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CAN(NOT) A STATE LAW OVERRIDE A FEDERAL TREATY OBLIGATION?

By

Evangelo M. Theodosopoulos*

I. INTRODUCTION

Arbitration contracts between United States' parties and foreign parties face uncertainty from state insurance laws containing anti-arbitration provisions. Though courts have done well to respect parties' decisions to arbitrate, the same courts have struggled to respect parties' decisions to arbitrate insurance disputes. Until recently, the law was settled that such arbitration agreements relating to contracts of insurance were ultimately subject to state law above all else.¹

The United States' Congress expressly granted the fifty states' preeminent authority to regulate the insurance industry under the McCarran Ferguson Act.² States have used this authority to enact laws that forbid parties to arbitrate insurance related disputes.³ Problems arise when one of the parties to the arbitration agreement, which is now rendered void by state law, is an international party. International parties are left wondering why the American courts'

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¹ *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d. Cir. 1995).

² McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015 (focusing on the preemption provision in § 1012(a); (b)). The McCarran Ferguson Act was Congress' response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) where the Supreme Court held that insurance was interstate commerce and therefore not subject to regulation by states. Congress felt that insurance regulation was traditionally within the realm of state's responsibility and therefore the purpose of the McCarran Ferguson Act was to turn back the power of insurance regulation to the states as it belonged before the Supreme Court's decision in *South-Eastern Underwriters Ass'n.*

³ Survey of state statutes prohibiting arbitration of insurance related disputes: (1) Arkansas, ACA 16-108-20. (2) Hawaii, HRS 431:10 -221. (3) Kansas, KSA 5-401 (*not* affecting arbitration for reinsurance contracts). (4) Kentucky, Ky.Rev.Stat.Ann. 304.22-101(6). (5) Louisiana, LA.REV.STAT. ANN. § 22:629. (6) Missouri, V.A.M.S. 435.350; 20 Mo. Code of State Regulations 500-1.600. (7) Nebraska, Neb. Rev. St. 25-2602.01. (8) Oklahoma, 12 Okl. St. § 1855(D). (9) South Carolina, S.C. Code Ann. 15-48-10(b)(4). (10) South Dakota, SDCL 21-25A-3. (11) Washington, RCWA 48.18.200. (12) Virginia, Va. Code Ann. 38.2-312.

responsibility to compel arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ (hereinafter “New York Convention”) fall victim to contrary state laws. To complicate matters, foreign insurers play a significant role in the American insurance industry, and arbitration is a preferred method of dispute resolution for international parties.⁵

In *Safety National Casualty Corp. v. Certain Underwriters at Lloyd’s, London*⁶, (hereinafter “Safety National”) the Fifth Circuit determined that the McCarran Ferguson Act did not allow state law to invalidate an arbitration agreement falling under the New York Convention.⁷ The outcome was both a victory and a loss. Under the Fifth Circuit’s opinion, foreign insurers doing business with American parties can rest assured that American courts will compel arbitration when faced with a valid arbitration agreement, despite the McCarran Ferguson Act and state laws to the contrary.⁸ The problem is that the Fifth Circuit was not the first United States’ Circuit court to speak to this issue as the Second Circuit had already decided the opposite.⁹

The Supreme Court denied cert to resolve the split between the Second and Fifth Circuit, after inviting the Solicitor General of the United States to file a brief

⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. 2, September 30, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 38.

⁵ Arthur D. Postal, *Foreign, Domestic Insurers Square Off in Offshore Tax Testimony*, National Underwriters Online, July 17, 2010, available at <http://www.property-casualty.com/News/2010/7/Pages/Foreign-Domestic-Insurers-Square-.aspx>; John P. Dearie & Michael Griffin, *Overseas Insurers*, Risk Management Magazine, Vol 56. Feb. 1, 2009, available at <http://www.rmmag.com/MGTtemplate.cfm?Section=MagArchive&NavMenuID=304&template=/Magazine/DisplayMagazines.cfm&Archive=1&IssueID=332&AID=3835&Volume=56&ShowArticle=1>.

⁶ *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714 (5th Cir. 2009).

⁷ *Id.* at 732.

⁸ *Id.*

⁹ *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41 (2d. Cir. 1995).

expressing the views of the United States.¹⁰ The Fifth Circuit and Second Circuit opinions cannot be reconciled easily. There is little ground for consensus between the two opinions. Until the Supreme Court speaks on this issue, practitioners must be aware that the Fifth Circuit will uphold international arbitration agreements despite state insurance regulations to the contrary, so long as the New York Convention would validate the arbitration agreement.

II. CASE LAW

A. *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*¹¹ (*En Banc*)

The Louisiana Safety Association of Timbermen, Self Insurer's Fund (hereinafter "LSAT") is a self insurance fund in Louisiana providing workers' compensation insurance for its members.¹² LSAT purchased excess insurance coverage from Certain Underwriters at Lloyd's of London (hereinafter "Lloyd's") for claims sounding in occupational-injury occurrences that exceeded amounts in LSAT accounts.¹³ Each reinsurance agreement LSAT purchased from Lloyd's contained an arbitration contract.¹⁴ After LSAT purchased reinsurance coverage from Lloyd's, LSAT negotiated a Loss Portfolio Transfer agreement with Safety National Casualty Corporation (hereinafter "respondent") whereby LSAT assigned its rights under the agreements with Lloyd's to respondent.¹⁵ Lloyd's refused to honor LSAT's agreement with respondent.¹⁶

¹⁰ Petition for Writ of Certiorari, 2010 LEXIS 6262 (*Cert. denied*); *see also*, *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London*, 130 S. Ct. 3311 (inviting Solicitor General to file a brief expressing the views of the United States).

¹¹ 587 F.3d 714 (5th Cir. 2009).

¹² *Id.* at 717.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Safety Nat'l Cas. Corp.*, 587 F.3d 714.

Respondent brought suit in federal district court against Lloyd's to recover rights from the reinsurance agreements gained from the Loss Portfolio Transfer Agreement negotiated between respondent and LSAT.¹⁷ Lloyd's moved to compel arbitration, and LSAT contended that the arbitration agreements were unenforceable under Louisiana Law.¹⁸ The district court quashed Lloyd's motion to compel arbitration, noting that the New York Convention¹⁹ normally requires the court to compel arbitration but in this case a Louisiana Statute²⁰ that prohibits arbitration agreements in insurance contracts required the Court to disregard the New York Convention.²¹ The district court reasoned that the New York Convention was reverse-preempted by State law because of the McCarran Ferguson Act.²² The Louisiana district court subsequently certified the order containing its rulings for immediate appeal because its ruling involved a question of law to which there was substantial ground for difference of opinion pursuant to 28 U.S.C. § 1292(b).²³ A panel of the Fifth Circuit concluded that the McCarran Ferguson Act did not allow the Louisiana anti-arbitration provision to 'reverse preempt' the New York Convention or the New York Convention's Implementing legislation.²⁴ The Fifth Circuit granted Rehearing en banc, and the panel opinion was vacated.²⁵ In its En Banc opinion, the Fifth Circuit held that the state law does not reverse-preempt the New York Convention.²⁶

The Fifth Circuit began its analysis by looking to the texts of the relevant statutes and treaties: The Louisiana statute,²⁷ the New York Convention, Section 2

¹⁷ *Id.*

¹⁸ *Id.* at 718.

¹⁹ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

²⁰ LA. REV. STAT. ANN. § 22:868.

²¹ *Safety Nat'l Cas. Corp.*, 587 F.3d at 718.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 718 (discussing the holding of the lower court in the context of the treaty itself, and the treaty's implementing legislation.).

²⁵ *Id.*

²⁶ *Safety Nat'l Cas. Corp.*, 587 F.3d at 718.

²⁷ *Id.* at 718 (referring to LA. Rev. Stat. Ann § 22:868).

of the Federal Arbitration Act (the New York Convention's implementing legislation),²⁸ and the McCarran Ferguson Act.²⁹ The relevant portion of the Louisiana statute³⁰ that LSAT cited to deny Lloyd's motion to compel arbitration provides:

A. No insurance contract 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:...

(2) Depriving the courts of this state of the jurisdiction of action against the insurer.

(C) Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

The Court noted that Louisiana courts voided arbitration agreements on the basis of this statute, although it is not clear from the text of the statute that arbitration agreements were unenforceable.³¹ Next, the court concluded that the Louisiana Statute conflicted with the United States commitments under the New York Convention.³² The relevant portion of the New York Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may

²⁸ *Id.* at 718 (referring to the New York Convention's implementing legislation, Chapter 2 of the Federal Arbitration Act).

²⁹ *Id.* at 718 (referring to 15 U.S.C. §§ 1011-1015 (focusing on the preemption provision in § 1012(a);(b))).

³⁰ LA. REV. STAT. ANN. § 22:868.

³¹ *Safety Nat'l Cas. Corp.*, 587 F.3d at 719.

³² *Id.*

arise between them in respect of a defined legal relationship, whether contractual or not, concerning subject matter capable of settlement by arbitration...

3. The Court of a Contract State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.³³

In looking to the text of the New York Convention, the court determined that the treaty contemplates enforcement of agreements under the convention in the signatory nation's courts.³⁴ The court next looked to the text the treaty's implementing legislation and noted that the implementing legislation establishes both federal court jurisdiction and venue.³⁵

The Court also considered the text of the McCarran Ferguson Act. The relevant portion of the statute provides that "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance... unless such act specifically relates to the business of insurance." Neither party argued that the New York Convention and its implementing legislation specifically related to the business of insurance.³⁶ It was assumed that the Louisiana statute regulates the business of insurance because neither party made it an issue.³⁷ The focus of the Court's discussion was centered on whether the Louisiana statute overrode the New York Convention's

³³ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Art. II pp. 1, 3.

³⁴ *Safety Nat'l Cas. Corp.*, 587 F.3d at 719.

³⁵ *Id.* (citing the Federal Arbitration Act 9 U.S.C. § 203-4.).

³⁶ *Id.* at 720-721.

³⁷ *Id.* at 721.

requirement that the parties' dispute be submitted to arbitration because the Court construes an act of Congress to invalidate, impair, or supersede state law.³⁸

LSAT argued that the New York Convention was not a self executing treaty and that the New York Convention only had effect in United States courts because the United States Congress passed implementing legislation.³⁹ According to LSAT, the Court must look to the implementing legislation and the McCarran Ferguson Act requires the Court to construe the New York Convention's implementing legislation as reverse preempted by Louisiana's Anti-arbitration statute.⁴⁰ In considering LSAT's argument The Court first discussed the importance of whether the New York Convention was self-executing or not in more detail.

LSAT conceded to the Court that, if the New York Convention were self-executing "it would be a treaty and not an 'Act of Congress' within the meaning of the McCarran Ferguson Act."⁴¹ Nevertheless, Lloyd's did not argue that the New York Convention was self executing.⁴² The Court proceeded to discuss, however, the test for determining whether a treaty is self executing, referencing the Supreme Court's decision in *Medillin v. Texas*.⁴³ Applying the Court's reasoning in *Medillin*, paying close attention to the Court's dicta,⁴⁴ the Fifth Circuit only said that the Supreme Court's language and decision in *Medillin* did not foreclose the possibility that the New York Convention is partially self-executing.⁴⁵ The Fifth Circuit, however, did not make such a decision, reasoning instead that "Act of

³⁸ *Id.*

³⁹ *Safety Nat'l Cas. Corp.*, 587 F.3d at 721.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ 552 U.S. 491 (2008) (holding that the Avena judgments of the International Court of Justice were not binding on United States courts because the Vienna Convention was not self executing).

⁴⁴ *See id.* at 521-522 (citing the New York Convention as an example of Congress according domestic effect to international obligations when it desires that result).

⁴⁵ *Safety Nat'l Cas. Corp.*, 587 F.3d at 723.

congress,” as used in the McCarran Ferguson Act, was not meant to encompass a non-self executing treaty that has been implemented by Congressional legislation.⁴⁶

The bottom line for the 5th Circuit is that a treaty remains a treaty, not an “Act of Congress,” even if the treaty is implemented by Congressional legislation.⁴⁷ Although the concept is easy to understand, the majority opinion is filled with justifications for such a conclusion. Somewhat self-explanatory, the majority explains that a treaty remains a treaty and not an “Act of Congress” because the treaty is negotiated by the Executive branch and ratified by the senate, not Congress.⁴⁸ The Court thought it untenable that when Congress used the phrase “Act of Congress” in the McCarran Ferguson Act, that the Congress intended that phrase to exclude self-executing treaties while including treaties implemented by Congress.⁴⁹ Language in the Federal Arbitration Act implementing the New York Convention also supports the majority’s distinction that an action within the New York Convention arises under the “Laws of the United States” as well as the “Treaties of the United States.”⁵⁰ The Fifth Circuit read Congress’ construction of Section 203 to mean that Congress thought that jurisdiction to enforce rights under the New York Convention did not “arise solely under an Act of Congress.”⁵¹

Focusing on the language in the implementing legislation, the Court said that it must “construe”⁵² the convention to be faced with the possibility of “superseding,” invalidating, or impairing the Louisiana law because the implementing legislation says little more than that it is implementing the treaty.⁵³ The Court next lists rules articulated in the New York Convention that supersede,

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 723-724.

⁵⁰ *Safety Nat’l Cas. Corp.*, 587 F.3d at 724 (looking to Jurisdiction; Amount in Controversy, 9 U.S.C. § 203 “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States”).

⁵¹ *Id.*

⁵² *Id.* at 725 (using “construe” as the term is used in the McCarran Ferguson Act).

⁵³ *Id.*

invalidate, or impair the function of the Louisiana law.⁵⁴ The Fifth Circuit explained that only by reference to the rules articulated in the convention, an implemented treaty, is there a command – “a judicially enforceable remedy” – to compel arbitration and impair the function of the Louisiana anti-arbitration statute.⁵⁵

The Fifth Circuit majority proceeded to attack the dissent’s position that an implemented non-self executing treaty is not a treaty within the meaning of the Supremacy Clause⁵⁶ of the U.S. Constitution.⁵⁷ The majority explains that the dissent’s reliance on *Hopson v. Kreps*⁵⁸ for the proposition that an implemented treaty has no independent significance is misplaced because the dissent reads *Hopson* out of context.⁵⁹ According to the majority, the dissent short circuits the meaning of *Hopson* because *Hopson* stands for the proposition that an implemented treaty does not have independent significance in defining the terms of its implementing legislation when the treaty and implementing legislation are in conflict, not that an implemented treaty has no significance as the dissent suggests. The majority also criticizes the dissent’s reliance on a “consensus of legal scholars,” explaining that the only source cited by the dissent would support the majority’s position.⁶⁰

After attacking the dissent’s position, the majority looks to case law at the time that the McCarran Ferguson Act was enacted to see whether courts analyzed

⁵⁴ *Id.*

⁵⁵ *Safety Nat’l Cas. Corp.*, 587 F.3d at 725.

⁵⁶ U.S. CONST. art. VI, cl.2.

⁵⁷ *Safety Nat’l Cas. Corp.*, 587 F.3d at 725.

⁵⁸ 622 F.2d 1375, 1380 (9th Cir. 1980) (finding that an implemented treaty may aid in defining the intended meaning of the terms used in the implementing statute, but the treaty does not have independent significance in defining terms used in the implementing statute when the treaty and the implementing statute are in conflict).

⁵⁹ *Safety Nat’l Cas. Corp.*, 587 F.3d at 726.

⁶⁰ *Id.* (quoting a passage from Louis Henkin, REPORTER OF RESTATEMENT (3RD) FOREIGN RELATIONS LAW).

treaties as “Acts of Congress.”⁶¹ The majority proffers *Missouri v. Holland*⁶² to support its position that an implemented treaty is viewed as distinct from the “act of congress” that implements the treaty.⁶³ From this 1920 Supreme Court case, the majority explains, Congress, in passing the McCarran Ferguson Act two decades later, was aware that a treaty that requires implementing legislation is distinct from an Act of Congress and the treaty itself could validly “override [a state’s] power.”⁶⁴ It is furthermore unlikely that when Congress crafted the McCarran Ferguson Act that Congress intended to abrogate any future treaty implemented by an Act of Congress.⁶⁵ The Majority thinks it is more likely that, should Congress have intended for non-self-executing treaties to fall within the purview of the McCarran Ferguson Act, that Congress would have included the phrase “or any treaty requiring congressional implementation” following the phrase “Act of Congress.”⁶⁶

The Majority also found support for its position to compel arbitration in the “congressionally sanctioned national policy favoring arbitration of international commercial agreements.”⁶⁷ The majority focused on the Supreme Court’s discussion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁶⁸ to elaborate the policy aspects supporting the decision to compel arbitration. The majority emphasized that International arbitration has become commonplace in an economy of expanding international trade, judicial hostility to arbitration must lessen, and national courts must cede jurisdiction of claims to transnational tribunals to support an international policy favoring commercial arbitration.⁶⁹ The Supreme Court in *Mitsubishi* subjected national antitrust laws to arbitration

⁶¹ *Id.* at 728.

⁶² 252 U.S. 416 (1920).

⁶³ *Safety Nat’l Cas. Corp.*, 587 F.3d at 728.

⁶⁴ *Id.* at 729 (quoting *Holland*, 252 U.S. at 434).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 730.

⁶⁸ 473 U.S. 614 (1985).

⁶⁹ *Safety Nat’l Cas. Corp.*, 587 F.3d at 730 (quoting *Mitsubishi*, 473 U.S. at 638-39).

explaining that all claims implicating statutory rights are subject to arbitration as per the national policy favoring arbitration articulated in the Federal Arbitration Act, less the “congressional intention expressed in some other statute” identifies a series of claims which must be held unenforceable.⁷⁰ Further, the Court stated that the Sherman Act did not evince such intent in *Mitsubishi*⁷¹, and the Majority in *Safety National* did not discern the McCarran Ferguson Act to “include protection against waiver of the right to a judicial forum.”⁷² The majority explains that the “strong policy” interests of states in regulating of the business of insurance are “ameliorated by the substantive provisions in the Convention,” because “the national courts of the United States will have the opportunity at the award-enforcement stage” to ensure that the legitimate interests of states in regulating insurance is protected.⁷³

B. Circuit Split: Fifth Circuit versus the Second Circuit

The majority in *Safety National*⁷⁴ concludes by expressing awareness that its decision conflicts with precedent in the Second Circuit.⁷⁵ In dissecting the relevant portion of the Second Circuit’s opinion in *Stephens v. American International Insurance co.*⁷⁶ the majority explains that the Second Circuit merely concluded that the New York Convention did not contain self executing treaty provisions, but notes that the Second Circuit did not address the intent of Congress

⁷⁰ *Id.* (quoting *Mitsubishi*, 473 U.S. at 627).

⁷¹ *Mitsubishi*, 473 U.S. at 627.

⁷² *Safety Nat’l Cas. Corp.*, 587 F.3d at 730.

⁷³ *Id.* at 730-731.

⁷⁴ *Id.*

⁷⁵ *Id.* at 731.

⁷⁶ *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41 (2d. Cir. 1995) (holding that a Kentucky anti-arbitration provision regulating the business of insurance reverse preempted the New York Convention because the New York Convention is a non-self-executing treaty that gets its domestic effect from its implementing legislation, and implementing legislation is an Act of Congress).

in using the phrase “no Act of Congress” in the McCarran Ferguson Act.⁷⁷ The Fifth Circuit therefore attempts to make self-execution irrelevant to its reasoning, in explaining that treaty provisions, self-executing or not, cannot be reverse preempted by state law under the McCarran Ferguson Act because no treaty is within the reach of the McCarran Ferguson Act.⁷⁸ Essentially, the Fifth Circuit sidesteps the Second Circuit’s finding that the implementing legislation gave the New York Convention its legal effect. The Fifth Circuit also notes that a subsequent decision, *Stephens v. National Distillers & Chemical Corp.*,⁷⁹ casts doubt on the reasoning of the Second Circuit in *Stephens v. American International Insurance Co.*⁸⁰ despite the Second Circuit’s carefully navigating its decision through alternative reasoning in its subsequent decision.⁸¹

Judge Edith Brown Clement of the Fifth Circuit was the lone concurrence for *Safety National*, but nevertheless she expands a compelling argument first suggested by the majority, and not addressed by the dissent. The Majority does not address whether Article II Section 3 of the New York Convention is a self-executing treaty provision because the majority claims that Lloyd’s did not brief the argument for its *en banc* rehearing.⁸² Judge Brown Clement explains that Lloyd’s should not be punished for focusing their *en banc* brief to address the

⁷⁷ *Safety Nat’l Cas. Corp.*, 587 F.3d at 731 (distinguishing *Stephens*, 66 F.3d 41).

⁷⁸ *Id.*

⁷⁹ 69 F.3d 1226 (2d Cir. 1995) (holding that a New York insurance law did not reverse preempt the Foreign Sovereign Immunities Act because the McCarran Ferguson Act does not allow state law to reverse preempt the common law, and the Foreign Sovereign Immunities Act operated by common law before Congress codified the Foreign Sovereign Immunities Act with an Act of Congress).

⁸⁰ 66 F.3d 41 (2d. Cir. 1995).

⁸¹ *Safety Nat’l Cas. Corp.*, 587 F.3d at 732 (quoting the Second Circuit in n.6 of *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d at 1233, where the Court explained that another panel ruled that the McCarran Ferguson Act prohibited the application of the Federal Arbitration Act in a way that preempted Kentucky insurance law, but this panel did not have to consider whether its holding conflicted with the other panel because this panel may rest its opinion on the ground that the Federal Statute at issue passed before the McCarran Ferguson Act and was well supported in Common Law before it was codified in statute).

⁸² *Id.* at 732 n.1 (Clement, J., concurring).

question posed by the panel.⁸³ According to Judge Brown Clement Article II, Section 3, of the New York Convention is a self-executing treaty provision.⁸⁴ The idea of a self-executing treaty provision comes from the Supreme Court's language in *Medellin*.⁸⁵ A treaty's parts may be separated from the whole of the treaty in order to evaluate whether a part of the treaty is self-executing.⁸⁶ Applying *Medellin*, Judge Brown Clement analyzes the language in Article II and concludes that Article II of the New York Convention is a self-executing treaty provision because it provides a "directive to domestic courts" when it uses mandatory language requiring courts to refer parties to arbitration.⁸⁷ The Concurrence appropriately deals with unfavorable dicta in *Medellin*⁸⁸ where the Supreme Court suggests that the Congress knows how to give domestic effect to a treaty when it has to do so, using the implementing legislation of the New York Convention as an example.⁸⁹ Starting from the idea that a treaty provision, not the whole treaty, is the appropriate unit of analysis in determining self-executing status, Judge Brown Clement limits the effective application of the Supreme Court's dicta in *Medellin*. Judge Brown Clement explains that the Supreme Court was not referring to Article II, Section 3, in its example of a non-self-executing treaty provision and therefore *Medellin*'s dicta did not imply that the Convention is "non-self-executing in all respects."⁹⁰ Recognizing that multilateral treaties are "presumptively non-self-

⁸³ *Id.*

⁸⁴ *Id.* at 732-733.

⁸⁵ *Medellin v. Texas*, 552 U.S. 491, 514 (noting its "obligation to interpret treaty provisions to determine whether they are self-executing").

⁸⁶ *Safety Nat'l Cas. Corp.*, 587 F.3d at 734 (Clement, J., concurring) ("Although the Supreme Court has never expressly held that individual treaty provisions may be self-executing, while a treaty in its entirety may not be, its case law inescapably leads to this conclusion").

⁸⁷ *Id.* at 735 (Clement, J., concurring) (quoting language from *Medellin*).

⁸⁸ See *supra* note 44 and accompanying text.

⁸⁹ *Medellin*, 552 U.S. at 521-522.

⁹⁰ *Safety Nat'l Cas. Corp.*, 587 F.3d at 736 (Clement, J., concurring).

executing,” Judge Brown Clement nevertheless concludes that Article II Section 3 of the New York Convention is a self-executing treaty provision.⁹¹

Three judges dissented from the majority opinion of the *en banc* panel in *Safety National*. The dissent begins by stating its argument in plain terms, implementing legislation is an “Act of Congress” and because the implementing legislation of the New York Convention does not explicitly address insurance, it is not capable of preempting state law.⁹² The dissent contends that there is no precedent to suggest that a non-self-executing treaty, in and of itself, has the power to preempt state law.⁹³ The source of preemptive authority for a non-self-executing treaty is its implementing legislation.⁹⁴ The dissent points to a string of authority for the proposition that non-self-executing treaties can only be enforced pursuant to legislation to carry them into effect.⁹⁵ The dissent explains that these treaties, requiring implementing legislation, have equal standing with federal statutes.⁹⁶ After responding to every argument forwarded by the majority, the dissent concludes that the holding of the Second Circuit should control the outcome of this case.⁹⁷

III. ANALYSIS

A. *Navigating the Circuit Split*

The majority in *Safety National (en banc)* composes a lengthy opinion with many arguments forwarded to support its conclusion, but a small three-judge

⁹¹ *Id.* at 737. (Clement, J., concurring).

⁹² *Id.* (Elrod, J., dissenting).

⁹³ *Id.* at 738. (Elrod, J., dissenting).

⁹⁴ *Id.* (Elrod, J., dissenting).

⁹⁵ *Safety Nat'l Cas. Corp.*, 587 F.3d at 738 (Elrod, dissenting) (citing *Foster v. Neilson*, 7 L. Ed. 415 (1829), *Whitney v. Robertson*, 124 U.S. 190 (1888), and *Medellin*, 552 U.S. 491 (2008)).

⁹⁶ *Id.* at 737 (Elrod, J., dissenting) (citing *Edye v. Robertson (Head-Money Cases)*, 112 U.S. 580 (1884)).

⁹⁷ *Id.* at 751 (Elrod, J., dissenting).

dissent drafts an opinion equal to the majority in its persuasive appeal. The Second Circuit and the Fifth Circuit have now addressed the same issue and provided diametrically opposed opinions. The Fifth Circuit majority attempts to distinguish the Second Circuit's opinion,⁹⁸ but the effectiveness of such an attempt will be judged by the lower courts in navigating through the case law.

The majority ultimately forwards three main arguments in support of its conclusion (1) A treaty and the act of Congress that implements the treaty cannot be merely an "Act of Congress"⁹⁹ (2) Implemented, non-self-executing treaties are not "Acts of Congress" as that phrase is used in the McCarran Ferguson Act,¹⁰⁰ and (3) America's strong national policy favoring the decision to compel arbitration in international commercial agreements bolster's the majority's conclusion.¹⁰¹ The dissent argues that (1) only the Implementing legislation of a non-self-executing treaty is capable of preempting state law,¹⁰² (2) a non-self-executing treaty has no independent significance apart from its implementing legislation,¹⁰³ and (3) a non-self-executing treaty's implementing legislation is on par with a federal statute subject to reverse preemption under the McCarran Ferguson Act.¹⁰⁴

Borrowing the novel approach forwarded by the *Safety National* concurrence may be the safest way to reconcile the Fifth Circuit with the Second Circuit. The Second Circuit's reasoning can be distinguished on the basis that the Supreme Court articulated a new framework for determining self-executing treaty status in *Medellin*,¹⁰⁵ thirteen years after *Stephens*¹⁰⁶ was decided. *Stephens* holding

⁹⁸ See *supra* notes 70-71 and accompanying text.

⁹⁹ *Safety Nat'l Cas. Corp.*, 587 F.3d at 722-23.

¹⁰⁰ *Id.* at 723-25, 728.

¹⁰¹ *Id.* at 730-31.

¹⁰² *Id.* at 738-40 (Elrod, J., dissenting).

¹⁰³ *Id.* at 740 (Elrod, J., dissenting).

¹⁰⁴ *Safety Nat'l Cas. Corp.*, 587 F.3d at 740 (Elrod, J., dissenting).

¹⁰⁵ *Medellin v. Texas*, 552 U.S. 491, 506-507 (2008) (outlining the framework for determining the self-execution status of treaties, "the interpretation of a treaty, like the interpretation of a statute, begins with its text... we have also considered 'aids to

relies on the finding that the New York Convention is a non-self-executing treaty. Also, the Second Circuit's analysis in *Stephens* is less than thorough on this point.¹⁰⁷ Applying the newer, binding framework for determining self-executing treaty status articulated in *Medellin*, and then reaching the conclusion that Article II, Section 3, of the New York Convention is a self-executing treaty provision is a sufficient ground for distinguishing the result in *Stephens* without sidestepping the result in *Stephens*.

B. The Aftermath: Pick a Side

Since *Safety National (en banc)* was decided by the Fifth Circuit, the other federal circuits and state courts alike have abstained from the debate over whether the McCarran-Ferguson Act authorizes states' laws to preempt international arbitration agreements falling under the New York Convention. The Fifth Circuit since clarified its position on the McCarran-Ferguson Act in the context of arbitration, explaining "We have held that the McCarran-Ferguson Act allows state regulation of insurance to preempt the FAA (*Internal citations omitted*). However, even more recently we have held that state insurance law cannot reverse preempt the New York Convention and its implementing legislation (*Internal citation omitted*)."¹⁰⁸

Academics have sided with the Fifth Circuit. The Restatement (Third) of International Commercial Arbitration takes the position that the McCarran Ferguson Act does not restrict arbitral tribunals of their jurisdiction over

interpretation' the negotiation and drafting history of the treaty as well as the 'postratification understanding' of signatory nations").

¹⁰⁶ *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d. Cir. 1995).

¹⁰⁷ *Safety Nat'l Cas. Corp.*, 587 F.3d at 737 (Clement, concurring) (identifying a lack of analysis in *Stephens*, 66 F.3d 41 on the point that the New York Convention is not self-executing.).

¹⁰⁸ *Todd v. S.S. Mut. Underwriting Ass'n (Berm.) Ltd.*, 601 F.3d 329, 335 fn.9 (5th Cir. 2010).

international transactions arising under Chapter Two of the FAA.¹⁰⁹ Similarly, Couch on Insurance takes the position that Congress, in drafting the McCarran Ferguson Act, did not intend to include “treaty” within the scope of the words “act of congress,” such that an international agreement among nations would be subject to reverse preemption.¹¹⁰ Thus far, the Fifth Circuit got it right.

Circuit Judge Cohen’s Concurring opinion in *Safety National*¹¹¹ has influenced at least one other Judge’s approach to analyzing multilateral treaties status’ as self-executing or not.¹¹² Judge Torruela forcefully argues against the judicial presumption that multilateral treaties are non-self-executing without first looking to the text of the treaty.¹¹³ Circuit Judge Torruela forcefully argues that should judges not begin with the text of a treaty when considering the doctrine of self-execution as instructed by the Supreme Court, the “judicially created theory” of self-execution will continue to erode our nation’s international commitments.¹¹⁴

IV. CONCLUSION

The circuit split between the Fifth and Second Circuits may stir uncertainty for international parties looking to do business in the American insurance industry. Though the Second Circuit’s opinion left the integrity of

¹⁰⁹ RESTATEMENT (THIRD) INTERNATIONAL COMMERCIAL ARBITRATION §5-13 (Reporter’s Notes).

¹¹⁰ COUCH ON INSURANCE (THIRD) §2:4.

¹¹¹ *Safety Nat’l Cas. Corp.*, 587 F.3d at 737 (Clement, J., concurring).

¹¹² *Iguarta v. U.S.*, 626 F.3d 592, 621 (1st Cir. 2010) (Torruela, J., concurring in part and dissenting in part).

¹¹³ *Id.* at 621-22 (citing *Safety Nat’l Cas. Corp.*, 587 F.3d d at 737 (Clement, J., concurring)).

¹¹⁴ *See id.* (Torruela, J., concurring in part and dissenting in part) (“The doctrine of self-execution of treaties, or stated in the negative, of non-self-execution, is a judicially-created theory which has, at convenient times, been used to avoid international commitments, particularly where human rights are concerned. Today, this theory promotes a rule whereby treaties are presumed to be non-self-executing, when in fact the text and history of the Supremacy Clause counsel exactly the opposite”).

international commercial arbitration agreements subject to the application of fifty varying bodies of insurance regulation, the Supreme Court's denial of certiorari leaves parties searching for ways to square the opinions of the Fifth and Second Circuits. The Fifth Circuit majority suggests grounds to distinguish the Second Circuit's conclusion, even when the Second Circuit looked at the same components (New York Convention, state insurance regulation, and the McCarran Ferguson Act) to reach its conclusion. Furthermore the dissent in *Safety National* makes strong arguments casting doubt on the majority's analysis of self-executing and non-self-executing treaties. The effect of *Safety National* is that all treaties, self-executing or not, are no longer within the reach of the McCarran Ferguson Act. Practitioners representing international parties should be aware of the way that state jurisdictions have interpreted anti-arbitration provisions when drafting their arbitration agreements. The safest way to ensure that an arbitration agreement is enforced is to survey the laws of the controlling state and check for anti-arbitration provisions or jurisdiction stripping language in the context of insurance.¹¹⁵ While the Fifth Circuit opinion was a victory for predictability in the field of international commercial arbitration, comparatively, the Supreme Court's silence on the split between the Second and the Fifth Circuit may further complicate matters for international parties in the insurance industry. Practitioners, be weary!

¹¹⁵ See *supra* note 2 and accompanying text.