No. 21-____

IN THE

Supreme Court of the United States

CLMS MANAGEMENT SERVICES LIMITED PARTNERSHIP, ROUNDHILL I, L.P.,

Petitioners,

v.

AMWINS BROKERAGE OF GEORGIA, LLC; AMRISC, LLC; C.J.W. & ASSOCIATES, INC.; CERTAIN UNDERWRITERS AT LLOYD'S,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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November 10, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

The McCarran-Ferguson Act provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance. . ." 15 U.S.C. § 1012(b). Washington State law prohibits mandatory arbitration provisions in insurance policies. The Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08, requires arbitration of certain matters involving foreign entities.

The question presented is: Whether a provision of state law prohibiting mandatory arbitration in a policy of insurance issued by a foreign insurer is preempted by the Federal Arbitration Act or does the McCarran-Ferguson Act reverse-preempt the Federal Arbitration Act.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner CLMS Management Services Limited Partnership advises that it has no parent corporation and that no publically held corporation owns more than 10% of its stock.

Petitioner Roundhill I, L.P., advises that it is has no parent corporation and that no publically held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The McCarran-Ferguson Act provides that "[n]o Act of Congress" that does not "specifically relate[] to the business of insurance" shall be construed to preempt any State law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). In this case the Ninth Circuit held that Article II, Section 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) is a self-executing treaty, not an "Act of Congress," and therefore is not subject to the McCarran-Ferguson Act's anti-preemption provision. In so holding, the Ninth Circuit acknowledged that its decision conflicts with the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995).

The Ninth Circuit's decision requires Washington policyholders to arbitrate disputes with foreign insurance companies, notwithstanding a Washington statute that invalidates arbitration agreements in insurance contracts. At least 13 States have enacted similar statutes. Certiorari is warranted to resolve the split in the circuits on an important and recurring issue.

Because this issue is almost always decided either in an unreviewable remand order or in a non-final order on arbitrability, this case presents a rare opportunity for the Court to provide much-needed guidance to the lower courts on this important and recurring issue.

OPINIONS BELOW

The opinion of the court of appeals (App. 20a-40a) is reported at 8 F.4th 1007. The relevant order of the district court (App. 1a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2021. App. 20a-40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b).

STATUTORY PROVISIONS INVOLVED

Section 1012(b) of the McCarran-Ferguson Act, Title 15, United States Code, provides, in relevant part:

> 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 . . . .

The other relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and the relevant portions of the Revised Code of Washington are reproduced in the Appendix. App. 41a-78a.

STATEMENT OF THE CASE

1. The McCarran-Ferguson Act. In most instances, the Supremacy Clause of the United States Constitution mandates that a state law give way to a conflicting federal law. *Kurns v. R.R. Friction Products Corp.*, 565 U.S. 625, 630 (2012). However, in 1945, Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States v. South-Eastern Underwriters Association*, which held that the business

of insurance is subject to federal regulation under the Commerce Clause. 322 U.S. 533, 552-53 (1944). The McCarran-Ferguson Act restored the "virtually exclusive [regulatory] domain" that the States traditionally had exercised over the insurance industry prior to *South-Eastern Underwriters. St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39 (1978), and imposed a "clear-statement 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." *U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507-08 (1993).

The McCarran-Ferguson Act commits the regulation of insurance to state law by providing that any state law enacted for the purpose of regulating insurance will trump, or "reverse preempt," any contrary federal law that does not relate specifically to insurance. 15 U.S.C. § 1012(b).

By establishing a federal policy of deferring to state regulation of insurance matters, the McCarran-Ferguson Act "overturn[s] the normal rules of preemption." *Fabe*, 508 U.S. at 507. As this Court has held, McCarran–Ferguson prohibits federal preemption of state statutes regulating insurance and effectuates reverse preemption when the following three conditions are met: (1) The federal law does not specifically relate to the business of insurance; (2) the federal law would invalidate, impair or supersede the state statute if applied; and (3) the state statute was enacted for the purpose of regulating insurance. *Id.* at 501; *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999).

To supersede a state law that was enacted for the purpose of regulating insurance, a federal law must contain a "clear statement" that it is meant to apply to

the insurance business. *Fabe*, 508 U.S. at 507; *see also* 15 U.S.C. § 1011 ("[S]ilence on the part of Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States."). The McCarran-Ferguson Act thus protects state regulation "against inadvertent federal intrusion . . . through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

2. Washington's Insurance Arbitration Statute. Washington, like other States, has enacted a statute that prohibits the enforcement of arbitration clauses in the context of insurance disputes. Revised Code of Washington 48.18.200 provides, in part:

> (1) 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
>
> . . .
>
> (b) depriving the courts of this state of the jurisdiction of action against the insurer . . .
>
> (2) 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 Washington Supreme Court has held that RCW 48.18.200 prohibits mandatory arbitration agreements in insurance contracts – finding that the phrase "jurisdiction of action against the insurer" demonstrated the legislature's intent to protect the right of policyholders

to bring an original "action against the insurer" in court. *State Dep't of Transp. v. James River Ins. Co.*, 176 Wn. 2d 390, 399, 292 P.3d 118 (2013). Providing insureds and insurers access to the courts "helps assure the protection of Washington law to Washington insureds." *Id.* The Washington Supreme Court further noted that its interpretation was consistent with that of other jurisdictions that had analyzed similar statutory provisions. *Id.* at 399-400.

3. Chapter 2 of the Federal Arbitration Act. In 1925, Congress enacted Chapter 1 of the FAA, which sets forth a federal policy favoring arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). The FAA is a statute of general applicability; it contains no statement that it is meant to apply to the insurance business. As a result, federal courts consistently have held that, pursuant to the McCarran-Ferguson Act, state laws prohibiting enforcement of arbitration clauses in insurance contracts are not preempted or otherwise impaired by Chapter 1 of the FAA.[1]

In 1970, Congress amended the FAA by adding Chapter 2, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention). *See* Pub. L. No. 91-368, 84 Stat. 692. Article II of the Convention reflects the same

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[1] *See, e.g., Am. Bankers Ins. Co. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006) (addressing § 83-11-109 of the Mississippi Code); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 859 (11th Cir. 2004) (per curiam) (addressing Ga. Code § 9-9-2(c) of the Georgia Code); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (addressing § 435.350 of the Missouri Statutes); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 934-35 (10th Cir. 1992) (addressing § 5-401 of the Kansas Statutes).

policy in favor of arbitration as the original provisions of the FAA and relates to arbitration when a foreign entity is involved. It provides that "[e]ach 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 which may arise between them," and that "[t]he court of a Contracting 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." Convention, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. II.

Like Chapter 1 of the FAA, Chapter 2 is a statute of general applicability that contains no statement that it is meant to apply to the insurance business.

There is no dispute between the parties that the Convention and its enabling legislation would invalidate, impair or supersede RCW 48.18.200 if applied; and RCW 48.18.200 was enacted for the purpose of regulating insurance. The sole issue before this Court is whether the Convention (treaty) is self-executing, without the need of enabling legislation, or whether the Convention is made enforceable through its enabling legislation, 9 U.S.C. §§ 201-208 (the Convention Act), an "Act of Congress." If the Convention is effectuated through its enabling legislation, the "Convention Act," it is an "Act of Congress" which is reverse-preempted by operation of the McCarran-Ferguson Act. 15 U.S.C. § 1012(b).

4. The Insurance Dispute. Petitioners CLMS Management Services, L.P. and Roundhill I, LP are Washington businesses that own and manage a townhome community in Houston, Texas. Petitioners obtained insurance coverage through Lloyd's of London for their

townhome community. Contained within Petitioners' policy of insurance is a mandatory arbitration clause. Appellants' underlying lawsuit concerns insurance claims arising from damages their community sustained during Hurricane Harvey in 2017. Petitioners sued Respondents in the United States District Court for the Western District of Washington. The court of first instance had jurisdiction pursuant to 28 U.S.C. § 1332.

The question presented first came before the District Court on Respondents' Certain Underwriters and Lloyd's and C.J.W. & Associates Motion to Compel Arbitration and Stay Proceedings. In that motion, Respondents argued that the Convention, Art. II, Sec. 3, and its enabling legislation, 9 U.S.C. § 201 *et. seq*. preempted Washington's anti-arbitration law. Petitioners submitted a brief in opposition and argued that through operation of McCarran-Ferguson, Washington's anti-arbitration law reverse-preempted the Convention and its enabling legislation, and the arbitration clause contained within the policy of insurance was unenforceable.

5. The District Court's Order. The District Court granted Respondents' Certain Underwriters and Lloyd's and C.J.W. & Associates Motion to Compel Arbitration and Stay Proceedings, and the matter was stayed in favor of Arbitration in New York.

The court then certified the question for interlocutory appeal, based on its conclusion that the ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion," and that "there is considerable disagreement between courts around the country about whether and why the Convention preempts state laws like RCW 48.18.200." App. 16a-19a.

6. The Ninth Circuit Opinion. The Ninth Circuit granted leave to appeal and a three-judge panel affirmed the decision of the District Court. App. 20a-40a. The Ninth Circuit held that the Convention was a self-executing treaty, and thus not an "Act of Congress" reverse-preempted by operation of the McCarran-Ferguson Act. In reaching this conclusion it considered, distinguished, and rejected this Court's decision in *Medellin*, which expressly identified the Convention as an example of a non-self-executing treaty. *Medellin v. Texas*, 552 U.S. 491, 521–22 (2008).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision creates a circuit split on an important issue of federal law. The conflicting decisions will cause insurance policyholders to be treated very differently depending upon where their case arises. Some policyholders will receive the protection of state laws that restrict the enforceability of arbitration clauses in insurance contracts. Other policyholders will be forced into arbitration with foreign (but not U.S.-based) insurance companies. The issue in this case arises frequently in the lower courts, but it is seldom subject to review on appeal. This case thus presents a rare opportunity for the Court to resolve an important and recurring issue of federal law.

A. The Ninth Circuit's Decision Directly Conflicts With A Decision of the Second Circuit

As the Ninth Circuit acknowledged, its decision conflicts with the Second Circuit's decision in *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995). In *Stephens*, the Second Circuit held that a Kentucky insurance anti-arbitration statute takes precedence over Chapter 2 of the FAA by operation of the

McCarran-Ferguson Act. 66 F.3d at 43. The Second Circuit rejected the insurance company's argument that the Convention is not an "Act of Congress" and therefore is not subject to the McCarran-Ferguson Act. The court held that "[t]his argument fails because the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation." *Id.* at 45. The court held that the Convention has effect as a matter of domestic law only through Chapter 2 of the FAA, which is an "Act of Congress" subject to the McCarran-Ferguson Act's anti-preemption provision. *Id.; see also Surer v. Munich Reinsurance Co*., 223 F.3d 150, 152 (3d Cir. 2000) (framing preemption issue as whether there was a conflict between Convention's implementing legislation and an allegedly contrary New Jersey statute).

The Second Circuit's approach in *Stephens* is consistent with the analysis of other courts of appeals in cases involving non-self-executing treaty provisions and their implementing legislation. *See, e.g., Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) (concluding that "[t]he issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute"); *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring) ("Strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is enacted by, or incorporated in, implementing legislation.") (Citation and internal punctuation omitted).

The Fourth and Fifth Circuits have also considered cases similar to the Ninth Circuit below and the Second Circuit in *Stephens*, but neither the Fourth nor Fifth Circuits have directly addressed the precise

issue presented herein. *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 385-86 (4th Cir. 2012), *Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London*, 587 F.3d 714, 732–33 (5th Cir. 2009). In short, the Ninth Circuit's view that the Convention is self-executing was unanimously rejected by the Second Circuit in *Stephens*, adopted by only one of the eighteen Fifth Circuit judges in *Safety National*, and was specifically left undecided by Fourth Circuit in *ESAB Group*. *Stephens*, 66 F.3d at 45–46; *Safety Nat. Cas. Corp.*, 587 F.3d at 732–33 (Clement, J., concurring); *ESAB Grp., Inc.*, 685 F.3d at 388. Indeed, three judges dissented from the majority in *Safety National*.

Further, the Ninth Circuit's view that the Convention is self-executing cannot be reconciled with this Court's decision in *Medellin*, which expressly identified the Convention as an example of a non-self-executing treaty. 552 U.S. at 521–22. As stated by this Court,

> In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. See, *e.g.*, . . . 9 U.S.C. §§ 201–208 ("The [U.N.] 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," § 201). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.

Id. Notably, this Court cited the entirety of Chapter 2 of the FAA, which implemented all Articles of the Convention as an example of a non-self-executing treaty.

In addition to creating a direct circuit split over the applicability of the McCarran-Ferguson Act's anti-preemption provision to mandatory arbitration provisions contained in insurance policies between domestic entities and foreign insurers, the Ninth Circuit's decision cannot be reconciled with the uniform federal authority holding that Chapter 1 of the FAA does not preempt state laws prohibiting enforcement of arbitration clauses in wholly domestic insurance contracts pursuant to the McCarran-Ferguson Act.[2] Thus, as a result of the Ninth Circuit's decision in this case, U.S.-based insurers remain subject to state laws limiting the enforceability of arbitration clauses in insurance contracts, while foreign insurers can circumvent those laws in the Ninth Circuit (but not in the Second Circuit).

B. The Federal Issue is Important

The federal question presented in this case is extremely important. Washington is not alone in prohibiting mandatory arbitration provisions in insurance policies. At least 13 other states have enacted laws that prohibit enforcement of arbitration clauses in insurance disputes.[3] At least 3 other states have

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[2] *See, e.g., Am. Bankers Ins. Co.*, 436 F.3d at 494 (addressing § 83-11-109 of the Mississippi Code); *McKnight*, 358 F.3d at 859 (addressing Ga. Code § 9-9-2(c) of the Georgia Code); *Standard Sec. Life Ins. Co*., 267 F.3d at 823-24 (addressing § 435.350 of the Missouri Statutes); *Mut. Reinsurance Bureau*, 969 F.2d at 934-35 (addressing § 5-401 of the Kansas Statutes).

[3] *See* Ark. Code Ann. § 16-108-201(b) (2011); Haw. Rev. Stat. § 431:10-221 (1987); Kan. Stat. Ann. § 5-401(c) (1987); Ky. Rev.

enacted laws that prohibit or limit enforcement of arbitration clauses in certain types of insurance disputes.[4] These states have made the reasonable judgment that, despite its potential benefits in other contexts, mandatory arbitration clauses have no place in insurance policies.

The Ninth Circuit's decision throws into doubt the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company. The invalidity of these state laws undermines the States' important interests - interests that the McCarran-Ferguson Act advances even at the expense of important federal interests. As this Court has noted, "[u]nder the terms of the McCarran-Ferguson Act, . . . federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe*, 508 U.S. at 502.

Statutes enacted by Washington and other states further the interests of policyholders by preventing insurers from forcing their insureds into arbitration. *See McKnight*, 358 F.3d at 858; *Standard Sec. Life Ins. Co.*, 267 F.3d at 824 (by introducing the possibility of

Stat. Ann. § 417.050(2) (2019); La. Stat. Ann. § 22:868 (2020); Mo. Ann. Stat. § 435.350 (1996); Neb. Rev. Stat. Ann. § 25-2602.01(f)(4) (2010); 10 R.I. Gen. Laws Ann. § 10-3-2 (1998); S.C. Code Ann. § 15- 48-10(b)(4) (1978); S.D. Codified Laws § 21-25A-3 (1997); Va. Code Ann. § 38.2-312 (1986).

[4] *See* Cal. Health & Safety Code § 1363.1 (requiring specific disclosure requirements before an arbitration clause in certain health insurance contracts may be enforced); Md. Code Regs. 31.11.10.07 (prohibiting mandatory binding arbitration for disputes involving health insurance contracts); Miss. Code Ann. § 83-11-109 (prohibiting arbitration of uninsured motorist claims); 044-0002-23 Wyo. Code R. § 7 (prohibiting mandatory arbitration of uninsured motorist claims).

jury verdicts into the equation, state insurance anti-arbitration provisions are designed to affect the process for resolving disputed insurance claims). As a result of the Ninth Circuit's holding, policyholders with foreign insurers will be compelled to arbitrate their disputes, potentially in distant locales with no meaningful connection to the underlying coverage dispute.[5] This is precisely the type of result that the McCarran-Ferguson Act seeks to avoid by encouraging local regulation of the insurance business. *See Fabe*, 508 U.S. at 502.

That foreign insurance companies intend to force policyholders into arbitration to avoid subjecting their claims handling decisions to the judgment of juries is clear from the frequency with which arbitration clauses appear in insurance contracts. *See* Tyrone R. Childress, *The Use of Arbitration in Insurance Coverage Disputes: A Policyholder Perspective, in Emerging Applications for ADR: Leading Lawyer on Utilizing Alternative Dispute Resolution in New Ways and Testing Innovative Approaches* (Jan. 2010), *at* 2010 WL 384497 ("Arbitration is certainly being used more frequently to resolve disputes in the insurance coverage arena. . . . From the policyholder perspective, this increase relates at least in part to insurers trying to avoid or minimize the impact of unfavorable legal precedent and contract interpretation principles that have been developed through court decisions that are not as favorable to insurers. Insurers may believe that such legal precedent is less likely to be strictly applied in arbitration proceedings that are less subject to appellate review."); *see also* Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption*

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[5] In this case, Washington policyholders with property damage in Texas are being forced to arbitrate in New York with U.K. based insurers.

of the Federal Arbitration Act, 11 Conn. Ins. L.J. 253, 253-54 (2004-2005) ("[A]rbitration provisions are appearing with increasing frequency in all types of insurance policies . . . . [C]oncern over the fairness of arbitration, especially in consumer contracts, is magnified in the insurance context.").

C. The Ninth Circuit's Decision Provides An Excellent Vehicle For This Court's Review

This case provides an excellent vehicle for this Court to review the question decided by the court of appeals. Because the question arises frequently in the lower courts but rarely makes its way to a court of appeals, let alone this Court, the opportunity for review of an important federal issue is a rare opportunity for this Court to provide much-needed guidance to the lower courts.

The issue presented in this case arises frequently in district courts, where it has given rise to division and confusion. The district court in this case determined that the Washington statute should not be enforced pursuant to McCarran-Ferguson, and ultimately certified the question for an interlocutory appeal while noting that "there is considerable disagreement between courts around the country about whether and why the Convention preempts state laws like RCW 48.18.200." App. 17a. *J.B. Hunt Transport, Inc. v. Steadfast Ins. Co.*, No. 5:20-cv-5049, 2020 WL 3579552, at *6 (W.D. Ark. 2020) (holding that the Convention is self-executing); *Foresight Energy, LLC v. Certain London Mkt. Ins. Companies*, 311 F. Supp. 3d 1085 (E.D. Mo. 2018) (holding that Article II, Section 3 of the Convention is non-self-executing and finding that Missouri's anti-arbitration statute reverse-preempted 9 U.S.C. § 201 *et. seq.* by operation of the McCarran-Ferguson Act); *Martin v. Certain Underwriters at Lloyd's, London*,

No. SACV 10-1298 AG, 2011 WL 13227729 (C.D. Cal. 2011) (holding that the Convention is self-executing); *Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co. Ltd.*, No. 07-cv-1071, 2007 WL 2752366, at *3 (W.D. Ark. 2007) (finding *Stephens* unpersuasive and holding that "the New York Convention must be enforced according to its terms over all prior inconsistent rules of law") (quotations and citation omitted); *PinnOak Res., LLC v. Certain Underwriters at Lloyd's, London*, 394 F. Supp. 2d 821, 828 (S.D.W. Va. 2005) (noting that "the decisions are split" on whether state laws can invalidate agreements to arbitrate with foreign insurers pursuant to McCarran-Ferguson and retaining jurisdiction because "[i]n view of this split of authority, this court concludes that [the] removal petition presents a substantial question of federal law"); *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, No. 96-4173-cv-2, 1996 WL 938126, at *2 (W.D. Mo. 1996) (finding chapter 2 of FAA does not preempt Missouri's insurance arbitration statute because "neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance"). This Court's review is warranted to resolve the continuing division and confusion over a recurring and important federal issue, involving the intersection between competing federal policies favoring arbitration clauses in commercial agreements and local state regulation of the business of insurance.

There are two ways in which the issue typically arises in the lower courts: (1) a foreign insurance company files a motion to compel arbitration, based on Chapter 2 of the FAA; or (2) a foreign insurance company removes a state court action to federal court based on Chapter 2 of the FAA. In both situations - and regardless of how the district court rules on the

motion presenting the issue - the district court's ruling rarely is subject to appellate review.

This case presents an example of the first way that the anti-preemption issue arises. Petitioners filed this case in federal court based on diversity jurisdiction, and the Respondents filed a motion to compel arbitration. Petitioners opposed the arbitration motion, arguing that the state law is subject to the McCarran-Ferguson Act's anti-preemption provision, and therefore is not invalidated by Chapter 2 of the FAA. A court presented with these arbitrability motions will either decide that Chapter 2 of the FAA preempts the state law and stay the case while the parties submit to arbitration, or it will decide that Chapter 2 of the FAA does not preempt the state law and allow the case to proceed in federal district court. Either way, the order is non-final, and cannot be appealed unless the district court certifies the question to the court of appeals and the court of appeals accepts certification. *See, e.g.*, 28 U.S.C. § 1292(b).

In this case, the district court determined that Chapter 2 of the FAA preempted the Washington insurance arbitration statute, and subsequently certified the issue for an interlocutory appeal based on its perception that

> there is considerable disagreement between courts around the country about whether and why the Convention preempts state laws like RCW 48.18.200. The Ninth Circuit has not weighed in on the question. Consequently, although the Court is confident in its reasoning, this is not a run-of-the-mill arbitration scenario; rather, the issue raised for appeal is complex and there is clearly room for disagreement.

App. 17a. The district court in *Stephens* ruled in a similar fashion on the motion - it concluded that Chapter 2 of the FAA preempted Kentucky's insurance arbitration provision - and that case also made its way to the Second Circuit through certification of an interlocutory appeal. *See* 66 F.3d at 43 (district court granted insurer's motion to compel arbitration, and Second Circuit accepted interlocutory appeal under § 1292).

The second way this issue arises is through the federal courts' removal jurisdiction. A policyholder will file an insurance coverage lawsuit in state court, and the foreign insurance company defendant may remove the case to federal court, asserting that the dispute is subject to an arbitration provision that "falls under the Convention." *See* 9 U.S.C. § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States."). The policyholder then raises the McCarran Ferguson Act issue in a motion to remand the case to state court for lack of federal jurisdiction.

If the district court finds that Chapter 2 of the FAA supersedes the contrary state law and federal question jurisdiction therefore exists, the ruling would again be non-final, and only subject to appeal through certification under § 1292(b). If the district court agrees that Chapter 2 of the FAA is subject to the McCarran-Ferguson Act's anti-preemption provision, it will issue an order remanding the case to state court for lack of federal jurisdiction. That order will be unreviewable pursuant to 28 U.S.C. § 1447(d) ("An order remanding

a case to the State court from which it was removed is not reviewable on appeal or otherwise.").

This is precisely what happened in *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997). The policyholder filed suit in state court, and the foreign insurance company removed the case to federal court and sought to compel arbitration. *See* 1996 WL 938126, at *1 (W.D. Mo. 1996). The policyholder moved to remand to state court based on Missouri's insurance anti-arbitration statute, and the district court remanded the case, holding that "neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance." *Id.* at *2. When the foreign insurance company appealed that decision, the Eighth Circuit determined that under 28 U.S.C. § 1447(d), it had no jurisdiction to review the district court's order remanding the case for lack of jurisdiction. *Transit Cas. Co*., 119 F.3d at 624.

Because the procedural posture in which this recurring issue arises rarely results in appellate review, this case presents an ideal vehicle for this Court to resolve the question presented. The Court should grant the petition in order to resolve the split in the circuits on an important issue addressing the proper intersection between the McCarran-Ferguson Act and the Convention's implementing legislation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 10, 2021

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed December 26, 2019]

Case No. 3:19-cv-05785-RBL

CLMS MANAGEMENT SERVICES LIMITED PARTNERSHIP; ROUNDHILL I, L.P.,

Plaintiffs,

v.

AMWINS BROKERAGE OF GEORGIA, LLC; AMRISC, LLC; C.J.W. & ASSOCIATES, INC.; CERTAIN UNDERWRITERS AT LLOYD'S,

Defendants.

HONORABLE RONALD B. LEIGHTON

ORDER ON DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S AND CJW & ASSOCIATES, INC.'S MOTION TO COMPEL ARIBTRATION AND STAY PROCEEDINGS

DKT. # 22

INTRODUCTION

THIS MATTER is before the Court on Defendants Certain Underwriters at Lloyd's and CJW & Associates, Inc.'s Motion to Compel Arbitration and Stay

Proceedings. Dkt. # 22. This case is an insurance dispute concerning coverage for flood damage to a residential development in Houston, TX, that is owned by Roundhill I, L.P., and managed by CLMS Management Services, L.P. Complaint, Dkt. # 1, at 3. Defendants move to enforce the Policy's mandatory arbitration clause, which requires all disputes be resolved in New York. Policy, Dkt. # 23, Ex. 1, at 37 (26 of 48). However, enforcement of the arbitration clause turns on a clash between two sources of law: RCW 48.18.200, which bars mandatory arbitration clauses in insurance contracts, and the Convention on the Recognition of Foreign Arbitral Award, Art. II, Sec. 3, which requires U.S. courts to enforce arbitration clauses upon request. At the fulcrum of these two is the McCarran-Ferguson Act, which provides that state insurance law preempts conflicting federal law. The question is whether the Convention—an international treaty implemented by a congressional statute—is preempted by RCW 48.18.200.

For the following reasons, the Court holds that the Convention is not preempted and GRANTS Defendants' Motion to Compel Arbitration and Stay Proceedings.

BACKGROUND

Plaintiffs' Houston residential development, Roundhill Townhomes, allegedly sustained $5,660,000 worth of damage as a result of Hurricane Harvey in August of 2017. Dkt. # 1, at 3. The property was insured through August 30, 2017 under Commercial Insurance Policy No. AMR-39768-02 with the Lloyd's Underwriters. *Id.*; Policy, Dkt. # 23, Ex. 1, at 5. This Policy constitutes one coverage part of a larger insurance agreement between CLMS and Defendant Amrisc, LLC, which acts as the "program manager for the com-

panies" providing coverage. Policy, Dkt. # 23, Ex. 1, at 5. The agreement with Amrisc effectively creates "a separate contract between the [CLMS] and each of the Underwriters." *Id*. at 8 (1 of 4). CJW, a Florida company, is the third-party claims administrator for the Lloyd's Underwriters. *Id*. at 39 (28 of 48); Dkt. # 1 at 3.

The citizenship of the Lloyd's Underwriters, meanwhile, is a bit more complicated. Plaintiffs allege simply that the Lloyd's Underwriters are "a British business entity with its principle place of business in London, England." Dkt. # 1, at 2. However, as the Eleventh Circuit explained in *Underwriters at Lloyd's, London v. Osting-Schwinn*:

> The Society of Lloyd's, London, is not an insurance company, but rather a British organization that provides infrastructure for the international insurance market. Originating in Edward Lloyd's coffee house in the late seventeenth century, where individuals gathered to discuss insurance, the modern market structure was formalized pursuant to the Lloyd's Acts of 1871 and 1982. . . . Lloyd's itself does not insure any risk. Individual underwriters, known as "Names" or "members," assume the risk of the insurance loss. Names can be people or corporations; they sign up for certain percentages of various risks across several policies. . . .
>
> Names underwrite insurance through administrative entities called syndicates, which cumulatively assume the risk of a particular policy. . . . The syndicates are not incorporated, but are generally organized by Managing Agents, which may or may not be cor-

> porations. The Managing Agents determine the underwriting policy for the syndicate and accept risks on its behalf, retaining a fiduciary duty toward the underwriting Names. . . .

613 F.3d 1079, 1083 (11th Cir. 2010).

After their property was damaged, Plaintiffs submitted a claim under the Policy. Dkt. # 1 at 3. Plaintiffs allege that they made inquiries about their claim that went unanswered until CJW sent them a letter in May 2018 stating that the Policy's deductible was $3,600,000. *Id*. Plaintiffs contend that the deductible should instead be $600,000. *Id*. at 4. This disagreement is at the center of Plaintiffs' Complaint. *Id*.

Defendants' Motion to Compel is based on the arbitration provision in the Policy's "Conditions" section. It reads as follows:

> ARBITRATION CLAUSE: All matters in difference between the Insured and the Companies (hereinafter referred to as "the parties") in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal in the manner hereinafter set out.
>
> . . .
>
> The seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance.
>
> . . .

> The award of the Arbitration Tribunal shall be in writing and binding upon the parties who covenant to carry out the same.

Policy, Dkt. # 23, Ex. 1, at 37 (26 of 48). "Companies" is defined as synonymous with "Underwriters" and "Insurers." *Id*. at 45 (34 of 48).

DISCUSSION

In most cases, the enforceability of arbitration clauses is governed primarily by Chapter I of the Federal Arbitration Act. *See* 9 U.S.C. §§ 1-16. However, in 1970, the U.S. acceded to the Convention on the Recognition of Foreign Arbitral Awards. Convention Done at New York June 10, 1958, T.I.A.S. No. 6997, 21 U.S.T. 2517, 1970 WL 104417, at *5 (Dec. 29, 1970). Article II, Section 3 the Convention provides that "[t]he court of a Contracting State . . . shall, at the request of one of the parties, refer the parties to arbitration . . . ." *Id*. at *1. Contemporaneous to the U.S.'s accession, the FAA was amended so that Chapter II now implements the Convention in disputes involving foreign parties or related to a foreign state. 9 U.S.C. §§ 210, 202.

In opposition to the FAA, Washington law bars the enforcement of binding arbitration clauses in insurance contracts. *See State, Dep't of Transp. v. James River Ins. Co.*, 176 Wash. 2d 390, 399 (2013) (interpreting RCW 48.18.200(1)(b)). Although the FAA would normally preempt a conflicting state law under the Supremacy Clause, the McCarran-Ferguson Act creates a system of "reverse-preemption" for insurance law. *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993). Under McCarran-Ferguson, "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." 15 U.S.C. § 1012(b). Courts have held that, under the McCarran-Ferguson Act, RCW 48.18.200 preempts Chapter I of the FAA. *See James River*, 176 Wash. 2d at 402; *Landmark Am. Ins. Co. v. QBE Ins. Corp.*, No. C15-1444 RSM, 2015 WL 12631550, at *6 (W.D. Wash. Dec. 9, 2015).

Plaintiffs argue that the same outcome should apply for Chapter II of the FAA and the Convention. According to Plaintiffs, the Convention is only enforceable in the U.S. through Chapter II of the FAA, which is an "Act of Congress" that is subject to the McCarran-Ferguson Act. *See* 15 U.S.C. § 1012(b). Consequently, because RCW 48.18.200 relates specifically to insurance and would be impaired by applying Chapter II of the FAA, the federal statute is preempted and the Convention is thus unenforceable. Defendants respond that, first, Article II, Section 3 of the Convention is self-executing, which means it does not require Chapter II of the FAA or any other implementing legislation to be enforceable domestically. Second, Defendants contend that, even if the Convention is non-self-executing, Chapter II of the FAA is not an "Act of Congress" within the meaning of the McCarran-Ferguson Act because it implements an international treaty.[1]

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[1] Defendants also argue that Washington law does not apply because the insured property is in Texas and, even if it does, the Policy does not cover "subjects located, resident, or to be performed in" Washington, making RCW 48.18.200 inapplicable. These arguments may have merit but are only raised in Defendants' Reply Brief. Dkt. # 32 at 9-10. As Plaintiffs point out, raising new arguments on reply is disfavored. *See United States v. Puerta*, 982 F.2d 1297, 1300 n.1 (9th Cir. 1992). In any case,

1. Overview of Case Law Analyzing the Convention on the Recognition of Foreign Arbitral Awards and the McCarran-Ferguson Act

Courts addressing the interplay between the McCarran-Ferguson Act and the Convention have applied divergent reasoning and reached conflicting outcomes. In a brief discussion, the Second Circuit concluded that the entire Convention is non-self-executing and that its implementing legislation is an "Act of Congress" that is preempted by state law under McCarran-Ferguson. *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995); *see also Foresight Energy, LLC v. Certain London Market Insurance Companies*, 311 F. Supp. 3d 1085, 1097-1101 (E.D. Mo. 2018) (agreeing with *Stephens*). *Stephens* does not explain why the Convention is non-self-executing but appears to rely on the mere existence of Chapter II of the FAA as proof that the Convention requires implementing legislation to be enforceable in the U.S. *See id*. (citing 9 U.S.C. §§ 201–208 (1994)).

The Fifth Circuit reached a contrary conclusion in *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009) (en banc). After hemming and hawing about whether Article II, Section 3 of the Convention is self-executing, *id.* at 721-22, the court bypassed the issue by holding that the phrase "Act of Congress" in the McCarran-Ferguson Act does not include treaties and their implementing legislation because it would make

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addressing these points would require additional briefing and possibly additional evidence. *See* Policy, Dkt. # 23, Ex. 1, at 48 (37 of 48) (stating that the insured "locations" are "specified in the Statement of Values on file with AmRisc . . . ."). Because the Court can decide the Motion on other grounds, the new arguments made on reply will not be considered.

no sense for Congress to "permit state law to preempt implemented, non-self-executing treaty provisions but not to preempt self-executing treaty provisions." *Id*. at 723-24. In another, somewhat confusing explanation, the court also concluded that Chapter II of the FAA only gains substance by referencing the Convention, which means the Convention itself supersedes Louisiana law. *Id*. at 724-25.

In *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376 (4th Cir. 2012), the Fourth Circuit also held that the Convention was enforceable but for different reasons. Although noting that there was "much to recommend" the argument that Section 3 is self-executing, the court similarly avoided this "confus[ing]" issue. *Id*. at 387-88. Instead, the court concluded that Congress did not intend for the McCarran-Ferguson Act's scope to encompass statutes implementing treaties. *Id*. at 389. In reaching this holding, *ESAB Group* relied on the Supreme Court's observation in *American Insurance Association v. Garamendi*, 539 U.S. 396, 428 (2003) that McCarran-Ferguson only applies to "domestic commerce legislation" and other cases limiting the McCarran-Ferguson Act's reach. *Id*. at 388-89 (citing *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982) (Title VII not preempted under McCarran-Ferguson); *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1995) (FSIA not preempted)).

Finally, in *Martin v. Certain Underwriters of Lloyd's, London*, the Central District of California squarely held that Section 3 is self-executing. No. SACV101298AGAJWX, 2011 WL 13227729, at *6 (C.D. Cal. Sept. 2, 2011). The court explained that Section 3's use of "the verb 'shall' . . . expressly directs courts to enforce arbitration agreements" and

thus gives Section 3 "automatic effect." *Id*. Consequently, because no "Act of Congress" was necessary for the Section 3's enforceability, the Convention was not preempted by California state law under McCarran-Ferguson. *Id*.

2. Whether the Convention is Preempted by RCW 48.18.200(1)(b) under the McCarran-Ferguson Act

After reviewing the above-described cases, the Court is most persuaded by *Martin*'s determination that the McCarran-Ferguson Act does not apply to Article II, Section 3 of the Convention because it is self-executing. The Supreme Court "has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). A treaty falls into the former, self-executing category when it "operates of itself without the aid of any legislative provision." *Id*. (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829)). In such situations, the treaty is "equivalent to an act of the legislature" and is declared by the Constitution to be "the law of the land." *Foster*, 27 U.S. at 314.

In contrast, a treaty is non-self-executing "when either of the parties [merely] engages to perform a particular act." *Id*. A non-self-executing treaty "addresses itself to the political, not the judicial department," and therefore requires Congress to enact implementing legislation "before it can become a rule for the Court." *Id*. "In sum, while treaties 'may comprise 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.'" *Medellin*, 552 U.S. at 505 (quoting *Igartua–De La Rosa v. United States*, 417 F.3d 145, 150 (C.A.1 2005) (en banc)). A treaty may "contain both self-executing and non-self-executing provisions." *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001).

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin*, 552 U.S. at 506 (citing *Air France v. Saks*, 470 U.S. 392, 396–397 (1985)). In *Medellin*, the Court analyzed Article 94(1) of the United Nations Charter, which provides that "[e]ach 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 508. The Court concluded that the phrase "undertakes to comply" renders the article non-self-executing because "[i]t does not provide that the United States 'shall' or 'must' comply with an ICJ decision" but rather "call[s] upon governments to take certain action." *Id*. (quoting *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (C.A.D.C. 1988)). In other words, "[t]he Article is not a directive to domestic courts." *Id*.

Here, Article II, Section 3 of the Convention commands that "[t]he court of a Contracting 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." 1970 WL 104417, at *1 (emphasis added). As the court in *Martin* explained, "[t]he word 'shall' does not leave discretion to the legislative or judicial branches to determine the degree of enforcement." 2011 WL 13227729, at *6. Section 3 contains exactly the type of "directive to

domestic courts" that was missing in *Medellin*, making it self-executing. *See* 552 U.S. at 508.

While the Fourth and Fifth Circuits ultimately shied away from this issue, their reasoning is consistent with the Court's conclusion. *ESAB Group* observed that the word "shall" in Section 3 is "indicative of a self-executing treaty provision" according to the Supreme Court. 685 F.3d at 387. And *Safety National* ultimately held that the Convention itself, not its implementing statute, supersedes Louisiana law because "it is by [the FAA's] reference to the Convention that we have a [judicially-enforceable] command." 587 F.3d at 721-22, 725. This type of "command" is also what makes the treaty self-executing.

Both cases declined to explicitly hold that Section 3 is self-executing largely because of a passage from *Medellin* in which the Court listed Chapter II of the FAA as an example of Congress implementing a non-self-executing treaty. 552 U.S. at 521-22. But this brief observation was made in dicta and is not binding. Furthermore, as observed in *Martin* and *Safety National*, it is unclear whether *Medellin* was referring to the entire Convention or only part of it. *See Martin*, 2011 WL 13227729, at *6; *Safety National*, 587 F.3d at 722.

Indeed, it may very well be that Section 3 is the Convention's only self-executing provision. While Section 3 states that "[t]he *court* of a Contracting State . . . shall . . . refer the parties to arbitration," the rest of the Convention's provisions omit the word "court." *See, e.g.*, Convention, Art. III, 1970 WL 104417, at *1 ("Each *Contracting State* shall recognize arbitral awards as binding . . . .") (emphasis added). This means that only Section 3 is directed to the "judicial department," rather than the "political department."

See Foster, 27 U.S. at 314. Consequently, *Stephen*'s assumption that the entire Convention is non-self-executing simply because Congress enacted Chapter II of the FAA is unpersuasive. 66 F.3d at 45 (citing 9 U.S.C. §§ 201–208).

Because Section 3 is self-executing, it is not an "Act of Congress" that is subject to preemption under the McCarran-Ferguson Act. The Convention controls and the Policy's arbitration clause is not barred by Washington law.

3. Enforceability of the Arbitration Clause under the Convention

Although Article II, Section 3 of the Convention is self-executing, Chapter II of the FAA nonetheless limits the Convention's application. *See* 9 U.S.C. § 202. Courts have boiled these limitations down to four requirements: "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 655 (9th Cir. 2009) (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294–95 (11th Cir.2005)). The Convention itself also limits enforcement of arbitration clauses that are "null and void," encompassing "standard breach-of-contract defenses[,] . . . such as fraud, mistake, duress, and waiver, that can be applied neutrally on an international scale." *Bautista*, 396 F.3d at 1302.

The parties do not argue that the Policy is "null and void" and the Court sees no reason why it would be. Furthermore, the first three requirements for applying the Convention are easily satisfied—the parties' insured/insurer-relationship is commercial in nature and governed by a written agreement with an arbitration clause. *See* Dkt. # 23, Ex. 1, at 37 (26 of 48).

The fourth requirement is a little trickier. The Lloyd's Underwriters do not comprise a single foreign company but rather a collection of names and syndicates that could be located anywhere in the world. *See Osting-Schwinn*, 613 F.3d at 1083. Although Defendants claim that "the Policy is subscribed to by numerous foreign entities incorporated under the laws of England and Wales," Motion, Dkt. # 22, at 8, the Policy itself does not identify where each syndicate is from. Dkt. # 23, Ex. 1, at 10 (3 of 4). However, Defendants also argue that their commercial relationship with Plaintiffs has a "reasonable relation to a foreign state" because "the Policy was underwritten through the Lloyd's of London insurance market in London, which was created by and is governed by Parliament." Dkt. # 22, at 8. The Court agrees. CLMS's Policy with the Lloyd's Underwriters is the product of a uniquely foreign insurance market and would not be available from a U.S. company. This is enough to satisfy the fourth requirement for the Policy to fall under the Convention.

This leaves only the question of whether Plaintiffs' claims against CJW, a Florida corporation, should also be sent to arbitration. CJW is not a party to the Policy but serves as the third-party claims administrator for the Lloyd's Underwriters. Motion, Dkt. # 22, at 3; Policy, Dkt. # 23, Ex. 1, at 39 (28 of 48). "[N]onsignatories of arbitration agreements may be bound

by the agreement under ordinary contract and agency principles." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). One test for an agency theory of nonsignatory enforcement is whether "the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Chastain v. Union Sec. Life Ins. Co.*, 502 F. Supp. 2d 1072, 1081-82 (C.D. Cal. 2007) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

Although neither party offers any argument on this point, the Court holds that CJW may enforce the Policy's arbitration clause. Plaintiffs allege that CJW informed them of the $3,600,000 deductible—the action that forms the basis of CJW's breach of contract claim against the Lloyd's Underwriters. Dkt. # 1, at 3-4. Plaintiffs' claim thus depends on the close relationship between CJW and the Lloyd's Underwriters that amounts to an agency relationship. It would eviscerate the arbitration clause's effect if CJW was barred from enforcing it.

There is no doubt that Plaintiffs' claims relate to the insurance provided by the Lloyd's Underwriters and therefore fall within the scope of the Policy's arbitration clause. Dkt. # 23, Ex. 1, at 37 (26 of 48). Those claims therefore belong before an arbitration tribunal in New York.

CONCLUSION

For the above reasons, Defendants' Motion to Compel Arbitration and Stay Proceedings [Dkt. # 22] is GRANTED.

IT IS SO ORDERED.

Dated this 26th day of December, 2019.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed February 11, 2020]

Case No. 3:19-cv-05785-RBL

CLMS MANAGEMENT SERVICES LIMITED PARTNERSHIP, ROUNDHILL I, L.P.,

Plaintiffs,

v.

AMWINS BROKERAGE OF GEORGIA, LLC; AMRISC, LLC; C.J.W. & ACCOCIATES, INC.; and CERTAIN UNDERWRITERS AT LLOYD'S,

Defendants.

HONORABLE RONALD B. LEIGHTON

ORDER ON MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(B)
DKT. # 43

THIS MATTER is before the Court on Plaintiffs' Motion for Certification Pursuant to 28 U.S.C. § 1292(b). Dkt. # 43. Plaintiffs wish to appeal the Court's December 26, 2019 Order granting Defendants' Motion to Compel Arbitration and Stay Proceedings on the basis that RCW 48.18.200, which bars mandatory arbitration clauses in insurance contracts,

is preempted by the Convention on the Recognition of Foreign Arbitral Awards, Art. II, Sec. 3, which requires U.S. Courts to enforce arbitration clauses upon request. Order, Dkt. # 41.

Certification of a non-appealable order under 28 U.S.C. § 1292(b) is appropriate only when the following three requirements are met: (1) the order involves a controlling question of law; (2) as to which there is a substantial ground for a difference of opinion; and (3) an immediate appeal from the order could materially advance the ultimate termination of the litigation. *See* 28 U.S. C. §1292(b); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025-26 (9th Cir. 1982). The Ninth Circuit instructs that certification under § 1292(b) "is to be applied sparingly and only in exceptional cases." *United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959). Exceptional cases are those in which allowing interlocutory appeal would avoid protracted and expensive litigation. *In re Cement Antitrust Litigation*, 673 F.2d at 1026.

This is such a case. First, the issue raised for appeal is controlling because it will determine whether this dispute will be resolved via arbitration in New York or in these proceedings. Second, as the Court observed in its Order, there is considerable disagreement between courts around the country about whether and why the Convention preempts state laws like RCW 48.18.200. *See* Dkt. # 41 at 5-7. The Ninth Circuit has not weighed in on the question. Consequently, although the Court is confident in its reasoning, this is not a run-of-the-mill arbitration scenario; rather, the issue raised for appeal is complex and there is clearly room for disagreement.

Finally, although granting Plaintiffs' Motion will mean that this case temporarily remains in the federal

judiciary, it will ultimately lessen the risk of the parties spending unnecessary time litigating. Allowing Plaintiffs to appeal now rather than after the conclusion of arbitration and formal dismissal of this case will eliminate the danger of going through an entire unnecessary arbitration process. On the other hand, denying Plaintiffs' Motion would guarantee that arbitration takes place but may also result in the same appeal occurring on a later date. It is therefore in the interest of efficiency to allow Plaintiffs to go forward with their interlocutory appeal.

For the above reasons, Plaintiffs' Motion for Certification Pursuant to 28 U.S.C. § 1292(b) is GRANTED. This case shall remain STAYED until the culmination of the appeal process.

IT IS SO ORDERED.

Dated this 11th day of February, 2020.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 19, 2020]

No. 20-80039

CLMS MANAGEMENT SERVICES LIMITED PARTNERSHIP; ROUNDHILL I LP,

Plaintiffs-Petitioners,

v.

AMWINS BROKERAGE OF GEORGIA LLC; et al.,

Defendants-Respondents.

D.C. No. 3:19-cv-05785-RBL
Western District of Washington, Tacoma

ORDER

Before: NGUYEN and COLLINS, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioners shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35428

CLMS MANAGEMENT SERVICES LIMITED PARTNERSHIP; ROUNDHILL I, LP,

Plaintiffs-Appellants,

v.

AMWINS BROKERAGE OF GEORGIA, LLC; AMRISC, LLC; CJW & ASSOCIATES, INC.; CERTAIN UNDERWRITERS AT LLOYD'S,

Defendants-Appellees.

D.C. No. 3:19-cv-05785-RBL

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted April 15, 2021
Seattle, Washington

Filed August 12, 2021

Before: Michael Daly Hawkins,
M. Margaret McKeown, and Morgan Christen,
Circuit Judges.

Opinion by Judge Christen

OPINION

SUMMARY[*]

Arbitration / McCarran-Ferguson Act

The panel affirmed the district court's order granting a motion to compel arbitration in plaintiffs' diversity insurance coverage action.

The insurers filed a motion to compel arbitration, arguing that the policy issued to plaintiffs had an arbitration provision that fell within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a multilateral treaty. Plaintiffs argued that the arbitration provision was unenforceable because Washington law prohibited the enforcement of arbitration clauses in insurance contracts and the McCarran-Ferguson Act operated to reverse-preempt the Convention, such that Washington law controlled.

The panel held that the text of Article II, Section 3 of the Convention and the Convention's relevant drafting and negotiation history led to the conclusion that Article II, Section 3 was self-executing, and it required enforcement of the parties' arbitration agreement. The panel further concluded that the Convention was not reverse-preempted by Wash. Rev. Code § 48.18.200. Because the Convention was not an "Act of Congress" subject to reverse-preemption by the

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

McCarran-Ferguson Act, the district court correctly granted defendants' motion to compel arbitration.

COUNSEL

Michael A. Barcott (argued) and Daniel P. Barcott, Holmes Weddle & Barcott, Seattle, Washington, for Plaintiffs-Appellants.

Colleen V. McCaffrey (argued) and Shannon M. Benbow, Wood Smith Henning & Berman LLP, Seattle, Washington; Jeffrey S. Weinstein, Mound Cotton Wollan & Greengrass LLP, New York, New York; for Defendants-Appellees.

David S. Watnick, Covington & Burling LLP, San Francisco, California; Mark W. Mosier and Jordan V. Hill, Covington & Burling LLP, Washington, D.C.; for Amicus Curiae United Policyholders.

OPINION

CHRISTEN, Circuit Judge:

This appeal presents an issue of first impression in this circuit that lies at the intersection of international, federal, and state law: whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15, allows a Washington statute to reverse-preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a multilateral treaty. We conclude that the relevant provision of the Convention is self-executing, and therefore not an "Act of Congress" subject to reverse-preemption by the McCarran-Ferguson Act. Accordingly, we affirm the district court's order compelling arbitration.

I

In 2016, Plaintiffs CLMS Management Services Limited Partnership (CLMS) and Roundhill I, LP,

domestic entities, entered into an insurance contract (the Policy) through defendant Amrisc, LLC. The Policy provided coverage for a townhome complex in Texas that Roundhill owns and CLMS operates. The relevant portion of the Policy was underwritten by defendants Certain Underwriters at Lloyd's London (Lloyd's), members of a foreign organization, and it contains a mandatory arbitration provision:

> All matters in difference between the Insured and the Companies (hereinafter referred to as "the parties") in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal in the matter hereinafter set out . . . .
>
> The seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance. . . .
>
> The award of the Arbitration Tribunal shall be in writing and binding upon the parties who covenant to carry out the same. If either of the parties should fail to carry out any award the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business.

In August 2017, Hurricane Harvey caused an estimated $5,660,000 in damages to the townhome complex. Plaintiffs submitted a claim under the Policy, but in May 2018 defendant CJW & Associates (CJW), a third-party claims administrator for Lloyd's, responded that the Policy's deductible was $3,600,000.

Plaintiffs filed a complaint in the Western District of Washington asserting three claims: breach of contract, failure to communicate policy changes, and unfair claims handling practices in violation of Washington law.[1] The primary allegation underlying plaintiffs' claims is that "[u]nder the Policy, the deductible should be $600,000, not $3,600,000."

Lloyd's and CJW filed a motion to compel arbitration and stay proceedings in the district court. The motion argued that the Policy's arbitration provision falls within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), by which the United States committed to enforce arbitration agreements between foreign and domestic entities. Lloyd's and CJW argued that the Convention required the district court to refer plaintiffs' claims to arbitration.

Plaintiffs did not contest that the arbitration provision falls within the Convention's scope, but argued the provision is unenforceable because Washington law specifically prohibits the enforcement of arbitration clauses in insurance contracts and the McCarran-Ferguson Act operates to reverse-preempt the Convention, such that Washington law controls. Therefore, plaintiffs argued, the arbitration provision is unenforceable.

The district court granted Lloyd's and CJW's motion. The court reasoned that Article II, Section 3 of the Convention is self-executing, and therefore is not an "Act of Congress" subject to reverse-preemption pursuant to the McCarran-Ferguson Act. The dis-

[1] For purposes of this appeal, the parties do not dispute that Washington law applies to the merits of these claims.

trict court held that it was required to enforce the arbitration provision pursuant to the Convention.

The court recognized that the parties' dispute presents a question of first impression in this circuit, and certified its order for interlocutory review. A motions panel of our court granted plaintiffs' petition for permission to appeal. We have jurisdiction pursuant to 28 U.S.C. § 1292(b).

II

We review de novo a district court's order compelling arbitration. *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1152 (9th Cir. 2004). The district court explained that enforcement of the arbitration clause turns on a clash between two sources of law: a Washington statute that prohibits mandatory predispute arbitration clauses in insurance contracts, and Article II, Section 3 of the Convention, which, with few exceptions, requires United States courts to enforce written arbitration agreements like the one at issue here, between foreign and domestic entities.

As the district court aptly observed, the McCarran-Ferguson Act lies "[a]t the fulcrum" of Washington law and the Convention. In most instances, the Supremacy Clause mandates that a state law gives way to conflicting federal law, but the McCarran-Ferguson Act "provides that state insurance law preempts conflicting federal law." Thus, the question central to this appeal is whether Washington law, by operation of the McCarran-Ferguson Act, reverse-preempts the Convention.

Wash. Rev. Code § 48.18.200 provides:

> (1) . . . [N]o 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 . . .
>
> (b) depriving the courts of this state of the jurisdiction of action against the insurer . . . .
>
> (2) 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 Washington Supreme Court has interpreted § 48.18.200 to "prohibit[] binding arbitration agreements in insurance contracts," and held that predispute binding arbitration provisions in insurance contracts are unenforceable. *State, Dep't of Transp. v. James River Ins. Co.*, 292 P.3d 118, 123 (Wash. 2013). We are bound by the Washington Supreme Court's interpretation of § 48.18.200. *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) ("[F]ederal courts are bound by the pronouncements of the state's highest court on applicable state law.").

The Convention is a multilateral treaty crafted during a 1958 United Nations conference. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 381 (4th Cir. 2012). The United States participated in the Convention's drafting, but did not accede to the Convention until 1970. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020). Article II of the Convention provides in full:

> 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 which may arise between them in respect of a defined legal relationship, whether contrac-

> tual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting 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.[2]

The Convention art. II, June 10, 1958, 21 U.S.T. 2517 (emphasis added). "The Convention obligates signatories (1) to recognize and enforce written agreements to submit disputes to foreign arbitration and (2) to enforce arbitral awards issued in foreign nations." *ESAB Group*, 685 F.3d at 381.

Congress amended Title 9 of the U.S. Code to accommodate implementation of the Convention. The Convention Act, 9 U.S.C. § 201 *et seq.*, states that the Convention "shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. § 201. As the Supreme Court has explained, the Convention Act also "grants federal courts jurisdiction over actions governed by the Convention, § 203; establishes venue for such actions, § 204; authorizes removal from state

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[2] The exception that arbitration agreements need not be enforced if they are "null and void, inoperative or incapable of being performed" is not at issue here.

court, § 205; and empowers courts to compel arbitration, § 206." *GE Energy*, 140 S. Ct. at 1644. If the Convention and Washington state law were the only provisions in play, the parties agree that Washington's law would be preempted pursuant to ordinary Supremacy Clause principles. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land." (emphasis added)).

But in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552–53 (1944), that insurance is subject to federal regulation under the Commerce Clause, Congress enacted the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993). The McCarran-Ferguson Act first 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." 15 U.S.C. § 1011. The portion of the Act at the center of this appeal provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Thus, the McCarran-Ferguson Act "transformed the legal landscape by overturning the normal rules of pre-emption." *Fabe*, 508 U.S. at 507. "The first clause of [§ 1012(b)] reverses [the normal preemption rules] 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.*

III

We begin by considering whether it is the Convention or the Convention Act that compels enforcement of the arbitration agreement. Defendants argue that Article II, Section 3 of the Convention is self-executing, and it is therefore the Convention that compels enforcement. More specifically, they contend that because a self-executing multilateral treaty is not an "Act of Congress," the Convention preempts Washington state law. Plaintiffs counter that the Convention is not self-executing, and argue it is enforceable as domestic law only through the Convention Act. From there, plaintiffs rely on the McCarran-Ferguson Act to argue that because the Convention Act does not specifically relate to the business of insurance, it is reverse-preempted by Wash. Rev. Code § 48.18.200, and the parties' arbitration agreement is unenforceable.

The Supreme Court has "long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). A treaty is self-executing and has automatic force as domestic law "when it 'operates of itself without the aid of any legislative provision.'" *Id.* at 505 (quoting *Foster v. Neilson*, 27 U.S. 253, 254 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. 51 (1833)). "When, in contrast, '[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.'" *Id.* (alteration

in original) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). We have said that, "[a]t its core, the question of self-execution addresses whether a treaty provision is directly enforceable in domestic courts." *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1193 (9th Cir. 2017).

"The interpretation of a treaty, like the interpretation of a statute, begins with its text," *Medellin*, 552 U.S. at 506, and "[s]ome treaties reveal their self-execution by expressly calling for direct judicial enforcement," *Marshall Islands*, 865 F.3d at 1194. Applying this "time-honored textual approach," *Medellin*, 552 U.S. at 514, we conclude Article II, Section 3 of the Convention is self-executing.[3]

In *Medellin*, the Supreme Court considered whether a judgment of the International Court of Justice (ICJ) was directly enforceable as domestic law. 552 U.S. at 498. The Court explained that "[t]he obligation on the part of signatory nations to comply with ICJ judgments derives . . . from Article 94 of the United Nations Charter," which provides that "[e]ach 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 508 (alterations in second quotation in original) (emphasis omitted) (quoting 59 Stat. 1051). The Court concluded Article 94 is non-self-executing, and therefore ICJ decisions are not automatically enforceable, because Article 94 "is not a directive to domestic courts" and "does not provide that the United

[3] Treaties may contain both self-executing and non-self-executing provisions. *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); Restatement (Third) Foreign Relations Law of the United States § 111 cmt. h (1987) ("Some provisions of an international agreement may be self-executing and others non-self-executing.").

States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts." *Id.* Instead, the Court explained that Article 94 "call[s] upon governments to take certain action" and "reads like 'a compact between independent nations' that 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Id.* at 508–09 (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988); *Edye v. Robertson*, 112 U.S. 580, 598 (1884)).

Our court has relied on similar textual clues to conclude that Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is non-self-executing. *Marshall Islands*, 865 F.3d at 1193–99. That treaty provision states that the signatories "undertake[] to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 21 U.S.T. 483. The court in *Marshall Islands* reasoned that Article VI is non-self-executing in part because it is neither directed to domestic courts nor calls for immediate judicial enforcement. 865 F.3d at 1195. Rather, the text of Article VI is a "prime example of language that offers no 'directive to domestic courts' and instead calls for future action by a political branch." *Id.* (quoting *Medellin*, 552 U.S. at 508).

Plaintiffs argue that, like the provisions at issue in *Medellin* and *Marshall Islands*, Article II, Section 3 is merely a "general proclamation" that "provides no

additional guidance as to the mechanism for enforcing [] an agreement to arbitrate." We disagree. Article II, Section 3 of the Convention stands in stark contrast to the treaty provisions at issue in *Medellin* and *Marshall Islands*. Rather than speaking in broad, aspirational terms, it provides that "*[t]he court of a Contracting 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* . . . ." 21 U.S.T. 2517 (emphases added). This provision is addressed directly to domestic courts, mandates that domestic courts "shall" enforce arbitration agreements, and "leaves no discretion to the political branches of the federal government whether to make enforceable the agreement-enforcing rule it prescribes." *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 735 (5th Cir. 2009) (en banc) (Clement, J., concurring). A straightforward application of the textual analysis outlined in *Medellin* compels the conclusion that Article II, Section 3 is self-executing; it is plainly unlike the types of "general proclamations" at issue in *Medellin* and *Marshall Islands*.

Though the text of Article II, Section 3 leaves little doubt that the provision is self-executing, "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985). Accordingly, we also "look to the executive branch's interpretation . . . , the views of other contracting states, and the treaty's negotiation and drafting history in order to ensure that [our] interpretation of the text is not contradicted by other evidence of intent." *Patterson v. Wagner*, 785 F.3d

1277, 1282 (9th Cir. 2015) (citing *Abbott v. Abbott*, 560 U.S. 1, 15–20 (2010)).

Prior to the United States' accession to the Convention, President Lyndon Baines Johnson transmitted the Convention to the Senate for its advice and consent. Message from the President of the United States Transmitting the Convention, S. Exec. Doc. E 90-2 (Apr. 24, 1968).[4] President Johnson explained that the Convention would "facilitate the recognition and enforcement by foreign courts of arbitral awards granted in the United States as well as similar action by our courts with respect to foreign arbitral awards." *Id.* at 1. President Johnson further explained that before the United States would accede to the Convention, "[c]hanges in Title 9 (Arbitration) of the United States Code will be required," *id.*, and at Senate hearings addressing the Convention "the witness from the Department [of State] informed the Foreign Relations Committee that deposit of the U.S. Instrument of Accession would be deferred until Congress enacted the necessary implementing legislation," H.R. Rep. No. 91-1181, at 3603 (1970).

This historical record shows that the executive believed some changes in federal law were necessary to accommodate and implement at least some portions of the Convention, but plaintiffs point to no evidence that the Convention's drafters and negotiators believed Article II, Section 3, specifically, was not self-executing. Indeed, the Convention Act's other provisions largely address procedural and logistical matters, such as federal courts' jurisdiction to hear claims arising under the Convention and the proper

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[4] Available at https://cdn.arbitration-icca.org/s3fspublic/document/media_document/038.pdf.

venue for such claims. *See GE Energy*, 140 S. Ct. at 1644; Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 147 (2018) (arguing the enactment of the Convention Act shows "only that Congress wanted to ensure the effective and efficient enforcement of the Convention's self-executing substantive terms in U.S. courts" by providing "procedural and ancillary mechanisms" that "could not sensibly" be addressed by a multilateral treaty with 159 Contracting States). The Supreme Court has "never provided a full explanation of the basis for [its] practice of giving weight to the Executive's interpretation of a treaty" or "delineated the limitations of this practice, if any," *GE Energy*, 140 S. Ct. at 1647, and President Johnson's message is, at best, inconclusive regarding whether Article II, Section 3 is self-executing. We conclude that President Johnson's message does not override the plain text of the Convention.

Moreover, in a brief to the Supreme Court, the Solicitor General has more recently expressed the view that Article II, Section 3 of the Convention is self-executing. In *Safety National*, the Fifth Circuit, sitting en banc, concluded that the McCarran-Ferguson Act does not reverse-preempt Article II, Section 3 of the Convention but did not decide whether that provision is self-executing. *See* 587 F.3d at 731 ("[W]e conclude that implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act."). The *Safety National* plaintiffs petitioned for certiorari, and the Supreme Court called for the Solicitor General's views. The Solicitor argued that Article II, Section 3 of the Convention contains "precisely the elements" the Supreme Court was looking for in *Medellin*, namely, mandatory language directed to courts rather than aspirational language directed to the political branches.

Brief for the United States as Amicus Curiae, *La. Safety Ass'n of Timbermen - Self Insurers Fund v. Certain Underwriters at Lloyd's, London*, No. 09-945, 2010 WL 3375626 at *8–9 (2010). The Solicitor General argued "the fact that domestic legislation may have been necessary to clarify jurisdiction-and venue-related issues pertaining to the implementation of the Convention does not contradict the conclusion that Article II[, Section 3] is self-executing." *Id.* at *11.

Plaintiffs argue that the Supreme Court has identified the Convention as an example of a non-self-executing treaty. But for support, plaintiffs point only to the Supreme Court's passing reference to the Convention Act in *Medellin* as an example of a statute that implements a treaty. The dicta plaintiffs rely upon states:

> Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. *See, e.g.*, 22 U.S.C. § 1650a(a) . . . ; 9 U.S.C. §§ 201–208 ("The [U.N.] 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," § 201). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.

Medellin, 552 U.S. at 521–22. Taken in context, the Court's citation to the Convention Act, which includes procedural and logistical provisions pertaining to subjects like venue and federal court jurisdiction, does

not undermine the self-executing language of Article II, Section 3. *See Safety National*, 587 F.3d at 736 (Clement, J., concurring) (arguing that *Medellin*'s "dictum offers little support for the view that the Convention is non-self-executing in all respects"). Unlike Article II, the remaining provisions of the Convention do not impose direct obligations upon domestic courts. *See generally* 21 U.S.T. 2517. *Medellin* does not suggest that all provisions within the Convention are non-self-executing, and it makes no mention of Article II, Section 3 at all. Indeed, relying on *Medellin*'s passing reference to the Convention Act to conclude that Article II, Section 3 is non-self-executing would contradict *Medellin*'s own clear direction that "[t]he interpretation of a treaty . . . begins with its text," not the existence of legislation enacted to implement various treaty provisions. *Medellin*, 552 U.S. at 506.

The plain text of Article II, Section 3 and the Convention's relevant drafting and negotiation history lead us to conclude that Article II, Section 3 is self-executing. We therefore conclude it is the Convention itself that requires enforcement of the parties' arbitration agreement.

IV

Plaintiffs point to the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995), to caution that the conclusion that Article II, Section 3 is self-executing creates a circuit split. With respect, we disagree with the Second Circuit's interpretation of the Convention. *Stephens* was decided more than twenty-five years ago, before the Supreme Court issued *Medellin*. Without the benefit of *Medellin*'s guidance, the Second Circuit concluded that the Convention is non-self-executing

but it did not undertake an analysis of the Convention's text, drafting and negotiation history, or the views of the executive. *Stephens*, 66 F.3d at 45; *cf. Medellin*, 552 U.S. at 506–07. Rather, *Stephens* seemed to rely exclusively on the existence of the Convention Act to conclude the Convention is non-self-executing. *Stephens*, 66 F.3d at 45.

Our conclusion that Article II, Section 3 is self-executing finds support in the reasoning of the Fourth and Fifth Circuits. *See ESAB Group*, 685 F.3d at 387 (acknowledging there is "much to recommend" the position that Article II, Section 3 is self-executing); *Safety National*, 587 F.3d at 722 (applying the reasoning of *Medellin* and explaining that "[t]he Convention expressly states that domestic courts 'shall' compel arbitration when requested by a party to an international arbitration agreement"). Both the Fourth Circuit and the Fifth Circuit en banc majority stopped short of deciding whether Article II, Section 3 is self-executing because they relied on other grounds to conclude the Convention required enforcement of the arbitration provisions at issue, but both circuits recognized that Article II, Section 3 is a mandatory directive to domestic courts, and this is an essential characteristic of self-executing treaties. *ESAB Group*, 685 F.3d at 387; *Safety National*, 587 F.3d at 722. The conclusions reached in *ESAB Group* and *Safety National* align with our ultimate conclusion: state laws prohibiting arbitration provisions in insurance contracts do not reverse-preempt the Convention's command that domestic courts are obligated to enforce international arbitration agreements unless such agreements are null and void, inoperative, or incapable of being performed. 21 U.S.T. 2517.

V

Having concluded Article II, Section 3 of the Convention is self-executing and that it alone requires enforcement of the parties' arbitration agreement, we must decide whether it is reverse-preempted by Wash. Rev. Code § 48.18.200, which renders pre-dispute arbitration agreements in insurance contracts unenforceable. We conclude the Convention is not reverse-preempted.

The McCarran-Ferguson Act broadly provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). This imposes a clear-statement 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." *Fabe*, 508 U.S. at 507 (internal quotation marks and citation omitted).

The parties do not expressly dispute that a multilateral treaty entered into by the United States, on its own, is not an "Act of Congress" for purposes of the McCarran-Ferguson Act, and we agree with the Fifth Circuit that "[t]he commonly understood meaning of an 'Act of Congress' does not include a 'treaty.'" *Safety National*, 587 F.3d at 723. Congress consists of both the Senate and House of Representatives. U.S. Const. art. I, § 1. Because treaties require only the approval of the Senate, U.S. Const. art. II, § 2, cl. 2, a treaty is more accurately described as an exercise of executive power constrained by the Constitution, not as an "Act of Congress." Indeed, the Supremacy Clause itself distinguishes between "the Laws of the United States,"

which must comport with the bicameralism and presentment requirements, *see I.N.S. v. Chadha*, 462 U.S. 919, 948–49 (1983), and "Treaties," which need not, U.S. Const. art. II, § 2.

The legislative history of the McCarran-Ferguson Act is consistent with our conclusion that Congress did not intend the McCarran-Ferguson Act to apply to treaties. In a Senate debate prior to passage of the Act, Senator Homer Ferguson, one of the Act's co-sponsors, explained:

> the purpose of [§ 1012(b)] is very clear, that Congress did not want at the present time to take upon itself the responsibility of interfering with the taxation of insurance or the regulation of insurance by the States. . . . If there is on the books of the United States a *legislative act* which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected, because Congress had not, under [§ 1012(b)], said that the new law specifically applied to insurance.

91 Cong. Rec. 481 (1945). This legislative history reinforces what the text makes clear: an "Act of Congress" within the meaning of the McCarran-Ferguson Act is a "legislative act" passed by both houses of Congress. *Id.*; *see Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (explaining that "a federal statute directed to implied preemption by domestic commerce legislation

cannot sensibly be construed to address preemption by executive conduct in foreign affairs").

Moreover, as the Fourth Circuit observed, construing the McCarran-Ferguson Act to permit state laws to reverse-preempt multilateral treaties would frustrate the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments." *ESAB Group*, 685 F.3d at 390 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)). By acceding to the Convention, "the government has opted to use this voice to articulate a uniform policy in favor of enforcing agreements to arbitrate internationally, even when 'a contrary result would be forthcoming in a domestic context.'" *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)). "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995). We do not interpret the McCarranFerguson Act to reverse-preempt Article II, Section 3 of the Convention.

VI

Article II, Section 3 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards is self-executing, and it requires enforcement of the parties' arbitration agreement. Because the Convention is not an "Act of Congress" subject to reverse-preemption by the McCarran-Ferguson Act, the district court correctly granted defendants' motion to compel arbitration.

AFFIRMED.

APPENDIX E

15 U.S.C.A. § 1011

§ 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.

15 U.S.C.A. § 1012

§ 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 supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless 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 October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C.A. § 1013

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

Effective: January 13, 2021

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

(c)(1) Nothing contained in this chapter shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits).

(2) Paragraph (1) shall not apply with respect to making a contract, or engaging in a combination or conspiracy——

(A) to collect, compile, or disseminate historical loss data;

(B) to determine a loss development factor applicable to historical loss data;

(C) to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade; or

(D) to develop or disseminate a standard insurance policy form (including a standard addendum to an insurance policy form and standard terminology in an insurance policy form) if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form.

(3) For purposes of this subsection—

(A) the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition;

(B) the term "business of health insurance (including the business of dental insurance and limited-scope dental benefits)" does not include—

(i) the business of life insurance (including annuities); or

(ii) the business of property or casualty insurance, including but not limited to—

(I) any insurance or benefits defined as "excepted benefits" under paragraph (1), subparagraph (B) or (C) of paragraph (2), or paragraph (3) of section 9832(c) of Title 26 whether offered separately or in combination with insurance or benefits described in paragraph (2)(A) of such section; and

(II) any other line of insurance that is classified as property or casualty insurance under State law;

(C) the term "historical loss data" means information respecting claims paid, or reserves held for claims reported, by any person engaged in the business of insurance; and

(D) the term "loss development factor" means an adjustment to be made to reserves held for losses incurred for claims reported by any person engaged in the business of insurance, for the purpose of bringing such reserves to an ultimate paid basis.

15 U.S.C.A. § 1014

§ 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

15 U.S.C.A. § 1015

§ 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

APPENDIX F

9 U.S.C.A. § 201

§ 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.

9 U.S.C.A. § 202

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C.A. § 203

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over

such an action or proceeding, regardless of the amount in controversy.

9 U.S.C.A. § 204

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

9 U.S.C.A. § 205

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C.A. § 206

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

9 U.S.C.A. § 207

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C.A. § 208

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

APPENDIX G

T.I.A.S. No. 6997 (U.S. Treaty), 21 U.S.T. 2517 (U.S. Treaty), 1970 WL 104417 (U.S. Treaty)

UNITED STATES OF AMERICA

Multilateral

Recognition and Enforcement of Foreign Arbitral Awards[1]

Convention done at New York June 10, 1958;[2]

Accession, with declarations, advised by the Senate of the United States of America October 4, 1968; Accession, with said declarations, approved by the President of the United States of America September 1, 1970; Accession of the United States of America, with said declarations, deposited with the Secretary-General of the United Nations September 30, 1970; Proclaimed by the President of the United States of America December 11, 1970; Entered into force with respect to the United States of America December 29, 1970.

December 29, 1970.

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[1] For note by the Department of State, see p. 2561.

[2] Texts as certified by the Secretary-General of the United Nations.

BY THE PRESIDENT OF
THE UNITED STATES OF AMERICA

A PROCLAMATION

UNITED NATIONS CONFERENCE ON
INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION
AND ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS

Article I

Article II

Article III

Article IV

Article V

Article VI

Article VII

Article VIII

Article IX

Article X

Article XI

Article XII

Article XIII

Article XIV

Article XV

Article XVI

Note by the Department of State

BY THE PRESIDENT OF
THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

UNITED NATIONS CONFERENCE ON
INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION
AND ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to

differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.[3]

Article II

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

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting 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.

Article III

1. Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of

[3] For note by the Department of State, see p. 2561.

arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927[4] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is

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[4] 27 LNTS 157; 92 LNTS 301.

or hereafter becomes a party to the Statute of the International Court of Justice,[5] or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature,

[5] TS 993; 59 Stat. 1055.

ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII; (*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

FOR AFGHANISTAN:

FOR ALBANIA:

FOR ARGENTINA:

Subject to the declaration contained in the Final Act.

C. RAMOS
26 August 1958

FOR AUSTRALIA:

FOR AUSTRIA:

FOR THE KINGDOM OF BELGIUM:

Joseph NISOT
A. HERMENT

FOR BOLIVIA:

FOR BRAZIL:

FOR BULGARIA:

Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment.

A. GHEORGIEV 17 XII 1958

FOR THE UNION OF BURMA:

FOR THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC:

F. N. GRYAZNOV
29/XII-1958

FOR CAMBODIA:

FOR CANADA:

FOR CEYLON:

M. T. D. KANAKARATNE December 30th, 1958

FOR CHILE:

FOR CHINA:

FOR COLOMBIA:

FOR COSTA RICA:

Alberto F. CAÑAS

FOR CUBA:

FOR CZECHOSLOVAKIA:

Czechoslovakia will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these states grant reciprocal treatment.

Jaroslav PŠČOLKA October 3, 1958

FOR DENMARK:

FOR THE DOMINICAN REPUBLIC:

FOR ECUADOR:

José A. CORREA Dec 17/1958

FOR EL SALVADOR:

M. Rafael URQUÍA

F.R. LIMA

FOR ETHIOPIA:

FOR THE FEDERATION OF MALAYA:

FOR FINLAND:

G.A. GRIPENBERG Dec. 29th, 1958

FOR FRANCE:

G. GEORGES-PICOT
25 November 1958

FOR THE FEDERAL REPUBLIC OF GERMANY:

A. BULOW

FOR GHANA:

FOR GREECE:

FOR GUATEMALA:

FOR HAITI:

FOR THE HOLY SEE:

FOR HONDURAS:

FOR HUNGARY:

FOR ICELAND:

FOR INDIA:
C. K. DAPHTARY

FOR INDONESIA:

FOR IRAN:

FOR IRAQ:

FOR IRELAND:

FOR ISRAEL:

H. COHN

FOR ITALY:

FOR JAPAN:

FOR THE HASHEMITE KINGDOM OF JORDAN:
Thabet KHALIDI

FOR THE REPUBLIC OF KOREA:

FOR LAOS:

FOR LEBANON:

FOR LIBERIA:

FOR LIBYA:

FOR LIECHTENSTEIN:

FOR THE GRAND DUCHY OF LUXEMBOURG:
Georges HEISBOURG
Le 11 novembre 1958

FOR MEXICO:

FOR MONACO:

Marcel PALMARO Le 31/12/58

FOR MOROCCO:

FOR NEPAL:

FOR THE KINGDOM OF THE NETHERLANDS:

C. SCHURMANN

FOR NEW ZEALAND:

FOR NICARAGUA:

FOR THE KINGDOM OF NORWAY:

FOR PAKISTAN:

K. M. KAISER
30th of December 1958

FOR PANAMA:

FOR PARAGUAY:

FOR PERU:

FOR THE PHILIPPINE REPUBLIC:

Octavio L. MALOLES

The Philippine delegation signs *ad referendum* this Convention with the reservation that it does so on the basis of reciprocity and declares that the Philippines will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State pursuant to article I, paragraph 3, of the Convention.

FOR POLAND:

Jacek MACHOWSKI

With reservations as mentioned in article I, par. 3.

FOR PORTUGAL:

FOR ROMANIA:

FOR SAN MARINO:

FOR SAUDI ARABIA:

FOR SPAIN:

FOR THE SUDAN:

FOR SWEDEN:
Agda RÖSSEL Dec. 23, 1958

FOR SWITZERLAND:

Felix SCHNYDER
29 décembre 1958

FOR THAILAND:

FOR TUNISIA:

FOR TURKEY:

FOR THE UKRAINIAN SOVIET SOCIALIST REPUBLIC:

P. P. UDOVICHENKO
29.XII.1958

FOR THE UNION OF SOUTH AFRICA:

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:

A. A. SOBOLEV
29-XII-58

FOR THE UNITED ARAB REPUBLIC:

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

FOR THE UNITED STATES OF AMERICA:

FOR URUGUAY:

FOR VENEZUELA:

FOR VIET-NAM:

FOR YEMEN:

FOR YUGOSLAVIA:

By its resolution of October 4, 1968, the Senate of the United States of America, two-thirds of the Senators present concurring, gave its advice and consent to accession to the Convention with the following declarations:

> "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."
>
> "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

The accession of the United States of America to the Convention was approved by the President of the United States of America with the aforesaid declarations on September 1, 1970, and the instrument of accession was deposited with the Secretary-General of the United Nations on September 30, 1970;

In accordance with paragraph 2 of Article XII, the Convention will enter into force for the United States of America on December 29, 1970, the ninetieth day after the deposit of its instrument of accession;

In accordance with paragraph 2 of Article X and pursuant to a notification by the Government of the

United States of America received by the Secretary-General of the United Nations on November 3, 1970, the application of the aforesaid Convention will extend, with effect from February 1, 1971, to all the territories for the international relations of which the United States of America is responsible;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to the end that, subject to the aforesaid declarations, it shall be observed and fulfilled, as to the United States of America on and after December 29, 1970, and as to all the territories for the international relations of which the United States of America is responsible on and after February 1, 1971, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed. DONE at the city of Washington this eleventh day of December in the year of our Lord one thousand nine hundred seventy and of the Independence of the United States of America the one hundred ninety-fifth.

[SEAL]
RICHARD NIXON

By the President:
WILLIAM P ROGERS
Secretary of State

Note by the Department of State

List of countries parties to the convention as of December 29, 1970, with texts of declarations and reservations made at the time of signature of the convention or deposit of the instrument of ratification or accession.

Country	**Date of deposit of ratification or accession (a)**
Austria	May 2, 1961(a)
The Republic of Austria will apply the Convention, in accordance with the first sentence of article I(3) thereof, only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State.	
[Translation]	
Bulgaria	October 10, 1961
Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment. [Translation]	
Byelorussian Soviet Socialist Republic	November 15, 1960

The Byelorussian Soviet Socialist Republic will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment. [Translation]

Cambodia	January 5, 1960(a)
Central African Republic	October 15, 1962(a)

Referring to the possibility offered by paragraph 3 of article I of the Convention, the Central African Republic declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

[Translation]

Ceylon	April 9, 1962
Czechoslovakia	July 10, 1959

"Czechoslovakia will apply the Convention to recognition and enforcement of awards made in

the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment."

Ecuador — January 3, 1962

Ecuador, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting State only if such awards have been made with respect to differences arising out of legal relationships which are regarded as commercial under Ecuadorean law. [Translation]

Finland — January 19, 1962

France[6] — June 26, 1959

Referring to the possibility offered by paragraph 3 of article I of the Convention, France declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences

[6] Extended to all territories of the French Republic.

arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

[Translation]

Germany, Federal Republic of[7] June 30, 1961

"With respect to paragraph 1 of article I, and in accordance with paragraph 3 of article I of the Convention, the Federal Republic of Germany will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State."

Ghana April 9, 1968(a)

Greece July 16, 1962(a)

Hungary March 5, 1962(a)

". . . the Hungarian People's Republic shall apply the Convention to the recognition and enforcement of such awards only as have been made in the territory of one of the other Contracting States and are dealing with differences arising in respect of a legal relationship considered by the Hungarian law as a commercial relationship."

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[7] Applicable to Land Berlin.

India	July 13, 1960
"In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India."	
Israel	January 5, 1959
Italy	January 31, 1969(a)
Japan	June 20, 1961(a)
". . . it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."	
Malagasy Republic	July 16, 1962(a)
The Malagasy Republic declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; it further declares that it will apply	

the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

[Translation]

Morocco	February 12, 1959(a)

The Government of His Majesty the King of Morocco will only apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State.

[Translation]

Netherlands[8]	April 24, 1964

Referring to paragraph 3 of article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Kingdom declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.[Translation]

Niger	October 14, 1964(a)
Nigeria	March 17, 1970(a)

[8] Applicable to the Kingdom in Europe, Surinam and the Netherlands Antilles.

"In accordance with paragraph 3 of article I of the Convention, the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a State party to this Convention and to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Laws of the Federal Republic of Nigeria."

Norway March 14, 1961(a)

"1. We will apply the Convention only to the recognition and enforcement of awards made in the territory of one of the Contracting States."

"2. We will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property."

Philippines July 6, 1967

". . . the Philippines, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of awards made only in the territory of another

Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

Poland	October 3, 1961
"With reservations as mentioned in article I, par. 3."	
Romania	September 13, 1961(a)
The Romanian People's Republic will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its legislation. The Romanian People's Republic will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State. As regards awards made in the territory of certain non-contracting States, the Romanian People's Republic will apply the Convention only on the basis of reciprocity established by joint agreement between the parties. [Translation]	
Switzerland	June 1, 1965

Referring to the possibility offered by paragraph 3 of article I, Switzerland will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. [Translation]

Syria — March 9, 1959(a)

Tanzania — October 13, 1964(a)

"The Government of the United Republic of Tanganyika and Zanzibar will apply the Convention, in accordance with the first sentence of article 1(3) thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State."

Thailand — December 21, 1959(a)

Trinidad and Tobago — February 14, 1966(a)

"In accordance with Article I of the Convention, the Government of Trinidad and Tobago declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. The Government of Trinidad and Tobago further declares that it will apply the Convention only to differences

arising out of legal relationships, whether contracted or not, which are considered as commercial under the Law of Trinidad and Tobago."

Tunisia	July 17, 1967(a)

. . . with the reservations provided for in article I, paragraph 3, of the Convention, that is to say, the Tunisian State will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Tunisian law. [Translation]

Ukranian Soviet Socialist Republic	October 10, 1960

The Ukrainian Soviet Socialist Republic will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.

[Translation]

Union of Soviet Socialist Republics	August 24, 1960

The Union of Soviet Socialist Republics will apply the provisions of this Convention in respect

to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment. [Translation]

United Arab Republic	March 9, 1959(a)
United States of America[9] "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."	September 30, 1970(a)

[9] Extended to all the territories for the international relations of which the United States of America is responsible, with effect from Feb. 1, 1971.

APPENDIX H

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.18. The Insurance Contract (Refs & Annos)

West's RCWA 48.18.200

Effective: January 1, 2020

Currentness

48.18.200. Limiting actions, jurisdiction

(1) Except as provided by subsection (3) of this section, 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

(a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or

(b) depriving the courts of this state of the jurisdiction of action against the insurer; or

(c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.

(2) 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.

(3) For purposes of out-of-network payment disputes between a health carrier and health care provider covered under the provisions of chapter 48.49 RCW, the arbitration provisions of chapter 48.49 RCW apply.