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The McCarran Ferguson Act and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards: To Reverse-Preempt or Not?

Claudia Lai†

INTRODUCTION

Recent events have ensured that insurance litigation over the next couple of years will be voluminous and deal with many novel questions of law. The 2008 financial crisis has generated considerable litigation, raising new legal issues.1 Insurance litigation is also expected to be extremely active as a result of the 2010 Gulf of Mexico oil spill.2 The consequences of insurance regulation will have a widespread impact on the insurance industry, insurance policy holders, and society at large. At the same time, the increasingly global nature of commerce has placed greater emphasis on the importance of international arbitration. Consequently, the validity, content, and interpretation of arbitration clauses in insurance contracts will be central to the resolution of the novel legal issues surrounding the current torrent of litigation.

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The general consensus among scholars is that regulation of insurance by the states is preferable over federal regulation. Proponents of state regulation argue that states are better situated to effectively regulate insurance matters, and their historical role in regulating insurance has resulted in expertise and efficiency in regulation. Indeed, "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and the McCarran Ferguson Act (MFA) provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." The MFA therefore reverses the norm that federal law supersedes conflicting state law, and instead calls for "reverse-preemption"—preemption of federal law by a state regulatory statute.

The Federal Arbitration Act (FAA) provides the framework for arbitration in the United States. Chapter 2 of the FAA (Convention Act) incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a treaty providing that signatory nations "shall recognize" arbitration agreements.

There is tension between the MFA and the Convention Act where state law is enacted for the purpose of regulating insurance conflicts with the terms of the Convention Act. Several circuits have noted this tension. Only two have addressed whether the MFA permits reverse-preemption of the New York Convention, but these circuits are split on the issue. This Comment analyzes the circuit split and the arguments employed by district courts that have addressed the issue. Ultimately, this Comment...


4 For a general discussion of state regulation versus federal regulation of insurance, see Kimball, 45 Minn L Rev 471 (cited in note 3).

5 15 USC § 1011.

6 15 USC §§ 1011–1015.

7 15 USC § 1012(b).


9 9 USC § 1 et seq.


takes the position that the MFA enables state insurance law to reverse-preempt the New York Convention.

Part I of this Comment summarizes the various approaches advocated by the circuits that have split on this issue and other district courts that have addressed whether the MFA should allow state law to reverse-preempt the New York Convention. Part I.A will explain the history and purpose of the MFA. Part I.B will explain the history and purpose of the New York Convention, and Part I.C will examine the tension between the MFA and the New York Convention and the courts' treatment of this conflict. Part II argues that the MFA should enable state law to reverse-preempt the New York Convention for four reasons. First, the New York Convention is not a self-executing treaty; therefore, its operation requires reference to an "Act of Congress." Second, regardless of whether the New York Convention is self-executing or non-self-executing, it must be treated as an "Act of Congress" and therefore is subject to the broad scope of the MFA. Third, under the New York Convention's exceptions, compliance with the New York Convention is exempted where state insurance law prohibits the New York Convention's enforcement. Fourth, state regulation of insurance is preferable and therefore states should have the ability to determine the terms of their regulatory schemes. Consequently, the New York Convention cannot prevail where state insurance law conflicts with its terms. Finally, Part III provides a brief conclusion.

I. CURRENT LAW

A. The MFA

"Scholarly writing on insurance regulation generally supports state [as opposed to federal] regulation of insurance."13 These scholars consider state regulation of insurance to be more efficient than a federal regulatory system since "states are closer to the consumers they are protecting and the industry they are regulating."14 Because the business of insurance is closely tied to the welfare of citizens, state regulators have a greater stake than federal regulators in implementing efficient regulatory schemes and are therefore generally seen as better positioned to regulate

13 Randall, 26 Fla St U L Rev at 668 (cited in note 3).
insurance.\textsuperscript{15} State regulation provides "increased opportunities for citizen participation in government," better encourages "healthy diversity and opportunities for experimentation with regulatory structures and content," and enhances democracy and liberty through checks on various levels of government.\textsuperscript{16} In particular, competition among the states provides leverage for the insurance industry not possible at a federal level, since insurance companies can escape overly burdensome regulatory regimes by exiting the forum.\textsuperscript{17} As a result, scholars generally agree that state insurance regulation is preferable to federal regulation for the state, its citizens, and the insurance industry.\textsuperscript{18}

Congress enacted the MFA\textsuperscript{19} in 1945 in response to \textit{United States v South-Eastern Underwriters Association}.\textsuperscript{20} Prior to \textit{South-Eastern}, states had exercised an unencumbered right to regulate the relationships between insurers and policyholders.\textsuperscript{21} In \textit{South-Eastern}, the Supreme Court abandoned that longstanding practice and held that "insurance transactions are subject to federal regulation under the Commerce Clause."\textsuperscript{22} This "precedent-smashing" decision\textsuperscript{23} resulted in "serious concern that state tax and regulatory schemes would now be found unconstitutional."\textsuperscript{24}

The MFA was "an attempt to 'turn back the clock' and reinstate the state regulatory scheme that had existed prior to \textit{South-Eastern}."\textsuperscript{25} The MFA provides that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business,"\textsuperscript{26} and that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose

\begin{footnotes}
\item 15 Kimball, 45 Minn L Rev at 510 (cited in note 3).
\item 16 Randall, 26 Fla St U L Rev at 665 (cited in note 3).
\item 17 See Kimball, 45 Minn L Rev at 510 (cited in note 3).
\item 18 Randall, 26 Fla St U L Rev at 665 (cited in note 3).
\item 19 15 USC § 1011 et seq.
\item 23 HR Rep No 143, 79th Cong, 1st Sess 2 (1945).
\item 26 15 USC § 1012(a).
\end{footnotes}
of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."27 Thus, the MFA prevents federal regulation from interfering with state insurance regulation unless such federal regulation is specifically targeted at regulating insurance. At the same time, the freedom that the MFA grants the states is limited to insurance regulation. "It [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to [South-Eastern]."28

B. The New York Convention and Implementing Legislation

The New York Convention was drafted in 1958 by a United Nations committee.29 Under the New York Convention, each signatory nation is required to "recognize an agreement in writing under which the parties undertake to submit to arbitration" for any dispute "capable of settlement by arbitration."30 The New York Convention "secure[d] the several advantages available in domestic arbitration—speed, informality, economy, [and] expertise of decision makers."31 More importantly, the New York Convention enacted uniform standards for the enforcement of contracts, "minimizing uncertainties in dealing with unfamiliar laws in several foreign jurisdictions."32

Although the United States attended and participated in the 1958 conference, it did not sign the treaty. The United States Senate instead ratified the New York Convention in 1968.33 But

27 15 USC § 1012(b).
28 HR Rep No 143, 79th Cong, 1st Sess 3 (1945).
30 New York Convention, Art II (cited in note 10).
33 Corcoran, 77 NY 2d at 231. See also John P. McMahon, Implementation of the UN Convention on Foreign Arbitral Awards in the US, 2 J Marit L & Comm 735, 737 (1971).
the Senate delayed accession until 1970, after amendments to the FAA implementing the New York Convention had been enacted.\textsuperscript{34} Congress adopted these amendments under Chapter 2 of the FAA, the Convention Act, which provides that courts of acceding nations must recognize arbitration clauses falling under the New York Convention.\textsuperscript{35}

Congress enacted the FAA in 1925 in an effort to overcome American courts’ hostility to the arbitration of disputes under the common law.\textsuperscript{36} The FAA governs the federal court enforcement of arbitration agreements and arbitral awards made pursuant to such agreements.\textsuperscript{37} Chapter 2 of the FAA consists entirely of the Convention Act. In § 201, it provides that the New York Convention “shall be enforced” by United States courts “in accordance with this chapter.”\textsuperscript{38} In effect, the Convention Act replicates the FAA.\textsuperscript{39} Both require courts to enforce arbitration clauses. However, the Convention Act’s reach is broader than the FAA’s and “authorizes district courts to order parties to proceed with a Convention arbitration even outside of the United States.”\textsuperscript{40} The Convention Act also establishes federal court jurisdiction and venue.\textsuperscript{41}

C. Tension between the MFA and the New York Convention

Federal law trumps state law through the Supremacy Clause.\textsuperscript{42} The MFA carves out a statutory exception to this constitutional regime by providing that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless

\textsuperscript{34} See McMahon, 2 J Marit L & Comm at 737 (cited in note 33). See also \textit{Industrial Risk Insurers}, 141 F3d at 1440.
\textsuperscript{35} 9 USC § 201 et seq.
\textsuperscript{36} \textit{Circuit City Stores v Adams}, 532 US 105, 111 (2001). See also HR Rep No 96, 68th Cong, 1st Sess, 1 (1924) (“Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate.”).
\textsuperscript{38} 9 USC § 201.
\textsuperscript{39} See \textit{Sedco, Inc v Petroleos Mexicanos Mexican National Oil Co}, 767 F2d 1140, 1146 (5th Cir 1985).
\textsuperscript{40} Id. See also 9 USC § 206 (“A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.”).
\textsuperscript{41} See 9 USC §§ 203–204.
\textsuperscript{42} See US Const Art VI, cl 2.
such Act specifically relates to the business of insurance." The MFA therefore enables the "reverse-preemption" of federal law—that is, preemption of federal law by a state regulatory statute. The Court in United States Dept of Treasury v Fabe found that the MFA effectuates reverse-preemption when the following three conditions are met: (1) the federal law does not specifically relate to the business of insurance; (2) the federal law would invalidate, impair, or supersede the state statute if applied; and (3) the state statute was enacted for the purpose of regulating insurance.

The FAA does not regulate the business of insurance. Some state laws directly conflict with the FAA. When state law regulating the business of insurance is at odds with the terms of the FAA, courts must reconcile the inherent tension between the MFA and the FAA. Circuits have differed in their approach to discerning the interaction between the MFA and the FAA, applying Fabe's three-part test inconsistently.

It is not clear that the rule for reverse-preemption in the context of domestic arbitration also applies to international arbitration agreements and treaty obligations. A circuit split has recently developed on whether the MFA authorizes reverse-

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43 15 USC § 1012(b).
44 Safety National Corp, 587 F3d at 720.
46 Id at 501.
47 See Stephens v American International Insurance Co, 66 F3d 41, 44 (2d Cir 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.").
48 See, for example, La Rev Stat Ann § 22:868 (voiding arbitration agreements that deprive Louisiana courts of jurisdiction over insurance actions); Kentucky Liquidation Act, Ky Rev Stat Ann § 304.33-010(6) (stating that all choice of law or arbitration provisions in a contract to which an insolvent insurer in liquidation proceedings is a party are "subordinated" to the Act).
49 For a general discussion of courts that have approached this issue, see Amsouth Bank v George Dale et al, 386 F3d 763, 781–83 (6th Cir 2004).
50 Compare Garcia v Island Program Designer, Inc, 4 F3d 57, 61–62 (1st Cir 1993) (parsing individual provisions of a federal statute to determine whether the law specifically relates to insurance) with Stephens, 66 F3d at 45 (considering a statutory scheme in its entirety). See also Munich American Reinsurance Co v Crawford, 141 F3d 585, 592 (5th Cir 1998) (noting the circuits' different approaches and explaining that "Fabe's holding in this respect is simply unclear").
51 See Pinnoak Resources, LLC v Certain Underwriters at Lloyd's, London, 394 F Supp 2d 821, 827–28 (SD WV 2005). Also compare American Bankers Insurance Co of Florida v Inman, 436 F3d 490, 494 (6th Cir 2006) (holding that the MFA allowed a Mississippi underinsured-motorist law to reverse-preempt the FAA in the context of a dispute between an injured insured and his insurer) with Safety National, 587 F3d at 722 (holding that the New York Convention is not reverse-preempted by a Louisiana statute which essentially voids arbitration agreements, but not reconsidering Inman's holding because the issue was not presented for appeal).
preemption of the New York Convention or the Convention Act where there is a conflict with state law. District courts have also disagreed on this matter.

The following three subsections explore the disagreements among the courts that have addressed this issue. Section I.C.1 analyzes the Second Circuit's position in Stephens v American International Insurance Co. Section I.C.2 analyzes the Fifth Circuit's position in Safety National Casualty Corp v Certain Underwriters at Lloyd's, London, discussing first the Fifth Circuit's concurrence and then the dissent in order to highlight the court's conflicting interpretations of the New York Convention. Section I.C.3 analyzes the discussion in other courts and the arguments they employ in arguing for reverse-preemption.

1. The Second Circuit: the MFA reverse-preempts by the New York Convention.

a) Stephens. The Second Circuit held in Stephens that the New York Convention is reverse-preempted by state law through operation of the MFA. In its brief opinion on the issue, from which no judges dissented, the Second Circuit noted the distinction between a self-executing treaty and a non-self-executing treaty, first recognized in the Supreme Court's holding in Foster v Neilson, which stated:

A treaty is in its nature a contract between two nations, not a legislative act.... [The United States Constitution] declares a treaty to be the law of the land. It is consequently 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. But when the terms of stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department;

52 Compare Stephens, 66 F3d at 46 with Safety National, 587 F3d at 724.
54 66 F3d 41 (2d Cir 1995).
55 587 F3d 714 (5th Cir 2009).
56 See Stephens, 66 F3d at 45.
57 27 US 253 (1829).
and the legislature must execute the contract before it can become a rule for the Court.\textsuperscript{58}

Because the New York Convention depends upon an "Act of Congress," namely the Convention Act, for its implementation, the Second Circuit held that the New York Convention was not self-executing.\textsuperscript{59} Consequently, since the MFA mandates that "[n]o Act of Congress shall be construed to . . . supersede any law . . . regulating the business of insurance," the Second Circuit held that the Kentucky Liquidation Act reverse-preempted the Convention Act, and found that the New York Convention itself was "simply inapplicable in this instance."\textsuperscript{60}

\textit{b) District and state courts.} Case law from both a district court within the Second Circuit and a New York State court additionally evinces a strong policy in favor of allowing states to regulate insurance, in spite of the United States' strong policy favoring arbitration.\textsuperscript{61} Because the MFA establishes an "express federal policy of noninterference in insurance matters,"\textsuperscript{62} the strong policy favoring arbitration is "not as sacrosanct" so as to justify refusing operation of the MFA.\textsuperscript{63}

2. The Fifth Circuit: the New York Convention Supersedes the MFA.

\textit{a) Safety National.} The \textit{Safety National} court included three dissenting judges and one concurring judge.\textsuperscript{64} This Section analyzes the majority opinion, the concurring opinion, and then the dissenting opinion.

\textsuperscript{58} Id at 255, revd on other grounds by \textit{United States v Percheman}, 32 US 51, 89 (1833) (noting that Spanish portion of treaty provided a new interpretation and changed earlier understood meaning).

\textsuperscript{59} \textit{Stephens}, 66 F3d at 45, citing 9 USC §§ 201–208.

\textsuperscript{60} \textit{Stephens}, 66 F3d at 45, quoting 15 USC § 1012(b).

\textsuperscript{61} See \textit{Washburn v Corcoran}, 643 F Supp 554, 557 (SDNY 1986) (holding that the FAA must yield to the MFA); \textit{Corcoran v Ardra Insurance Company, Ltd}, 77 NY2d 225, 233–34 (NY 1990) (holding that state law prevailed because arbitration was "incapable of being performed" under the exceptions of the Convention).

\textsuperscript{62} \textit{Levy v Lewis}, 635 F2d 960, 963 (2d Cir 1980).

\textsuperscript{63} \textit{In Re Board of Directors of Hopewell International Insurance}, 238 Bankr 25, 64 (SDNY 1999).

\textsuperscript{64} See generally \textit{Safety National}, 587 F3d 714.
(i) Majority opinion. In Safety National, the Fifth Circuit held that the New York Convention is not reverse-preempted by state law through operation of the MFA. This is because: (1) "Congress did not intend to include a treaty within the scope of an 'Act of Congress' when it used those words in the MFA," and (2) a treaty, not a domestic statute—here, the New York Convention, rather than the Convention Act—superseded state law at issue.

The Fifth Circuit did not decide whether the New York Convention was self-executing. The court considered the question of self-execution to be irrelevant for the purpose of determining whether the New York Convention should be considered an "Act of Congress." This is because Congress had not used the term "treaty" to exclude implemented non-self-executing treaties in several federal statutes. Further, the court found "no apparent reason" why Congress would have distinguished self-executing implemented treaties from non-self-executing implemented treaties. This reasoning was supported by case law that analyzed a treaty that had been implemented by an "Act of Congress" in the same way as a non-implemented treaty. Therefore, a non-self-executing treaty should have the same force as a self-executing treaty.

Additionally, since "[a]n action or proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treaties of the United States," Congress recognized that actions under the New York Convention "arose not only under the laws of the United States but also under treaties of the United States." The Fifth Circuit therefore concluded that Congress had recognized that jurisdiction over actions to enforce the New York Convention did not arise solely under an "Act of Congress."

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65 Id at 732.
66 Id at 718.
67 See id at 721 ("It is unclear to us whether the [New York] Convention is self-executing.").
69 See id at 723 n 35, citing Revenue Act of 1941, Pub L No 77-250, § 109, 55 Stat 687, 695 (1941) and Farm Labor Supply Appropriation Act, Pub L No 78-229, § 3, 58 Stat 11, 13 (1944).
71 See id at 727-29 (discussing Missouri v Holland, 252 US 416 (1920)).
72 Safety National, 587 F3d at 724, quoting 9 USC § 203.
73 See id at 724-25.
The Fifth Circuit also held that a "treaty (the [New York] Convention), not an 'act of Congress' (the Convention Act)" superseded state law.\textsuperscript{74} The Convention Act states that the New York Convention "shall be enforced in United States courts in accordance with this chapter"\textsuperscript{75} and defines when an arbitration agreement "falls under the [New York] Convention."\textsuperscript{76} The Fifth Circuit reasoned that:

It is the [New York] Convention under which legal agreements "fall"; it is an action or proceeding under the [New York] Convention that provides the court with jurisdiction; such an action or proceeding is "deemed to arise under the laws and treaties" of the United States, the treaty in this case being the [New York] Convention; and when chapter 1 of title 9 (the FAA) conflicts with the [New York] Convention, the [New York] Convention applies.\textsuperscript{77}

Because "the Convention Act does not . . . operate without reference to the contents of the [New York] Convention,"\textsuperscript{78} it was not the Convention Act, but the New York Convention, an implemented treaty, that superseded state law. The Fifth Circuit therefore concluded that the MFA's "provision that 'no Act of Congress' should supersede state insurance law was inapplicable."\textsuperscript{79}

(ii) Concurrence. The concurrence noted that if the New York Convention were not self-executing, state law would supersede the New York Convention because a non-self-executing treaty's force is derived from its enabling legislation.\textsuperscript{80} Instead, the concurrence argued that the New York Convention is self-executing and therefore supersedes state law by operation of the Supremacy Clause.\textsuperscript{81}

\begin{itemize}
  \item \textsuperscript{74} Id at 723.
  \item \textsuperscript{75} 9 USC § 201.
  \item \textsuperscript{76} 9 USC § 202.
  \item \textsuperscript{77} \textit{Safety National}, 587 F3d at 724–25 (internal citations omitted).
  \item \textsuperscript{78} Id at 724.
  \item \textsuperscript{79} Id at 725.
  \item \textsuperscript{80} Id at 733 (Clement concurring) (stating that the dissent "persuasively refutes" the majority's argument, but that the dissent's argument relies on the finding that the Convention is self-executing).
  \item \textsuperscript{81} \textit{Safety National}, 587 F3d at 732 (Clement concurring).
\end{itemize}
The Supreme Court provided guidance on analyzing whether a treaty is self-executing or non-self-executing in *Medellín v Texas*.\(^{82}\) *Medellín* "recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law" and identified "explicit textual expression" as the focus of the self-execution analysis.\(^{83}\) The *Medellín* court noted that treaty provisions setting forth international obligations in mandatory terms "tilt strongly toward self-execution."\(^{84}\)

Noting that the New York Convention provides that a "court . . . shall . . . refer the parties to arbitration" and that this constitutes "a directive to domestic courts," the concurrence concluded that Article II of the New York Convention is self-executing.\(^{85}\) Therefore, Article II is fully enforceable in domestic courts by its own operation and is "entitled to recognition as 'the supreme Law of the Land' under the Supremacy Clause."\(^{86}\)

(iii) Dissent. The dissenting opinion emphasized that the New York Convention has no legal effect in the United States absent the enabling provisions of the Convention Act.\(^{87}\) Non-self-executing treaties, it reasoned, have no effect outside of implementing legislation under the Supremacy Clause.\(^{88}\) According to the dissent, the New York Convention derives its legal force from the Convention Act.\(^{89}\) Since the Convention Act is an "Act of Congress," the MFA enables the Louisiana law to reverse-preempt the New York Convention. The dissent noted that case law from other circuits supports this proposition.\(^{90}\)

\(^{82}\) 552 US 491 (2008).

\(^{83}\) Id at 504, 513 (quotation marks omitted).

\(^{84}\) *Safety National*, 587 F3d at 735 (Clement concurring), citing *Medellín*, 552 US at 509 n 5.

\(^{85}\) *Safety National*, 587 F3d at 735 (Clement concurring), quoting New York Convention (cited in note 10); *Medellín*, 552 US at 508.

\(^{86}\) *Safety National*, 587 F3d at 735 (Clement concurring), quoting US Const Art VI, cl 2.

\(^{87}\) See *Safety National*, 587 F3d at 740–45 (Elrod dissenting).

\(^{88}\) See id at 742.

\(^{89}\) See id at 743.

\(^{90}\) See *Safety National*, 587 F3d at 742–43, citing *Stephens*, 66 F3d at 45; *Suter v Munich Reinsurance Co*, 223 F3d 150, 160–62 (3d Cir 2000) (framing the same preemption issue in terms of whether there was a conflict between the Convention Act and a contrary New Jersey statute).
3. District Courts.

In refusing to find reverse-preemption of the New York Convention by the MFA, district courts have (1) limited the scope of the MFA,\(^91\) (2) limited defenses under the New York Convention,\(^92\) (3) argued that there is a strong policy favoring the enforcement of international arbitral agreements,\(^93\) and (4) applied the last-in-time rule, which requires that later-enacted rules prevail over earlier inconsistent rules.\(^94\)

On the other hand, district courts that have held that the MFA reverse preempts the New York Convention apply the MFA by its terms and find reverse-preemption where the *Fabe* test is satisfied.

a) Arguments employed when refusing to find reverse-preemption.

(i) Limiting the scope of the MFA. Several district courts have held that the MFA does not reverse-preempt the New York Convention by reasoning that the MFA’s scope is limited to interstate commerce.\(^95\) These courts note that the MFA “has never been held to have abrogated federal procedural practices in federal court cases,”\(^96\) and therefore the MFA was intended to apply to interstate commerce rather than foreign commerce. Under the Convention Act, “[a]n agreement . . . arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention.”\(^97\) Therefore, arbitration agreements under the New York Conven-

\(^91\) See, for example, *Continental Insurance Co v Jantran, Inc*, 906 F Supp 362 (ED La 1995).

\(^92\) See, for example, *Goshawk*, 466 F Supp 2d at 1305-06.

\(^93\) See, for example, *Certain Underwriters at Lloyd’s v Simon*, 2007 US Dist LEXIS 77686 (SD Ind).

\(^94\) See, for example, *Industrial Risk Insurers*, 141 F3d at 1440, citing *Sedco*, 767 F2d at 1145.


\(^96\) *McDermott International*, 1992 WL 37695 at *4* n 11, citing *Triton Lines, Inc v Steamship Mutual Underwriting Association*, 707 F Supp 277, 278-79 (SD Tex 1989). See also *Stephens v National Distillers and Chemical Corp*, 69 F3d 1226, 1231 n 5 (2d Cir 1995) (declining to address whether the MFA is limited to interstate and not foreign commerce, but noting that “there is some indication in the legislative history of the McCarran-Ferguson Act that it was intended to apply only to [Interstate] Commerce Clause legislation”).

\(^97\) 9 USC § 202.
tion necessarily involve foreign commerce. Under this line of thinking, because the MFA purportedly does not apply to foreign commerce, the MFA does not enact reverse-preemption when the New York Convention applies.

(ii) Limiting defenses available under the New York Convention. Similarly, the district court for the Northern District of Georgia refused to find reverse-preemption by holding that the Eleventh Circuit had previously limited the defenses available in international arbitration to those recognized by the New York Convention. The Eleventh Circuit had earlier held that because of “the unique circumstances of foreign arbitration, . . . domestic defenses to arbitration may only be recognized under the [New York] Convention if there exists a precise, universal definition . . . that may be applied effectively across the range of countries that are parties to the [New York] Convention.” Because the MFA is not capable of universal application, it is not recognized as a defense under the New York Convention. Therefore, the court concluded that New York Convention is supreme over state insurance law.

(iii) Relying on policy favoring arbitration. Some district courts supplement their holdings that the New York Convention is not reverse-preempted by the MFA with the strong policy favoring arbitration clauses. By relying on the strong policy of international comity and predictability in enforcing arbitration clauses in the context of international commerce, the Supreme Court has upheld international arbitration agreements that would otherwise be unenforceable in domestic contexts.

(iv) The New York Convention must be enforced over all prior inconsistent rules of law. Some courts conclude that since

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98 Goshawk, 466 F Supp 2d at 1305-06 (refusing to find reverse-preemption because the Eleventh Circuit has recognized that the Convention prevails over previously enacted inconsistent rules of law, and because of the strong policy for international comity warranting international arbitration).

99 Id, citing Bautista v Star Cruises, 396 F3d 1289, 1302 (11th Cir 2005) (internal quotation marks omitted).

100 Goshawk, 466 F Supp 2d at 1306.

101 See, for example, id; Simon, 2007 US Dist LEXIS 77686 at *17, citing Goshawk 466 F Supp 2d at 1303; Murphy Oil USA, Inc v SR International Business Insurance Co, 2007 US Dist LEXIS 69732, *10 (WD Ark).

"[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law," and because MFA was enacted prior to the implementation of the New York Convention, the New York Convention should prevail.

b) Argument employed when finding reverse-preemption. Though the Eighth Circuit has not decided the issue, a district court within the circuit held in *Transit Casualty Co v Certain Underwriters at Lloyd's of London* that the MFA does cause reverse-preemption of the New York Convention. The district court held that a Missouri anti-arbitration statute reverse-preempted both the FAA and the New York Convention by operation of the MFA. Because the New York Convention did not apply, the district court remanded the case to state court for lack of subject matter jurisdiction. The Eighth Circuit ultimately did not address the FAA issue and dismissed the appeal of the district court's decision as it found that it lacked jurisdiction to review the order under 28 USC § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

II. PROPOSED RESOLUTION

Part II of this Comment advocates that the MFA should permit reverse-preemption of the New York Convention for four reasons. This section addresses each of these arguments in turn. Part II.A argues that the New York Convention is not self-executing; its authority is derived from an "Act of Congress," which is subject to reverse-preemption of the MFA. Part II.B notes that, irrespective of whether the New York Convention is self-executing or non-self-executing, as a treaty it should be treated as an "Act of Congress," subject to the broad applicability of the MFA. Part II.C argues that the New York Convention exempts compelling arbitration where an agreement to arbitrate

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103 *Industrial Risk Insurers*, 141 F3d at 1440, quoting *Sedco*, 767 F2d at 1145.
104 See, for example, *Goshawk*, 466 F Supp 2d at 1305; *Murphy Oil*, 2007 US Dist LEXIS 69732 at *9.
107 Id at *3.
108 Id at *8.
109 Id at *12.
110 *Transit Casualty*, 119 F3d at 622, quoting 28 USC § 1447(d).
offends the law of the forum, and, therefore, where state law conflicts with the terms of the New York Convention, application of the New York Convention is exempted. Part II.D asserts that state regulation of insurance is a preferable regime, and in order to allow states to perform this function, they must be able to decide the terms of their regulatory regimes, and they are unable to do this where the terms of the New York Convention prevail over conflicting state laws.

A. The New York Convention is Not Self-Executing and Must be Construed with Reference to the Convention Act

In *Medellín*, the Supreme Court noted that the existence of implementing legislation provides a strong indication that the treaty is not self-executing.111 "Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result,"112 and "Congress has not hesitated to pass implementing legislation for treaties that in its view require such legislation."113 The Convention Act's existence suggests that Congress did not consider the New York Convention to be self-executing.

The Fifth Circuit's *Safety National* concurrence, in refuting the idea that the existence of implementing legislation indicates a non-self-executing treaty, argued that the *Medellín* court was interpreting Article III, and not Article II, of the New York Convention.114 This is because, "[u]nlike Article II, Article III contains no language addressed to the courts of Contracting States and instead addresses itself only to the Contracting States themselves."115 Therefore, the Fifth Circuit concurrence argued that the analysis of whether Article II is self-executing was independent from that of Article III.

The Fifth Circuit's *Safety National* concurrence is too superficial in its analysis of Article III in this respect. The fact that Article III lacks instructions explicitly naming the courts of the contracting state does not mean that Article III was intended to be non-self-executing while Article II was intended to be self-executing. Article III states that "[e]ach Contracting State shall

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111 *Medellín*, 552 US at 521–22, citing 9 USC §§ 201–208 ("The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress.").
113 Id at 522 n 12.
114 See *Safety National*, 587 F3d at 736 (Clement concurring).
115 Id.
recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” This is essentially a broad directive to the relevant authority in each contracting state to enforce arbitral awards. It merely considers that enforcement of arbitral awards might not fall to the judiciary in each contracting state, while acknowledging that enforcement of an agreement to arbitrate, instead of to litigate, would necessarily fall upon the contracting state’s judiciary. This is bolstered by various instructions in the Articles that follow Article III to “the competent authority” with respect to the enforcement of arbitral awards. For the United States, this competent authority is the courts. Because Article III, like Article II, contains a directive to the relevant authority, the self-execution analysis of Article II must, similar to Article III, depend in some part upon whether it relies upon implementing legislation.

Article II’s operation depends on the Convention Act. Indeed, the Convention Act plays a necessary role in the operation of the New York Convention. The New York Convention applies to an unlimited range of arbitral agreements between signatory nations, of which only a subset are enacted through the Convention Act. Paragraph 1 of Article I of the New York Convention provides that the New York Convention applies to the recognition and enforcement of arbitral awards without any limitation as to the nature of the relationship that gives rise to the award, while paragraph 3 of Article I of the New York Convention permits a state party to the New York Convention to file a declaration that the New York Convention will apply only to legal relationships that are considered as commercial under the national law of the state. The United States did file such a declaration because its “purpose in adhering to the [New York] Convention is for the beneficial effects it will produce for the foreign commerce of the United States and not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 states of the Union.” Because of this, the Advisory Committee on Private International Law found it “necessary to include the sub-

117 See, for example, id at Art V.
119 See New York Convention, Art I (cited in note 10).
120 Hearing before the Committee on Foreign Relations, 91 Cong, 2d Sess 33-34 (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State’s Advisory Committee on Private International Law).
stance of this limiting declaration in the legislation that implements the [New York] Convention. 121

Therefore, not all arbitral agreements enforceable under the New York Convention are enforceable under the Convention Act, and to discern which arbitral agreements are enforceable under the New York Convention within the United States requires reference to the Convention Act. As a result, the Fifth Circuit’s reliance on the fact that they construe the New York Convention itself, rather than its implementing legislation, to supersede state law is untenable. Since it is necessary to construe the Convention Act in order to enforce the New York Convention, it cannot be the case that the Fifth Circuit simply construed the New York Convention to preempt the MFA; reference to the Convention Act was necessary. Thus, it must be an “Act of Congress” that the Fifth Circuit construed. Under the MFA, this is impossible.

The text of the New York Convention strongly suggests that the New York Convention is not self-executing. “The interpretation of a treaty, like the interpretation of a statute, begins with its text.” 122 The language of the treaty demonstrates whether it was the signatories’ intent to ratify the treaty’s terms “by force of the instrument itself.” 123 Because the enforceability of the New York Convention cannot be ascertained without reference to the Convention Act, it is unlikely that the New York Convention was intended to be a self-executing treaty.

The Fifth Circuit’s Safety National concurrence also argued that Article II’s “directive to domestic courts” 124 indicated that Article II was self-executing. Because such mandatory terms “tilt strongly toward self-execution,” 125 the Fifth Circuit concurrence argued that Article II was self-executing and fully enforceable in domestic courts by its own operation. 126 However, as noted, the text of Article I notes that a contracting state may limit the scope of applicability of the New York Convention, and the United

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121 Id at 34 (emphasis added).
122 Medellín, 552 US at 506 (internal citation omitted).
123 United States v Pemcheman, 32 US 51, 89 (1833) (holding that the Spanish translation of a treaty that was held to be self-executing was non-self-executing in English because “the language of” the treaty indicated the signatories’ intent to ratify and confirm the terms of the treaty “by force of the instrument itself”).
124 Safety National, 587 F3d at 735 (Clement concurring), quoting Medellín, 552 US at 508.
125 Safety National, 587 F3d at 735 (Clement concurring).
126 Id.
States has done this through its implementing legislation.\textsuperscript{127} Further, though the Fifth Circuit's \textit{Safety National} concurrence interprets Article II to say that "[r]eferral to arbitration is mandatory, not discretionary,"\textsuperscript{128} a court of the contracting state retains discretion over referral to arbitration where enforcement of the New York Convention is "contrary to the public policy" of that state.\textsuperscript{129}

Additionally, the Supreme Court's holding in \textit{Sanchez-Llamas v Oregon}\textsuperscript{130} indicates that purposive interpretation also plays a role in treaty interpretation.\textsuperscript{131} Citing \textit{Sanchez-Llamas}, the \textit{Medellin} court analyzed the United States' intent in acceding to the Vienna Convention on Consular Relations (Vienna Convention), under which it had agreed to submit disputes arising out of the Vienna Convention to the International Court of Justice (ICJ).\textsuperscript{132} The Court noted that:

Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement . . . that supports the notion that ICJ judgments displace state procedural rules.\textsuperscript{133}

With respect to the New York Convention, instead of there being no statement that the New York Convention should displace state rules, there is an explicit statement to the contrary. Indeed, Richard D. Kearney, the Chairman of the Secretary of State’s Advisory Committee on Private International Law, stated at the hearing before the Foreign Relations Committee that the New York Convention does not alter or change a citizen's rights under state law.\textsuperscript{134}

\textsuperscript{127}See 9 USC § 201.
\textsuperscript{128}\textit{Safety National}, 587 F3d at 735 (Clement concurring).
\textsuperscript{129} New York Convention, Art V (cited in note 10).
\textsuperscript{130} 548 US 331, 354 (2006).
\textsuperscript{133} \textit{Medellin}, 552 US at 517.
\textsuperscript{134} See Hearing before the Committee on Foreign Relations, 91 Cong, 2d Sess 44 (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State’s Advisory Committee on Private International Law).
Further, congressional intent in ratifying the New York Convention supports the notion that the treaty was not intended to be self-executing. Indeed, while the United States attended and participated in the 1958 conference where the New York Convention was drafted, it did not sign the treaty until the Senate gave its advice and consent to ratification. Notably, accession was delayed until enactment of the Convention Act. The timing of accession demonstrates that the United States signed the New York Convention intending that the treaty itself not be self-executing, and therefore found that enactment of the Convention Act was "necessary.

B. The New York Convention, Self-Executing or Otherwise, is Equivalent to an "Act of Congress" and is Therefore Subject to Reverse-Preemption by the Broad Scope of the MFA

Even if the New York Convention were self-executing, the MFA should enact reverse-preemption of the New York Convention's provisions. This is because an "Act of Congress" does not distinguish between federal law and treaties. Where a treaty contains stipulations that are self-executing, those stipulations "have the force and effect of a legislative enactment." A self-executing treaty, then, "is a law of the land as an act of congress is." 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." Since self-executing treaties are the equivalent to legislative enactments, there is no reason to distinguish, for purposes of the MFA, between an "Act of Congress" and a self-executing treaty that has an equivalent effect to an "Act of Congress."

Some courts that have argued that the MFA does not enact reverse-preemption of the New York Convention have done so by limiting the MFA's scope. However, the MFA "intentionally

135 See McMahon, 2 J Marit L & Comm at 737 (cited in note 33).
136 Id.
137 Hearing before the Committee on Foreign Relations, 91 Cong, 2d Sess 34 (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law) (emphasis added).
138 See 15 USC § 1012(b).
139 Whitney v Robertson, 124 US 190, 194 (1888).
140 Edye v Robertson, 112 US 590, 598 (1884).
141 Foster v Neilson, 27 US at 254, revd on other grounds by Percheman, 32 US at 89 (noting that Spanish portion of the treaty provided a new interpretation and changed the earlier understood meaning). See also Valentine v United States, 57 S Ct 100, 103 (1936).
142 See, for example, Safety National, 587 F3d at 722 (arguing that the MFA did not
embraced the full scope of possible federal regulation."¹⁴³ In one of the first cases to be decided following the passage of the MFA, the Supreme Court noted that "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."¹⁴⁴ This grant of broad discretion to the states evinces a strong intent to have the MFA apply to any state laws that had been and will be enacted for the purpose of regulating the business of insurance.

Further, the MFA explicitly carves out three exceptions with respect to which the MFA does not apply.¹⁴⁵ This demonstrates that limitations to the MFA were clearly contemplated and should not be implied where absent. Therefore, regardless of whether the New York Convention is self-executing or otherwise, its effect should remain that of an "Act of Congress," which under the MFA is subject to reverse-preemption by state insurance laws. As noted, the committee hearing ratifying the New York Convention suggests that the New York Convention was not intended to affect state regimes.¹⁴⁶ It would thus be at odds with the intent of the MFA and the New York Convention to read the MFA so narrowly as to limit its application to the arbitral agreements under the New York Convention.

C. Recognition of Arbitration Agreements may be Refused Under Exemptions to the New York Convention

Article V lists circumstances under which recognition and enforcement of an arbitral award may be refused. These include instances where "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country, or [t]he recognition or enforcement of the award would be contrary to the public policy of that country."¹⁴⁷ Where state law requires that a dispute be settled in a state court, submitting that...
dispute to international arbitration would offend the law of that state, especially where the MFA directs that state law should prevail. The New York Convention explicitly contemplates exemption from enforcing arbitral awards under the New York Convention in these circumstances.\textsuperscript{148}

Similarly, under Article II, referral to arbitration is required “unless [the court] finds that the said agreement is null and void, inoperative or incapable of being performed.”\textsuperscript{149} Where an anti-arbitration state statute voids or makes inoperative arbitral agreements in insurance contracts, the New York Convention explicitly contemplates exemption from arbitration.\textsuperscript{150} Indeed, conference proceedings leading to the adoption of the New York Convention support a broad reading of the “null and void, inoperative or incapable of being performed”\textsuperscript{151} clause.

During the conference proceedings, the Israeli delegate noted that, while a court could refuse enforcement of an award that was incompatible with the law of the forum or public policy, “the court had to refer parties to arbitration whether or not such reference was lawful or incompatible with public policy.”\textsuperscript{152} The German delegate noted that this difficulty arose from the omission in Article II(3) “of any words which would relate the arbitral agreement to an arbitral award capable of enforcement under the [New York] [C]onvention” and proposed adding language relating an arbitral agreement to an arbitral award capable of enforcement under the New York Convention.\textsuperscript{153}

The German proposal failed to garner a two-thirds majority vote, and Article II “was thus adopted without any words linking agreements to the awards enforceable under the [New York] Convention.”\textsuperscript{154} This omission was also not corrected in the Report of the Drafting Committee.\textsuperscript{155} However, “the obligation to refer parties to arbitration was (and still is) qualified by the

\textsuperscript{148} See id.
\textsuperscript{149} Id at Art II(3).
\textsuperscript{150} See, for example, id at Art V.
\textsuperscript{151} New York Convention, Art II(3) (cited in note 10).
\textsuperscript{153} Scherk, 417 US at 531 n 10 (Douglas dissenting), quoting Haight at 27.
\textsuperscript{154} See Scherk, 417 US at 531 n 10 (Douglas dissenting), quoting Haight at 28.
\textsuperscript{155} See Scherk, 417 US at 531 n 10 (Douglas dissenting), quoting Haight at 28.
clause 'unless it finds that the agreement is null and void, inoperative or incapable of being performed.'\textsuperscript{156}

In light of the proceedings, Chief Justice Douglas of the United States Supreme Court advocated a broad reading of the "null or void" clause in \textit{Scherk v Alberto-Culver Co},\textsuperscript{157} though the majority ultimately decided the case on separate grounds.\textsuperscript{158} "As the applicable law is not indicated, courts may under this wording be allowed some latitude; they may find an agreement incapable of performance if it offends the law or the public policy of the forum."\textsuperscript{159} Though the delegates were unwilling to limit the referral of an arbitral agreement, it would seem that they agreed that a court may decline to enforce an agreement that offends its law or public policy.\textsuperscript{160}

The New York Convention contemplates and exempts arbitral agreements from being enforced under the New York Convention where agreements are incapable of performance because they offend the law of a forum. Therefore, there is no direct conflict between the MFA and the New York Convention that would require the New York Convention to be enforced "over all prior inconsistent rules of law."\textsuperscript{161} Further, the New York Convention was not intended to alter or change a citizen's rights under state law,\textsuperscript{162} and it should not be considered an "inconsistent rule[ ] of law."\textsuperscript{163}

Therefore, while a later-in-time self-executing treaty supersedes a federal statute if there is a conflict,\textsuperscript{164} as discussed, the New York Convention contemplates exceptions to enforcement of arbitral agreements and awards that are "incapable of being performed."\textsuperscript{165} Accordingly, where the exceptions apply, there is no inconsistency between the MFA and the New York Convention.

\textsuperscript{156} See \textit{Scherk}, 417 US at 531 n 10 (Douglas dissenting), quoting Haight at 27–28 (emphasis added).
\textsuperscript{157} 417 US 506 (1974)
\textsuperscript{158} See generally \textit{Scherk}, 417 US 506.
\textsuperscript{159} Id at 531 n 10 (Douglas dissenting), quoting Haight at 28 (emphasis added).
\textsuperscript{160} See \textit{Scherk}, 417 US at 531 (Douglas dissenting), citing Haight at 27–28.
\textsuperscript{161} \textit{Industrial Risk Insurers}, 141 F3d at 1440, quoting \textit{Sedco}, 767 F2d at 1145.
\textsuperscript{162} See Hearing before the Committee on Foreign Relations, 91 Cong, 2d Sess 44 (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law).
\textsuperscript{163} \textit{Industrial Risk Insurers}, 141 F3d at 1440, quoting \textit{Sedco}, 767 F2d at 1145.
\textsuperscript{164} \textit{Cook v United States}, 288 US 102, 118–19 (1933).
\textsuperscript{165} New York Convention, Art II(3) (cited in note 10).
D. Preserving the State Regulatory Regime of Insurance is Desirable

State regulation has been the status quo of insurance regulation.166 "The states have the expertise. The states are closest to the consumer, and the states have the tools and facilities to do the job."167 As discussed, state regulation of insurance also provides benefits such as industry and citizen participation in government, greater flexibility in governance, and enhancement of democracy through checks on various levels of government. So that they may regulate insurance, some states require that insurance disputes be settled in courts of that state's jurisdiction.168 To the extent that parties are able to contract around a state regulatory regime and submit their disputes to arbitration, states lose their ability to regulate insurance. State regulators have made substantial investment in state regulation and have the greatest stake in the continuation of state regulation.169 Because the business of insurance is strongly tied to the welfare of a state's residents, state insurance regulatory schemes are best suited to maximize state welfare.

If the New York Convention were to prevail over the MFA, states would lose their ability to regulate insurance disputes within their jurisdiction. On the other hand, where states void arbitration agreements, parties maintain their freedom to contract in alternative forums to avoid regulatory schemes that they do not wish to be subject to. This is because there is no conflict between the MFA and the Convention Act where there is no underlying state law that is inconsistent with the Convention Act. Resolving the conflict between the MFA and the Convention Act in favor of state law enables states, which have most at stake in the regulation of the business of insurance, to effect the most efficient regulatory scheme, be it through requiring that disputes be settled in their own courts, or by allowing parties the freedom to contract for arbitration.

Further, because insurance companies in a state system retain the possibility of exit from a particularly invasive or burden-

166 See generally Randall, 26 Fla St U L Rev 625 (cited in note 3).
167 Id at 685, quoting Ronald Gift Mullins, Strong Congressional Debate Role Urged for Industry Regulators, J COM, June 11, 1997 at A6 (quoting a statement by Josephine Musser, who was the 1997 National Association of Insurance Commissioners President and Wisconsin Insurance Commissioner).
168 See, for example, La Rev Stat Ann § 22:868 (voiding arbitration agreements that deprive Louisiana courts of jurisdiction over insurance actions).
169 See Randall, 26 Fla St U L Rev at 684 (cited in note 3).
some regulatory regime, states will not unreasonably impose burdensome regulations.\textsuperscript{170} If insurance companies prefer that their arbitral agreements be enforced, their ability to contract in alternative forums serves as a check to state regulatory regimes. Indeed, exit would result in loss of coverage for state consumers, substantial tax revenues, and employment opportunities. The resolution proposed here therefore preserves the states’ ability to regulate insurance, without destroying the parties’ ability to contract if they so wish. On the other hand, enforcing the New York Convention over inconsistent state insurance laws reduces the ability that states are able to regulate insurance, and may result in a sub-optimal regulatory scheme because arbitral norms may differ from state schemes. As a result, allowing states the power to set the terms of their regulatory structure preserves the preferred regulatory scheme while maintaining parties’ contractual freedom through their ability to exit. In turn, the parties’ exit option serves as a check on state regulatory systems to ensure an optimal regulatory scheme.

III. CONCLUSION

Where a state law regulating the business of insurance conflicts with the New York Convention, the MFA operates such that state law should prevail over the New York Convention. First, the New York Convention is not self-executing since the New York Convention by its terms contemplates that its operation may be limited by the contracting state. And Congress has done so through “necessary” implementing legislation. Second, the MFA’s application to the New York Convention cannot be limited because Congressional intent in enacting the MFA contemplated its broad applicability. Third, the New York Convention specifically exempts enforcement of arbitral awards or agreements where enforcement would offend the law of the forum. Fourth, allowing state law to reverse-preempt the New York Convention preserves the preferable status quo that the regulation of insurance remains within the states’ hands. While it may be argued that parties to arbitral agreements relating to the business of insurance may enter such agreements with the expectancy that they are enforced under the New York Convention, such parties have access to information as to the state’s insurance laws under which they are governed. Further, “where a

\textsuperscript{170} See generally Albert O. Hirschman, Exit, Voice and Loyalty: Responses to Declines in Firms, Organizations and States (Harvard 1970).
treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."\textsuperscript{171} Therefore, where state insurance law does not allow for enforcement on an arbitral agreement, the MFA operates such that state law should prevail over the New York Convention.

\textsuperscript{171} Sanchez-Llamas, 548 US at 347.