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

EN BANC BRIEF OF APPELLEE, LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN

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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
Trustee William D. Files, Jr.	
Trustee Daniel Wyatt	
Trustee Todd N. Martin	
Trustee Travis L. Taylor	
Trustee Michael Hawkins	
Trustee Manor Love	

CERTIFICATE OF INTERESTED PERSON - Continued

2. Counsel for Parties

Joseph J. Bailey — Appellees (LSAT)
Provosty, Sadler, deLaunay, Fiorenza & Sobel

James M. Garner — Appellants
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Alan D. Ezkovich — Appellants
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George Vogrin — Appellants
Michael Frimet
Diane Fazzolari
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William E. Scott, III — Appellee (Safety National)
Michael P. Wilson
Watson, Blanche, Wilson & Posner

Andrew K. Epting, Jr. — Appellee (Safety National)
Pratt-Thomas, Pearce, Epting & Walker

3. Other Interested Parties

National Safety Consultants, Inc.

Braxton Reinsurance Brokers, Inc.

Braxton Insurance Brokers, Inc.

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LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN - SELF INSURERS FUND

STATEMENT REGARDING ORAL ARGUMENT

_____This court has set this matter for oral argument before the entire court on May 21, 2009.

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I. JURISDICTIONAL STATEMENT

LSAT agrees that this court has jurisdiction from the court's order quashing the arbitration under 28 USC §1292 (b) and Fed. R. App. Proc. 5.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Panel held in the instant case that the State of Louisiana may not prohibit enforcement of an arbitration clause contained in a policy of insurance issued for delivery within its borders to one of its citizens by an offshore insurer. Was this proper considering the McCarran-Ferguson Act and the Convention Act?

III. STATEMENT OF THE CASE

This matter is on appeal pursuant to 28 U.S.C. § 1292(b) from the district court's denial of a motion by Underwriters to compel arbitration under numerous policies of specific excess insurance issued by various syndicates to the Louisiana Safety Association of Timbermen - Self Insurers Fund. The district court denied the motion to compel arbitration and declined to enforce the arbitration clauses in the policies, finding that the McCarran-Ferguson Act (providing that "[n]o Act of Congress shall be construed to ... supercede any law enacted by any State for the purpose of regulating the business of insurance") precluded enforcement of the Convention Act, 9 U.S.C. § 201-208, on the grounds that the Convention Act implements and gives domestic effect to a treaty, the Convention on the Recognition

and Enforcement of Foreign Arbitral Awards (Convention). The Panel deciding this matter disagreed and reversed the district court, finding that the language used by Congress in the McCarran-Ferguson Act "Act of Congress" and "such Act" did not intend to preclude enforcement of a later adopted treaty, even if the treaty was not domestically enforceable absent an enabling Act of Congress, and even though the enabling Act of Congress or the treaty does not specifically relate to the business of insurance. This directly conflicts with *Stephens v. American International Insurance Co.*, 66 F.3d 45 (2d Cir. 1995), and this court decided to hear the matter en banc.

IV. STATEMENT OF FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

LSAT-SIF is a Louisiana trust with a certificate of authority to operate as a Louisiana self insurance fund. See La. R.S. 23:1195 et. seq. LSAT is not authorized to operate in any state other than Louisiana. All of the operations of LSAT-SIF are in Louisiana. LSAT purchased policies from London. The intermediary in each policy is listed with a Metairie address. It is not disputed that each policy was issued for delivery to the intermediary, as required by the Insurance Code. La. R.S. 22:634. The policies are excess workers' compensation policies. LSAT assigned the rights in the policies (after a specific date) to Safety. London refused to pay LSAT's assignee, Safety National. Safety filed suit against London. London and Safety

agreed to arbitrate. London named LSAT as a party to the arbitration, claiming premiums were due. LSAT named an arbitrator to prevent default, but essentially refused to participate, moving to quash the arbitration in district court. The district court granted LSAT's motion. The district court found that London's remedy of arbitration was reverse preempted by Louisiana law by virtue of the McCarran-Ferguson Act. The district court certified interloculatory London's appeal and this court granted London's petition to appeal.

V. ARGUMENT

Part XIV of the Louisiana Insurance Code entitled "The Insurance Contract" has been interpreted by the Louisiana Supreme Court to prohibit arbitration between an insured and its insurer. The Louisiana Insurance Code provides that "no insurance contract issued delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state...shall contain any condition, stipulation, or agreement ... depriving the courts of this state of the jurisdiction of action against the insurer; ... [a]ny such condition, stipulation, or agreement in violation of this Section shall be void..." La. R.S. 22:629. Louisiana courts have squarely held that the provision means that arbitration clauses in insurance contracts are void. *Spillman v. United States Fidelity & Guar. Co.*, 179 So.2d 454 (La. App. 3 Cir. 1965); *Macaluso v. Watson*, 171 So.2d 755 (La. App. 4th Cir. 1965)*; Doucet*

v. Dental Health Plans Management Corp., 412 So.2d 1383 (La. 1982). This is a substantive interpretation, and this court is *Erie* bound to interpret this law the same as the courts of Louisiana. This court has so acknowledged in *McDermott International, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583 (5th Cir. 1997) and *West of England Ship Owners Mut. Ins. Ass'n (Luxembourg) v. American Marine Corp.*, 981 F.2d 749, 750, n.5 (5th Cir. 1993).

The Federal Arbitration Act, 9 U.S.C.A. §1 et. seq. was adopted in 1925 and codified in 1947. Act Feb. 12, 1925, c. 213, § 1, 43 Stat. 883; 1947 Acts. House Report No. 255, 1947 U.S. Code Cong. Service, p 1515. It provides, in the pertinent part:

> **§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The McCarran-Ferguson Act, 15 U.S.C.A § 1011 et. seq. was adopted in 1945, "*to express the intent of the Congress with reference to the regulation of the business*

of insurance" 79 Cong. Ch. 20, March 9, 1945, 59 Stat. 33. It provides, in the pertinent part:

> **§ 1011 Declaration of policy**
> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and *that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States*.
>
> **§ 1012 Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948**
>
> **(a) State regulation**
>
> The business of insurance, and *every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation**
>
> *No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State* for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance*: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of September 26, 1914, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et. seq.] shall be applicable to the business of insurance to the extent such business is not regulated by State law.

The Convention Act 9 U.S.C.A. §201 et. seq. was adopted in 1970. It provides, in the pertinent part,

§201. Enforcement of Convention

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

As shown in LSAT's original brief, London must concede that arbitration would be denied in this Circuit (and every other Circuit) if it were a domestic carrier. This court has so held as has every other court to have addressed the issue since the case of *United States Department of the Treasury v. Fabe*, 508 U.S. 491, 113 S.Ct. 2202 (1993). As panels of this court have twice held that Congress did not intend to usurp state law by the FAA, this court now called upon to determine whether Congress intended a different result by the Convention Act - whether it intended to abrogate state law regulating the business of insurance when it adopted the Convention Act.

A. The Federal Policy Favoring Uniformity in the Interpretation of Agreements To Arbitrate and the Presumption in Favor of Finding an Agreement Does Not Apply in Determining Whether Congress Intended to Preclude from Arbitrability a Certain Class of Claims

To avoid the uniform rulings against domestic carriers, London claims that the fact that it issued a policy from London as opposed to New York makes all the difference and changes the answer. London and other foreign insurers have successfully made this argument filing similar briefs in several district courts around

the country. The distinction may be correct where the conduct is such that the state cannot regulate it. Close review of the instant case, however, will reveal little difference between the two situations where a state has the power to regulate the insurer's conduct and the McCarran-Ferguson Act applies.

Whether issued from London or New York, the policies in the instant case were issued for delivery in Louisiana through a surplus line broker in Metairie. Surplus line taxes were paid to the State. LSAT conducts operations only in Louisiana. The risks covered are workers compensation liabilities resulting from injuries to Louisiana workers and covered by Louisiana law. LSAT covers only the Louisiana operations of its members. All of its trustees are Louisiana businessmen. There is no doubt that Louisiana law applies and no doubt that Louisiana has the power to regulate the relationship between LSAT and London. The McCarran-Ferguson Act by its own terms applies under these facts, and the international concerns are mitigated by Louisiana's clear ability to regulate under the facts of this case.

London makes the problem appear more difficult (and the outcome more favorable to it) than it really is by conflating two issues. London mixes up the determination of whether the parties agreed to arbitrate a certain claim with the determination of whether Congress intended to preclude arbitrability for that claim.

LSAT shows that there are two separate inquiries. The first is whether the

parties agreed to arbitrate a particular issue. That issue is not before this court.[1] The only issue before this court is whether Congress intended by the McCarran-Ferguson Act to leave to Louisiana the decision of whether or not to allow a waiver of judicial remedies under the facts of this case. There is no reason to distinguish the FAA and the Convention Act under the facts of this case.

The FAA and the Convention Act each similarly evidence a strong federal policy that questions of whether and the extent to which the parties agreed to arbitrate must be resolved in accordance with federal substantive law, with a healthy regard for that federal policy favoring arbitration, and that any doubts concerning the scope of the issues the parties agreed to arbitrate be resolved in favor of arbitration. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475, 109 S.Ct. 1248, 1253 (1989). But this language should not be conflated, as London freely does, in making a wholly separate inquiry - determining whether Congress has evinced an intention to preclude arbitration for a certain class of claims.

Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985), involved both the FAA and the Convention Act. The disputes

[1]LSAT has asserted various defenses to the contracts, and reserves them for later determination in the District Court should they become necessary.

between the parties there were truly international in nature. The question before the court was whether related statutory U.S. antitrust claims could be arbitrated, or whether Congress evinced an intent to preclude arbitration from such claims. The court reaffirmed that the FAA created a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. 105 S.Ct. at 3353. The court, however, distinguished the rule applied to the interpretation of an agreement to arbitrate from the rule to be used in determining whether or not a class of claims has been excluded from arbitration by Congress: "[t]hat is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act [the court here was referring to both the FAA and the Convention Act] that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."... "Having made the bargain to arbitrate, the party should be held to it *unless Congress itself has evinced an intention to preclude a waiver of judicial remedies* for the statutory rights at issue." 105 S.Ct. at 3354... "[T]he Court of Appeals correctly conducted a two step inquiry, first

determining whether the parties' agreement to arbitrate reached the statutory issues and, upon finding that it did, considering *whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims*."

The court agreed with the approach taken by the lower court, but it ultimately disagreed with the conclusion of the lower court as to the outcome. The court found that there was no *explicit* support from Congress to preclude arbitrability in either the Sherman Act or the Federal Arbitration Act [including the Convention Act, as the court was discussing international transactions]. The court stated that enforcement of the parties' advance agreement on a forum acceptable to both is even more important in contracts where the parties are from different countries, noting the need for predictability in the resolution of the parties disputes in international agreements. "[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." The court thus noted that a finding of Congressional intent to preclude arbitrability could be different depending on whether the agreement involved a truly international as opposed to a domestic agreement, but nowhere did it apply any presumption with regard to the determination of congressional intent to preclude arbitrability. At the end of the day, it simply refused to supply, without an *explicit* statement, congressional intention to exclude a class of claims from arbitrability based on policy arguments that the

statutory antitrust issues were too complex for an arbitrator, that the pool of arbitrators would be hostile to such claims, or that the antitrust claims were fundamentally too important to allow these claims to be heard by an arbitrator, whether or not these reasons might be enough in the domestic context.

The point, however, is that the Court recognized that Congress has to power to exclude a class of claims from arbitrability, and the analysis of whether Congress has done so is wholly separate from determining whether the parties agreed to arbitrate a certain issue. The language regarding the application of substantive federal law and all of the presumptions favoring a finding of arbitrability concerns itself with the interpretation of the parties' agreement to arbitrate, not with whether Congress intended in some other statute to preclude a class of claims from arbitrability. London has conflated these in its submissions, and this court should recognize the difference between the two tasks.

Concededly, *Mitsubishi* does state that congressional intent may be different depending upon the true international nature of the case before the court. A strong international flavor might cause this court to reach a different conclusion in determining whether Congress intended to preclude arbitration in some cases, and may even require an explicit statement from Congress, but no presumption applies to this part of the test, and there is nothing special about this part of the analysis.

Moreover, as shown below, Congress has made an explicit statement and the international concerns do not predominate when a policy is issued for delivery to a state so that a state may regulate the relationship between the insurer and the insured so that the McCarran-Ferguson Act applies. The McCarran-Ferguson Act provides an explicit statement that state law is to control in those instances where a state may regulate that conduct.

B. International Flavor is Weak and International Concerns do not Predominate or Prevent the Application of State Law when a State has the Power to Regulate and the McCarran-Ferguson Act Controls

The law of each state has traditionally governed in the business of insurance conducted within that state. Both foreign and domestic insurers have traditionally been subject to the laws of the state where their policies were issued for delivery. The concerns for international comity, respect for the capacities of foreign and transnational tribunals, and the need of the international commercial system for predictability in the resolution of disputes are attenuated in a case where a policy is issued for delivery to a particular state and the state has the power to regulate all aspects an insurer's relations and conduct within its borders. Moreover, the need for uniformity has never been the norm in insurance law since the formation of this nation.

Review of the insurance policies at issue leaves no doubt that Louisiana law

applies and that Louisiana can regulate the relationship between London and LSAT. Because this is the regulation of the business of insurance, the McCarran-Ferguson Act applies by its own terms, and Louisiana law should not be usurped.

The court in *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 94 S.Ct. 2449 (1974) recognized the distinction between a truly international transaction from one where the international party had so many direct contacts with the local forum that the international concerns are no longer valid. The court stated that such a party [as London in the instant case] should not be allowed to invoke the 'talisman' of having an 'international contract' when international concerns are not truly present. *Scherk*, n. 11, 94 S.Ct. at 2456. The court discussed the contacts the parties had with the various forums and related choice of law concepts, and was concerned with unnecessarily exalting the primacy of the laws of the United States over the laws of other countries. The court stated: "[C]oncededly, situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in *Wilko* would meaningfully apply." *Id*. LSAT submits that the international concerns are by definition attenuated where a policy is issued for delivery to a particular state and the both the insurer and the insured invoke the application of state law in the enforcement of that policy.

In *Scherk*, the contract concerned the sale of business enterprises organized

under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets. Likewise, a truly international situation was likely present in *McDermott International, Inc. v. Underwriters at Lloyd's*, 120 F.3d 583 (5th Cir. 1997), where the a policy was issued to a multinational corporation registered in Panama, was not issued for delivery in Louisiana, and the accident did not occur in the United States. State law and the McCarran-Ferguson Act do not apply in those kinds of cases.

But in the instant case, where Louisiana can pervasively regulate the issues at hand, where the contacts are such that a state has the power to regulate all aspects of an insurer's relationships and conduct, the McCarran-Ferguson Act explicitly provides that state law controls and federal law does not, and the McCarran-Ferguson Act applies by its own terms. It provides that the "continued regulation and taxation by the several States of the business of insurance is in the public interest" 15 U.S.C.A. §1011. It further provides that the term "State" includes the several states: Alaska, Hawaii, Puerto Rico, Guam and the District of Colombia. Thus, while there may be some 'international transactions' where the McCarran-Ferguson Act is not applicable (see, e.g., *McDermott*), the instant case is not one of them. In the instant case, the contacts are such that Louisiana may pervasively regulate the dispute at issue, and the 'international contract' talisman, invoked by London, should not bear

greatly on this court's determination of whether Congress has expressly evinced an intention to leave it to the states to decide whether to preclude a waiver of judicial remedies in their own regulation of the business of insurance.

Viewed from afar, the United States has never appeared as a single entity or as one voice in the business of insurance. This view has always been colored by the states, each applying its own law. In *Wilburn Boat Co. v. Fireman's Fund Insurance Company*, 348 U.S. 310, 75 S.Ct. 368 (1955), the court gave a history of the insurance industry in the United States. At issue there was whether Texas law requiring that an insurer prove prejudice to obtain a defense, or whether general maritime law controlled, where a breach of warranty was a defense even if no prejudice was proven by the insurer. The court stated that the fact that a case comes within the Admiralty Clause of the Constitution does not mean that every term in every maritime contract can only be controlled by some federally defined admiralty rule. "In the field maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the states. As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make." *Id*. 348 U.S. at 314. The court later stated: "[t]he whole judicial and legislative history of insurance regulation in the United States warns us against the

judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the States came into being."... "The measure Congress passed ..., known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue. Accordingly, the Act contains a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States." *Id.* at 319. "Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been - with the States."

There is no federal rule specifically requiring arbitration in the business of insurance. The FAA and the Convention Act do not specifically relate to the business of insurance. Thus, the application of state law fulfills the mandate of the McCarran-Ferguson Act without directly conflicting with either the FAA or the Convention Act. The international concerns raised in *Mitsubishi* and *Scherk* are not truly present in the instant case, while Louisiana has a substantial interest in regulating this dispute

because the policies were issued for delivery here, the broker was located here, the insured was and is located here, and its laws apply to all aspects of the dispute. No other interest remotely approaches that of Louisiana in regulating this dispute.

LSAT is not arguing for a fact specific inquiry often applied in conflicts of law analysis; the language of the McCarran-Ferguson Act and its legislative history show that the Act itself provides an explicit "bright line" by its own terms. The bright line is whether the party alleged to be subject to regulation has engaged in the business of insurance within or directed toward a state so that the state may regulate its conduct. Generally, the question is answered by whether or not a policy of insurance was issued for delivery within a state. International concerns and the need for uniformity fade when the McCarran-Ferguson Act becomes applicable. When the international concerns are greatest, and the contacts between an international insurer and a state are insufficient to allow state regulation, the McCarran-Ferguson Act does not apply.

The legislative history of the McCarran-Ferguson Act supports this view. The purpose of the McCarran-Ferguson Act was to "express the intent of the Congress with respect to the regulation of the business of insurance." 1945 Acts, House of Representatives Report No. 143. U.S. Code Congressional Service p. 670 (1945). House Report No. 143 begins with "*From its beginning, the business of insurance has*

been regarded as a local matter, to be subject to and regulated by the laws of the several states." This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, *leading to the generally accepted doctrine that the business of insurance was not subject to federal law*. The report then notes that in *Southeastern Underwriters Association*, the Supreme Court decided that the business of insurance was commerce and subject to the anti-trust laws. The House Report indicated that this called into question the validity of state tax laws as well as state regulatory provisions. "Already many insurance companies have refused, while others have threatened refusal to comply with state tax laws, as well as with other state regulations, on the grounds that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent smashing decision of the *Southeastern Underwriters* case will subject insurance executives to both civil and criminal actions for misappropriation of company funds. The committee has therefore given immediate consideration to S.340, together with a similar measure, HR 1973, so that the several states may know that Congress desires to protect the continued regulation and taxation of the business of insurance by the several states and thus enable insurance companies to comply with state laws. *Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always,*

however, to the limitations set out in the controlling decisions of the United States Supreme Court, as for instance, in *Allgeyer v. Louisiana*, (165 U.S. 578), *St. Louis Cotton Compress Company v. Arkansas*, (260 U.S. 346) and *Connecticut General Insurance v. Johnson*, (303 U.S. 77), which hold, enter alia, that a state does not have the power to tax contracts of insurance or re-insurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the state or to regulate such transactions in any way." Thus, the McCarran-Ferguson Act is limited to those cases where the state had unquestioned authority to regulate its conduct, and the legislative history provides that such regulation was a *local concern*.

The cases cited in House Report No. 143 show that the McCarran-Ferguson Act would not apply in those cases where the concerns for international comity predominate; the Act applies only where the insurer has submitted to pervasive regulation by the state through its own conduct. For example, in *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427 (1897), the state law at issue read:

> "Be it enacted by the general assembly of the State of Louisiana, that any person, firm or corporation who shall fill up, sign or issue in this state, any certificate of insurance under an open marine policy, or who in any manner whatever, does any act in this state to effect for himself, or for another, insurance on property then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of $1,000.00 for each offense,

> which shall be sued for in any competent court by the attorney general for the benefit of the Charity Hospitals in New Orleans and Shreveport."

Louisiana filed suit against Allgeyer, alleging that it had violated the above statute by mailing from New Orleans a letter of advice to the Atlantic Mutual Insurance Company of New York advising that company of the shipment of 100 bales of cotton to foreign ports in accordance with the terms of an open marine policy issued by Atlantic Mutual. The defendants defended on the grounds that the contracts of insurance were made by them with an insurance company in the state of New York, that the premiums were to be paid in New York, that the losses thereunder were also to be paid in New York, and that the contracts were New York contracts and that under the Constitution of the United States, the defendants had the right to do and perform any act or acts within the state of Louisiana which might be necessary and proper for the execution of those contracts.

Atlantic Mutual was engaged of the business of marine insurance, had appointed no agent within the state of Louisiana and had not complied with the conditions required of the laws of the state for doing business within the same by insurance companies incorporated and domiciled out of the state. The defendants were exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe. Justice Peckham, delivering the opinion of the court,

stated, "there is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with, the prohibition may be absolute."

However, it was not claimed that Atlantic Mutual Insurance Company was doing business within the state. The court noted that the Louisiana Supreme Court had previously held that a policy of marine insurance issued by a foreign insurance company not doing business within the state and having no agent therein must be considered as having made the contract at the domicile of the company issuing the open policy and that in such case, where the insurance company had no agent in Louisiana, it could not be considered as doing business within the state. The court held that Louisiana could not regulate the business of Atlantic Mutual or its insured.

The court in *Allgeyer* distinguished the facts before it from a case where the policy was issued for delivery and payments made to the agent wholly within a particular state. The court indicated that it was proper for a state to regulate the business of insurance where all of the verbal acts of the insured and the agent in procuring such insurance were done within the state. See *Hooper v. State of California*, 155 U.S. 648, 15 S.Ct. 207 (1895).

In *St. Louis Cotton Compress Company v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125 (1922), the court held that the State of Arkansas could not levy a tax for insurance issued on property in Arkansas on a policy that was issued for delivery and paid for in St. Louis, Missouri, the domicile of the corporation. Justice Holmes stated, "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

In *Connecticut General Life Insurance Company v. Johnson*, 303 U.S. 77, 858 S.Ct. 436 (1938), the issue was whether California could regulate a company that reinsured California insurers against loss on policies of life effected by them in California and issued to residents there. The reinsurance contracts were entered into in Connecticut where premiums were paid and where the losses were payable. The question was whether a tax laid by California on the receipt of reinsurance in Connecticut infringes on the due process clause of the 14th Amendment. As to whether or not the tax was valid, the court stated, "we look to the state power to control the objects of the taxes marking the boundaries of the power to lay it. Hence it is that state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there and may tax them. But the Due Process Clause denies to the state power to tax and regulate the corporation's property and activities elsewhere. Appellant, by its reinsurance contracts, undertook

only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationships between appellant and those originally insured and called for no act in California. Apart from the facts that appellant was privileged to do business in California, and that the risked reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance, or discharge took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded them no protection.

The contracts at issue in the instant case are not reinsurance. They are specific excess insurance policies, issued for delivery in Louisiana and controlled solely by Louisiana law. Because Louisiana's ability to regulate the conduct in question is so pervasive, the dispute at hand is primarily a local matter, and international concerns are hardly present. The McCarran-Ferguson Act applies Louisiana law and explicitly provides that no Act of Congress shall be interpreted to usurp Louisiana law.

The limit of the state's power to regulate conduct outside of its borders also distinguishes *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S.Ct. 2374 (2003), where the state of California attempted to control the foreign conduct of foreign insurers in matters not related to their business in California [the state

sought lists from Europe to aid in recovery of losses in World War III]. Unlike *Garamendi*, the instant case does not involve foreign affairs but instead the regulation of the relationship between an insurer and its insured where the insurer indisputably engaged in the business of insurance within the state's borders and the dispute centers on that conduct. *Garamendi* is further distinguished because the executive order at issue there clearly had effect in Europe where California sought to regulate in conflict with it. In the instant case, the Convention was not self-executing and did not have domestic effect in the absence of implementing legislation, so there is no direct conflict between it and Louisiana law.

C. This Court has Twice Concluded that the McCarran-Ferguson Act Evinces Congressional Intent to Allow Each State to Preclude a Waiver of Judicial Remedies under the FAA.

In *United States Department of the Treasury v. Fabe*, 508 U.S. 491, 113 S.Ct. 2202 (1993), the court held that a state law was not preempted by a federal priority statute because the federal priority statute did not relate specifically to the business of insurance. According to the court, the McCarran-Ferguson Act trumped the federal priority statute to the extent the state law was enacted "for the purpose of regulating the business of insurance."

It is clear from the language of *Fabe* that the McCarran-Ferguson Act applies where the statute is aimed at protecting or regulating the relationship between the

insurer and the insured. The court noted that the core of the business of insurance is proscribing the terms of the insurance contract or setting the rate charged. The court stated that the performance and the enforcement of the insurance contract falls within the business of insurance. The court stated: "The McCarran-Ferguson Act did not simply overrule South-Eastern Underwriters and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of preemption. Ordinarily, a federal law supersedes any inconsistent state law. The first Clause of §2(b) reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Id*. at 507.

In *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995), the court held that, by virtue of reverse preemption of the McCarran-Ferguson Act, state insurance law invalidated an arbitration clause invoked under the both the FAA and the Convention Act.

Panels of this court have now twice upheld state laws prohibiting arbitration in disputes with an insurer operating within its boundaries. In both instances, the court held that state law controlled by virtue of the McCarran-Ferguson Act, and that the Federal Arbitration Act did not apply to such disputes. Very recently, in

American Bankers Ins. Co. of Florida v. Inman, 436 F.3d 490 (5 Cir. 2006), the court refused to enforce an arbitration clause in a dispute for underinsured motorists coverage, where it was prohibited by state law, notwithstanding the FAA. The court relied upon *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998). In *Munich*, the court affirmed a decision to dismiss a complaint seeking to compel arbitration, holding that the FAA was reverse preempted by the McCarran-Ferguson Act. The court stated: "there is no question that the FAA does not relate specifically to the business of insurance." The court relied upon *Fabe*, stating: "statutes that focus on protecting the relationship between the insurer and the insured are laws regulating the business of insurance." The court stated: "statutes aimed at protecting this relationship [between an insurance company and its policyholders], directly or indirectly are laws regulating the business of insurance." *Id*. at 593-594. "[L]aws [regulating the business of insurance] symbolize the public interest in having the States continue to serve as the preeminent regulators of insurance in our federal system and indicates the special status of insurance in the realm of state sovereignty." *Id*. at 595. "*What we are saying is that, by operation of the McCarran-Ferguson Act, a federal act that permits states to exert broad power over the insurance industry, state laws regulating the business of insurance may suspend federal remedies based on conflicting federal statutes -here, the FAA*." (emphasis added) *Id*. at 595-596.

The court in *Munich* further cited with approval and relied upon *Stephens*.

D. *Stephens* was Correctly Decided, and this Court Should find No Distinction Between the FAA and the Convention Act Where the McCarran-Ferguson Act Applies

In *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995), the court held that, by virtue of reverse preemption of the McCarran-Ferguson Act, state insurance law invalidated an arbitration clause invoked under the both the FAA and the Convention Act. The court found that the Convention was not self-executing and was imported only through the Convention Act. Because the Convention Act did not relate to the business of insurance, the Court found that it was reverse preempted by the McCarran-Ferguson Act. This ruling is correct, the Convention is not self-executing. The Convention is without effect in the absence of its implementing legislation, the Convention Act. The Convention Act is an act of congress that does not specifically relate to the business of insurance and is reverse preempted by the McCarran-Ferguson Act.

E. The Convention is not Self-Executing

It is the intent of the United States that determines whether an international agreement between nations is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. *Restatement (Third) of Foreign Relations Law* § 111 (1987). If the international

agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the executive branch in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement. *Id*. Since the president can make a treaty only with the advice and consent of the Senate, he must give effect to the conditions imposed by the Senate on its consent. *Restatement (Third) of Foreign Relations Law* § 314 (1987). A treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective as domestic law subject to that understanding. *Id*. If no such statement is made, indication that the executive branch or the Senate ascribed a particular meeting to the treaty is relevant to the interpretation of the treaty by a United States court in the same way that the legislative history of a statute is relevant to its interpretation. *Id*. After an agreement is concluded, the president often must decide whether the agreement is self-executing or whether further legislation is required. Congress may also consider whether new legislation is necessary and, if so, what it should provide. *Id*.

United States representatives in negotiating agreements are often sensitive to claims, particularly by members of the House of Representatives, that some matters cannot be self-executing under the Constitution, and that political or administrative

considerations that make it preferable that a treaty not become law in the United States until it is implemented by Congress. The Senate also, when consenting to a treaty, has sometimes insisted that it should not go into effect until implementing legislation has been enacted. *Restatement (Third) of Foreign Relations Law* § 111 (1987) note 5.

In *Medellin v. Texas*, ___ US ___, 128 S.Ct. 1346 (2008), the court was called to determine whether or not a decision by the International Court of Justice ("ICJ"), which decision provided that the cases of certain Mexican nationals, including applicant, had to be reviewed without regard to whether the applicant had allowed his claim to default under state procedural rules. The majority stated that the question was whether the judgment of the ICJ had automatic legal effect such that the judgment of its own force applied in state and federal court. *Id.* at 1356. This turned on the court's interpretation of the Optional Protocol, United Nations Charter, and the International Court of Justice statute. The court found that the plaintiff was *without any remedy* and that the judgment of the ICJ was not automatically binding domestic law *because none of the treaty sources created binding federal law in the absence of implementing legislation*. The court stated that, while treaties "may compromise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-

executing' and is ratified on these terms." *Id.* at 1356. In note 2, *the court stated that a non-self-executing treaty does not by itself give rise to domestically enforceable federal law*. Whether such a treaty has domestic effect *depends upon implementing legislation* passed by Congress. *Id.* The court noted that even treaties that are self-executing in the sense that they create federal law generally do not create private rights or provide for a private cause of action in domestic courts. *Id.* n. 3 at 1357.

The court stated that the interpretation of the treaty, like the interpretation of the statute, begins with its text. The court also considered aids to its interpretation, the negotiation and drafting history well as the post ratification understanding of signatory nations.

Article 94 of the United Nations Charter provided that each member of the United Nations *undertakes to comply* with the decision of the ICJ in any case to which it is a party. *Id.* at 1358. The court noted that the executive branch [Department of State] contended that the phrase "undertakes to comply" is not an acknowledgment that the ICJ decision will have immediate legal effect in the courts of UN members, but instead a commitment on the part of UN members to take future action through their political branches to comply with an ICJ decision. *Id.*

The court stated that *the interpretation of the executive branch was entitled to great weight*. *Id.* at 1361. The court further found it important that the article was not

a directive to domestic courts, but rather, a directive to the signatory nations. The court stated that the language of the article was not sufficient to indicate by itself that the Senate that ratified the UN Charter intended to vest the ICJ decisions with immediate legal effect in domestic courts. The court found instead that the language called upon the government to take action. *Id.* at 1358.

The court affirmed and relied upon the reasoning of Justice Marshall in the case of *Foster v. Neilson*, 27 U.S. 253, 2 Pet. 253 (1829). In that case, Justice Marshall found that a treaty was not self-executing because its text "all . . . grants of land . . . shall be ratified and confirmed" did not act directly on the grants but rather pledged the faith of the United States to pass acts which shall ratify and confirm them. The court in *Medellin* compared the *Foster* case with *United States v. Percheman*, 7 Pet. 51, 8 L.Ed. 604 (1833), where a separate claim that was made under the same treaty but based on the Spanish translation that had been brought to the court's attention for the first time. In that case, the court found that the Spanish version of the treaty controlled and that it indicated the party's intent to ratify and confirm the land grant by the force of the instrument itself. In that case, the treaty stated that the land grants made by the king "shall remain confirmed" indicated an intent that the agreement be self-executing. The court summarized, stating that while treaties may comprise international commitments ... they are not domestic law unless

Congress has either enacted complimenting legislation or the treaty itself conveys an intention that it be "self-executing" *and is ratified on those terms*. *Id.* at 1356.

The court in *Medellin* found that the fact that Congress did not enact implementing legislation meant that Congress did not intend for the treaty to have immediate domestic effect. The court stated that the Convention Act [the act at issue in the instant case], implementing the Convention, demonstrated that Congress knew how to accord domestic effect to international obligations when it desired such a result. The court found that Congress has not hesitated to pass implementing legislation for treaties that in its view require such legislation. n.12 at 1366.

The court stated that it was for Congress to implement a non-self-executing treaty. *Id.* at 1368. The court stated that, once a treaty is ratified without provisions clearly according it domestic effect, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "the power to make the necessary laws is in Congress; the power to execute in the President." *Id.* at 1369. The court stated that the terms of the non-self-executing treaty can become domestic law only in the same way as any other law - through passage of legislation by both houses of Congress combined with either the President's signature or Congressional override of a Presidential veto. *Id.* The court stated that a non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have a

domestic effect of its own force, that understanding precludes the assertion that Congress has implicitly authorized the President - acting on his own - to achieve precisely the same result. *Id.*

In *Foster v. Neilson*, 27 U.S. 253, 2 Pet. 253 (1829), the plaintiff claimed land under grant made by the Spanish governor on January 2, 1804 and ratified by the king of Spain on May 29, 1804. The defendants excepted to the petition of the plaintiff, alleging that it did not show title because the land had been ceded before the grant to France and by France to the United States, making the grant void being that the king of Spain had no authority to make the grant at the time. The court refused to allow the treaties at issue to be a rule to decide private rights or to overturn prior legislation where Congress had not implemented it by legislation and where Congress had expressed a contrary intent in other legislation.

On October 21, 1803, Congress had passed an act to enable the president to take possession of the territory ceded by France to the United States. On February 24, 1804, Congress passed an act for laying and collecting duties within the ceded territory and to conduct other activity. On March 26, 1804, Congress passed an act directed toward land that was ceded by France to the United States erecting Louisiana into two territories. The fourteenth section of that law provided: "[t]hat all grants for lands within the territory ceded by the French Republic to the United States by the

treaty of the 30th of April, 1803, the title whereof was at the date of the treaty of St. Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto of whatsoever nature towards the obtaining any grant, title or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." The title of actual settlers acquired before December 20, 1803 were excepted from this rule.

The court stated that the obvious intent of this law was to put all titles that might have been acquired from Spain after its retro cession of Louisiana to France completely under the control of the American government. Despite this, the plaintiff claimed a right by virtue of the treaty between the United States and the king of Spain executed on February 22, 1819. That treaty provided, "His Catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated eastward of the Mississippi, known by the name of East and West Florida." The treaty further provided, "all the grants of land made before the 24th of January, 1818 by his Catholic majesty, or by his lawful authorities, in the said territory ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty."

The court noted that the king of Spain had consistently insisted that no part of West Florida had been ceded by the Treaty of St. Ildefonso, but that the United States had uniformly denied the title set up by the Crown of Spain, insisting that West Florida had been transferred to France in the Treaty of St. Ildefonso. The court stated that the United States could therefore not be understood to have admitted that the land in question belonged to Spain or that it had passed from Spain to them by the article. The court noted that the words 'which belong to him' was evidence of the fact that the United States did not admit that the property in question belonged to the king of Spain. The court found that the words "all the grants of land made before the 24th of January, 1818, by his Catholic majesty, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty" to be ambiguous. The court asked the question, "Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?"

The court stated that in the United States a treaty is to be the law of the land, regarded in the 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 engages to perform a*

particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court. The court noted that the language did not say that all grants made by the king of Spain before January 24, 1818 shall be valid to the same extent as if the ceded territories had remained under his dominion. It did not say that those acts are hereby confirmed. The court noted that had that been the language, it would have acted directly on the subject, and which would have repealed those acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession. The court found this to be the language of a contract and that the ratification and confirmation promised must be done by the act of the legislature. Until such act shall be passed, the court was not at liberty to disregard existing laws on the subject.

The court noted that on May 23, 1828, Congress had passed an act that all claims embraced in the treaty of February 22, 1819 between the United States and Spain that were too large for the commissioners to decide (under prior legislation) shall be received and adjudicated by the judge of the superior court "provided that nothing in this section shall be construed to enable the judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the king of Spain, nor any claim not presented to the commissioners or register and receiver."

The court also noted that Congress passed acts confirming complete grants of land from the Spanish government based on reports made by the commissioners. The court found that all of these laws indicated that Congress had reserved to itself the supervision of the titles reported by its commissioners but had passed no law withdrawing the grants from the 14th section of Act 1804 [the statutory language quoted above], which nullified all grants from the king of Spain after the Treaty of St. Ildefonso in 1800. Thus, because the plaintiff did not bring himself within the coverage of any of the Acts of Congress, the court *refused to give any effect* to the Treaty of Amity, Settlement and Limits signed on February 22, 1819, and the plaintiff was *without any remedy*.

Turning to the instant case, the language of the Convention is ambiguous. The language of Article II is a directive to each contracting state to take action: "Each Contracting State shall recognize."[2] Article III likewise is a directive to each contracting state to take action. "Each Contacting State shall recognize." Neither Article provides how they shall be recognized or by whom.

This language is not any more clear than the language found in *Foster v. Neilson*. However, the legislative history is clear. House Report 91-1181 provides

[2]The reference to a court of a contracting state in subparagraph 3. applies only when it is seized of an action. It does not state when a court is to be seized of an action.

"the purpose of [the Convention Act] *is to implement the Convention* of the Recognition and Enforcement of Foreign Arbitral Awards which was approved by the Senate on October 4, 1968. The bill would create a new chapter under Title 9 of the U.S.C. (the Federal Arbitration Act) dealing exclusively with the recognition and enforcement and awards pursuant to the provisions of the Convention. The Convention . . . was adopted at the conclusion of the United Nations Conference which was held in New York from May 20 to June 10, 1958. The Convention entered into force on June 7, 1959, and at the present it is in effect for 34 countries. Although the United States participated in the conference, the Convention was not signed on behalf of our government at that time because the American delegation felt that certain provisions were in conflict with some of our domestic laws. According to the administration, however, as a result of increasing support for the Convention (both within and without the government), the United States decided in favor of accession and it was transmitted to the Senate for advice and consent on April 24, 1968. Even though the Convention was approved in October of 1968, the instrument of accession will not be deposited until [the Convention Act] is enacted into law.

The House Report attached a letter dated December 3, 1969 from Mr. H. G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, Department of State, to the Speaker of the House of Representatives requesting enactment of the

subject legislation. The letter provided in a pertinent part: "at the [Senate Foreign Relations Committee hearing] on the Convention, the witness from the [State] department informed the Foreign Relations Committee the deposit of the US instrument of accession would be deferred until the Congress enacted *the necessary implementing legislation* (Senate Executive Report 10, 90th Congress, Second Session). The Federal Arbitration Act, which has been codified in Title 9 of the USC embodies basic national policy concerning arbitration. The Secretary of State's advisory committee on private international law, suggests that the Department discuss with a small group of representatives of [the ABA, members of the arbitration bar and law school professors] the most effective approach to the implementing legislation. The consensus of the group, with which the Department of Justice concurs, was that rather than amending a series of sections of the Federal Arbitration Act, it would be preferable to enact a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention. This approach would leave unchanged a largely settled interpretation of the Federal Arbitration Law but not under the Convention."

Public Law 91-368 provided "this Act [enacting this chapter] shall be effective upon the entry into force of the Convention with respect to the United States [the Convention was entered into force for the United States on December 29, 1970].

Article XII of the Convention provides that the Convention shall enter into force on the 90th day after deposit by such state of its instrument of ratification or accession.

Thus, the Senate who gave advice and consent the State Department who made the agreement and the House of Representatives, who adopted the implementing legislation, all believed that the legislation was necessary to implement the Convention. The interpretations by both houses of Congress and the executive branch are entitled to great weight. Moreover, the adoption of the implementing legislation was a predicate to the advice and consent of the Senate. Thus, this court should find that the Convention Act was necessary to implement the Convention, and that the Convention was not self-executing.

F. The Convention is Implemented only by the Convention Act

It is the implementing legislation, rather than the treaty itself, that is given effect as the law of the United States. That is true even when a non-self-executing agreement is "enacted" by, or incorporated in, implementing legislation. *Restatement (Third) of Foreign Relations Law* § 111 (1987). In *Medellin v. Texas*, __ US __, 128 S.Ct. 1346 (2008), in note 2, *the court stated that a non-self-executing treaty does not by itself give rise to domestically enforceable federal law*. Whether such a treaty has domestic effect *depends upon implementing legislation* passed by Congress.

In *Yuen Jin v. Mukascy*, 538 F.3d 143 (2 Cir. 2008), the petitioners argued that

the United Nations Protocol relating to the status of refugees and the United Nations Convention Against Torture required the INS to ensure that aliens will not be returned to a country in which they are likely to face prosecution or torture. The court, citing prior precedent, found that these two treaties were not self-executing treaties. The court stated that they therefore *do not create private rights petitioners can enforce in this court beyond those contained in the implementing statutes and regulations*. The court noted that even if the treaties were self-executing that there was a strong presumption against inferring individual rights from international treaties. *Id.* at 159.

In *ITC Limited v. Punchgini, Inc.*, 482 F.3d 135 (2nd Cir. 2007), the court addressed whether certain provisions of the Paris Convention together with certain articles of the Agreement on Trade provided legal support for a "famous marks claim" under the Lantham Act. The treaty provided for member states upon request of an interested party to prohibit the use of a trademark considered by competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of the Convention. The court held that the provision [of Article 16 for the protection of service marks] was "plainly not a self-executing treaty." The court found that the agreements "*are not self-executing and thus their legal effect in the United States is governed by implementing*

legislation." The court noted that Congress amended numerous federal statutes to implement specific provisions of the treaty, but it had enacted no legislation aimed directly at the provision at issue, and the treaty of its own force provided no remedy.

In *United States v. Arredondo*, 31 U.S. 691, 6 Pet. 691 1832, authored by Justice Baldwin, the United States had passed various acts to implement the treaty of February 22, 1819 with Spain. By legislation, Congress appointed commissioners to decide private claims to land within the ceded territory where the land did not exceed a league square and, on those exceeding that quantity, the commissioners were directed to report their opinion for future action by Congress. The larger claims were reserved and remained unsettled until resolution which was done by passage of a law dated May 23, 1828. The law provided in the sixth section: "that all claims to land within the territory of Florida, embraced by the treaty, which shall not be finally decided and settled under the previous provisions of the same law, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by the Act, and which shall not have been reported as antedated or forged, shall be received and adjudicated by the judge of a superior court of the district within which the land lies, upon the petition of the claimant, according to forms, rules, regulations, conditions, restrictions and limitations prescribed to the district judge and claimants in Missouri by the Act of May 26, 1824." The Act of

May 26, 1824 further authorized the superior court to hear and determine the claim according to *the principles of justice and the laws and ordinances of the government under which the claim originated.*

Plaintiff brought himself under this Act and the court stated that the Act directed it to determine the matter according to the principals of justice, which in turn required the court to determine the case according to the Law of Nations, the stipulations of any treaty and proceedings under the same, and the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to be derived, and all other questions which may properly arise between the claimants and the United States. The court stated that the plaintiff in *Foster v. Neilson* was in different circumstances than the plaintiff in this case. *The plaintiff in that case stood simply on his own right without any act of Congress authorizing the suit or conferring on the court any extraordinary powers*. The court noted that in *Foster v. Neilson*, the court deemed the settlement of national boundaries to be a political question, and that it was not the duty of the court to lead, but to follow the action of the other departments of the government; and that it could not determine individual rights when those have not acted. The court stated that the rule established in *Foster v. Neilson* 'if the course of the nation had been a plain one, its courts would hesitate to pronounce it erroneous"... "we think, then, however

individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decision to the will of the legislature, if that has been clearly expressed" was not at issue because congress had given it authority to act in legislation. "*We must therefore be distinctly understood as not in least impairing, but affirming the principal of Foster v. Nelson.*"

The court stated it was authorized to construe the treaty, not as a contract between two nations, the stipulations which must be executed by an act of Congress before it can become a rule for a decision, not as *the basis* and *only* foundation of the title of the claimant, but "as a *rule* to which we must have *due regard* in deciding whether the claimant's have made out title to the lands in controversy - a rule by which we are neither directed by the law or bound to make our decree upon, any more than on the laws of nations, of Congress or of Spain." *Id*. at 735. "The Acts of 1824 and 1828 authorize and require us to decide on the pending title on all the evidence and laws before us." *Id*. at 735. The point of *Arredondo*, is that *the basis for the claim* to title was not the treaty, but the laws, which imported the treaty for court's decision.

Thus, because the Convention is not self-executing, the Convention is given effect only through its implementing legislation, the Convention Act. The Convention Act serves as the only basis for the federal remedy of arbitration,

importing the Convention as a rule for decision. That the Convention Act is an act of Congress is beyond dispute. Because the Convention Act and the Federal Arbitration Act are both "Acts of Congress," there is no basis to apply the McCarran-Ferguson Act differently to one than to the other.

G. The McCarran-Ferguson Act Suspends the Federal Remedy of Arbitration in the Convention Act

The legislative history clearly establishes that the Convention is not self-executing. The case law holds that the Convention provides no remedy absent its enabling legislation. The enabling legislation was the Convention Act, an "Act of Congress." Where it applies, the McCarran-Ferguson Act suspends the federal remedy of arbitration under the Convention Act in the same manner as under the Federal Arbitration Act. There is no basis to distinguish the two. The McCarran-Ferguson Act applies to *every person* engaged in the business of insurance within a state.

In *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), a panel of this court stated: "there is no question that the FAA does not relate specifically to the business of insurance." The court relied upon *Fabe*, stating: "statutes that focus on protecting the relationship between the insurer and the insured are laws regulating the business of insurance." The court stated: "statutes aimed at

protecting this relationship [between an insurance company and its policyholders], directly or indirectly are laws regulating the business of insurance." *Id*. at 593-594. "[L]aws [regulating the business of insurance] symbolize the public interest in having the States continue to serve as the preeminent regulators of insurance in our federal system and indicates the special status of insurance in the realm of state sovereignty." *Id.* at 595. "What we are saying is that, by operation of the McCarran-Ferguson Act, a federal act that permits states to exert broad power over the insurance industry, state laws regulating the business of insurance *may suspend federal remedies based on conflicting federal statutes* -here, the FAA." (emphasis added) *Id*. at 595-596.

These statements apply equally to the Convention Act as to the FAA. There is no basis to distinguish the Convention Act from the FAA in those limited circumstances where, as here, the state has the power to regulate and the McCarran-Ferguson Act applies. In *Medellin*, the court stated that the United States is always at liberty to make such laws as it thinks proper. *Id.* n.5, 128 S.Ct. at 1359. London must concede that Congress "could have" passed a law excluding the business of insurance from the Convention Act. LSAT respectfully submits that Congress did so in the McCarran-Ferguson Act, in those cases where the state has the authority to regulate the insurers conduct.

What else could Congress have said? LSAT submits that any additional

language would be mere surplusage. LSAT submits that Congress could not have been more explicit; it provided that; "[t]he business of insurance, and *every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business; "*[n]o Act of Congress* shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, and *that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States*." This language applies with as much force to the Convention Act as to the FAA on the facts of the instant case.

VI. CONCLUSION

The decision of the district court should be affirmed. If, however, this court disagrees, the case should be remanded for further proceedings.

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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 11,580 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

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman font.

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Dated: April 14th, 2009

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that the above and foregoing APPELLEE'S 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 14th day of April, 2009:

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I hereby certify further that the APPELLEE'S EN BANC BRIEF has been filed with the Clerk of Court by First-Class United States Mail, hand delivering an original, twenty (20) paper copies, and an electronic copy to the Clerk of Court, this 15th day of April, 2009.

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