**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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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*.

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

v.

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

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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

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# APPELLANTS' *EN BANC* REPLY BRIEF

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## I. INTRODUCTION

LSAT's brief reiterates its contention that the Panel's opinion "directly conflicts" with *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995), requiring *en banc* review. LSAT Br. at 2. Strangely, LSAT spends little more than a paragraph discussing *Stephens* and fails to respond directly to Underwriters' arguments for distinguishing and rejecting *Stephens*. *See id.* at 25, 27. LSAT wrongly suggests, moreover, that the reinsurance contracts are not truly "international" under the Convention and, therefore, ignores the important reasons for distinguishing the preemption analysis under the Convention and FAA. Likewise, LSAT goes to great lengths in an attempt to demonstrate that the Convention is a non-self-executing treaty but ultimately fails to explain why this Court should apply a different analysis to a later-in-time, *implemented* non-self-executing treaty than a self-executing treaty. Because no legal basis exists for doing so and refusing to follow the Convention would greatly undermine the United States' international obligations, Underwriters respectfully request the Court to reverse the District Court's holding.

## II. ARGUMENT

### A. LSAT Wrongly Suggests That the Reinsurance Contracts Are "Domestic" in Nature and, Thus, This Case Does Not Implicate International Concerns.

LSAT argues that little differentiates the facts of this case from a domestic case. *Id.* at 7. Similarly, LSAT contends that the resolution of the question before this

Court will not have any international impact. *Id.* at 12-14, 24. Both of these assertions are factually and legally wrong.

First, LSAT seeks to blur the distinction between the international nature of this transaction and a domestic insurance transaction. This confusion is mere slight of hand meant to distract the Court from the real issues. LSAT mischaracterizes the facts of this case as "domestic" by ignoring the most important fact. LSAT did not obtain its reinsurance in Louisiana or, in fact, in the United States.

Instead, LSAT went outside the United States to purchase reinsurance from Underwriters in England.[1] LSAT had to purchase its reinsurance in the foreign excess and surplus lines market because the reinsurance it sought was not available in Louisiana.[2] *See* LA. REV. STAT. ANN. § 22:435(A)(3) (Special Pamphlet A 2009) (allowing surplus lines insurance only if insurance may not be obtained from authorized insurer). As excess and surplus lines carriers, Underwriters are treated differently than domestic carriers and are not subject to the same rules and regulations for filing rates and forms as domestic carriers. Contrary to LSAT's argument, "the

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[1]LSAT asserts that the policies were issued for delivery in Louisiana and the broker and the insured were located in Louisiana. LSAT does not advise the Court, however, that the reinsurance contracts were negotiated in London or that it had a Lloyd's broker representing its interests in London and negotiating there on its behalf.

[2]In its brief, LSAT acknowledges that it purchased its insurance in the excess and surplus lines market. *See* LSAT Br. at 7.

Louisiana Insurance Code provides little regulation of surplus lines insurance." *See Edwards v. Daugherty*, 883 So. 2d 932, 943 (La. 2004).

Second, LSAT's argument focuses wrongly on the parties' supposed "contacts" with Louisiana. This dispute does not revolve around which "state" has the most significant contacts. *See* LSAT at 16-17. Likewise, the Court is not *Erie*-bound to follow Louisiana law on the preemption question before it. *Compare id.* at 4 *with United States v. Belmont*, 301 U.S. 324, 331 (1937). Even if this Court were to look to state law, however, the only state-court decision directly on point rejected LSAT's argument. *See F.A. Richard & Assocs., Inc. v. General Mar. Catering Co.*, 688 So.2d 199, 202 (La.App. 4 Cir. 1997). Regardless of the "contacts" with Louisiana or where the reinsurance contracts were "delivered," the Convention applies to the parties' arbitration agreement because one of the parties is not an American citizen and their commercial relationship has a reasonable relationship to a foreign state. *See Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982).

Lastly, LSAT completely misreads the Supreme Court's holding in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). *See* LSAT Br. at 13-14. The Supreme Court made clear that 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 . . . in signatory countries." 417 U.S. at 520 (emphasis added). *Scherk* expressly rejected the imposition of "parochial" limitations on the enforcement of arbitration agreements as LSAT requests this Court to do. *See id.*

### B. Important Legal Reasons Exist to Distinguish the Court's Preemption Analysis Under the Convention and FAA.

LSAT implores this Court to apply its FAA precedent to the Convention because it can find no reason to distinguish between them in this case. *See* LSAT at 8. LSAT also continues to claim that *Stephens* justifies its position despite failing to provide an articulate response to Underwriters' arguments for distinguishing and rejecting *Stephens*. LSAT is again wrong on both fronts. Important legal reasons exist for enforcing the Convention in this case even if the Court would not enforce a similar arbitration agreement in a domestic insurance policy.

Most importantly, unlike the FAA and as the Second Circuit recognized *after Stephens*, the McCarran-Ferguson Act does not extend to foreign commerce. *See* Underwriters Br. at 14-16, 19-20. LSAT does not address this argument at all in its brief. Nevertheless, in attempting to distinguish the Supreme Court's holding in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), LSAT implicitly recognizes why the McCarran-Ferguson Act does not require reverse-preemption here.

*See* LSAT Br. at 23-24. The McCarran-Ferguson Act cannot be construed to allow state law to reverse-preempt a treaty because it addresses domestic commerce only, not foreign commerce. *Cf. Garamendi*, 539 U.S. at 428. Thus, different rules apply to matters under the Convention and the FAA. As demonstrated in section D, below, LSAT wrongly asserts that this case does not involve foreign affairs or have an effect outside the United States.

Moreover, even if the policies underlying the Convention and FAA are similar, that does not mean they apply equally to international and domestic contracts. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). Even LSAT concedes *Mitsubishi*'s holding that the "*enforcement* of the parties' advance agreement on a forum acceptable to both is *even more important* in contracts *where the parties come from different countries*, noting the need for predictability in the resolution of the parties' disputes in *international agreements*." LSAT Br. at 10 (emphasis added). LSAT admits that such an international flavor may "cause the court to reach a different conclusion in determining whether Congress intended to preclude arbitration" in cases such as this one. *Id.* at 11. The international nature of the parties' reinsurance contracts necessitates the enforcement of their arbitration agreements "even assuming a contrary result would be forthcoming in the domestic context." *Mitsubishi*, 473 U.S. at 629; *see also* LSAT Br. at 10.

LSAT mistakenly contends, however, that "nowhere did [*Mitsubishi*] apply any presumption with regard to the determination of congressional intent to preclude arbitrability." LSAT Br. at 10. The Supreme Court held, in fact, precisely the opposite of what LSAT suggests. *Mitsubishi* concluded that Congress had established a presumption that it did not intend to exclude a class of cases from the Convention, e.g., insurance, unless it expressly said so, and, thus, courts should not recognize subject-matter exceptions to the Convention if Congress had not expressly instructed them to do so. 473 U.S. at 639 n.21. The fact that Congress *could have* excluded insurance, as LSAT suggests, only proves the point – this Court should not create an insurance exception to the Convention because Congress did not expressly recognize such a subject-matter exception. *See* LSAT Br. at 46.

### C. LSAT Avoids Answering the Question Posed by the Panel – Why Should an *Implemented* Non-Self-Executing Treaty Be Treated Any Differently Than a Self-Executing Treaty?

LSAT spends a significant portion of its brief discussing self-executing and non-self-executing treaties and arguing that the Convention is a non-self-executing treaty. *See id.* at 27-40. This discussion fails to address the primary question before the Court. The question before the Court is not whether the Convention is self-executing or what preemptive effect, if any, an unimplemented non-self-executing treaty would have on a conflicting state law. The question is what preemptive effect

a later-in-time, implemented treaty has on conflicting state law. *See Medellín v. Texas*, — U.S. —, 128 S. Ct. 1346, 1366 (2008) (noting that implementing legislation gave United States' international obligations under Convention "domestic effect").

Importantly, LSAT does not claim that, under the McCarran-Ferguson Act, state law would trump a later-in-time self-executing treaty. LSAT fails, however, to answer the question posed by the Panel. Specifically, if state law would not reverse-preempt a self-executing treaty, why should it reverse-preempt an *implemented* non-self-executing treaty? *See Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744, 752 (5th Cir. 2008).

LSAT's lengthy recitation of the holdings in *Foster*, *Percheman*, *Arredondo*, and *Medellín* is, therefore, unhelpful as none of those cases is directly on point. None of those cases even considered, let alone decided, how to answer the question before this Court. *See* LSAT Br. at 29-36, 42. This Court should hold, as the Panel did, that no legal basis exists for allowing state law to reverse-preempt the Convention.

Indeed, *Missouri v. Holland*, 252 U.S. 416 (1920), held that it is not sufficient to say, as LSAT does, that the Convention only has domestic effect through its implementing legislation. *See id.* at 40-45. LSAT completely ignores this case although both the Panel and Underwriters cited it. *Missouri* recognized that even if Congress could not preempt state insurance laws through a general "Act of Congress,"

it could through a treaty and a congressional act. *See Missouri*, 252 U.S. at 432-33 (upholding constitutionality of Migratory Bird Act and associated treaty). Here, the implementing legislation expressly provides that the "*Convention . . . shall be enforced* in United States courts . . . ." 9 U.S.C.A. § 201 (emphasis added). Thus, the Court should hold that the Convention preempts the Louisiana statute at issue.

### D. Applying State Law Would Directly and Significantly Undermine the United States' International Obligations Under the Convention.

Contrary to LSAT's assertion, the resolution of the parties' dispute directly implicates international concerns because it affects the fulfillment of the United States' international commitments under the Convention. By adopting the Convention, the United States committed to the other Contracting States to enforce it. Consequently, as in *Garamendi*, not applying the Convention here would significantly affect the United States' conduct of foreign affairs and commerce. *See* SEN. EXEC. DOC. E., 90th Cong., 2d Sess. at 1 (1968) (President supported adoption of the Convention because it would promote international trade and investment).

LSAT wrongly argues that the McCarran-Ferguson Act is an explicit statement that international concerns do not predominate. LSAT Br. at 12. The McCarran-Ferguson Act does not represent either an explicit or implicit statement about the international concerns in this case because it does not extend to foreign commerce,

which LSAT has not denied. Therefore, the Court should not apply the McCarran-Ferguson Act to the international reinsurance contracts at issue to allow Louisiana law to reverse-preempt the Convention.

The international concerns in this case are not limited to the effect that application of state law would have on the United States' international obligations under the Convention. This case also directly implicates important international business considerations. In *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1209 (5th Cir. 1991), this Court expressed a great concern that not enforcing the Convention "could jeopardize the international arbitration agreements of United States citizens" in other disputes. *See also id.* at 1211 ("If state courts refuse to promptly enforce arbitration agreements in Convention cases, other signatory nations could cite the Convention's reciprocity clause to justify departing from the Convention in cases involving citizens of states with recalcitrant courts."). *McDermott*'s concern for reciprocity applies with equal force in this case.

Similarly, a refusal to enforce international arbitration agreements, as LSAT urges, would not only frustrate the predictability of international business transactions but would also lead to "destructive" forum shopping. *Scherk*, 417 U.S. at 517-18. If a party believed a U.S. court would not enforce an arbitration agreement, it might seek an order from a foreign court enjoining suit here. As *Scherk* observed, "the dicey

atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517.

LSAT's reliance upon the holding in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), is likewise misplaced. *See* LSAT Br. at 15-16. *Wilburn Boat* did not hold that federal law must always bow to state regulation of insurance or that federal courts should ignore the importance of national and international uniformity in the rules governing transnational insurance contracts. State insurance law does not apply to a marine insurance contract where there is an "entrenched federal precedent." *Thanh Long P'ship v. Highlands Ins. Co.*, 32 F.3d 189, 193-94 (5th Cir. 1994). The Convention represents just such an entrenched federal rule, thereby necessitating its application to the reinsurance contracts at issue. The Court should enforce the parties' arbitration agreements to ensure the Convention's uniform application, without parochial interference by individual states, which this Court has previously held is essential to international business transactions of this kind. *See McDermott*, 944 F.2d at 1211-12.

## III. CONCLUSION

Accordingly, Underwriters respectfully request that the Court reverse the holding of the District Court and enforce the parties' arbitration agreements.

DATED: April 27, 2009.

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 page limitation of Fed. R. App. P. 32(a)(7)(A) because it does not exceed fifteen (15) pages.

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 27, 2009.

## CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that the above and foregoing APPELLANTS' *EN BANC* REPLY 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 27th day of April 2009:

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I hereby certify further that the APPELLANTS' *EN BANC* REPLY BRIEF has been filed with the Clerk of Court by hand delivering an original, twenty (20) papers copies, and an electronic copy to the Clerk of Court, this 27th day of April 2009.

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