust laws).³

In order to assuage fears that the federal government would intrude on the states’ power to tax and regulate the insurance industry, “Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation.”⁴ Consequently, in 1945, Congress enacted the McCarran-Ferguson Act,⁵ (“MFA”), wherein, among other things, it declared that the “continued regulation and taxation by the several States of the business of insurance is in the public interest”⁶ Thus, the MFA reinforced that the states have near-exclusive authority to regulate the business of insurance.

The MFA contains two primary provisions relevant to this chapter. First, section 1012(a) vests in the states the authority to regulate the business of insurance by providing that “[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”⁷ Second, section 1012(b) contains a reverse-preemption provision that provides: “[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”⁸ In other

¹ *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978).

² *Paul v. Virginia*, 75 U.S. (1 Wall.) 168, 183 (1869).

³ *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 546–51 (1944) (holding that the Sherman Antitrust Act applied to the business of insurance, and therefore, insurance could be regulated by Congress under the Commerce Clause).

⁴ *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 499–500 (1993).

⁵ McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (1946).

⁶ *Id.* § 1011.

⁷ *Id.* § 1012(a).

⁸ *Id.* §§ 1012(a)–(b).

words, acts of Congress that do not specifically relate to the business of insurance are reverse-preempted by state insurance laws and regulations.⁹

B. *State Laws Restricting Arbitration of Insurance Claims*

Approximately one-third of the states have enacted legislation prohibiting or restricting arbitration of disputes against insurers.

Six states have enacted laws prohibiting clauses in insurance contracts that deprive the respective state courts of jurisdiction over disputes against insurers, or in the case of Maine,¹⁰ against foreign insurers. These states include Hawaii,¹¹ Louisiana,¹² Massachusetts,¹³ Virginia,¹⁴ and Washington.¹⁵

Additionally, ten states have excluded certain types of disputes arising from insurance contracts from their respective arbitration codes. These states include Arkansas,¹⁶ Georgia,¹⁷ Kentucky,¹⁸ Missouri,¹⁹ Montana,²⁰ Nebraska,²¹ Oklahoma,²² South Carolina,²³ South Dakota,²⁴ and Vermont.²⁵ The District of Columbia has also enacted legislation declaring arbitration clauses in consumer insurance contracts void and unenforceable.²⁶

Finally, California has enacted a law that restricts the arbitration of disputes with healthcare insurers by requiring certain formalities in the arbitration agreements in order for them to be enforceable.²⁷

⁹ *Id.* § 1012(b).

¹⁰ ME. REV. STAT. ANN. tit. 24-A, § 2433 (2019).

¹¹ HAW. REV. STAT. ANN. § 431:10-221 (WEST 2019).

¹² LA. STAT. ANN. § 22:868 (2019).

¹³ MASS. GEN. LAWS ch. 175, § 22 (2019).

¹⁴ VA. CODE ANN. § 38.2-312 (2019).

¹⁵ WASH. REV. CODE ANN. § 48.18.200 (West 2020).

¹⁶ ARK. CODE ANN. § 16-108-230 (West 2019).

¹⁷ GA. CODE ANN § 9-9-2 (West 2020).

¹⁸ KY. REV. STAT. ANN. § 417.050 (West 2020).

¹⁹ MO. ANN. STAT. § 435.350 (West 2019).

²⁰ MONT. CODE ANN. § 27-5-114 (West 2019).

²¹ NEB. REV. STAT. ANN. § 25-2602.01 (West 2019).

²² OKLA. STAT. ANN. tit. 12, § 1855 (West 2019).

²³ S.C. CODE ANN. § 15-48-10 (2019).

²⁴ S.D. CODIFIED LAWS § 21-25A-3 (2019).

²⁵ VT. STAT. ANN. tit. 12, § 5653 (West 2019).

²⁶ D.C. CODE § 16-4403(c)(1), (d) (2020).

²⁷ CAL. HEALTH & SAFETY CODE § 1363.1 (West 2020).

C. *The New York Convention and the Chapter 2 of the Federal Arbitration Act*

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”) was established in 1958 to provide standard procedures for the recognition and enforcement of private arbitration agreements entered into in fellow contracting states, and to recognize and enforce arbitral awards issued in such states.²⁸ Specifically, the Convention requires signatories to (1) recognize and enforce written agreements to submit disputes to non-domestic arbitration, and (2) enforce non-domestic arbitral awards entered in contracting states²⁹ absent any of the enumerated grounds for refusal.³⁰

As indicated in the U.S. Senate Report concerning the implementation of the Convention, the United States did not sign the Convention when it was originally adopted due to concern that certain provisions contained therein conflicted with domestic laws.³¹ Subsequently, Congress amended the Federal Arbitration Act (“FAA”) and included Chapter 2 to incorporate and implement the Convention.³²

II. THE CIRCUIT SPLIT

Federal Circuit Courts have split on whether the MFA preempts the Convention and Chapter 2 of the FAA, and if it does, to what extent. Specifically, the courts have split on whether, under the MFA, state laws that restrict or prohibit the arbitration of insurance disputes are preempted by the Convention.

²⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts I–III, June 10, 1958, 21 U.S.T. 2517 [hereinafter *New York Convention*].

²⁹ *Id.*

³⁰ Albert Jan van den Berg, *Why Are Some Awards Not Enforceable?*, in INT’L COUNCIL FOR COMMERCIAL ARBITRATION CONG., SER. NO. 12, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 291, 291–92 (Albert Jan van den Berg ed., 2005).

³¹ H.R. REP. NO. 91-1181 (1970), as reprinted in 1970 U.S.C.C.A.N. 3601, 3601–02.

³² *Id.* at 3602.

In *U.S. Department of Treasury v. Fabe*, the U.S. Supreme Court established a three-prong test to determine whether federal laws unrelated to the business of insurance are reverse-preempted by state insurance laws and regulations under the MFA.³³ Under the test, courts must consider whether (1) the state statute was enacted for the purpose of regulating the business of insurance; (2) the federal statute involved “does not specifically relat[e] to the business of insurance”; and (3) the application of the federal statute would “invalidate, impair, or supersede” the state statute regulating insurance.³⁴

While the *Fabe* test provides guidance for resolving conflicts between federal laws and state insurance laws, it provides little guidance as to whether the Convention, an international treaty, supersedes the MFA.³⁵ Complicating the issue is the fact that courts have not agreed on if the Convention is self-executing. Several courts have declined to determine whether the convention is self-executing but have nonetheless held the Convention supersedes the MFA.³⁶ Other courts have found it is not self-executing because the Convention was enacted through Chapter 2 of the FAA, and it is therefore an act of Congress that interferes with state laws regulating the business of insurance, and consequently, is reverse-preempted under the MFA.³⁷

A. *Cases Holding the Convention is Superseded by the MFA*

The Second and Eighth Circuits have found that, under the MFA, state-level anti-arbitration provisions supersede the Convention and Chapter 2 of the FAA. These Circuits have concluded that

³³ *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 500–01 (1993).

³⁴ *Id.* In *Union Labor Life Insurance v. Pireno*, the U.S. Supreme Court identified three criteria that are relevant to determining what constitutes the “business of insurance”: “*first*, whether the practice has the effect of transferring or spreading a policyholder’s risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.” 458 U.S. 119, 129 (1982) (emphasis in original) (citation omitted).

³⁵ *See Fabe*, 508 U.S. at 500–01.

³⁶ *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 717 (5th Cir. 2009); *ESAB Grp. v. Zurich Ins.*, 685 F.3d 376, 380 (4th Cir. 2012).

³⁷ *Stephens v. Am. Int’l Ins.*, 66 F.3d 41, 45–46 (2d Cir. 1995).

the Convention—because it was enacted by implementing legislation through Chapter 2 of the FAA—is not a self-executing treaty, and therefore, does not preempt conflicting state laws under the Supremacy Clause of the U.S. Constitution.³⁸

The Second Circuit first addressed the issue in *Stephens v. American International Insurance Co.*³⁹ *Stephens* concerned a dispute between an insolvent insurance company chartered under the laws of Kentucky and a foreign reinsurer arising from a reinsurance contract containing a broad arbitration clause.⁴⁰ The first issue the court had to decide was whether the FAA preempts the Kentucky Liquidation Act, a state law which contains an “anti-arbitration provision” and regulates the performance of insurance contracts once an insurer is insolvent.⁴¹ Because the Kentucky Liquidation Act was a law enacted “for the purpose of regulating the business of insurance,” the court held the law was preserved and not preempted by the FAA, which does not specifically relate to the business of insurance.⁴² Beyond this, the court also held that the Convention did not preempt the Kentucky Liquidation Act under the Supremacy Clause because it is not self-executing and “relies upon an Act of Congress for its implementation.”⁴³ Specifically, the court held that the Convention’s “implementing legislation”—Chapter 2 of the FAA—does not preempt the Kentucky Liquidation Act, and, therefore, is “inapplicable” to the dispute in question.⁴⁴ Thus, even though the Convention mandates the recognition and enforcement of private agreements to arbitrate amongst parties in contracting states, the Convention was reverse-preempted by the “anti-arbitration” provision in the Kentucky Liquidation Act.⁴⁵

³⁸ *Id.* at 45.

³⁹ *Id.*

⁴⁰ *Id.* at 42–43.

⁴¹ *Id.* at 43–45.

⁴² *Id.* at 44–45.

⁴³ *Id.* at 45.

⁴⁴ *Id.*

⁴⁵ *Id.* at 45–46. In a subsequent decision, however, the Second Circuit held that the MFA did not supersede the Foreign Sovereign Immunities Act (“FSIA”) because Congress intended for the FSIA to preempt all contrary state law. *Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1232 (2d Cir. 1995). Recognizing the potential conflict with its earlier decision, the court noted that the

The Eight Circuit arrived at the same conclusion in *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*.⁴⁶ Like *Stephens*, *Transit* involved a dispute between an insolvent insurance company (this time, a Missouri company) and a foreign reinsurer wherein the subject reinsurance agreement contained an arbitration clause.⁴⁷ Also like in *Stephens*, the *Transit* court found that Missouri's arbitration statute—which expressly exempts insurance contracts from the categories of agreements that may contain enforceable agreements to arbitrate—is not preempted by the FAA or the Convention because unlike the latter laws, the former law was enacted for the purpose of regulating the business of insurance.⁴⁸ While the *Transit* court did not expressly address whether the Convention is self-executing, it explained that the Convention was implemented by Congress through the amendment of the FAA, and specifically, through the inclusion of Chapter 2 of the FAA.⁴⁹

B. *Cases Holding the MFA Does Not Supersede the Convention*

In contrast with the Second and Eighth Circuits, the Fifth and Fourth Circuits have rejected the argument that, under the MFA, state arbitration laws related to the business of insurance reverse-preempt the Convention.⁵⁰ For different reasons, they have each held that state-level insurance disputes are not exempt from the Convention pursuant to the MFA's reverse-preemption provision.⁵¹

Sitting en banc, the Fifth Circuit addressed the interaction between the MFA and the Convention in *Safety National Casualty Corp. v. Certain Underwriters At Lloyd's, London*.⁵² There, the

same reasoning might apply to Chapter 2 of the FAA, but the court declined to consider the conflict at that time. *Id.* at 1233 n.6.

⁴⁶ *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 621–22 (8th Cir. 1997).

⁴⁷ *Id.* at 620.

⁴⁸ *Id.* at 621, 623–24.

⁴⁹ *Id.* at 620.

⁵⁰ *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 717 (5th Cir. 2009); *ESAB Grp. v. Zurich Ins.*, 685 F.3d 376, 380 (4th Cir. 2012).

⁵¹ *Safety Nat'l*, 587 F.3d at 724; *ESAB Grp.*, 685 F.3d at 388, 390.

⁵² *Safety Nat'l*, 587 F.3d at 717.

court found it was “unclear” whether the Convention is self-executing because the requirements of the Convention are largely compulsory, but the Supreme Court had suggested in dicta that at least portions of the Convention are not self-executing.⁵³ Notwithstanding, the court went on to hold that even if the Convention was not self-executing, the Convention nonetheless supersedes the MFA for two primary reasons.⁵⁴

First, the MFA only reverse preempts acts of Congress or statutes, not treaties.⁵⁵ A treaty, the court held, “remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress[,]” and even if it is implemented by Congress, it “does not mean that it ceases to be a treaty and becomes an ‘Act of Congress.’”⁵⁶

Second, even though the Convention was implemented through Chapter 2 of the FAA, it is the Convention and not Chapter 2 of the FAA that supersedes state law.⁵⁷ Indeed, as explained by the court, Chapter 2 provides, at 9 U.S.C. § 203, that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States.”⁵⁸ This, the court explained, is “a direct indication that Congress thought that for jurisdictional purposes, an action falling under the Convention arose not only under the laws of the United States but also under *treaties* of the United States.”⁵⁹ Chapter 2 of the FAA, the court further explained, defines when an arbitration agreement “falls under the Convention” and provides United States courts with jurisdiction over “[a]n action or proceeding falling under the Convention”⁶⁰ Accordingly, because Chapter 2 of the FAA “directs us to the treaty it implemented,”

⁵³ *Id.* at 721–22 (citing *Medellín v. Texas*, 552 U.S. 491, 521–22 (2008)).

⁵⁴ *Id.* at 722–24.

⁵⁵ *Id.* at 722 (“Even if the Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an ‘Act of Congress,’ as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation.”).

⁵⁶ *Id.* at 723 (citations omitted).

⁵⁷ *Id.* at 724–25.

⁵⁸ *Id.* at 724 (quoting 9 U.S.C. § 203 (2018)).

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting 9 U.S.C. § 202).

it is the treaty itself that we construe, and not the implementing legislation, when determining whether the Convention supersedes state law.⁶¹ In other words, because “the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the [MFA’s] provision that ‘no Act of Congress’ shall be construed to supersede state law regulating the business of insurance is inapplicable.”⁶²

Less than three years after the *Safety National* decision, the Fourth Circuit also grappled with the issue as to whether the Convention supersedes the MFA in *ESAB Group, Inc. v. Zurich Insurance PLC*.⁶³ In *ESAB*, the defendants—foreign insurers—sought to remove an action filed by a domestic insured, arguing that the district court had subject matter jurisdiction because the operative insurance policies contained arbitration clauses governed under the Convention.⁶⁴ Like the *Safety National* court, the *ESAB* court did not resolve the question whether the Convention is self-executing, listing reasons why it could be considered both self- and non-self-executing, and stating “the question of what constitutes a self-executing treaty has long confused courts and commentators.”⁶⁵

Instead, the court held that the Convention supersedes the MFA because the MFA “is limited to legislation within the domestic realm.”⁶⁶ Specifically, the court explained that the MFA did not “apply to every federal statute” and that Congress did not intend for the MFA “to apply so broadly.”⁶⁷ The court further explained that Congress did not intend for the MFA “to permit state law to vitiate international agreements entered by the United States.”⁶⁸ Finally, the court identified a number of occasions where other Courts of Appeals refused to afford the MFA an overly-broad scope and reasoned that, because Chapter 2 of the FAA “provides, without exception, that the Convention ‘shall be enforced in United States courts,’”

⁶¹ *Id.* at 725.

⁶² *Id.*

⁶³ 685 F.3d 376, 379 (4th Cir. 2012).

⁶⁴ *Id.* at 380.

⁶⁵ *Id.* at 387 (citation omitted).

⁶⁶ *Id.* at 388.

⁶⁷ *Id.*; *See Am. Ins. v. Garamendi*, 539 U.S. 396, 428 (2003) (“[The MFA was] directed to implied preemption by domestic commercial legislation.”).

⁶⁸ *ESAB Grp. v. Zurich Ins.*, 685 F.3d 376, 389 (4th Cir. 2012) (citations omitted).

Congress intended to replace all contrary state laws.⁶⁹ The court contrasted this language with that of the MFA, which contains “no such express direction[,]” and whose aim “is not arbitration or treaties, but ‘domestic commerce legislation.’”⁷⁰ Because of this, the court held that Chapter 2 of the FAA, “as legislation implementing a treaty, is not subject to reverse preemption, so insurance disputes are not exempt from [Chapter 2] pursuant to [MFA’s] reverse-preemption rule.”⁷¹ Additionally, the court held that—even if Chapter 2 and the MFA are in irreconcilable conflict—the more recent Chapter 2 of the FAA would prevail over the MFA.⁷²

III. CURRENT SITUATION IN THE ELEVENTH CIRCUIT

The Eleventh Circuit has been silent on the interaction between the MFA and the Convention. This is probably because, as explained below, of the three states within the Eleventh Circuit (Alabama, Florida and Georgia), Georgia is the only one containing an anti-arbitration provision related to the business of insurance.⁷³

A. Alabama Arbitration Law

Alabama has not enacted any laws that prohibit or restrict the use of arbitration clauses in insurance contracts. Alabama, however, does have a general law prohibiting arbitration. Specifically, section 8-1-41 of the Alabama Code provides that “[a]n agreement to submit a controversy to arbitration” “cannot be specifically enforced.”⁷⁴ Notwithstanding, the Alabama Supreme Court has held that the statute does not relate to the business of insurance and, therefore, does not benefit from the MFA’s reverse-preemption provision.⁷⁵

⁶⁹ *Id.* at 389–90 (quoting 9 U.S.C. § 201 (2018)).

⁷⁰ *Id.* at 390 (citing *Garamendi*, 539 U.S. at 428).

⁷¹ *Id.*

⁷² *Id.* at n.6 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

⁷³ See discussion *infra* Section III.C; GA. CODE ANN. § 9-9-2(c)(3) (West).

⁷⁴ ALA. CODE § 8-1-41(3) (2003), *invalidated* by *Cent. Reserve Life Ins. v. Fox*, 869 So. 2d 1124 (Ala. 2003).

⁷⁵ *Cent. Reserve Life Ins. v. Fox*, 869 So. 2d 1124, 1127 (Ala. 2003); see *Am. Bankers Ins. of Fla. v. Crawford*, 757 So. 2d 1125, 1136 (Ala. 1999).

B. *Florida Arbitration Law*

Like Alabama, Florida has not enacted any laws that prohibit or restrict the use of arbitration clauses in insurance contracts. Unlike Alabama, Florida is a relatively pro-arbitration state, containing both a domestic and international arbitration code. Specifically, Florida has enacted both the Revised Florida Arbitration Code⁷⁶ and the Florida International Commercial Arbitration Act.⁷⁷ The former governs any agreement to arbitrate made on or after July 1, 2013 or arbitration proceedings initiated on or after July 1, 2016.⁷⁸ The latter applies to international commercial arbitration, subject to any agreement in force between the United States and any other country or countries.⁷⁹

C. *Georgia Arbitration Law*

Unlike Alabama and Florida, Georgia has enacted legislation expressly addressing the use of arbitration clauses in insurance contracts. Specifically, the Georgia Arbitration Code excludes “[a]ny contract of insurance” from the scope of the act.⁸⁰ While the Georgia Supreme Court and the Eleventh Circuit have both held that Georgia’s anti-arbitration provision reverse-preempts the FAA, the courts assessed this conflict in cases involving domestic disputes.⁸¹ In contrast, the analysis yields a different result when confronting the MFA and the FAA in the purview of international disputes. In *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I, Inc.*, the court held Georgia’s anti-arbitration provision does not conflict with the Convention because the MFA only applies to arbitration agreements within the United States.⁸² The court arrived at its decision by citing other district court decisions that held that the MFA “applies

⁷⁶ Revised Florida Arbitration Code, FLA. STAT. §§ 682.01–.25 (2019).

⁷⁷ Florida International Commercial Arbitration Act, FLA. STAT. §§ 684.0001–.0049 (2019).

⁷⁸ FLA. STAT. § 682.013. The Revised Florida Arbitration Code replaced the Florida Arbitration Code, which had been in effect since 1957.

⁷⁹ FLA. STAT. § 684.0002(1).

⁸⁰ GA. CODE ANN. § 9-9-2(c)(3) (2019).

⁸¹ *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 855 (11th Cir. 2004); *Love v. Money Tree, Inc.*, 614 S.E.2d 47, 48 (Ga. 2005).

⁸² 466 F. Supp. 2d 1293, 1302–03 (N.D. Ga. 2006).

only to domestic agreements, and thus the Convention . . . controls.”⁸³ Because of this, and following “the Eleventh Circuit’s mandate that ‘[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law,’” the court held that the MFA—a prior federal law—could not be used as a defense to the Convention.⁸⁴ In light of this mandate from the Eleventh Circuit, the court found that the *Stephens*⁸⁵ decision out of the Second Circuit—which did not address the issue of the MFA being passed before Chapter 2 of the FAA—was “unpersuasive.”⁸⁶

Similarly, in *Lloyds Underwriters v. Netterstrom*, the court adopted the position of the District Court of the Northern District of Georgia in *Goshawk Dedicated v. Portsmouth*,⁸⁷ holding the McCarran-Ferguson Act applies only to arbitration agreements within the United States and that it has *no effect on an international arbitration agreement* that is governed by the Convention.⁸⁸ The court determined in the case of conflict between the FAA and the MFA, “[t]he [FAA] must give way to contrary provisions of state laws regulating the business of insurance” under the MFA.⁸⁹ However, in the case of conflict between state laws regulating insurance and international arbitration, which is the subject matter of the Convention, the latter will prevail over states laws by reason of the Convention being an

⁸³ *Id.* at 1302–03 (citing *In re Arbitration Between England Ship Owners Mut. Ins. Ass’n (Luxembourg) & Am. Marine Corp.*, No. 91-3645, 1992 WL 37700, at *4–5 (E.D. La. Feb. 18, 1992); *Triton Lines, Inc. v. Steamship Mut. Underwriting Ass’n Ltd.*, 707 F. Supp. 277, 278–79 (S.D. Tex. 1989)).

⁸⁴ *Id.* at 1304–05 (citing *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998)). In arriving at this conclusion, the court also relied on the Eleventh Circuit’s ruling in *Bautista v. Star Cruises*, 396 F.3d 1289, 1302 (11th Cir. 2005), holding that “domestic defenses to arbitration may only be recognized under the Convention ‘if there exists a precise, universal definition . . . that may be applied effectively across the range of countries that are parties to the Convention’” *Goshawk Dedicated v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1305 (N.D. Ga. 2006) (citations omitted).

⁸⁵ *Stephens v. Am. Int’l Ins.*, 66 F.3d 41, 42 (2d Cir. 1995).

⁸⁶ *Goshawk*, 466 F. Supp. at 1305 n.9.

⁸⁷ *Id.* at 1293.

⁸⁸ *Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732, 737–38 (Fla. Dist. Ct. App. 2009).

⁸⁹ *Id.* at 737.

international agreement between the United States and other nations.⁹⁰

Furthermore, in *Lloyds Underwriters*⁹¹ and in *Goshawk*,⁹² the courts buttressed their decisions on the holding from *Bautista v. Star Cruises*,⁹³ holding that the non-domestic international arbitration agreements were enforceable. In *Bautista*, the court restated the long-standing principle that the FAA “generally establishes a strong presumption in favor of arbitration of international commercial disputes,” and that an international arbitration agreement is enforceable under the Convention if (1) it is in writing; (2) it provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen.⁹⁴

Therefore, under the state of affairs in the Eleventh Circuit, state laws regulating the business of insurance will not prevent the FAA in the context of international arbitration.

IV. ADDRESSING THE CONFLICT BETWEEN THE CONVENTION AND THE MCCARRAN-FERGUSON ACT

The issue of preemption between the MFA and the Convention is complex. To resolve it, courts might rely on constitutional provisions, precedent, statutory interpretation, and principles of international law. This Article explains how, through the correct application of these tools, the Convention supersedes conflicting provisions under the MFA.

A. *Supremacy Clause*

The Convention, as an international treaty, is supreme law of the land under the Constitution; therefore, conflicting state law provisions are preempted by the Supremacy Clause, which establishes federal law’s supremacy over state law.⁹⁵ This clause, which usually

⁹⁰ *Id.*

⁹¹ 17 So. 3d at 737.

⁹² 466 F. Supp. at 1305.

⁹³ 396 F.3d at 1294.

⁹⁴ *Id.* (quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998)).

⁹⁵ U.S. CONST. art. VI, cl. 2.

requires a straightforward analysis, becomes complex when the courts are confronted with the reverse preemption provision from the MFA or the application of the distinction between treaties that are “self-executing” and those that are not. This distinction is relevant because some courts have concluded that non-self-executing treaties are not binding on the United States until they have been fully implemented.⁹⁶ Accordingly, a treaty that is not self-executing is not afforded supremacy under the Constitution.⁹⁷

The Supreme Court first introduced the distinction between self-executing and non-self-executing treaties in *Foster v. Neilson*.⁹⁸ In *Foster*, the Court examined the Spain-United States treaty for its domestic effects and held that, when a treaty does not contain self-executing language but merely states a pledge to enact further legislation, the treaty does not take effect or become the supreme law of the land unless Congress performs the legislative act.⁹⁹ The Convention expressly states that a contracting state’s courts “shall, at the request of one of the parties, refer the parties to arbitration”¹⁰⁰ This provision is not addressed to the executive or legislative branch, instead, it commands the judiciary to refer to arbitration those matters in which the parties made a valid arbitration agreement within the meaning of the Convention.¹⁰¹

The precise nature of this distinction, and its very existence, is a matter of controversy.¹⁰² “Congress will often bypass any chance of doubt concerning the force of a treaty by enacting implementing legislation.”¹⁰³ Out of an abundance of caution, Congress amended the FAA to implement the Convention by requiring courts to enforce

⁹⁶ See *Forster v. Neilson*, 27 U.S. 253, 314 (1829).

⁹⁷ *Id.*

⁹⁸ *Id.* In *Foster*, the Court made the distinction between those treaties where the parties engaged to perform a particular act by the political branches, which required legislation to be executed by the courts, and those treaties that were addressed to the Judicial department, and considered the latter to be self-executing. *See id.*

⁹⁹ *Id.* at 314–15.

¹⁰⁰ New York Convention, *supra* note 28, art. II, cl. 3.

¹⁰¹ *See id.*

¹⁰² See, e.g., Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995).

¹⁰³ J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT’L L. 1535, 1552 (2008).

arbitration agreements,¹⁰⁴ provided that the two instruments would enter into force at the same time.

Furthermore, the Convention was ratified by the Senate and signed by the U.S. President, satisfying the requirements under the Constitution to enjoy supremacy over state laws.¹⁰⁵ Accordingly, state laws should not preempt the Convention as it relates to recognition and enforcement of international arbitration agreements. Courts are required to interpret the FAA consistently with the Convention to achieve its objective and fulfill its purpose.

Congress cannot implicitly remove the supremacy given to international treaties by the Constitution and empower state anti-arbitration provisions because the supremacy clause mandates that states laws conflicting with the international treaties are invalid.¹⁰⁶ Additionally, treaty-making is not one of Congress' enumerated powers, but a function shared with the executive.¹⁰⁷ Allowing state legislation to preempt treaties creates inconsistencies irreconcilable with the national character required for international treaties. In Federalist Papers Number 75, Alexander Hamilton explained that the "treaty making" function was placed in the Senate to achieve "a steady and systematic adherence to the same views; a nice and uniform sensibility to national character"¹⁰⁸ Uniformity and national character are not achieved when Congress allows the states to enact provisions inconsistent with international obligations. Consequently, Congress cannot grant preemption to state regulations that directly conflict with international treaty obligations.

B. *Last-In-Time Rule*

Under the last-in-time rule, the Convention controls over conflicting provisions from the McCarran Ferguson Act. In 1870, the Supreme Court first held that a federal law may supersede a treaty and vice-versa.¹⁰⁹ In *Breard v. Greene*, the Court affirmed that "an

¹⁰⁴ See H.R. REP. NO. 91-1181 (1970), as reprinted in 1970 U.S.C.C.A.N. 3601, 3603.

¹⁰⁵ 9 U.S.C. § 201 (2018).

¹⁰⁶ U.S. CONST. art. VI, cl. 2.

¹⁰⁷ See U.S. CONST. art. II, § 2.

¹⁰⁸ THE FEDERALIST NO. 75, at 266 (Alexander Hamilton) (Terence Ball ed., 2003) [hereinafter Hamilton, THE FEDERALIST NO. 75].

¹⁰⁹ *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870).

Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”¹¹⁰ By the same token, if a treaty and a federal statute conflict, “the one last in date will control the other.”¹¹¹

Thus, whether or not a treaty is self-executing, when a federal statute and an international treaty conflict, courts are required to apply the last-in-time rule. This general principle allows Congress to modify or repeal treaties by enacting subsequent legislation, even if those enactments amount to violations of treaties under international law.¹¹²

The MFA is incompatible with the Convention because it grants federal law status to state laws regulating the business of insurance.¹¹³ In contrast, the Convention mandates that arbitration agreements must be enforced unless they fall within the enumerated grounds under the convention. Because the business of insurance is not contemplated as a defense to enforcement under the Convention, the application of both provisions is impossible.

Chapter 2 of the FAA was enacted on July 31, 1970, providing that it will be effective upon entry into force of the Convention.¹¹⁴ The Convention was entered into force for the United States on December 29, 1970.¹¹⁵ The MFA was enacted on March 9, 1945.¹¹⁶ Accordingly, under the last-in-time rule, the Convention should control in cases where it conflicts with the MFA.

C. Policy Favoring Arbitration

“While Congress acted to preserve the states’ dominance in insurance regulation, it moved” in the opposite direction to federalize the policies regarding arbitration.¹¹⁷ The development of modern American arbitration policy tracks a global movement toward the acceptance of international arbitration. Following this trend, the

¹¹⁰ 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

¹¹¹ *Id.* (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

¹¹² *Head Money Cases*, 112 U.S. 580, 597, 599 (1884).

¹¹³ *See* 15 U.S.C. § 1011 (2018).

¹¹⁴ Federal Arbitration Act, Pub. L. No. 91–368, §2, 84 Stat. 693 (1970).

¹¹⁵ *Id.* § 4.

¹¹⁶ McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (1946).

¹¹⁷ *ESAB Grp. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (4th Cir. 2012).

United States enacted Chapter 1 of the FAA to liberalize the enforcement of arbitration in maritime and commercial contracts.¹¹⁸ Furthermore, the policy favoring international arbitration was widely expanded by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*¹¹⁹ In *Mitsubishi Motors*, a dispute arose between a car dealer and a joint venture car manufacturer.¹²⁰ The parties’ contract contained an arbitration agreement, which provided that “[a]ll disputes, controversies or differences which may arise between [the parties] out of or in relation to [the contract] or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.”¹²¹ The dealer asserted an antitrust counterclaim against the Joint Venture.¹²² The Court held that in the light of the clear intention of Congress, it was its obligation to shake off the old judicial hostility towards arbitration, as well as the “unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.”¹²³

Some courts have concluded that the MFA should yield to the strong policy favoring arbitration because “there is some indication in the legislative history of the MFA that it was [limited] to [Interstate] Commerce Clause Legislation” and not foreign commerce.¹²⁴ This is a valid conclusion considering that Congress enacted the MFA under its power to regulate interstate commerce. Therefore, states’ anti-arbitration provisions should yield to the Convention because there exists strong policy considerations in favor of arbitration.

¹¹⁸ See generally 9 U.S.C. §§ 1–16.

¹¹⁹ *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 627–28 (1985).

¹²⁰ *Id.* at 616–17.

¹²¹ *Id.* at 617.

¹²² *Id.* at 620.

¹²³ *Id.* at 638.

¹²⁴ *Murphy Oil USA, Inc. v. SR Int’l Bus.*, No. 07–CV–1071, 2007 WL 2752366, at *3 (W.D. Ark. Sept. 20, 2007) (quoting *Stephens v. Nat’l Distillers and Chem. Corp.*, 69 F.3d 1225, 1231 n.5 (2d Cir. 1995); see also *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293, 1306 (N.D. Ga. 2006).

D. *Statutory Interpretation*

In its 1804 decision, *Murray v. Schooner Charming Betsy*, the Supreme Court stated that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”¹²⁵ Since then, the *Charming Betsy* canon of construction has become an important component of the legal regime defining the U.S. relationship with international law. It is applied regularly by the Supreme Court and lower federal courts, and it is enshrined in the black-letter-law provisions of the *Restatement (Third) of the Foreign Relations Law of the United States*.¹²⁶

Enactment of Chapter 2 of the FAA was an act of Congress aligning domestic legislation to comply with international obligations under both the *Charming Betsy* canon and the last-in-time rule; had Congress wanted to provide a particular meaning, it could have done so. Similarly, were Congress to have wanted state insurance laws to preempt the Convention, it could have enacted legislation to repeal the Convention. In the meantime, courts are required to interpret the MFA in a manner that does not violate the international obligations imposed by the Convention.

E. *Principle of Good Faith*

The Convention is an international agreement that ought to be performed in good faith. As Alexander Hamilton explained in the Federalist Papers Number 75, the power making treaties does not relate to the execution of laws, or to the creation of new ones, instead “[i]ts objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith.”¹²⁷ Such an analogy reflects the idea that international treaties must be performed in good faith.

The principle of good faith is an accepted principle of international law under the Vienna Convention on the Law of Treaties (“VCLT”), which states that “[e]very treaty in force is binding upon

¹²⁵ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹²⁶ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (AM. LAW INST. 1986).

¹²⁷ Hamilton, THE FEDERALIST NO. 75, *supra* note 108, at 265 (emphasis in original).

the parties to it and must be performed by them in good faith.”¹²⁸ States may not invoke the internal law provisions as a justification for failure to comply with the United States’ obligations under international law because states are bound to interpret treaties “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²⁹ This principle is binding upon the United States as customary international law and a general principle of international law recognized by nations throughout the world.¹³⁰

Furthermore, the Supreme Court has recognized that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹³¹ The Court, however, noted that “where there is no treaty, . . . resort must be had to the customs and usages of civilized nations.”¹³² Therefore, to fulfill its treaty obligations in good faith in compliance with the terms of the VCLT, U.S. courts must enforce international arbitration agreements, even in insurance contracts, which are traditionally governed by states’ laws.

V. CONCLUSIONS AND RECOMMENDATIONS

A. *Conclusions*

Consistent case law in the Eleventh Circuit demonstrates a strong likelihood that the Eleventh Circuit Court of Appeals would refuse to apply the reverse-preemption provision in the MFA to invalidate an agreement to arbitrate under the Convention.

Congress did not intend that a treaty, like the Convention, would be within the scope of the reverse-preemption provision in the MFA. The term “Act of Congress” in the MFA referred strictly to legisla-

¹²⁸ Vienna Convention on the Law of Treaties, art. 26, Jan. 7, 1980, 1155 U.N.T.S. 331.

¹²⁹ *See id.* art. 31.

¹³⁰ Hamilton, THE FEDERALIST NO. 75, *supra* note 108, at 467–95.

¹³¹ *In re The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹³² *Id.*

tive activity because the legislative history of the MFA does not indicate that Congress intended to reverse-preempt an implemented treaty whether self-executing or not.

B. *Recommendations*

This Article recommends that Congress amend the MFA to define the term “Act of Congress” as limited to the legislative activities under Article I of the United States Constitution.

Congress should amend the MFA to state that anti-arbitration provisions are valid only in domestic cases so as not to interfere with international obligations under the Convention. Moreover, Congress should amend the MFA to, or enact other legislation that would, state that enforcement of arbitration agreements should be enforceable in the business of insurance.