No. 06-30262

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SAFETY NATIONAL CASUALTY CORPORATION,
Plaintiff-Appellee,

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN - SELF INSURERS FUND,
Intervenor Plaintiff-Appellee

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
Defendants-Appellants.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
Plaintiffs-Appellants

v.

SAFETY NATIONAL CASUALTY CORPORATION and LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
U.S.D.C. Case Nos. 02-1146-A and 05-262-A
The Honorable John V. Parker
United States District Judge

APPELLANTS' *EN BANC* BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Case No. 06-30262
Safety National Casualty Corp., et al. v.
Certain Underwriters at Lloyd's, London, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Parties

Certain Underwriters at Lloyd's, London, subscribing to Certificate Nos. TNC0145//92/114, TNC0146/92/106, TNC0147/92/103, TNC0302/92/107, TNC0370/92/105, TNC0145//93/114, TNC0146/93/104, TNC0147/93/102, TNC0302/93/104, TNC0370/93/102, TNC0145//94/108, TNC0146/94/104, TNC0147/94/101, TNC0687/95, TNC0302/94/106, TNC0370/94/103, TNC0693/95, TNC0694/95, TNC0145//95/105, TNC0687/96, TNC0145B/95/104, TNC0693/96	Appellants
Safety National Casualty Corporation	Appellee
Louisiana Safety Association of Timbermen – Self Insurers Fund	Appellee

2. Counsel for Parties

James M. Garner Joshua S. Force Sher Garner Cahill Richter Klein & Hilbert, L.L.C.	Appellants
Alan D. Ezkovich Ezkovich & Co., LLC	Appellants

CERTIFICATE OF INTERESTED PERSONS – Continued

George Vogrin Michael Frimet Diane Fazzolari Nelson Levine deLuca & Horst, LLC	Appellants
William E. Scott, III Michael P. Wilson Watson, Blanche, Wilson & Posner	Appellee (Safety National)
Andrew K. Epting, Jr. Andrew K. Epting, Jr., L.L.C.	Appellee (Safety National)
Joseph John Bailey Provosty, Sadler, Delaunay, Fiorenze & Sobel	Appellee (LSAT)

3. Other Interested Parties

National Safety Consultants, Inc.

Braxton Reinsurance Brokers, Inc.

Braxton Insurance Brokers, Inc.

Paul W. Cooksey

_____

JOSHUA S. FORCE
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STATEMENT REGARDING ORAL ARGUMENT

On February 11, 2009, the Court ordered that this case be heard *en banc* with oral argument.

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I.

STATEMENT OF JURISDICTION

The jurisdiction of the district court over this action is based 28 U.S.C. § 1331 because the case arises under the laws or treaties of the United States, including specifically the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 21 U.S.T. 2517, T.I.A.S. 6997, *reprinted following* 9 U.S.C.A. § 201 (West 1999), and 9 U.S.C.A. §§ 201-08.

This appeal is an interlocutory appeal from an order the District Court certified involved a controlling issue of law as to which there was a substantial difference of opinion and that an immediate appeal would materially advance the litigation. RE, Tab H at 659.[1] On March 21, 2006, this Court granted Underwriters' Petition for Permission to Appeal from the District Court's December 5, 2005 and February 14, 2006 rulings. This Court has appellate jurisdiction under 28 U.S.C. § 1292(b).

II.

STATEMENT OF ISSUES PRESENTED

1. The United States Supreme Court has held with respect to the Convention that "concerns for international comity, respect for the capacities of

[1] In their Appellants' *En Banc* Brief, Underwriters will refer to their Record Excerpts as "RE." Underwriters will cite to documents in the Clerk's Record on Appeal for Case No. 02-CV-1146 as "ROA[02] [docket number] at [docket page number]" and for Case No. 05-CV-262 as "ROA[05] [docket number] at [docket page number]."

foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444 (1985). The district court held that Louisiana state law reverse-preempted the Convention due to the effect of the McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011-15 (West 1997). The issue presented is whether the Convention, as an international treaty, trumps Louisiana's purported restriction on the enforcement of the arbitration agreement.

2. The issue presented for review is whether a written arbitration agreement between foreign insurers and their domestic assureds should be enforced and the parties ordered to arbitrate their differences or whether the domestic assured has the ability to invoke parochial rules that may obviate international contractual obligations.

III.

STANDARD OF REVIEW

The standard of review as to whether the Convention requires enforcement of an arbitration agreement is *de novo*. *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 903 (5th Cir.) ("[W]hether the Supremacy Clause and the Convention require enforcement of the arbitration clause is a question of law, reviewed *de novo*."),

cert. denied, 546 U.S. 826, 126 S. Ct. 365, 163 L. Ed. 2d 71 (2005). Likewise, a court of appeals "reviews *de novo* the district court's interpretation of a treaty or federal statute." *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1292 (11th Cir. 2003). Lastly, this Court reviews "a district court's denial of a motion to compel arbitration *de novo*." *American Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 492 (5th Cir. 2006).

IV.

STATEMENT OF THE CASE

This appeal arises from the District Court's rulings wrongly refusing to enforce arbitration provisions in a reinsurance contract as required by the Convention. This matter began on December 17, 2002 when Appellee Safety National Casualty Corporation ("Safety National") sued Appellants, Certain Underwriters at Lloyds, London ("Underwriters"), and others regarding various Reinsurance Contracts Underwriters had issued to the Appellee Louisiana Safety Association of Timbermen ("LSAT") (hereinafter the "Reinsurance Contracts"). ROA[02] 1 at 1. Safety National alleged in its Complaint that LSAT assigned Safety National certain rights to the Reinsurance Contracts under a Self Insurance Loss Portfolio Transfer Assumption Agreement ("Loss Transfer Agreement") dated December 17, 1997.[2]

[2] Underwriters have never agreed to this assignment.

On June 26, 2003, Underwriters filed a Motion to Dismiss based on Safety National's lack of standing. ROA[02] 16. Underwriters sought, as alternative relief, an order compelling arbitration of Safety National's claims in accordance with the arbitration provisions in the Reinsurance Contracts. *Id.* By order dated August 13, 2003, the District Court denied Underwriters' Motion to Dismiss but ordered the parties to arbitration, staying the suit pending the outcome of the arbitration. ROA[02] 28 at 137.

Underwriters initiated arbitration proceedings against both Safety National and LSAT. ROA[02] 33 at 173. The parties began the process of arbitrator selections until an impasse resulted over a dispute regarding the number of arbitrators permitted for each party. *Id*. at 176. As a result, Underwriters filed a Motion to Lift the Stay for the Limited Purpose of Compelling Arbitration Among All Necessary Parties (the "Motion to Compel Arbitration"). ROA[02] 32.

LSAT then intervened in the suit by filing a Motion to Intervene in the Proceedings, to Lift the Stay, and Quash the Arbitration (the "Motion to Quash the Arbitration"). ROA[02] 38. The Motion to Quash the Arbitration alleged that Louisiana law prohibited the enforcement of the arbitration clauses in the Reinsurance Contracts. *Id.* at 201. The matter was referred to the Magistrate Judge. ROA[02] 55.

While the motions were pending, on April 11, 2005, Underwriters filed a separate action (05-CV-262), alleging that any disputes among Safety National, LSAT, and Underwriters fell within the Court's federal question jurisdiction pursuant to the Convention and should be referred to arbitration. RE, Tab J.

The parties extensively briefed the arbitration issue, and, on August 22, 2005, the Magistrate Judge issued a Report and Recommendation finding the arbitration clauses to be enforceable under the Convention and recommending that LSAT's Motion to Quash the Arbitration be denied and Underwriters' Motion to Compel Arbitration be granted. RE, Tab D.

LSAT appealed the Magistrate Judge's Report and Recommendation to the district court judge, who, by order dated December 5, 2005, rejected the Magistrate Judge's recommendations, granted LSAT's Motion to Quash the Arbitration, and denied Underwriters' request to compel arbitration. RE, Tab E at 581. The District Court held that, pursuant to the McCarran-Ferguson Act, a Louisiana statute invalidating any provision in an insurance contract that deprives the Louisiana state courts of jurisdiction over an action against the insurer preempted the enforcement of the Convention. As a result, the District Court ruled the parties' disputes were not arbitrable. *Id.* at 583-86.

Underwriters filed a Request for Certification of Interlocutory Appeal. RE, Tab F. Underwriters asked the District Court to reconsider the arbitrability of the parties'

disputes under the Convention. In particular, Underwriters argued that the McCarran-Ferguson Act could not prevent the Convention from preempting the Louisiana statute because the Convention was not an Act of Congress and, thus, did not fall within the narrow exception to federal preemption created by the McCarran-Ferguson Act. *Id.* at 595-96.

On January 10, 2006, the District Court issued a Notice to Counsel, informing the parties that it was "having serious second thoughts as to the correctness of the court's ruling." RE, Tab G at 629. The Notice to Counsel stated that "[b]ecause of such second thoughts, the court is considering reconsideration of that ruling." *Id.* Despite those second thoughts, on February 14, 2006, the District Court denied Underwriters' request for reconsideration.[3] RE, Tab H. The District Court noted, however, that "Underwriters [have] requested that the court certify the December 5, 2005, ruling as appealable under 28 U.S.C. § 1292(b) (doc. 83). The court's own vacillation provides support for this request." *Id.* at 659. Accordingly, the District Court opined that "this ruling involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this litigation." *Id.*

[3] While the District Court declined to reconsider its earlier ruling concerning arbitration, it concluded "that the Convention remains a basis for federal question jurisdiction over this matter." ROA[02] 90 at 659.

Following the decision by the District Court, Underwriters timely filed a Petition for Permission to Appeal with this Court.[4] On March 21, 2006, the Court entered a *per curiam* order granting Underwriters' Petition for Permission to Appeal the District Court's December 5, 2005 and February 14, 2006 rulings. On June 4, 2007, the Court heard oral argument on Underwriters' appeal. Subsequently, on September 29, 2008, the Panel reversed the District Court's order, without dissent, and held that the arbitration agreements between the parties were enforceable under the Convention. LSAT responded to the Panel's opinion by filing an Application for Rehearing *En Banc* on October 14, 2008. Underwriters opposed LSAT's application, and Safety National advised the Court that it took no position on the application. On February 11, 2009, the Court granted the application and ordered that the appeal be reheard *en banc* with oral argument.

V.

STATEMENT OF FACTS

LSAT was a Louisiana qualified group self-insurance fund in the business of providing workers' compensation insurance for its members. Underwriters provided excess occupational accident insurance to LSAT, reinsuring those claims for certain

[4] Safety National also disagreed with LSAT's position that the arbitration clauses were not effective and informed this Court that it "joins in Underwriters' arguments in favor of arbitrability." Answer to Certain Underwriters at Lloyds, London Permission for Pet. to Appeal Order of the U.S.D.C., Middle Dist. of La. filed on behalf of Safety National Casualty Corporation at 4.

occupational injury occurrences. Safety National provides excess workers' compensation coverage to various self-insured employers and alleges itself to have assumed LSAT's obligations to pay LSAT's insured claims.

Underwriters agreed with LSAT to the terms of several "Specific Employer's Excess Occupational Accident Insurance Policies." The contracts between LSAT and Underwriters contain arbitration agreements that state, in pertinent part:

> This arbitration agreement shall be construed as a separate and independent contract between the parties hereto and arbitration hereunder shall be a condition precedent to the commencement of any action at law.
>
> Should any difference of opinion arise between the Underwriters and the Insured which cannot be resolved in the normal course of business with respect to the interpretation of this Certificate or the performance of the respective obligations of the parties under this Certificate, *the difference shall be submitted to arbitration.*

RE, Tab J at 26 (emphasis added). The agreements also provide detailed procedures for the selection of arbitrators and the conduct of the arbitration proceedings. *Id*.

Safety National was not a party to Underwriters' contracts with LSAT. Rather, Safety National entered into a separate Loss Transfer Agreement with LSAT on or about December 17, 1997. Underwriters never agreed to this assignment. Safety National claims the right to recover reinsurance proceeds from Underwriters as a result of the Loss Transfer Agreement, a claim Underwriters dispute.

A number of disputes have arisen concerning these various contracts. The disputes concern Underwriters' obligations under the Reinsurance Contracts to either

Safety National or LSAT, Safety National's and LSAT's rights and obligations under the Loss Transfer Agreement, Underwriters' right to obtain payment from LSAT for additional premiums due Underwriters, and LSAT's right to obtain a refund from Underwriters of certain charges allegedly paid by LSAT to one of its brokers. Underwriters contend that all of the disputes among the parties should be referred to arbitration as the parties to the contracts agreed in writing. This contention and LSAT's opposing view frame the issues before this Court.

VI.

SUMMARY OF ARGUMENT

The Convention represents one class of "the supreme Law of the Land" under the Constitution. By adopting the Convention, the United States obligated itself to enforce the provisions of the Convention and made a commitment to the other Contracting States that it would abide by the Convention. Indeed, the United States adopted the Convention to provide for uniform and predictable rules for the enforcement of international arbitration agreements and awards. The Supreme Court of the United States has recently and repeatedly declared a national policy favoring arbitration.

The District Court rejected and abandoned, however, this national policy and the United States' express obligations under the Convention by holding that the McCarran-Ferguson Act required the court to apply La. Rev. Stat. § 22:629(A)(2),

which has been held to prohibit arbitration of insurance disputes, rather than the Convention. The Convention, though, cannot be trumped by either the McCarran-Ferguson Act or any conflicting Louisiana state law. In its application for rehearing *en banc*, LSAT posited that *Stephens v. American International Insurance Co.*, 66 F. 3d 41 (2d Cir. 1995), a Second Circuit case, created a conflict between this circuit and the Second Circuit and that this Court should defer to its sister court.

Stephens should not be adopted by this Court. There is ample precedent demonstrating that the McCarran-Ferguson Act was intended to apply only to domestic interstate commerce, not *foreign commerce*, which is at issue in this matter. This is demonstrated by applicable case law as well as the fact that the act specifically applies only to "Acts of Congress," which the Convention is not. Furthermore, the Supreme Court has recognized that the McCarran-Ferguson Act does not permit state insurance laws to reverse-preempt executive conduct in foreign affairs and that concerns for comity, uniformity, and predictability in *international commercial relations* require enforcement of arbitration agreements in *international contracts,* even if those agreements would not be enforceable in a purely domestic context.

Moreover, the Louisiana Statute at issue in this matter, § 22:629(A)(2), has been found by Louisiana state and federal courts to be preempted by the Convention. The District Court's decision in this case is an aberration to this well-established precedent. In fact, all of the Louisiana-based federal courts (save the one below) and

the lone Louisiana state court addressing this issue have held that the Convention preempts any inconsistent provisions of the Louisiana Insurance Code.

Even assuming that La. Rev. Stat. § 22:629(A)(2) bars arbitration because some Louisiana state courts believe that arbitration deprives them of jurisdiction, federal courts determine whether *they* have been deprived of jurisdiction. Consequently, this Court should look to *federal* jurisdictional law, which strongly encourages arbitration and holds that arbitration in no way deprives the federal courts of jurisdiction. Therefore, this Court should reverse the District Court's holding refusing to enforce the parties' agreement to arbitrate their disputes.

VII.

ARGUMENT

A. The Reinsurance Contracts' Arbitration Agreements Are Enforceable Under the Convention Because the Convention Trumps the McCarran-Ferguson Act and Any Conflicting Louisiana State Law.

The District Court wrongly held that the Reinsurance Contracts' arbitration agreements are unenforceable because "the McCarran-Ferguson Act forbids the Convention from invalidating La.R.S. 22:629(A)(2) which nullifies arbitration agreements in insurance contracts . . . ."[5] RE, Tab E at 5. As explained more fully

[5] Effective January 1, 2009, the Louisiana Legislature renumbered § 22:629 as § 22:868. *See* LA. REV. STAT. ANN. § 22:868 (Special Pamphlet A 2009). Because the District Court's opinion and all prior briefs in this appeal refer to the statute by the former number, Underwriters will use that number in this brief to avoid confusion.
(continued...)

below, there is ample precedent demonstrating that the Convention, as a treaty, is not superseded by McCarran-Ferguson or any state law. In fact, the McCarran-Ferguson Act does not apply to international insurance agreements, such as the Reinsurance Contracts at issue in this matter. Moreover, the Convention and its implementing legislation have been held to trump state law even in the face of the McCarran-Ferguson Act, and courts have specifically held that La. Rev. Stat. § 22:629(A)(2) does not preempt the Convention.

LSAT attempts to dispute this notion by relying on *Stephens* as its sole basis for seeking the instant *en banc* rehearing. As explained more fully below, this Court should not follow or adopt the Second Circuit's holding in *Stephens* because intervening law has cast doubt on its holding, the Second Circuit decision did not address many of the legal issues presented in this matter, and the decision misapplied the very Supreme Court precedent it purported to follow. The Reinsurance Contracts' arbitration clause therefore should be enforced pursuant to the Convention.

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[5](...continued)
The renumbering of the statute did not change the language of § 22:629(A)(2) [now § 22:868(A)(2)], which provides that "[n]o insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . regardless of where made or delivered shall contain any condition, stipulation, or agreement: . . . [d]epriving the courts of this state of the jurisdiction of action against the insurer." LA. REV. STAT. ANN. § 22:629(A)(2) (West 2004). As discussed further below, § 22:629(A)(2) does not expressly invalidate arbitration agreements in insurance contracts, but Louisiana courts have construed it to do so. *See*, *e.g.*, *Doucet v. Dental Health Plans Management Corp.*, 412 So.2d 1383 (La. 1982) (dictum). *See infra* note 15.

1. The Convention Trumps the McCarran-Ferguson Act Because the Act Does Not Apply to International Treaties.

The McCarran-Ferguson Act 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, . . . unless such Act specifically relates to the business of insurance." 15 U.S.C.A. § 1012(b) (emphasis added). The Convention is a treaty of the United States and not an "Act of Congress." The District Court rested its analysis and holding therefore on the implementing legislation. The fact that Congress enacted implementing legislation, however, should not cause the Convention to cease to be a treaty for purposes of the McCarran-Ferguson Act. *See* ROA[20] 81 at 2. *Indeed, the provisions of the Convention Underwriters seek to enforce appear in Article II of the Convention itself and not in the text of the implementing legislation.*

As a treaty of the United States, the Convention constitutes the "supreme Law of the Land." U.S. CONST., art. VI, cl. 2; *see also United States v. Pink*, 315 U.S. 203, 230, 62 S. Ct. 552, 565-66, 86 L. Ed. 796 (1942); RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE U.S. § 111 cmt. d at 44 (1987) (hereinafter "RESTATEMENT"). While a *treaty* may rest on equal footing with an Act of Congress, that does not make it an *Act of Congress*. *See Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1946), *cert. denied*, 331 U.S. 808, 67 S. Ct. 1191, 91 L. Ed.2d 1828 (1947). The McCarran-Ferguson Act does not expressly or impliedly extend to treaties, and the

District Court did not rely upon any authority to suggest it did. Because the McCarran-Ferguson Act represents a "narrow exception" to federal preemption of state law, its exception should be strictly construed. Accordingly, this Court should not read McCarran-Ferguson to extend beyond Acts of Congress to treaties of the United States. Rather, the Court should hold that the District Court erred in doing so and reverse its rulings.

2. The McCarran-Ferguson Act Does Not Trump the Convention Because the Act Applies Only to Domestic Commerce.

The McCarran-Ferguson Act does not apply to international insurance contracts enforceable under the Convention because McCarran-Ferguson was intended to apply only to domestic interstate commerce – *not foreign commerce*. The Supreme Court of the United States expressly recognized the domestic limit of the McCarran-Ferguson Act in *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). The *Garamendi* Court considered whether a California statute requiring insurers doing business in the state to disclose information about policies sold in Europe between 1920 and 1945 interfered with the federal government's conduct of foreign affairs. *Id.* at 401; 123 S. Ct. at 2379. The Supreme Court held that executive agreements into which the President had entered with

several European countries and that recognized an exclusive forum and remedy for Holocaust-era insurance claims preempted the inconsistent state law.

In reaching this holding, the Supreme Court rejected California's argument that Congress, through the McCarran-Ferguson Act, had authorized state laws such as the one at issue:

> As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised. . . . *[A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs*.

Id. at 428; 123 S. Ct. 2394 (emphasis added). The Supreme Court's holding is consistent with its prior recognition that "[f]oreign commerce is pre-eminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'"[6] *Japan Line, Ltd. v. County of Los*

[6] In transmitting the Convention to the Senate for its advice and consent, President Lyndon B. Johnson made clear that his administration considered the Convention important for foreign commerce. The President noted that "[e]xperience under the convention has established that it contributes in many ways to the promotion of international trade and investment. For example, it provides greater flexibility for the arranging of business transactions abroad; it simplifies the enforcement of foreign arbitral awards; it gives more binding effect to awards and standardizes enforcement procedures; and it strengthens the concept of safeguarding private rights in foreign transactions." SEN. EXEC. DOC. E., 90th Cong., 2d Sess. at 1 (1968).

Angeles, 441 U.S. 434, 448, 99 S. Ct. 1813, 1821, 60 L. Ed. 2d 336 (1979); *see also* RESTATEMENT § 1, Reporters' Notes 5 (1987).

The United States Court of Appeals for the Second Circuit has similarly recognized that the McCarran-Ferguson Act may not reach foreign commerce:

> The fact that [*United States Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993)] did not expressly reject a view of the McCarran-Ferguson Act that would limit its reach to legislation passed pursuant to the Commerce Clause should, however, caution us not to overextend *Fabe*'s reach. And there is some indication in the legislative history of the McCarran-Ferguson Act that it was intended to apply only to Commerce Clause legislation. For example, Senator Ferguson, discussing the purpose of the Act, stated that: "What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance."

Stephens v. National Distillers & Chem. Corp., 69 F.3d 1226, 1231 n.5 (2d Cir. 1996) (citations omitted) (hereinafter "*National Distillers*").

In the context of arbitration, the distinction between domestic and international contracts has been specifically recognized by the Supreme Court. For example, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508, 94 S. Ct. 2449, 2452, 41 L. Ed. 2d 270 (1974), the Alberto-Culver Company ("Alberto-Culver") bought three business enterprises from Scherk, a German citizen residing in Switzerland, as well as the rights held by those enterprises to various trademarks in cosmetic goods, pursuant to a contract that contained an arbitration provision. Alberto-Culver subsequently sued Scherk in an Illinois federal court, alleging that Scherk had violated the Securities

Exchange Act of 1934 by fraudulently representing the status of the trademarks. *Id.* at 509, 94 S. Ct. at 2452. The Supreme Court granted *certiorari* to decide whether Scherk could compel Alberto-Culver to arbitrate its claims, in accordance with the parties' contract, in light of the prior holding in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953), that "an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933." *Id.* at 510, 94 S. Ct. at 2452-53.

The Supreme Court rejected Alberto-Culver's reliance on *Wilko* to defeat enforcement of the arbitration agreement in its contract with Scherk. The *Scherk* Court found "significant and . . . crucial differences" between the agreements in that case and *Wilko* because "Alberto-Culver's contract to purchase the business entities belonging to Scherk was a *truly international agreement*." *Id.* at 515, 94 S. Ct. at 2455 (emphasis added). As a result of the special and different considerations involved in international commercial transactions, especially concerning choice of law and forum selection, the Supreme Court opined that:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. *A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but*

> *would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages*.[7]

Id. at 516-17, 94 S. Ct. at 2455-56 (emphasis added). Relying on its then-recent holding in *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), the Supreme Court held that the parties' agreement to arbitrate any dispute arising from their "international commercial transaction" was enforceable. *Scherk*, 417 U.S. at 518-20, 94 S. Ct. at 2457.

The Supreme Court's holding in *Scherk* is especially significant in the context of the present case because the Supreme Court did not render its holding pursuant to the terms of the Convention.[8] The Supreme Court noted, nevertheless, that the Convention and the United States' adoption and implementation of the Convention confirmed its holding. *Id.* at 417 U.S. 506, 520 n. 5, 94 S. Ct. at 2457 n.15. Thus, the Supreme Court recognized the importance of the policies underlying the Convention in international commercial transactions even before applying its express provisions.

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[7] Upholding the District Court's rulings may well prompt foreign insurers, in future cases, simply to initiate preemptive arbitrations or legal proceedings to compel arbitration in other Contracting States that will enforce the Convention. As the *Scherk* Court cautioned, in "the context of an international contract . . . an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice." *Id.* at 518, 94 S. Ct. at 2456. In that event, the courts of the United States, both federal and state, will truly and completely be ousted of jurisdiction to oversee the parties' litigation.

[8] The parties in *Scherk* entered into their contract and Alberto-Culver discovered Scherk's alleged misrepresentations before the Convention came into force in the United States. *See id.* at 509, 94 S. Ct. at 2452.

Likewise, in *Mitsubishi*, the Supreme Court once again drew a distinction between domestic and international commercial disputes. *Mitsubishi* held that "concerns for international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context*." 473 U.S. at 629, 105 S. Ct. at 3355 (emphasis added). These same concerns apply equally to the case before this Court and support the reversal of the District Court's ruling refusing to enforce the parties' agreement to arbitrate any disputes arising from their international commercial contracts.

Indeed, a number of district courts and commentators have expressly opined that the McCarran-Ferguson Act does not extend to contracts that fall under the Convention because it was not intended to apply to foreign commerce. *See, e.g.*, *Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins., Ltd.*, No. 02-22196, 2002 WL 32075793, *3 (S.D. Fla. Oct. 31, 2002); *Continental Ins. Co. v. Jantran, Inc.*, 906 F. Supp. 362, 366 (E.D. La. 1995); *McDermott Int'l, Inc. v. Underwriters at Lloyd's London*, No. 91-841, 1992 WL 37695, *4 (E.D. La. Feb. 14, 1992); LEE R. RUSS, 15 COUCH ON INSURANCE § 209:22 (2008).

The international nature of the parties' relationship and, thus, the applicability of the Convention distinguish this case from this Court's holding in *American Bankers*

Insurance Co. of Florida v. Inman, 436 F.3d 490 (5th Cir. 2006). In *American Bankers*, this Court held that a Mississippi statute expressly prohibiting arbitration provisions in uninsured motorist coverage came within the "narrow exception" of the McCarran-Ferguson Act and preempted the contrary provisions of the Federal Arbitration Act ("FAA"). *Id.* at 493-94. *American Bankers* involved a domestic insurance contract, however, not an international one as in this case. Consequently, the facts of that case did not implicate the Convention, the treaty rights and obligations of the United States, or the federal government's authority in respect of foreign commerce.[9] The *American Bankers* Court did not address, therefore, the extent to which state law could reverse-preempt the Convention. The case now before the Court presents that question and, necessitates a different result.

3. The Public Policy and Intent Behind the Convention Support Limiting the Applicability of the McCarran-Ferguson Act.

The United States adopted and implemented the Convention to promote predictability, uniformity, and reciprocity in the recognition and enforcement of arbitration agreements in international commercial contracts. In *Scherk*, the Supreme Court explained the goal of the Convention and the United States' purposes in adopting it:

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[9] "A rule of international law or a provision of an international agreement derives its status as law in the United States from its character as *an international obligation of the United States*." RESTATEMENT § 111 cmt. b (emphasis added); *see also id.* § 321 cmt. b.

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and *to unify the standards by which agreements to arbitrate are observed* and arbitral awards are enforced in the signatory countries.

417 U.S. at 520, 94 S. Ct. at 2457 (emphasis added); *see also Preston v. Ferrer*, — U.S. —, 128 S. Ct. 978, 981, 983, 169 L. Ed. 2d 917 (2008) (declaring a national policy favoring arbitration); *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373 (5th Cir. 2006); *Beiser v. Weyler*, 284 F.3d 665, 673 (5th Cir. 2002). Similarly in *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1207-08 (5th Cir. 1991), this Court also expressly recognized the importance of protecting the uniform application of the Convention. *McDermott* held that the purpose of the Convention would be best served by the development of a uniform body of law through the federal courts. *Id.*

The need for a federal forum for disputes involving the Convention was explained in *Acosta.* In *Acosta*, the plaintiffs asserted state-law tort claims against two foreign insurers, among others, in a Louisiana state court pursuant to the Louisiana Direct Action Statute. 452 F.3d at 375. The foreign insurers, whose policies contained arbitration clauses, removed the suit to federal court under 9 U.S.C.A. § 205. The plaintiffs moved to remand the suit to state court, which the district court denied. *Id.*

On appeal, this Court considered whether the district court had jurisdiction over the removed action under the Convention Act. *Id.* The *Acosta* Court concluded that the plaintiffs' direct-action claims related to the policies' arbitration clauses and, thus, jurisdiction was proper under the Convention Act. *Id.* at 379. In reaching this holding, the Court noted that

> the FAA contains no independent grant of federal jurisdiction; the Convention Act does. In fact, the very assertion that arbitration clauses undisputedly falling under the Convention Act must be ignored [as proffered by the insureds] emphasizes our responsibility to reasonably ensure the availability of a federal forum in which the uniform observance of such arbitration agreements can be most consistently effected.

Id. at 378 n.7 (citations omitted).

The effect of the District Court's ruling threatens the uniform application of the Convention, circumvents the Convention altogether, and permits the application of the individual laws of each state to *preempt the Convention* thereby completely obliterating the Convention. To preserve the uniform application of the Convention and the intent of McCarran-Ferguson, this court should reverse the District Court's ruling and hold that McCarran-Ferguson does not apply to international contracts.

4. Even If the McCarran-Ferguson Act Applied in This Matter So As to Allow the Application of La. Rev. Stat. § 22:629(a)(2), the Louisiana Statute Would Not Trump the Convention.

Even if the McCarran-Ferguson Act applied to the international insurance contracts at issue, which Underwriters deny, the Convention would still override the

application of Louisiana law. Indeed, contrary to the District Court's ruling, the majority of Louisiana *state and federal* courts that have addressed the question before this Court have held that § 22:629(A)(2) does not reverse-preempt the Convention. The District Court's ruling is an aberration and did not cite the lone Louisiana state-court opinion to have considered this issue. In *F.A. Richard and Associates, Inc. v. General Marine Catering Co.*, 688 So.2d 199, 202 (La.App. 4 Cir. 1997), the Louisiana Fourth Circuit Court of Appeal held that "the Convention, which encompasses Chapter 2 of Title 9, the Federal Arbitration Act, preempts any state law which would invalidate arbitration agreements [including § 22:629(A)(2)]."

The Louisiana Fourth Circuit does not stand alone in rejecting the application of Louisiana law to an arbitration agreement in an international insurance contract subject to the Convention. Two judges of the United States District Court for the Eastern District of Louisiana have also held that § 22:629(A)(2) does not preempt the Convention under the McCarran-Ferguson Act. *See Continental*, 906 F. Supp. at 366 (Berrigan, Ch. J.); *McDermott*, 1992 WL 37695, *4 (McNamara, J.); *In re Arbitration Between The West of England Ship Owners Mut. Ins. Ass'n (Luxembourg) & American Marine Corp.*, Civ. A. Nos. 91-3645, 91-3798, 1992 WL 37700, *4-5, 1993 AMC 1351 (E.D. La. Feb. 18, 1992) (McNamara, J.). The District Court dismissed these opinions because they cited Supreme Court cases involving arbitration provisions in non-insurance contracts. *See* ROA[02] 81 at 4 n.3. As already discussed

herein, however, these opinions correctly conclude that state law does not preempt the Convention under the McCarran-Ferguson Act. *See supra* at 13-20.

Courts in other jurisdictions have also held that similar state statutes do not preempt the Convention under McCarran-Ferguson.[10] *See*, *e.g.*, *Certain Underwriters at Lloyd's, London v. Simon*, No. 1:07-cv-0899, 2007 WL 3047128 (S.D. Ind. Oct. 18, 2007) (holding Convention supersedes McCarran-Ferguson Act); *Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co.*, No. 07-CV-1071, 2007 WL 2752366 (W.D. Ark. Sept. 20, 2007) (same); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I, Inc.*, 466 F. Supp. 2d 1293 (N.D. Ga. 2006) (holding Georgia anti-arbitration law did not reverse-preempt the Convention); *Antillean*, 2002 WL 32075793 at *3 (holding that Florida law did not preempt the Convention under the McCarran-Ferguson Act); *Assuranceforeningen Skuld (Gjensidig) v. Apollo Ship Chandlers, Inc.*, 847 So.2d 991, 993 (Fla. Ct. App.) (per curiam), *rev. denied*, 859 So.2d 513 (Fla. 2003) (same). This Court should likewise hold that the provisions of the Louisiana Insurance Code do not preempt a treaty of the United States under the McCarran-Ferguson Act. Where an

[10] Some of these courts expressly rejected the Second Circuit's holding in *Stephens*, on which LSAT premised its application for rehearing *en banc*. *See Murphy*, 2007 WL 2752366 at *3; *Goshawk*, 466 F. Supp. 2d at 1304 n.9. Underwriters likewise contend that this Court should not follow *Stephens* and address that case, *infra*, in Section VII(A)(5).

insured, like LSAT, goes outside the United States to procure its insurance, the Convention and not parochial state law should govern the parties' insurance contract.

The preemption of state law by treaties was recognized by the Supreme Court in *Missouri v. Holland*, 252 U.S. 416, 431, 40 S. Ct. 382, 382, 64 L. Ed. 641 (1920). In that case, the State of Missouri challenged the enforcement of the Migratory Bird Treaty Act as an unconstitutional interference with the state's Tenth Amendment rights.[11] The Supreme Court rejected the state's contention that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Id.* at 432-33, 40 S. Ct. at 383. Instead, Justice Holmes, writing for the Court, opined that "[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Id.* at 433, 40 S. Ct. at 383 (citation omitted). The Supreme Court upheld the treaty and the statute against the state's challenge, noting further that there is "[n]o doubt the great body of private relations usually falls within the control of the State, but a treaty may override its power." *Id.* at 434, 40 S. Ct. at 384. *See also Amaya*, 158 F. 2d at 556 ("The treaty-

[11] Congress enacted the Migratory Bird Treaty Act of July 3, 1918 to give effect to a December 8, 1916 treaty between the United States and Great Britain, which sought to protect various species of birds that migrated annually between the United States and Canada. *Id.* at 431, 40 S. Ct. at 383.

making power might even be superior to those powers which are reserved to the states."); RESTATEMENT § 302 cmt. d at 154 ("the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements").

It should be noted that, to the extent the McCarran-Ferguson Act could be construed to enable state law to reverse-preempt the Convention, the Convention would supersede any such inconsistent provisions of the act under the "last-in-time" rule. "Under our Constitution, treaties and statutes are equal in dignity. If a treaty and a statute are inconsistent, 'the one last in date will control the other.'" *Egle v. Egle*, 715 F.2d 999, 1013 (5th Cir. 1983) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S. Ct. 456, 458, 31 L. Ed. 386 (1888)); *see also United States v. Ray*, 423 F.2d 16, 21 (5th Cir. 1970); RESTATEMENT § 115(2) at 63.

The cases discussed in this section demonstrate that even though McCarran-Ferguson Act may have created a narrow exception to federal preemption, the act does not preclude the Convention from overriding it or state law. While Congress alone might not be able to enact general legislation to preempt state law in light of the McCarran-Ferguson Act, e.g., the FAA, Congress may override state law in enacting legislation to implement the Convention. Here, Congress and the executive branch have acted to protect the country's interests in the field of foreign commerce and expressed a clear intent to establish uniform rules for the enforcement of foreign

arbitration agreements. This Court should therefore enforce the terms of the Convention.[12] Further, this Court should reverse the District Court's denial of Underwriters' treaty-protected right to arbitration and recognize the holdings of the majority of Louisiana state and federal courts that § 22:629(A)(2) does not reverse preempt the Convention.

5. The Court Should Reject *Stephens* and Hold That the Convention Preempts Louisiana Law and the McCarran-Ferguson Act.

LSAT sought rehearing *en banc* based solely upon an alleged conflict between the Panel's opinion and the Second Circuit's holding in *Stephens*. *See* App. for Rehr'g at iii-iv. LSAT urged the Court further to adopt the Second Circuit's reasoning and holding in *Stephens*. *See id.* at 10-11. Underwriters submit *Stephens* should not be adopted by this Court. Subsequent opinions by both the Supreme Court and the Second Circuit cast significant doubt on the continued viability of *Stephens*. Moreover, the *Stephens* Court misapplied the very Supreme Court precedent it purported to follow.

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[12] *See Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968) (holding Oregon probate law invalid because it interfered with United States foreign policy); *Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961) ("We are mindful that rights of succession to property under local law may be affected by an overriding federal policy when a treaty makes different or conflicting arrangements. In such event the state policy must give way.") (quotation omitted).

a. Recent Case Law Casts Doubt on the Applicability of *Stephens*.

The holding in *Stephens* has been undermined by subsequent case law by the Supreme Court as well as in the Second Circuit. In fact, *Stephens* does not even address several of the issues presented in the recent case law, casting further doubt on the validity, if any, of the decision.

First, as the Panel recognized, the Supreme Court holding in *Garamendi* confirms that the McCarran-Ferguson Act was not intended to limit the executive branch's conduct of foreign affairs or its ability to negotiate and implement treaties. *See Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744, 751-52 (5th Cir. 2008). As discussed above, *Garamendi* held that executive agreements concerning foreign affairs preempted California insurance laws despite the McCarran-Ferguson Act. *See supra* at 14-15. In reaching its holding, the Supreme Court noted that the executive agreements, which were neither treaties nor ratified by Congress, were "fit to preempt state law, *just as treaties are*." *Garamendi*, 539 U.S. at 416, 123 S. Ct. at 2387 (emphasis added). The Supreme Court also acknowledged that a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs. *Id.* at 428, 123 S. Ct. at 2394 (emphasis added).

Stephens did not consider the issue of foreign affairs. If the McCarran-Ferguson Act does not permit a state insurance law to reverse preempt an executive agreement, the act should not be held to allow a state law to reverse preempt a treaty. Like an executive agreement, a treaty reflects the President's conduct of foreign affairs but, unlike an executive agreement, also requires the consent of the Senate.

Second, *Garamendi* and *National Distillers* indicate that Congress intended the McCarran-Ferguson Act to apply only to domestic interstate commerce – *not foreign commerce*. Indeed, a number of other courts and commentators have recognized that the act does not extend to contracts that fall under the Convention because it was not intended to apply to foreign commerce. *See supra* at 19. *Stephens* did not consider the intent of McCarran-Ferguson. In fact, after the decision was rendered, the Second Circuit itself also acknowledged some tension between its holding in *Stephens* and the McCarran-Ferguson Act's legislative history on this point. *See National Distillers*, 69 F.3d at 1231 n.5.

Third, and most importantly, in light of the Supreme Court's holding in *Garamendi*, following *Stephens* in this case would produce an anomalous result and undermine recent case law. Neither *Stephens* nor LSAT suggests that a self-executing treaty is an "Act of Congress" or that, under the McCarran-Ferguson Act, a state insurance law would reverse-preempt a conflicting self-executing treaty. As the Panel observed, it makes no sense that Congress would have intended the McCarran-

Ferguson Act to permit a state law to reverse preempt an executory treaty that *had been implemented by Congress* but not a self-executing treaty. *See Safety Nat'l*, 543 F.3d at 752. Thus, following *Stephens* would bring this Court into conflict with *Garamendi* because doing so would restrict the federal government's ability to negotiate and implement treaties affecting insurance. This Court should follow the Supreme Court in this regard and not follow the *Stephens*.

b. *Stephens* Misapplied the Supreme Court Precedent It Purported to Follow.

The Court should also reject the holding in *Stephens* because it misapplied the very Supreme Court precedent it purported to follow – *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 7 L. Ed. 415 (1829). *Stephens* ignored the holding of the decision, the subsequent history of the decision, and the differences between the treaty at issue in *Foster* and the Convention.

Specifically, *Foster* did not hold, as *Stephens* suggested, that a court could disregard an executory treaty. Rather, *Foster* recognized that the courts had to enforce a treaty as the supreme law of the land if the treaty were either self-executing *or* Congress had enacted the legislation necessary to implement it. *Stephens* misapplied this holding by concluding that the Convention did not preempt the Kentucky Liquidation Act, in accordance with the Supremacy Clause, because "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its

implementation." 66 F.3d at 45. *Stephens* premised this holding on the Supreme Court's statement in *Foster* that:

> A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our 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 the 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; and the legislature must execute the contract, before it can become a rule for the court.[1]

Id. (quoting *Foster*, 27 U.S. (2 Pet.) at 313-14).

Stephens ignored, however, the context of the *Foster* decision. In *Foster*, the plaintiff claimed title to land based upon a grant from the King of Spain and sought to enforce his claim under the treaty of February 22, 1819 between the United States and Spain. The Supreme Court concluded that the treaty was not self-executing because it expressly provided that the land grants had to be "ratified and confirmed" for the courts to recognize and enforce them. As a result, the treaty remained a "contract" between the United States and Spain, pursuant to which the United States promised only to take future action. *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 20 (2002). The court stated further that "if it is, the ratification and confirmation which are promised must be the act of the legislature. *Until such act shall be passed, the Court is not at liberty*

to disregard the existing laws on the subject. Foster, 27 U.S. (2 Pet.) at 314-15 (emphasis added). Thus, *Foster* did not hold, as the *Stephens* Court suggested, that a court was necessarily free to disregard an executory treaty. Rather, *Foster* recognized that the courts of the United States had to enforce a treaty as the supreme law of the land if either the treaty were self-executing *or* Congress had enacted the legislation necessary to implement.

Stephens further ignored the post-case treatment of *Foster* and specifically that four years after the decision, the Supreme Court effectively overruled *Foster* in *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L. Ed. 604 (1833). In *Percheman*, the Supreme Court considered the Spanish translation of the treaty, under which Article 8 read that the land grants "shall remain ratified and confirmed." *Id.* at 88. *Percheman* found that the "English side of the treaty leaves the ratification of the grants executory - they shall be ratified; the Spanish, executed - they shall continue acknowledged and confirmed." *Id.* at 69. Unlike in *Foster*, *Percheman* recognized the claimant's rights arising from the treaty because of its new conclusion that the treaty was self-executing and, therefore, could serve as a "rule" for the courts to apply. Similarly, the Supreme Court's intervening holding in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 8 L. Ed. 547 (1832), is not to the contrary.

Moreover, the treaty at issue in *Foster* is quite different from the Convention at issue. *Foster* addressed the differences between self executing treaties and

unimplemented executory treaties, which is not the case before this Court. *Stephens* wrongly concluded that the Convention had no effect because of the implementing legislation. When Congress implements an executory treaty, the courts must enforce the rights created by the treaty as between private parties so as to effectuate the contracting parties' purposes. *See* Erin R. Flanagan, *It's the "Supreme Law of the Land:" Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by SWANCC*, 22 PACE ENVTL L. REV. 175, 183-84 (2005).

The presence of the implementing legislation is of no moment in this matter as Underwriters seek to enforce rights granted to them directly by the Convention. *See* 9 U.S.C.A. §§ 201-08. Congress enacted the implementing legislation principally to distinguish cases falling under the Convention from those subject to the FAA and not because the Convention was necessarily "unimplemented" without this legislation. *See* SEN. REP. NO. 91-702, 91st Cong., 2d Sess. at 5 (1970).

B. LSAT's Position Will Result in Judicial Legislation As It Attempts to Exempt Insurance Arbitration Agreements From the Convention.

1. The Convention Has Specifically Declared Certain Agreements Exempt for Which Insurance Is Not Enumerated.

Article II of the Convention, which governs the enforceability of arbitration agreements, applies very broadly to international commercial agreements and provides only a few, limited exceptions.[13] As this Court has observed, "Article II(1) of the

[13] The Convention permits Contracting States to make two reservations in (continued...)

Convention itself is very broadly worded to provide that signing nations shall recognize arbitration agreements 'in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'" *Francisco*, 293 F.3d at 274. "The determination of whether a type of claim is 'not capable of settlement by arbitration' under Article II(1) must be made on an international scale, with reference to the laws of the countries party to the Convention." *Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc.*, 760 F. Supp. 1036, 1042 (E.D.N.Y. 1991).

In ratifying the Convention, the United States extended the Convention's reach to all arbitration agreements that arise "out of a legal relationship, whether contractual or not, which is considered as *commercial*." 9 U.S.C.A. § 202 (emphasis added); *see also id.* § 1 (defining "commerce" under the FAA). Similarly, in *Francisco*, this Court observed that "the language of the Convention, the ratifying language, and the Convention Act implementing the Convention . . . recognize that the only limitation on the type of legal relationship falling under the Convention is that it must be

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[13](...continued)
adopting the Convention. First, a Contracting States may "declare that it will apply the Convention to recognition and enforcement of awards made only in the territory of another Contracting State." Convention, Art. I(3). Second, a Contracting State may "declare it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." *Id.* In adopting the Convention, the United States made both of these reservations. *See id.*, note 29a (United States' declarations in adopting Convention); 9 U.S.C.A. § 202.

considered 'commercial.'" 293 F.3d at 274. The parties' dispute in this case falls under the Convention because the Reinsurance Contracts involve an international commercial relationship subject to the Convention. As a result, the parties' disputes regarding those Reinsurance Contracts concern a "subject matter" that may be resolved through arbitration for purposes of the Convention and the implementing legislation. The District Court erred in holding that, *under Louisiana law*, insurance was not a subject matter capable of arbitration.

The parties' arbitration agreements are likewise valid and enforceable under Article II(3) of the Convention. Article II(3) *requires* a court to refer a matter to arbitration, "unless it finds the said agreement is null and void, inoperative or incapable of being performed." Convention, Art. II(3). This exception is to be "narrowly construed." *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 960 (10th Cir.), *cert. denied*, 506 U.S. 1021, 113 S. Ct. 658, 121 L. Ed. 2d 584 (1992). The "null and void" exception applies "only to those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale." *Ledee*, 684 F.2d at 187; *see also Oriental*, 609 F. Supp. at 78; RICHARD A. LORD, 21 WILLISTON ON CONTRACTS § 57:55 (4th ed. 2006).

As with the determination whether the parties' insurance disputes constitute a subject matter capable of resolution by arbitration, this exception rests on federal, not state, law. Accordingly, the provisions of the Louisiana Insurance Code cannot render

the parties' arbitration agreement "null and void" because Louisiana's "parochial interests . . . cannot be the measure of how the 'null and void' clause is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation." *Ledee*, 684 F.2d at 187. None of the Appellees has argued, nor did the District Court find, that fraud, mistake, duress, or waiver invalidated the parties' arbitration agreements. Applying the proper and applicable federal law establishes, therefore, that the parties' agreements should be enforced in accordance with the terms of their contracts and the Convention.

2. This Court Should Not Create a Subject-Matter Exception to the Convention for Insurance Contracts Where Congress Has Not Expressly Established Such an Exception.

This Court has previously recognized in *Francisco* that the Convention was adopted and implemented by the United States to enforce arbitration agreements broadly in commercial contracts. *See Francisco*, 293 F.3d at 274. The Convention does not itself contain an exception for insurance contracts that would put the arbitration agreement before this Court outside the intended scope of the treaty. Likewise, in implementing the Convention, Congress did not expressly exclude insurance contracts from the treaty's reach. Because neither the Convention nor the implementing legislation excepts insurance contracts from the Convention, this Court should not create such an exception in this case.

Indeed, in *Mitsubishi*, the Supreme Court cautioned against the judicial creation of subject-matter exceptions where Congress had not expressly exempted those matters from the Convention. The Supreme Court observed that:

> The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But *we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so*.

Mitsubishi, 473 U.S. at 639 n.21, 105 S. Ct. at 3360 n.21 (emphasis added). The McCarran-Ferguson Act, which predates the Convention, does not mention arbitration agreements in insurance contracts let alone expressly exclude such commercial matters from the scope of the Convention. This Court should not create an "insurance exception" to the Convention when Congress has not expressly removed international insurance contracts from the Convention.

Moreover, the maxim "*expressio unius est exclusio alterius*," which holds that the inclusion of certain exemptions is an implicit exclusion of others, provides further support for not creating a new exception. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., Princeton University Press) (1997) at 25. Under this maxim, it must be assumed that all of the potential exceptions to the Convention were considered and the Contracting States

included only those that they intended. If no exception for insurance exists, one should not be created by the courts.

The Louisiana statute is, in fact, the precise type of parochial legislation the Supreme Court has repeatedly instructed courts *not to enforce* over the Convention. As the *Mitsubishi* Court recognized, if international arbitral institutions "are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration,' and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Id.* at 638-39, 105 S. Ct. at 3360; *see also Scherk*, 417 U.S. at 516-17, 94 S. Ct. at 2455-56.

The McCarran-Ferguson Act, permitting the state regulation of insurance, does not reflect or establish the type of fundamental national policy that might justify a limited exception to the United States' treaty obligations under the Convention. Because Congress has not created an express exception for insurance contracts, this Court should not create one, and Louisiana has no power to create one. "State or local statutes removing certain kinds of disputes . . . from arbitration cannot prevail over an agreement to arbitrate that is covered by the New York Convention." RESTATEMENT § 488, Reporters' Notes 1 at 639. The District Court erred in enforcing Louisiana

state law over the Convention and thereby creating a judicial exception to the Convention. This Court should reverse that holding.

C. Louisiana Revised Statute § 22:629(A)(2) Should Not Apply Because the Jurisdiction of This Court Is Based on a Federal Question and Only Federal Law Should Govern the Scope of the Court's Jurisdiction.

The District Court erred in disregarding the Convention and applicable federal law and, instead, looking to state law to determine both the substantive and procedural enforceability of the parties' arbitration agreement. This matter is subject to federal question jurisdiction, and, accordingly, federal substantive and procedural law should control. Indeed, in the context of whether to enforce an agreement to arbitrate, the Supreme Court has held that a court must apply "the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act.'" *Mitsubishi*, 473 U.S. at 625, 105 S. Ct. at 3353 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983)). "Federal law governs the interpretation, validity and enforcement of an arbitration clause in contracts falling under the United States Arbitration Act, 9 U.S.C. §§ 1-14, 201-208 (1982)."[14] *Oriental Commercial &*

[14] Where the parties to a contract have agreed to arbitrate their disputes, the Supreme Court has rejected efforts to use state law to avoid the arbitrability of a dispute arising under the contract and thereby to render certain contractual provisions meaningless. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64, 115 S. Ct. 1212, 1219, 131 L. Ed. 2d 76 (1995); *see also Preston*, 156 S. Ct. at 981 (holding that the FAA "calls for the application, in state as well as federal courts, of (continued...)

Shipping Co. v. Rosseel, N.V., 609 F. Supp. 75, 77 (S.D.N.Y. 1985); *see also Lim*, 404 F.3d at 903 ("Because the United States is a signatory to the Convention, and Congress enacted enabling legislation, the Convention is applicable as federal law in this case."); RESTATEMENT § 487 cmt. c (1987) ("Enforcement of foreign arbitral awards is a matter of international obligation and in the United States is governed by federal law . . . ."). The District Court erred, however, in looking solely to whether Louisiana law through the McCarran-Ferguson Act – and not the Convention or federal law – invalidated the parties' agreement.

Under federal law, as this Court has held, "the Convention contemplates a *very limited inquiry* by courts when considering a motion to compel arbitration." *Sedco v. Petroleos Mexicanos Mexican Nat. Oil Co.,* 767 F.2d 1140, 1144 (5th Cir. 1985) (emphasis added). Any "doubts as to whether a contract falls under the Convention Act should be resolved in favor of arbitration, in light of the Supreme Court's recognition generally of 'the strong federal policy in favor of enforcing arbitration agreements.'" *Francisco*, 293 F.3d at 274-75 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)). The District Court did not conduct a "limited inquiry" because it largely ignored the Convention and federal law in focusing on § 22:629(A)(2) of the Louisiana Revised Statutes. Moreover, although the District Court, found "the issue to be a close one" and

[14](...continued)
federal substantive law regarding arbitration").

expressed repeated doubts about the correctness of its ruling, it failed to resolve those doubts in favor of arbitration as required by this Court's controlling precedent. *See* RE, Tab E at 4, 88, 90. This Court should apply the governing federal law, under which the parties' arbitration agreement is plainly enforceable, and reverse the District Court's holding refusing to compel arbitration.

Even if § 22:629(A)(2) applied to the parties' arbitration agreements, which Underwriters dispute, the District Court still erred in refusing to enforce the agreements. The District Court erred not only in its application of § 22:629(A)(2) to the parties' arbitration agreements but also in its interpretation of that statute. The statute, as interpreted and applied by the District Court, makes no sense in the context of an agreement subject to the Convention, such as here.

Section 22:629(A)(2) seeks to require suits involving insurance disputes to be filed in the "courts of this state," in other words, in Louisiana state courts.[15] LA. REV.

[15] Louisiana Revised Statutes § 22:629 does not, by its terms, prohibit the enforcement of arbitration clauses in insurance contracts. The statute merely prohibits clauses in insurance contracts that deprive "the courts of this state of the jurisdiction of action against an insurer." LA. REV. STAT. ANN. § 22:629(A)(2). Although some Louisiana courts have held that this statute prohibits arbitration clauses in insurance contracts, Louisiana courts have rejected the proposition that arbitration divests state courts of jurisdiction elsewhere. *See E.C. Durr Heavy Equip. Co. v. Board of Commissioners of the Orleans Levee Bd.*, 719 So.2d 136, 138-39 (La.App. 4 Cir. 1998) (concluding that arbitration provision in construction contract to which political subdivision of state was a party did not conflict with provision in Louisiana Constitution vesting state district courts with exclusive jurisdiction over suits against state and its political subdivisions). Moreover, the Louisiana Binding Arbitration Law (the "LBAL"), LA. REV. STAT. ANN. §§ 9:4201-17 (West 1997), declares *all* written
(continued...)

STAT. ANN. § 22:629(A)(2). A Louisiana state court presented with an insurance provision implicating this statute must determine whether the provision deprives it of "jurisdiction" over the action against the insurer. *Id.* If the insurance provision would oust the court of jurisdiction, Louisiana jurisprudence suggests that the court must disregard the provision.

By force of federal law, however, cases arising under the Convention may be brought initially in federal court pursuant to 28 U.S.C. § 1331. In fact, even if an insured initiates its suit in state court, a Convention case may be removed to federal court, and, thus, an insured may not ensure a state-court forum. *See* 9 U.S.C.A. § 205. Federal question jurisdiction and the removal provisions of the implementing legislation do not violate or implicate § 22:629(A)(2) because the statute applies only to a "condition, stipulation, or agreement" contained in an insurance policy. LA. REV. STAT. ANN. § 22:629(A). Nevertheless, 28 U.S.C. § 1331 and 9 U.S.C. § 205 necessarily deprive the state courts of jurisdiction over the parties' dispute.

A federal court exercising federal question jurisdiction either by way of an initial filing or removal cannot apply § 22:629(A)(2) in the same manner as a

[15](...continued)
arbitration agreements to be valid and enforceable with the exception only of employment contracts, contracts "controlled by valid legislation of the United States," and contracts made before July 28, 1948. *Id.* §§ 9:4201, 4216. The LBAL does not exclude arbitration agreements in insurance policies. Therefore, Louisiana's arbitration laws also suggest that § 22:629(A)(2) should not be read broadly to extend to international insurance contracts.

Louisiana state court. The very fact that the suit is in federal court means that the state courts have been deprived of "jurisdiction" over the action suit. If the federal court must apply §22:629(A)(2) at all, which Underwriters deny, it must determine not whether the arbitration provision would deny the state courts of jurisdiction but whether it would deprive the *federal court* of jurisdiction. To make that determination, a federal court should apply federal, not state, law because the determination involves a question of federal, and not state, jurisdiction. There is no legal basis for a federal court to look to state law to decide its own jurisdiction.

Nevertheless, in the District Court, LSAT wrongly argued that the District Court was *Erie*-bound to apply the Louisiana state courts' interpretation of jurisdiction under § 22:629.[16] ROA[02] 88 at 635. The case before this Court arises under federal question jurisdiction pursuant to 28 U.S.C. § 1331, not diversity jurisdiction, because it involves a dispute under the Convention, a treaty of the United States. In federal question cases – in contrast to diversity cases – federal courts look to federal choice-of-law principles. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981). When the "federal statute in question

[16] It should be noted that Safety National filed this suit in federal, not state, court and did not oppose the District Court's original ruling, referring the dispute to arbitration. Likewise, LSAT participated initially in the arbitration before it became a party to this action and did not challenge the validity of the parties' arbitration agreement until the parties disagreed over how the arbitrators should be selected. *See supra* at 4. Underwriters also filed their Complaint only in the federal district court, not in a state court. *See* RE, Tab J.

demands national uniformity, [such as here,] federal common law provides the determinative rules of decision." *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir.), *cert. denied*, 531 U.S. 1014, 121 S. Ct. 571, 148 L. Ed. 2d 489 (200). Therefore, to determine whether enforcing the parties' arbitration agreement would oust a federal court of jurisdiction, this Court must consider federal law, not Louisiana law.

Indeed, a federal court must look to federal law to decide this question to ensure the development of uniform rules under the Convention. Because a "central goal of the New York Convention – and the driving force behind Congress's enactment of chapter 2 – was to set out uniform rules governing the recognition and enforcement of international arbitration awards . . . [a]pplying varying state standards in cases falling within the Convention's ambit would be in tension with the elemental purpose of chapter 2." *InterGen N.V. v. Grina*, 344 F.3d 134, 143-44 (1st Cir. 2003). The goal of uniformity would be ill served by a finding that an arbitration clause deprived one federal court of jurisdiction while arbitration clauses remained within the scope of other federal courts' jurisdiction simply because some state courts have a restrictive view of their jurisdiction in matters involving arbitration.

Applying federal law to this question produces a completely different result than the one reached by the District Court. Federal case law plainly holds that a federal court is not divested of jurisdiction when it orders a party to arbitration. *See,*

e.g., *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 77 (1st Cir. 2000) ("It is neither illogical nor meaningless for a court's jurisdiction to remain intact and crucial to the overall arbitration scheme even while it honors the parties' voluntary agreement to deal with the merits outside the courtroom."); *American Sugar Refining Co. v. The ANACONDA*, 138 F.2d 765 (5th Cir.1943), *aff'd*, 322 U.S. 42, 44, 64 S. Ct. 863, 865, 88 L. Ed. 1117 (1944) (holding that an arbitration agreement "does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate").

In another case involving the arbitration of insurance disputes in Louisiana, Judge Melançon of the Western District of Louisiana enforced an arbitration clause, specifically finding that § 22:629 did not bar such arbitration:

> While 22:629 may apply to the policy issued by Steadfast, section 29 does not explicitly preclude enforcement of arbitration clauses in insurance contracts. As provided by the foregoing, section 629 prohibits only agreements in insurance contracts which deprive Louisiana courts of "jurisdiction of action against the insurer." La. R.S. 22:629(A)(2). Arbitration provisions do not divest courts of jurisdiction over a matter. *American Sugar Refining Co. v. The Anaconda*, 138 F.2d 265, 766-67 (5th Cir. 1943); *Cf. E.C. Durr Heavy Equipment Co. v. Board of Commissioners of the Orleans Levee Board*, 719 So. 2d 136, 138 (La. App. 4th Cir. [1998]). Enforcement of the arbitration clause in the Steadfast policy does not deprive this Court of "jurisdiction of action" against Steadfast. Rather the Court retains jurisdiction to compel arbitration and to stay the proceedings pending arbitration as well as ultimate authority over the case.

Delta Seaboard Well Serv., Inc. v. Steadfast Ins. Co., Memorandum Ruling, Docket No. 99-2319 (W.D. La. May 24, 2000), *application for writs denied*, Docket No. 01-30190 (5th Cir. Feb. 20, 2001).

The court recognized that:

> Further, in keeping with the strong policy of favoring enforcement of arbitration agreements, the courts have created a body of federal substantive arbitration law applicable in both federal and state courts. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984). Examining the legislative history, the Court noted that Congress "contemplated a broad reach of the [Arbitration] Act, unencumbered by state-law constraints." *Id.* at 859. The Court found that "the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or … by state courts or legislatures." *Id.* Accordingly, the Court rejects Delta's argument that the McCarran-Ferguson Act mandates the application of Louisiana law in favor of applying federal arbitration law.

Id.

Because the arbitration clause does not divest a federal district court of jurisdiction over the action, the District Court erred in finding the parties' arbitration agreement invalid under § 22:629(A)(2). The District Court should have, instead, enforced the parties' arbitration agreement even if § 22:629(A)(2) applied to their contracts and, thus, wrongly quashed the parties' arbitration. This Court should reverse the District Court's erroneous ruling.

VIII.

CONCLUSION

The District Court erred in refusing to enforce the parties' agreement to arbitrate their disputes. Under the Convention, the parties' agreement is plainly enforceable. The Convention, which has been adopted and implemented by the United States, is not an "Act of Congress" and, therefore, preempts the McCarran-Ferguson Act and any inconsistent state law.

The District Court's holding not only ignores the supremacy of this treaty but greatly undermines the purposes the United States sought to achieve in adopting it. The holding permits each of the fifty states to adopt laws to circumvent or contravene the Convention and, in doing so, destroys the uniformity and predictability in international commercial transactions established by the Convention. Accordingly, this Court should reverse the District Court's holding, which erroneously allowed

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state law to reverse-preempt the Convention and, if left in place, would significantly harm the United States' treaty obligations under the Convention.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,850 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. Local Rule 32.2.

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Dated: March 16, 2009.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that the above and foregoing APPELLANTS' *EN BANC* BRIEF has been served on the following counsel by depositing two (2) paper copies and an electronic copy in the First-Class United States Mail, properly addressed and postage prepaid, this 16th day of March 2009:

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I hereby certify further that the APPELLANTS' *EN BANC* BRIEF has been filed with the Clerk of Court by hand delivering an original, twenty (20) paper copies, and an electronic copy to the Clerk of Court, this 16th day of March 2009.

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