THE RIGHT TO ARBITRATE(?): INTEGRATING CONSUMER PROTECTION INTO JUDICIAL REVIEW OF THE MCCARRAN-FERGUSON ACT AND THE NEW YORK CONVENTION

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International commercial arbitration has grown increasingly popular as an alternative method of dispute resolution. This Comment explores the struggle courts face when they must determine whether to apply the New York Convention, an international treaty that recognizes and compels arbitration agreements, or a federal statute known as the McCarran-Ferguson Act, which delegates authority to the states to regulate insurance. Conflict arises when foreign insurers seek to compel arbitration under the New York Convention in states with anti-arbitration insurance laws, and courts must choose between upholding domestic state laws or honoring the Treaty.

This Comment examines the method of analysis used by the First, Second, Fourth, Fifth, and Ninth Circuits to decide whether state anti-arbitration laws reverse preempt the New York Convention. Further, this Comment analyzes how changing views on arbitration — reflected in proposed legislation such as the Forced Arbitration Injustice Repeal (FAIR) Act of 2023 — impacts how courts weigh certain factors in their analyses. This Comment concludes by calling for courts to engage in interest-balancing analysis with greater consideration for consumer protection in the resolution of insurance disputes with foreign insurers.

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I. INTRODUCTION

International commercial arbitration continues to be an increasingly popular alternative to complex litigation.[1] However, arbitration in the insurance industry has prompted concerns over maintaining policyholders' access to courts.[2] U.S. policyholders, specifically those with arbitration clauses in their contracts with foreign insurers, may have to arbitrate their disputes pursuant to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention," the

1. *See* Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 CAL. W. INT'L L.J. 77, 77 (2012) ("[I]nternational arbitration has grown to become one of the preferred dispute resolution mechanisms for international contracts and investments.").

2. *See* Lina M. Colón Santiago, *Insurance Appraisal & Arbitration*, 8 U. P.R. BUS. L.J. 65, 67 (2017) (noting challenges associated with treating appraisal clauses in insurance policies as arbitration clauses).

"Convention," or the "Treaty") despite living in a state with anti-insurance arbitration laws.[3]

The United States' accession to the New York Convention created a circuit split among the First, Second, Fourth, Fifth, and Ninth Circuits; some circuits enforce arbitration clauses in foreign insurers' policies under the Convention, while others apply state anti-arbitration laws, as permitted under the McCarran-Ferguson Act (MFA) of 1945.[4] Uncertainty regarding the arbitrability of international insurance disputes continues to plague courts and legislators alike.[5]

Attempts by Congress and various states to protect U.S. consumers against forced arbitration in certain circumstances resulted in partial success.[6] The Forced Arbitration Injustice Repeal (FAIR) Act is just one example of an extensive trend in legislation and legal literature disapproving courts' current deference to international commercial arbitration provisions.[7] While the

3. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(2), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention] ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration."); David A. Rich, *Deference to the "Law of Nations": The Intersection Between the New York Convention, the Convention Act, the McCarran-Ferguson Act, and State Anti-Insurance Arbitration Statutes*, 33 T. JEFFERSON L. REV. 81, 83 (2010) (discussing how, in some jurisdictions, "state anti-insurance arbitration statutes reverse preempt the New York Convention and the Convention Act by way of the McCarran-Ferguson Act").

4. *See* McCarran-Ferguson Act of 1945, 15 U.S.C. § 1012(a) ("The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business."). *Compare* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45–46 (2d Cir. 1995) (holding that the New York Convention reverse preempts the MFA), *with* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1017–18 (9th Cir. 2021) (holding that Washington law does not reverse preempt the New York Convention).

5. *See* S.I. Strong, *The Special Nature of International Insurance and Reinsurance Arbitration: A Response to Professor Jerry*, 2015 J. DISP. RESOL. 283, 299 (2015) (noting that "the law regarding the relationship between the New York Convention, the FAA, and the McCarran-Ferguson Act is largely unsettled").

6. *See* Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473, 490 (9th Cir. 2023) (holding that California Assembly Bill 51, which prohibits employers from conditioning employment on an agreement to arbitrate certain claims, is preempted by the FAA); Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 402(a) (voiding pre-dispute arbitration agreements and pre-dispute joint-action waivers for sexual harassment claims).

7. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. (2023); Emmanuel Gaillard, *Coordination or Chaos: Do the Principles of*

FAIR Act will not resolve the circuit split created by disagreement over the enforceability of the MFA, it nevertheless suggests a shift in public policy against arbitration that could inform courts' decisions to weigh certain factors when determining whether the MFA "reverse preempts" the New York Convention.[8]

While caselaw and commentators often argue that the New York Convention should prevail, they are missing a key consideration: consumer protection as a matter of public policy.[9] Since the interpretation of the New York Convention is not as clear-cut as certain court opinions and commentators profess, consumer protection considerations can and should inform the proper resolution of the tensions between the New York Convention and the MFA. Part II of this Comment begins by discussing the history of state authority to regulate insurance and the international recognition of arbitration clauses under the New York Convention. Next, this Comment analyzes and compares recent district courts' analyses of the MFA and New York Convention in *Foresight Energy LLC v. Certain London Market Insurance Co.*[10] and *Krohmer Marina v. Certain Underwriters at Lloyd's*[11] to circuit courts' analyses of the statute and Treaty within the context of shifting views of arbitration. Part III of this Comment demonstrates that when circuit courts disproportionately weigh certain factors to determine whether the MFA reverse preempts the New York Convention, their analysis fails to protect U.S. policyholders when foreign insurers seek to compel arbitration under the New York Convention.[12] Part IV provides steps courts can take to incorporate consumer protection at earlier stages of analysis to determine whether to enforce the New York

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Comity, Lis Pendens, and Res Judicata Apply to International Arbitration?, 29 AM. REV. INT'L ARB. 205, 210 (2018).

8. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 738 (5th Cir. 2009) (noting reverse preemption is when a state statute preempts a federal law); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 274 (2019) (providing that "[t]oday, however, nearly all participants in statutory interpretation debates accept that meaning depends on context").

9. *See* Brian A. Briz & César Mejía-Dueñas, *Which Law is Supreme? The Interplay Between the New York Convention and the McCarran-Ferguson Act*, 74 U. MIA. L. REV. 1124, 1139–44 (2020) (explaining why the MFA should not reverse preempt the New York Convention); *see, e.g.*, *Safety Nat'l*, 587 F.3d at 731–32.

10. 311 F. Supp. 3d 1085 (E.D. Mo. 2018).

11. 655 F. Supp. 3d 1124 (E.D. Okla. 2023).

12. *See* Claudia Lai, Comment, *The McCarran Ferguson Act and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards: To Reverse-Preempt or Not?*, 2011 U. CHI. LEGAL F. 349, 372 (2011).

Convention or state anti-insurance arbitration clauses. Part V concludes that regardless of whether the FAIR Act is enacted, courts will ultimately need to reconsider their current methods of interest-balancing to resolve insurance disputes between foreign insurers and domestic policyholders.

II. UNDERSTANDING PREEMPTION OF INTERNATIONAL AND DOMESTIC ARBITRATION LAWS

While conflicts between international treaties and domestic federal laws are not uncommon, the tension between the MFA and the New York Convention prompted numerous law review articles and reports to dedicate attention to the circuit split among the First, Second, Fourth, Fifth, and Ninth Circuits.[13] U.S. courts have a history of favoring international commercial arbitration.[14] The FAIR Act's proposed prohibition of forced pre-dispute arbitration provisions signals a drastic shift in legislators' longstanding pro-arbitration policy by encouraging civil and commercial dispute resolution through litigation.[15] Interpretations more consistent with this contemporary view are found in recent district court opinions, which do not rely as heavily upon the foreign policy concerns that circuit courts historically looked to.[16] These district court cases pivot from heavy reliance on foreign policy concerns and embrace other factors instead, such as the plain language of the

13. *See, e.g.*, Gary Shaw, *Sorting Circuit Split on Foreign Arbitration Treaty's Authority*, LAW360 (Apr. 19, 2024, 3:10 PM), https://www.law360.com/insurance-authority/articles/1825622 (explaining the roots of the tension between the MFA and the New York Convention); Ellen M. Hames, Note, *Reconciling the Intersection of a Treaty and Federal Statutory Law: Why Reverse Preemption Should Keep Insurance-Related Arbitration Decisions with the States*, 64 DRAKE L. REV. 553, 571 (2016) (arguing that the New York Convention does not supersede state laws regulating insurance).

14. *See* Perry v. Thomas, 482 U.S. 483, 489 (1987) (stating that "Section 2 [of the Federal Arbitration Act] is a congressional declaration of liberal federal policy favoring arbitration agreements").

15. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. § 2 (2023).

16. *See* Foresight Energy v. Certain London Mkt. Ins. Cos., 311 F. Supp. 3d 1085, 1097 (E.D. Mo. 2018); *Krohmer Marina*, 655 F. Supp. 3d at 1140–42.

MFA and the legislative intent behind it.[17] This could prompt circuit courts to consider consumer protection more in the future.[18]

A. State Primacy Over Insurance Regulation

In response to the Supreme Court's holding in *United States v. South-Eastern Underwriters Association*,[19] Congress passed the MFA to reinstate state authority over the regulation of insurance out of the belief that "the continued regulation and taxation by the several States of the businesses of insurance is in the public interest."[20] However, under the MFA state statutes are only protected from federal preemption if: (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 regulates insurance.[21] Subsequent Supreme Court analysis of legislative intent supports recognizing state laws' supremacy to regulate insurance.[22] Consequently, the MFA has dramatic legal implications on insurance transactions involving foreign parties and states with anti-arbitration statutes.[23]

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17. *Compare Foresight Energy*, 311 F. Supp. 3d at 1097 (analyzing the plain language of the MFA), *and Krohmer Marina*, 655 F. Supp. 3d at 1140–42, *with* ESAB Grp. v. Zurich Ins. PLC, 685 F.3d 376, 390 (4th Cir. 2012) ("The Supreme Court has opined that the Convention and Convention Act demand that courts 'subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.'") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 (1985)).

18. *See Krohmer Marina*, 655 F. Supp. 3d at 1143.

19. 322 U.S. 533 (1944).

20. McCarran-Ferguson Act, 15 U.S.C. § 1011; *see* 322 U.S. at 553 (holding that no company that conducts interstate business is entirely exempt from congressional regulation). *See generally* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 319 (1955) (noting that MFA was meant to preserve state power to regulate insurance).

21. *See* McCarran-Ferguson Act, 15 U.S.C. § 1012(a)–(b).

22. *See* Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 521 (1947) (observing that Congress intended for states to regulate insurance where Congress had not expressly taken over); SEC v. Nat'l Secs., Inc., 393 U.S. 453, 459 (1969) ("The McCarran-Ferguson Act was an attempt to . . . assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation.").

23. *See* Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., 867 F.3d 449, 453 (4th Cir. 2017) (holding that the McCarran-Ferguson Act gives states absolute power over insurance regulation); *see also* S. Pioneer Life Ins. Co. v. Thomas, 385 S.W.3d 770, 774 (Ark. 2011) (holding that the McCarran-Ferguson Act preempts the Federal Arbitration Act because applying the FAA would invalidate

Under the MFA, state anti-arbitration statutes are not preempted by chapter I, section 2 of the Federal Arbitration Act (FAA).[24] Congressional enactment of the FAA forced courts to abandon their aversion of arbitration.[25] However, courts agree that the FAA is reverse preempted by the MFA in cases where state anti-insurance arbitration statutes prevent arbitration between an insurer and policyholder.[26] Several states have consequently enacted anti-arbitration laws.[27]

B. Federal Enforcement of Foreign Arbitration Agreements: The New York Convention

After World War II, the U.N. Economic and Social Council (ECOSOC) convened at the Conference on International Commercial Arbitration in New York and presented a Draft Convention for Foreign Arbitral Awards, which resulted in the adoption of the New York Convention.[28] During the United States' accession to the New York Convention, Congress amended chapter 2 of the FAA (also referred to as the Convention Act) so the Convention could be implemented in disputes with foreign parties or connected to other countries.[29]

Section 16-108-201(b)(2) of the state law); U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993) (noting that the MFA "transformed the legal landscape").

24. *See* Federal Arbitration Act, 9 U.S.C. §§ 201–208; McCarran-Ferguson Act, 15 U.S.C. § 1012(b); Katherine V.W. Stone, *Arbitration — From Sacred Cow to Golden Calf: Three Phases in the History of the Federal Arbitration Act*, 23 PEPP. DISP. RESOL. L.J. 113, 115–56 (2023) (tracing the history of the FAA).

25. *See* Jarred Pinkston, *Toward a Uniform Interpretation of the Federal Arbitration Act: The Role of 9 U.S.C. § 208 in the Arbitral Statutory Scheme*, 22 EMORY INT'L L. REV. 639, 641 (2008).

26. *See* Federal Arbitration Act, 9 U.S.C. §§ 201–208.

27. *See* ARK. CODE ANN. § 23-79-203(a) (West 2023) ("No insurance policy . . . shall contain any condition, provision, or agreement which directly or indirectly deprives the insured . . . the right to trial . . . ."); MO. ANN. STAT. § 435.350 (West 1996) ("A written agreement to submit any existing controversy to arbitration . . . except contracts of insurance . . . is valid, enforceable and irrevocable . . . .").

28. *See History 1923-1958*, N.Y. CONVENTION, https://www.newyorkconvention.org/text/travaux-preparatoires/history-1923-1958 (last visited Dec. 18, 2024).

29. 9 U.S.C. § 201 ("The [New York] Convention . . . shall be enforced in United States courts in accordance with this chapter.").

By implementing the Convention, Congress intended to create uniform arbitration standards.[30] Article II of the New York Convention is most relevant given that it lays out the responsibilities of Member States:

> First, each Contracting State shall recognize an agreement in writing under which parties undertake to submit to arbitration . . . Second, 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 of telegrams. Third, 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.[31]

International arbitration agreements are consequently presumed valid and enforceable.[32]

In addition to avoiding the biases of international courts in business dispute resolution, the New York Convention also fosters self-sufficient commercial relationships between businesses.[33] To date, 172 countries have ratified the New York Convention, and courts have continued to rely on it to resolve disputes.[34] Such reliance suggests that the Convention has succeeded in establishing a uniform legal framework for international commercial arbitration agreements and awards.[35]

C. Changing Views on the Fairness of Arbitration Clauses

Despite the New York Convention's success in establishing a consistent framework for enforcing arbitration agreements, skepticism over the perceived competitive advantage that arbitration provides businesses

30. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (noting that Congress wished to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts").

31. New York Convention, *supra* note 3, at art. II.

32. *See id.* at art. I.

33. *See* Mary Pennisi, Note, *Enforcing International Insurers' Expectations: Can States Unilaterally Quash Commercial Arbitration Agreements Under the McCarran-Ferguson Act?*, 16 FORDHAM J. CORP. & FIN. L. 601, 623 (2011) (noting the benefits of the New York Convention).

34. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNICTRAL, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_ arbitral_awards/status2 (last visited Dec. 18, 2024).

35. *See id.*

remains.[36] Recent legislative proposals, like the FAIR Act, reflect such concerns.[37] While the FAIR Act is unenacted, it nevertheless supports an alternative context under which courts might analyze the MFA against the New York Convention.[38]

Arbitration is often chosen as an alternative method of dispute resolution for its ability to protect against information leaking out about businesses and individuals in a lawsuit.[39] However, there is increasing recognition of the public's interest in resolving private commercial disputes in certain situations.[40] While arbitration can be faster and cheaper than litigation, the lack of a neutral and publicly accountable decision maker in settling disputes can also make it harder to perceive arbitration as fair.[41] Legislation like the FAIR Act, which aims to end forced arbitration clauses in consumer cases, addresses this concern.[42]

Section 502(b)(1) of the FAIR Act notes that "the applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator."[43] If enacted, the FAIR Act would restore the balance of

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36. *See* Hannah Myslik, Comment, *Attempting — and Failing — to Balance Fairness and Efficiency in the Arbitral System: How Arbitration Institutions are Defeating the Purpose of Arbitration*, 8 TEX. A&M L. REV. 583, 597 (2021) (arguing that the Supreme Court's expansion of the FAA makes it harder for consumers to bring suits and question the fairness of the arbitration process).

37. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. §§ 502 (a)–(b) (2023) (voiding pre-dispute arbitration agreements).

38. *See* Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1822–23 (2020) (arguing the importance of legislative intent as a tool of statutory interpretation).

39. *See* Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479, 481–82 (2005) (noting the benefits of privacy in arbitration).

40. *See* Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 226 (2017).

41. *See id.* at 228.

42. *See* Press Release, Richard Blumenthal, U.S. Sen., Blumenthal & Johnson Introduce Legislation Opening the Courthouse Doors to Consumers, Workers, (Apr. 28, 2023), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-johnson-introduce-legislation-opening-the-courthouse-doors-to-consumers-workers.

43. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. § 502(b)(1) (2023).

power between consumers and large corporations by removing limitations on discovery, class actions, and certain remedies.[44]

Given that courts continue to rely upon legislative intent, contemporary discontent over the abuse of arbitration clauses reflected in proposed and future legislation could prompt a reevaluation of factors by signaling to courts that there is a congressional shift away from support for arbitration.[45] As a result, this potential reevaluation shifts the contemporary view away from assuming that arbitration is uniformly good and puts into question courts' current method of analyzing the legislative intent and plain language of the MFA when determining whether it reverse preempts the New York Convention.[46]

D. Same Factors, Different Analysis: Diverging Court Interpretations of the MFA and New York Convention

In a dispute between a foreign insurer and a U.S. business, is an arbitration clause enforceable? Courts confronted with this question face the challenge of determining whether to compel arbitration pursuant to the New York Convention in states with anti-insurance arbitration laws.[47] Since the New York Convention prevents preemption by the MFA in the context of international commercial relationships, courts must choose between enforcing the New York Convention or the anti-arbitration statutes.[48]

The resolution of this question has important ramifications.[49] A Supreme Court decision supporting the New York Convention's supremacy over the MFA could motivate more international insurance companies to include arbitration clauses in their policies to better protect themselves against disputes that would otherwise be litigated.[50] Given congressional efforts to

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44. *See* F. Paul Bland et al., *From the Frontlines of the Modern Movement to End Forced Arbitration and Restore Jury Rights*, 95 CHI.-KENT L. REV. 585, 587–90 (2020).

45. *See id.* at 587 (explaining political support for arbitration).

46. *See* Fallon Jr., *supra* note 8, at 274 (noting that statutory interpretation depends on context).

47. *See* Angela D. Krupar, Note, *The McCarran-Ferguson Act's Intersection with Foreign Insurance Companies*, 58 CLEV. STATE L. REV. 883, 894 (2010) (noting that state anti-arbitration provisions prompted a circuit split over application of the New York Convention).

48. *See* J. Logan Murphy, Note, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, McCarran-Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT'L L. 1535, 1547 (2008).

49. *See* Krupar, *supra* note 47, at 905.

50. *See Arbitration Clauses in Insurance Contracts: The Urgent Need for Reform*, PUB. CITIZEN, https://www.citizen.org/article/arbitration-clauses-in-insurance-contracts

preserve state supremacy in insurance regulation, enforcement of arbitration clauses in insurance contracts through the New York Convention challenges Congress's initial opinion that states are better suited to regulate insurance.[51]

Unpredictability surrounding enforcement of arbitration agreements and awards resulting from conflicting court decisions on enforcement of the New York Convention due to the MFA has contributed to making the United States a less attractive forum for arbitration.[52] Furthermore, international businesses are dissuaded from engaging in commercial transactions with Americans to avoid litigating in U.S. courts, limiting American consumers' choice of insurers.[53]

1. Appellate Courts

Courts have struggled to resolve the issue of whether the MFA reverse preempts the New York Convention and chapter 2 of the FAA ever since the Second Circuit grappled with the issue in *Stephens v. American International Insurance Co.*[54] nearly thirty years ago.[55] *Stephens* involved a premium payment dispute between a Kentucky reinsurance company and several other insurance companies, one of which was British.[56] The court held that because the New York Convention was not self-executing, it was reverse preempted by Louisiana anti-arbitration laws.[57] Subsequent court opinions argue the Second Circuit lacked sufficient guidance, as its decision came out

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the-urgent-need-for-reform/ (last visited Dec. 18, 2024) (arguing against the use of pre-dispute arbitration clauses in contracts).

51. *See* Pennisi, *supra* note 33, at 615; *see also* Linda M. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNS. J. 411, 426 (1981) (arguing that the MFA "was a codification of the 'state action doctrine'").

52. *See* Pelagia Ivanova, Note, Forum Non Conveniens *and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U. L. REV. 899, 901–02 (2003) (noting that differing procedural requirements between courts could subvert the purpose of the New York Convention to establish uniform arbitral procedures).

53. *See* Pennisi, *supra* note 33, at 655 (arguing that forum-shopping would likely increase as a result of parties seeking to avoid states that enforce anti-arbitration statutes under the MFA).

54. 66 F.3d 41 (2d Cir. 1995).

55. *Id.* at 46; Briz & Mejía-Dueñas, *supra* note 9, at 1128.

56. *Stephen*s, 66 F.3d at 42–43. A reinsurance company provides insurance to other companies, allowing them to transfer insurance liabilities to the reinsurer. *See Reinsurance Companies*, CORP. FIN. INST., https://tinyurl.com/32b2y3b6 (last visited Jan. 3, 2025).

57. *Stephens*, 66 F.3d at 45.

before the Supreme Court decided *Medellin v. Texas*,[58] which established a framework for treaty interpretation.[59]

The Fifth Circuit split from the Second Circuit in 2009 in *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's*.[60] The court relied upon its interpretation of the phrase "[a]ct of Congress" and legislative intent to conclude that the New York Convention superseded Louisiana's anti-arbitration laws.[61] Following the Fifth Circuit, the Fourth Circuit, in *ESAB Group, Inc. v. Zurich Insurance PLC*,[62] similarly held that the Convention supersedes the MFA because the MFA "is limited to legislation within the domestic realm."[63] While the Fourth Circuit's decision tipped the scales in favor of treating the New York Convention as superseding the MFA, it failed to establish a concrete and reliable framework for courts to use to determine arbitrability under the FAA and the Convention.[64]

The Ninth Circuit in *CLMS Management Services LP v. Amwins Brokerage of Georgia*[65] addressed claims against international insurers who moved to compel arbitration under the New York Convention, despite Washington state laws prohibiting arbitration clauses in insurance

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58. 552 U.S. 491 (2008).

59. *See id.* at 527 ("A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force."); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 732–37 (5th Cir. 2009) (Clement, J., concurring) (arguing that the Second Circuit "undertook no textual analysis and set forth no reasons to support its conclusion"); Edward Lenci, *Insurers and Reinsurers, Here and Abroad, Should Pay Attention: The Second Circuit May Well Reconsider Reverse-Preemption of the New York Convention by the McCarran-Ferguson Act*, JD SUPRA (Aug. 23, 2023), https://www.jdsupra.com/legalnews/the-second-circuit-may-well-reconsider-5420696/.

60. *Safety Nat'l*, 587 F.3d at 752.

61. *Id.* at 722, 725 (noting that "because here the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the McCarran-Ferguson Act's provision that 'no Act of Congress' shall be construed to supersede state law regulating the business of insurance is inapplicable"). *But see id.* at 737 (Elrod, J., dissenting) ("However, the court's failure to ask the right question at the outset inevitably leads to its incorrect conclusion — that the Convention itself, a non-self-executing treaty, preempts the Louisiana statute.") (emphasis omitted).

62. 685 F.3d 376 (4th Cir. 2012).

63. *Id.* at 388.

64. *See* Matthew James Quan, Comment, *Untangling the Collision Between the McCarran-Ferguson Act and the Recognition of International Arbitral Awards: Reconciling the Second, Fourth, and Fifth Circuits' Approaches*, 86 TEMP. L. REV. 663, 683 (2014).

65. 8 F.4th 1007 (9th Cir. 2021).

contracts.[66] The court held that the arbitration agreement should be enforced because article II, section 3 of the New York Convention is self-executing and is not an "[a]ct of Congress," therefore Washington law does not reverse preempt the Convention.[67] The Ninth Circuit is praised for explicitly addressing the issue of whether the New York Convention is self-executing.[68]

The First Circuit recently weighed into the circuit split last year in *Green Enterprises v. Hiscox Syndicates Ltd*.[69] Noting the conflict between the Puerto Rican anti-arbitration law and chapter 2 of the FAA, which implements the New York Convention, the court held that because article II, section 3 of the New York Convention is self-executing and not an "act of Congress," the Puerto Rican anti-arbitration law was preempted.[70] The First Circuit's analysis of the Convention and the MFA supports the Fifth Circuit's analysis, which relied upon the Convention's treaty status to argue its exclusion from an act of Congress that would otherwise fall under the MFA, rather than its possible self-executing status.[71]

2. *District Courts*

Despite the overwhelming appellate court support for treating the New York Convention as preempting the MFA, various district courts in the Tenth and Eight Circuits held to the contrary, emphasizing the plain language of

66. *See id.* at 1009. *See generally* Caroline Simson, *9th Circ. to Weigh in on Lloyd's Arbitration Dispute*, LAW360 (May 21, 2020, 9:43 PM), https://www.law360.com/articles/1276102/9th-circ-to-weigh-in-on-lloyd-s-arbitration-dispute (providing a factual summary of *CLMS*); WASH. REV. CODE § 48.18.200(1)(b) (2019) (prohibiting arbitration clauses in insurance policies), *invalidated by* Allied Pros. Ins. Co. v. Anglesey, 952 F.3d 1131 (9th Cir. 2020).

67. *See CLMS Mgmt.*, 8 F.4th at 1016–18.

68. *See* Marguerite Roberts, *Insurance Law — Ninth Circuit Interpretation of Foreign Arbitration Treaty and Federal Law, Prevents State Insurance Law from Reverse-Preempting Treaty —* CLMS Mgmt. Servs. Ltd. P'ship v. Amwins Brokerage of Ga.*, 8 F4th 1007 (9th Cir. 2021)*, 45 SUFFOLK TRANSNAT'L L. REV. 251, 272–73 (2022) (arguing that the Ninth Circuit correctly applied *Medellin*'s textual approach established to interpret treaties to the New York Convention).

69. *See* Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 676 (1st Cir. 2023).

70. *See id.* at 676; P.R. LAWS ANN. tit. 26, § 1119 (2019) (prohibiting arbitration clauses in insurance policies).

71. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 731 (5th Cir. 2009).

the MFA to support their analysis.[72] In their rejection of the circuit courts' conclusions, the district courts' analysis exposed the gaps in the circuit courts' narrow interpretation of the New York Convention and MFA.[73] The district court decisions also suggest much is left open to debate despite the finality with which the First, Fourth, Fifth, and Ninth Circuits treat the issue.[74]

In *Foresight Energy v. Certain London Market Insurance Co.*,[75] the U.S. District Court for the Eastern District of Missouri addressed whether foreign insurers could remove the case under chapter 2 of the FAA.[76] Citing Missouri's anti-arbitration act, the U.S. policyholder argued that the implementing legislation of the Convention (the "Convention Act") was preempted under the MFA.[77] The court held that Missouri state law reverse preempted the Convention because the plain language of the MFA did not expressly exclude acts of Congress that implement treaties.[78] By finding that only the Convention Act, and not the New York Convention itself, could reverse preempt state law, the Eastern District of Missouri distinguished its analysis from the Fourth and Fifth Circuits.[79]

In *Krohmer Marina*, U.S. policyholders sued their German insurance company and its underwriters for failing to adjust the repair cost for damages caused by a windstorm.[80] Unlike *Foresight Energy*, however, the insurers filed a motion to stay pending arbitration.[81] In response to the business owners' assertion that under the MFA Oklahoma's anti-arbitration statute governed the dispute, the insurer argued that because it was a German citizen, the MFA did not apply.[82] The court held that the MFA preempts

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72. *See* Foresight Energy, LLC v. Certain London Mkt. Ins. Co., 311 F. Supp. 3d 1085, 1097, (E.D. Mo. 2018); Krohmer Marina, LLC v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1140–42 (E.D. Okla. 2023).

73. *See, e.g.*, *Foresight Energy*, 311 F. Supp. 3d at 1097–98.

74. *See id.*

75. *Id.*

76. *See id.* at 1087–89.

77. *See id.* at 1090; MO. ANN. STAT. § 435.350 (West 2024).

78. *See Foresight Energy*, 311 F. Supp. 3d at 1097–98, 1101.

79. *See id.* at 1100.

80. *See* Krohmer Marina, LLC v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1127–29 (E.D. Okla. 2023).

81. *Id.* at 1129.

82. *See id.* at 1134; 12 OKLA. STAT. tit. 12, § 1855 (2024) (stating that the Oklahoma "Uniform Arbitration Act shall not apply to . . . contracts which reference insurance, except for those contracts between insurance companies").

chapter 2 of the FAA because the Convention is non-self-executing and the plain language of the MFA is unambiguous such that holding otherwise would conflict with it.[83]

Foresight Energy and *Krohmer Marina* ultimately remind courts to look beyond the narrow definition of "act of Congress" and the self-executing nature of treaties and return to interpretation of a statute's plain language.[84] By applying a textual interpretation of the MFA, the district courts' analysis calls into question the advantage given to foreign insurers by the First, Fourth, Fifth, and Ninth Circuits.[85]

III. ANALYZING APPROACHES TO MFA REVERSE PREEMPTION OF THE NEW YORK CONVENTION

While the First, Fourth, Fifth, and Ninth Circuits all analyzed similar factors to reach the same conclusion, they afforded each factor varying levels of consideration.[86] As a result, there is no consistent framework for predicting how courts will enforce the MFA and Convention.[87] District court opinions reflect a shift towards greater emphasis on the plain language of the MFA, as opposed to congressional intent behind its enactment, to support reverse preemption of the New York Convention by state anti-arbitration statutes.[88]

Given the abundance of factors and methods to consider in interpreting the MFA and New York Convention, it is unsurprising that circuit and district courts end up "cherry-picking" when conducting analysis that

83. *See Krohmer Marina*, 655 F. Supp. 3d at 1135–36, 1140–42.

84. *See id.* at 1141–42; *Foresight Energy*, 311 F. Supp. 3d at 1100.

85. *See Foresight Energy*, 311 F. Supp. 3d at 1100; *Krohmer Marina*, 655 F. Supp. 3d at 1136–41.

86. *Compare* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 731 (5th Cir. 2009) (analyzing the meaning of "act of Congress"), *and* ESAB Grp. v. Zurich Ins., 685 F.3d 376, 388 (4th Cir. 2012) (declining to consider whether the New York Convention is self-executing), *with* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1016 (9th Cir. 2021) (concluding that article II, section 3 of the New York Convention is self-executing), *and* Green Enters. v. Hiscox Syndicates Ltd. at Lloyd's, 68 F.4th 662, 674–76 (1st Cir. 2023) (considering chapter 2 of the FAA as implementing legislation and whether article II, section 3 of the New York Convention is self-executing).

87. *See* Quan, *supra* note 64, at 688.

88. *See Foresight Energy*, 311 F. Supp. 3d at 1097; *Krohmer Marina*, 655 F. Supp. 3d at 1140–42.

disproportionately favors one factor of analysis over another.[89] However, this ultimately undermines their authority and makes it harder for future courts to determine the best means of analyzing the MFA and New York Convention.[90]

A. Treaty Interpretation: Self-Executing?

Before determining whether the New York Convention constitutes an act of Congress that the MFA preempts, courts must address whether the New York Convention is self-executing and "operates of itself without the aid of any legislative provision."[91] If the New York Convention is treated as non-self-executing, it would not apply to U.S. courts and would lead to doubt regarding what legal standard applies to international arbitration.[92] However, if the opposite is held, the United States could preserve its reputation as a reliable business partner abroad but at the expense of honoring state regulatory power over insurance.[93]

Splitting from the other circuit courts, the Fourth Circuit found that the New York Convention is non-self-executing based on the dissent's argument in *Safety National*.[94] The Second Circuit, on the other hand, argued that while the Convention is normally considered akin to a state statute, when the terms of the Treaty establish a contract between parties the Treaty must be executed by the legislative rather than judicial branch.[95] Accordingly, the Treaty cannot self-execute.[96]

While the Fifth Circuit admitted its confusion regarding whether the Convention was self-executing, the First and Ninth Circuits held that under *Medellin*, article II, section 3 of the Treaty is self-executing because the

89. *See* Sam Capparelli, Comment, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of* Bostock v. Clayton County*?*, 88 U. CHI. L. REV. 1419, 1425 (2021) (explaining cherry-picking).

90. *See id.*

91. Foster v. Neilson, 27 U.S. 253, 314 (1829), *overruled by* United States v. Percheman, 32 U.S. 51 (1833).

92. *See* Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 131 (2018).

93. *See id.*

94. *See* ESAB Grp. v. Zurich Ins., 685 F.3d 376, 385–88 (4th Cir. 2012).

95. *See* Stephens v. Am. Int'l Ins., 66 F.3d 41, 45 (2d Cir. 1995) (citing Foster v. Neilson, 27 U.S. 253, 313–14 (1829)).

96. *See id.*

Treaty's plain language directs courts to enforce arbitration agreements.[97] If not for the Treaty's dependence upon implementing legislation, the circuit courts' conclusion that the New York Convention is self-executing would be convincing, given that treaty interpretation requires courts to first look to the plain language of the text.[98] The district courts in *Foresight Energy* and *Krohmer Marina* pointed this out in their opinions, holding the Convention in its entirety is non-self-executing.[99]

B. Redefining an "Act of Congress": Competing Textualist Interpretations of the MFA and New York Convention

There are persuasive arguments for interpreting "act of Congress" broadly enough to encompass treaty implementation statutes, and appellate courts' rejections of the broader reading are subject to critique.[100] Assuming the New York Convention is not self-executing, the courts' analyses turn to determining whether to implement the Convention Act or the Convention itself.[101] Determining which statutory interpretation method to apply is a challenge courts often face.[102] When courts fail to apply consistent canons of statutory interpretation, they further dilute consistent application of the law.[103] Courts' conflicting analyses of the term "act of Congress" within the MFA at district and appellate levels reflects such complexity.[104]

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97. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 721 (5th Cir. 2009); Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 669, 671 (1st Cir. 2023); CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1012–13 (9th Cir. 2021).

98. *See* 9 U.S.C. §§ 201–208.

99. *See* Foresight Energy, LLC v. Certain London Mkt. Ins., 311 F. Supp. 3d 1085, 1097–1100 (E.D. Mo. 2018); Krohmer Marina, LLC v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1142–43 (E.D. Okla. 2023).

100. *See Foresight Energy*, 311 F. Supp. 3d at 1101; *Krohmer Marina*, 655 F. Supp. 3d at 1143.

101. *See, e.g.*, Pennisi, *supra* note 33, at 621–22.

102. *See* Chelsea A. Bunge-Bollman, *United We Stand, Divided We Fall? An Inquiry into the Values and Shortcomings of a Uniform Methodology for Statutory Interpretation*, 95 NOTRE DAME L. REV. REFLECTION 101, 105 (2019) ("The different ways that courts interpret statutes cause confusion and increase the likelihood that the courts may not be truly identifying the congressional *intent*.") (emphasis in original).

103. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1767 (2010) (arguing that courts' lack of uniform statutory interpretation exacerbates attempts at coordination between courts and Congress).

104. *See id.* (arguing that courts' lack of uniform statutory interpretation exacerbates attempts at coordination between courts and Congress).

Under the MFA, "no [a]ct of Congress shall be construed" to supersede state laws regulating the insurance business.[105] Every circuit court, except for the Second Circuit, uses the phrase "act of Congress" to support their holding that the MFA does not reverse preempt the New York Convention.[106] Such language avoids federal preemption of state authority overregulating the insurance business.[107] The MFA was designed to have a sweeping effect over a wide range of federal powers, which is expressed through the generalized language of "act of Congress," so it is peculiar that the appellate courts rely upon the same language to narrow the application of the MFA instead.[108]

In *Safety National*, the Fifth Circuit argued that the definition of an "act of Congress" excludes treaties, regardless of whether there is a legislative implementation.[109] Since the MFA reverse preempts acts of Congress or statutes but not treaties, the court also argued that even if Congress implements a treaty, it "does not mean that it ceases to be a treaty and becomes an 'Act of Congress.'"[110] Therefore, because the Convention is a treaty and chapter 2 of the FAA is an "Act of Congress," the court held that the MFA could not reverse preempt the Convention.[111] However, whether the Senate's ratification of the Convention constitutes an act of Congress that would result in the MFA reverse preempting the New York Convention is uncertain.[112] If courts choose to apply the Treaty or its implementing

105. McCarran-Ferguson Act § 2(b), Pub. L. No. 79-15, 59 Stat. 34 (codified at 15 U.S.C. § 1012(b)).

106. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 723–25 (5th Cir. 2009); Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 665–66 (1st Cir. 2023); CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1016–17 (9th Cir. 2021); ESAB Grp. v. Zurich Ins., 685 F.3d 376, 389–90 (4th Cir. 2012).

107. *See* 15 U.S.C. § 1012(b); *see also* Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran-Ferguson Act: How Far Should the Protection to Policyholders Go?*, 1 U. P.R. Bus. L.J. 35, 39–40 (2010).

108. *See supra* note 107; McCarran-Ferguson Act § 2(b).

109. *See Safety Nat'l*, 587 F.3d at 724.

110. *See* 15 U.S.C. § 1012(b); *Safety Nat'l*, 587 F.3d at 723.

111. *See Safety Nat'l*, 587 F.3d at 723 ("The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an 'Act of Congress.'").

112. *See* Foresight Energy, LLC v. Certain London Mkt. Ins., 311 F. Supp. 3d 1085, 1092–93 (E.D. Mo. 2018) (noting the lack of agreement amongst courts regarding whether the Convention Act constitutes an act of Congress).

legislation, the MFA may or may not reverse preempt the New York Convention.[113]

The district court in *Foresight Energy* diverged from the Fifth Circuit's decision to analyze the Convention, rather than the Convention Act, to determine whether the MFA reverse preempts the Treaty.[114] Siding with the dissent in *Safety National*, the district court argued that allowing the New York Convention to supersede the MFA conflicts with the plain language of the MFA.[115] Regardless of congressional intent, the district court's emphasis on the plain language of the MFA suggests revisiting the long-standing method of statutory interpretation.[116] The Supreme Court generally seeks to avoid interpreting domestic statutes in a way that conflicts with international laws.[117] However, given that the plain language of the MFA is clear in prohibiting the construction of acts of Congress that would preempt state laws, perhaps there is no way to avoid such conflicting interpretation.[118] Prioritizing international principles at the expense of U.S. consumers seems counterproductive to government efforts to increase consumer protection.[119]

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113. *Compare* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Georgia, 8 F.4th 1007, 1015 (9th Cir. 2021) (concluding that article II, section 3 of the Convention is self-executing, therefore "it is the Convention itself that requires enforcement of the parties' arbitration agreement"), *with Safety Nat'l*, 587 F.3d at 737 (Elrod, J., dissenting) (arguing that courts should only analyze chapter 2 of the FAA, the implementing statute, because the New York Convention Treaty is non-self-executing, and that because it does not specifically relate to the business of insurance, it reverse preempts the Treaty).

114. *See Foresight Energy*, 311 F. Supp. 3d at 1097; *Krohmer Marina*, 655 F. Supp. 3d at 1141 (rejecting the Fifth's Circuit's decision to construe the Convention rather than the Convention Act to supersede state law).

115. *See Foresight Energy*, 311 F. Supp. 3d at 1097–98 (quoting U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993) "In the Act, Congress prescribed a clear-statement rule for federal statutes affecting the business of insurance: uncertain provisions are to be construed not to preempt state insurance law.").

116. *See id.* at 1097 ("How much clearer than 'No Act of Congress' can Congress be?").

117. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

118. *See* 15 U.S.C. § 1012(b) ("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 . . . .").

119. *See, e.g.*, Jonathan Baccay, *The Consumer Financial Protection Bureau is Focusing, Again, on Arbitration Limits*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Sept. 26, 2023), https://www.cpradr.org/news/the-consumer-financial-protection-bureau-is-focusing-again-on-arbitration-limits (announcing that the

The district courts' divergence from the First, Fourth, Fifth, and Ninth Circuit opinions suggests a growing recognition of the need for increased consumer protection in disputes between U.S. policyholders and foreign insurers.[120]

Unlike the district courts, the Fourth Circuit in *ESAB Group, Inc.* relied on Supreme Court dicta in *American Insurance Association v. Garamendi*[121] to inform its interpretation of "act of Congress."[122] Specifically, because the Supreme Court "specified that McCarran-Ferguson was 'directed to implied preemption by domestic commerce legislation,'" the Fourth Circuit argued for a limited application of the MFA.[123] While lower courts often defer to Supreme Court dicta, they are free to disregard it.[124] Consequently, the Fourth Circuit's reliance on Supreme Court dicta in this case means that lower courts are not constrained by the decision.[125]

Similar to its rejection of the Fifth Circuit's interpretation of the MFA, the district court in *Foresight Energy* also refused to adopt the Fourth Circuit's holding that the MFA only applies domestically.[126] Once again pointing to the plain language of the MFA, the district court noted the MFA does not expressly exclude acts of Congress that implement treaties.[127] The district court in *Krohmer Marina* also found the Fourth Circuit's analysis unpersuasive given its seeming disregard for the text of the MFA in favor of

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Consumer Financial Protection Bureau is drafting a rule that could potentially limit pre-dispute arbitration clauses).

120. *See Foresight Energy*, 311 F. Supp. 3d at 1092, 1101; Krohmer Marina, LLC v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1137–38, 1143 (E.D. Okla. 2023); Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 677 (1st Cir. 2023).

121. 539 U.S. 396 (2003).

122. *See* ESAB Grp. v. Zurich Ins., 685 F.3d 376, 388 (4th Cir. 2012); *Garamendi*, 539 U.S. at 427–28.

123. *ESAB Grp.*, 685 F.3d at 388–89 (noting "[*Garamendi*] demonstrated that Congress did not intend for the McCarran-Ferguson Act to permit state law to vitiate international agreements entered by the United States"); *see Garamendi*, 539 U.S. at 428.

124. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 182 (2014) (quoting Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013) "Simply because the Court has 'once written dicta calling a tomato a vegetable' does not mean that subsequent judges are 'bound to deny that it is fruit forever after.'").

125. *See id.* at 187 (noting that the influence of Supreme Court dicta over lower courts is limited).

126. Foresight Energy, LLC v. Certain London Mkt. Ins., 311 F. Supp. 3d 1085, 1092, 1097 (E.D. Mo. 2018).

127. *Id.* at 1097–98.

foreign policy considerations and its interpretation of the New York Convention's legislative history.[128]

In contrast, the Ninth Circuit in *CLMS Management* argued that because a treaty such as the New York Convention does not require approval by both houses of Congress, it cannot be construed as an act of Congress.[129] While the Ninth Circuit also cited salient foreign policy implications as an argument against holding the Convention to be an act of Congress under the MFA, it ultimately found that such policy does not eclipse statutory text interpretation when the meaning is unambiguous.[130]

In keeping with the Fifth and Ninth Circuits, the First Circuit in *Green Enterprises* held that because the Convention is a treaty rather than an act of Congress, it supersedes the MFA.[131] The First Circuit afforded significant weight to the text of the Convention, which it used to argue that article II, section 3 provides instructions to domestic courts to compel arbitration.[132] The First Circuit subsequently reasoned that Congress does not have to implement legislation to execute article II, section 3.[133] By applying the language of the Treaty instead of the MFA, courts like the First Circuit end up favoring foreign insurers over U.S. policyholders in states with anti-arbitration statutes.[134] Following the district courts' analysis of the MFA's plain language in *Foresight Energy* and *Krohmer Marina* may provide better

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128. Krohmer Marina, LLC v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1141–42 (E.D. Okla. 2023); *see* United States v. Herrera, 51 F.4th 1226, 1287 (10th Cir. 2022) ("But when the statutory text is unambiguous, we need not rely on legislative history.").

129. *See Krohmer Marina*, 655 F. Supp. 3d at 1139, 1041–42.

130. *See* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1017 (9th Cir. 2021); *Foresight Energy*, 311 F. Supp. 3d at 1097–98.

131. Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 666 (1st Cir. 2023).

132. *Id.* at 667 ("[T]he text of the Convention makes plain that Article II(3) provides a clear 'directive to domestic courts.'") (citing Medellin v. Texas, 552 U.S. 491, 508 (2008)).

133. *See id.* at 670. *But see* Certain Underwriters at Lloyd's v. 3131 Veterans Blvd LLC, No. 22-CV-9849 (LAP), 2023 WL 5237514, at *6 (S.D.N.Y. Aug. 15, 2023) (ruling that the Convention was not self-executing based off the Second Circuit's holding in *Stephens*).

134. *See CLMS Mgmt.*, 8 F.4th at 1014; ESAB Grp. v. Zurich Ins., 685 F.3d 376, 379 (4th Cir. 2012); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 730 (5th Cir. 2009) (en banc); *Green Enters.*, 68 F.4th at 677.

protection for state anti-insurance arbitration statutes by adhering to consistent and established norms of statutory interpretation.[135]

Krohmer and *Foresight*'s analysis of the plain language of the MFA encourages courts to reconsider this language as preempting international and domestic arbitration clauses.[136] By deferring to foreign policy concerns arising from the United States' diplomatic relationships, courts minimize the initial intent of the MFA, which was to "embrace[] the full scope of possible federal regulation."[137] U.S. policyholders cannot, therefore, rely on state anti-arbitration laws to protect them while foreign insurers may rely on a court enforcing arbitration agreements almost every time.[138]

C. Legislative Intent

In addition to their different analytical approaches to the plain language of the MFA, the district courts also diverged from the circuit courts by excluding analysis of the legislative intent of the MFA.[139] Given the inability of courts to agree on the construction of "act of Congress," the examination of legislative intent is arguably a necessary tool to determine whether the MFA reverse preempts the New York Convention.[140]

The Fifth Circuit was the first to argue that if Congress intended for future treaties that conflicted with state laws regulating insurance and were implemented by an act of Congress to supersede state laws, they would have included language explicitly stating so in the MFA.[141] Similarly, the Ninth Circuit's analysis of the legislative history of the Convention and executive intent in *CLMS Management* led the court to conclude that the New York

135. *Foresight Energy*, 311 F. Supp. 3d at 1097–98; Krohmer Marina v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1141–42 (E.D. Okla. 2023).

136. *See supra* note 135.

137. Steven Koch, *McCarran-Ferguson Act Immunity from the Truth in Lending Act and Title VII*, 48 U. CHI. L. REV. 730, 735 (1981) (explaining congressional intent behind the MFA).

138. *See* Born, *supra* note 92, at 123.

139. *See Foresight Energy*, 311 F. Supp. 3d at 1097–98; *Krohmer Marina*, 655 F. Supp. 3d at 1141–42.

140. *See* Yates v. United States, 574 U.S. 528, 537 (2015) (arguing that statutory interpretation is influenced by the context in which the language and statute are being applied) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

141. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 729 (5th Cir. 2009) (en banc). *But see* 91 CONG. REC. 481 (1945) (statement of Sen. Homer Ferguson) ("The purpose of [Section 2(b) of the MFA] 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.").

Convention does not constitute an act of Congress under the MFA.[142] While the executive branch's interpretation of a treaty is afforded significant weight, excessive reliance on extrinsic evidence can muddle attempts to execute the MFA faithfully.[143]

The United States initially delayed accession to the Convention until "the necessary legislation" was passed; the First Circuit used this as further proof that the President believed the Convention was self-executing in the eyes of the court.[144] On the other hand, the Ninth Circuit admitted that the President's communication with the Senate could also be interpreted as proof that the Convention is non-self-executing and, therefore, not intended to supersede the MFA.[145] The court later dismissed the President's communication as "inconclusive" and stated that it did not "override the plain text of the Convention."[146] Such extensive reliance upon the interpretation of executive and legislative branches reveals how desperate courts are to avoid construing the New York Convention as an act of Congress, despite the plain language of the MFA suggesting otherwise.[147] District courts' decisions to exclude discussion of the legislative and

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142. *See* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1017 (9th Cir. 2021) ("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."); Message from the President of the United States Transmitting the Convention, S. Exec. Doc. E-90-2 (Apr. 24, 1968) (explaining 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").

143. *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given [to] them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

144. *See* Message from the President of the United States Transmitting the Convention, S. Exec. Doc. E-90-2 (Apr. 24, 1968); Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 677 (1st Cir. 2023).

145. *See CLMS Mgmt.*, 8 F.4th at 1014 (noting that President Johnson argued the necessity for changes to the FAA before acceding to the Convention).

146. *Id.*

147. *See* Aaron L. Wells, *When "Yes" Means "No": McCarran-Ferguson, the New York Convention, and the Limits of Congressional Assent*, 12 PEPP. DISP. RESOL. L.J. 267, 297 (2012) (arguing that the New York Convention is non-self-executing given the Supreme Court's focus on the "intention and understanding of the political branches that ratified the treaty"); *see also* Krupar, *supra* note 47, at 900 ("The plain meaning of the words of the McCarran-Ferguson Act should be regarded as conclusive to show that Congress, by including the words 'any' and every' must have intended not to limit its application to domestic insurers.") (internal citation omitted).

executive intent behind the MFA and Convention in *Foresight Energy* and *Krohmer Marina* could therefore either be a failure to conduct a holistic examination of the MFA or evidence that the district courts thought it unnecessary given that the plain language already operates as legislative intent.[148] While the district courts' exclusion of legislative intent in its analysis could be construed as neglectful, the circuit courts' arguable overreliance upon it comes at the expense of a faithful interpretation of the MFA's plain language.[149]

D. Re-Evaluating Statutory Interpretation to Determine Reverse Preemption by the MFA: Domestic and International Impacts

Conflicting textual interpretations of the New York Convention and the MFA muddle instructions to courts.[150] With the FAIR Act signaling a shift in policy away from pro-arbitration policy, courts will need to reevaluate the weight afforded to the legislative intent and plain language of the New York Convention and MFA in their decision to enforce arbitration clauses in states with anti-arbitration statutes.[151]

The First, Fourth, Fifth, and Ninth Circuit courts' use of foreign policy concerns to buttress their interpretation of chapter 2 of the FAA becomes even more glaring in the face of the FAIR Act — its goal of increasing consumer protection is a transition away from the presumed federal policy favoring arbitration.[152] As the Fourth and Ninth Circuit courts note, conflict arising from the United States treating its own laws as superseding those agreed upon by the international community would likely sour diplomatic relations with other countries.[153] However, section 502 of the FAIR Act pits

148. *See* Ardestani v. INS, 502 U.S. 129, 135 (1991) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981) "The 'strong presumption' that the plain language of the statute expresses congressional intent it rebutted only in 'rare and exceptional circumstances.'").

149. *See* Krupar, *supra* note 47, at 900 (arguing that the plain language of the MFA does not limits its application to domestic insurers).

150. *See* McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (prohibiting acts of Congress from superseding state insurance laws); New York Convention, *supra* note 3, at art. II(3) (mandating that a party to the treaty "shall . . . refer the parties to arbitration . . . .").

151. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. § 502(b)(1) (2023).

152. *See id.*; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements.").

153. *See* ESAB Grp. v. Zurich Ins., 685 F.3d, 376, 390 (4th Cir. 2012) (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) "[T]he federal government must be permitted to 'speak with one voice when regulating commercial relations with foreign

this concern against the growing dissatisfaction with arbitration's failure to protect U.S. consumers.[154] By treating forced pre-dispute arbitration clauses as invalid and unenforceable, the FAIR Act presents a compelling presumption against arbitration.[155]

Despite the uncertainty of the FAIR Act becoming law, it addresses what legislators and academics have increasingly perceived as unfairness in arbitration.[156] Given the courts' disagreement over whether the Convention supersedes the MFA, arbitrators tend to rely on their own rules.[157] While courts cannot help but make certain value judgments at times, such broad authority afforded to a single arbitrator has the potential to have even further-reaching influence over statutory interpretation and enforcement of arbitration agreements in international commercial disputes.[158] On the other hand, the FAIR Act's broad scope would prevent the potential expansion of arbitrators' influence over U.S. policy addressing international commercial arbitration.[159]

The FAIR Act's language eliminating forced pre-dispute arbitration also conflicts with chapter 2, section 206 of the FAA, which compels arbitration.[160] Courts confronted with determining whether to uphold state anti-arbitration statutes under the MFA or compel arbitration under the New York Convention must contend with case law precedent supporting prioritization of domestic law when international law is found irreconcilable.[161] International insurers' willingness to enter into business

governments.'"); CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1017 (9th Cir. 2021) (citing the Fourth Circuit's concern over the federal government's ability to present a unified front in its international commercial relationships).

154. *See* FAIR Act § 502(a).

155. *See id.*; Press Release, U.S. Sen. Sherrod Brown, Brown, Colleagues Introduce Legislation to Protect Consumers by Banning Forced Arbitration (May 3, 2023), https://tinyurl.com/5ykrbpka.

156. *See* Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 363 (2010) (arguing that a policy in favor of arbitration ignores consumer protection).

157. *See* Jan Kleinheisterkamp, *The Myth of Transnational Public Policy in International Arbitration*, 71 AM. J. COMP. L. 98, 100 (2023) ("Is it too far-fetched to consider commercial arbitrators, whose jurisdiction is the product of party autonomy, as akin to global regulators?").

158. *See id.*

159. *See* FAIR Act. § 502.

160. *See id.*; 9 U.S.C. §§ 201–208.

161. *See* United States v. Georgescu, 723 F. Supp. 912, 921 (1989) ("[W]hile courts must make a fair effort to interpret domestic law in a way consistent with international

with Americans could also decrease in response to the unreliability of whether arbitration clauses would be enforced in U.S. courts.[162] Despite the limited impact the FAIR Act alone might have on influencing court decisions, paired with district court decisions like *Foresight* and *Krohmer*, courts have alternative methods of analysis to consider when assessing whether the MFA reverse preempts the New York Convention.[163]

Some courts, like the Ninth Circuit, might consider the United States' accession to the Convention as proof of the government's intent to allow the New York Convention to supersede the MFA.[164] Article II, section 1 of the Convention provides a means for Congress to retain some of its authority over arbitration by "subject matter[s] [not] capable of settlement by arbitration."[165] Article II, section 1 could therefore also be construed to return power to regulate insurance to the states under the MFA.[166] While the FAIR Act does not suggest how courts should define "act of Congress" under the MFA or clarify whether the New York Convention should be construed as self-executing, Congress's persistent, albeit failed, attempts to pass the FAIR Act alongside the decrease in judicial support to arbitration clauses demonstrates a shift in favor of preventing international arbitration policies from always superseding domestic ones.[167]

If courts in the future apply a similar analysis as the First, Second, Fourth, Fifth, and Ninth Circuits did, insurance companies would continue to prevail

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obligations, in the event of irreconcilable conflict, the courts are bound to apply domestic law if it was passed more recently."); *see also* United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003) (quoting United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983)) ("It is also established that Congress 'may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.'").

162. *See* Pennisi, *supra* note 33, at 601–02 ("Commercial parties worldwide rely on arbitration clauses to mitigate the high risks inherent in international business transactions.").

163. *See* FAIR Act § 502; Foresight Energy v. Certain London Mkt. Ins. Co., 311 F. Supp. 3d 1085, 1097 (E.D. Mo. 2018); Krohmer Marina v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1140–42 (E.D. Okla. 2023).

164. *See* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1017 (9th Cir. 2021) ("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.'") (internal citation omitted).

165. New York Convention, *supra* note 3, at art. II(1).

166. *See id.*; Gary Shaw, *Sorting Circuit Split on Foreign Arbitration Treaty's Authority*, LAW360 (Apr. 19, 2024), https://www.law360.com/articles/1825622.

167. *See* FAIR Act § 502(b); *Foresight Energy*, 311 F. Supp. 3d at 1097 (E.D. Mo. 2018); *Krohmer Marina*, 655 F. Supp. 3d at 1140–42.

in such disputes.[168] The circuit courts' overemphasis of the aforementioned factors also places U.S. policyholders at a disadvantage in disputes with foreign insurers in states with anti-arbitration insurance laws, since such laws are superseded by the New York Convention.[169] Furthermore, state insurance commissioners in states with anti-arbitration statutes would also be forced to violate their laws.[170] By continuing to interpret chapter 2 of the FAA and the MFA within the framework of international public policy concerns and domestic pro-arbitration policy favoring enforcement of arbitration agreements, courts ensure that U.S. policyholders remain subject to arbitration no matter what state they are in, limiting their access to courts.[171]

On the other hand, district court decisions holding the MFA reverse preempts the New York Convention revive the importance of the long-standing method of statutory interpretation, which calls for referring to the plain language when the text is unambiguous.[172] Construing the MFA as an act of Congress in the context of domestic and foreign policy obscures the original intent behind the MFA.[173] However, the decisions in *Foresight Energy* and *Krohmer Marina* are a call to return to plain language statutory interpretation, which has been recognized as a longstanding "maxim of law" in the analytical toolbox.[174] The Supreme Court's decision to deny certiorari

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168. *See* Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 664–65 (1st Cir. 2023); *CLMS Mgmt.*, 8 F.4th at 1007; ESAB Grp. v. Zurich Ins., 685 F.3d 376, 388–90 (4th Cir. 2012); *see also* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714, 732–37 (5th Cir. 2009) (en banc).

169. *See, e.g.*, *Green Enters.*, 68 F.4th at 664–65.

170. *See* Emergency Appl. to Stay Procs. and Recall Third Cir.'s Mandate Pending Filing Pet. for Writ of Certiorari, United States v. Delaware Dep't of Ins., 66 F.4th 114 (3d Cir. 2023).

171. *See* Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U. S.F. L. REV. 39, 47 (2003) (noting how arbitration "deprives consumers. . . and other 'little guys'. . . of a jury trial") (citation omitted).

172. *See Foresight Energy*, 311 F. Supp. 3d at 1097; *Krohmer Marina*, 655 F. Supp. 3d at 1140–42.

173. *See Safety Nat'l*, 587 F.3d at 749–52 (Elrod, J., dissenting) ("[E]ven if such policy considerations were relevant to the interpretation of an unambiguous statute, and they are not, the court's analysis barely acknowledges the state interest that was significant enough to give rise to the rare reverse preempting provision of the McCarran-Ferguson Act in the first place.").

174. Green v. Biddle, 21 U.S. 1, 38 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense."); *see supra* note 172.

in *CLMS Management* and *Safety National* is a potential indicator that it is aware of the challenges of interpreting a domestic statute and a treaty whose plain language contradict one another.[175] However, denying certiorari does not constitute a decision on the merits of the case or predict how the Court would rule; it remains uncertain how the Court intends to resolve the issue.[176] Even if the Supreme Court applied the district courts' analysis in *Foresight Energy* and *Krohmer Marina*, it would still have to contend with article II, section 3 of the Convention, which directs signatories to compel arbitration.[177]

District court decisions like *Foresight Energy* and *Krohmer Marina* expose the gap in courts' interpretation of the MFA and New York Convention, while the FAIR Act indicates a change in congressional support for arbitration that could lead to greater efforts to better protect American consumers, particularly in states with anti-insurance arbitration statutes.[178] Together, *Foresight Energy*, *Krohmer Marina*, and the FAIR Act provide alternative perspectives for courts to consider when determining whether to enforce the MFA or New York Convention by forcing courts to confront changes in policy and judicial support for arbitration generally and in the context of insurance disputes.[179]

IV. RECOMMENDATIONS FOR BALANCING STATE SOVEREIGNTY WITH FEDERAL STATUTORY AND TREATY OBLIGATIONS

The courts' current method of analyzing the legislative intent and text of the MFA and the New York Convention disproportionately considers foreign policy interests to inform their decisions.[180] Such reliance benefits foreign

175. *See* CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1007 (9th Cir. 2021); *see also Safety Nat'l*, 587 F.3d at 734–35.

176. *See* Chris Paparella et al., *Can McCarran-Ferguson Take Away the Right to International Arbitration? Federal Courts Disagree*, STEPTOE (May 7, 2024), https://www.steptoe.com/en/news-publications/can-mccarran-ferguson-take-away-the-right-to-international-arbitration-federal-courts-disagree.html.

177. *See supra* note 173; *see also* New York Convention, *supra* note 3, at art. II(2).

178. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. §§ 502(b)(1) (2023); *see also* Foresight Energy v. Certain London Mkt. Ins. Co., 311 F. Supp. 3d 1085, 1097 (E.D. Mo. 2018); Krohmer Marina v. Certain Underwriters at Lloyd's, 655 F. Supp. 3d 1124, 1140–42 (E.D. Okla. 2023).

179. *See supra* note 178.

180. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) ("[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties'

insurance companies because it compels arbitration even in states with anti-arbitration statutes.[181] As a result, U.S. policyholders are more limited in their selection of insurance policies given that some courts might compel arbitration in disputes with foreign insurers despite living in a state with anti-arbitration insurance laws.[182]

Although foreign policy considerations support the supremacy of the New York Convention, courts should nevertheless be wary of prioritizing international laws over domestic ones when deciding whether to enforce a treaty over a statute.[183] Foreign policy considerations should not overshadow domestic policy concerns over arbitration when engaging in statutory interpretation.[184] The decisions of the First, Second, Fourth, Fifth, and Ninth Circuits demonstrate how one-sided interpretation of the New York Convention's plain language comes at the expense of consumer protection under the MFA.[185] The district courts in the Tenth and Eighth Circuits are arguably equally as guilty of conducting a one-sided analysis of the plain language of the MFA by declining to consider the political ramifications of construing a federal statute in violation of an international treaty.[186] Courts should, therefore, reanalyze their interest-balancing approach to give greater weight to the growing hostility towards the overuse of arbitration clauses and

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agreement, even assuming that a contrary result would be forthcoming in a domestic context.").

181. *See* Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 664–65 (1st Cir. 2023); CLMS Mgmt. Servs. Ltd. v. Amwins Brokerage of Ga., 8 F.4th 1007, 1018 (9th Cir. 2021); ESAB Grp. v. Zurich Ins., 685 F.3d 376, 394–95 (4th Cir. 2012); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 587 F.3d 714,732–37 (5th Cir. 2009) (en banc).

182. *See* Christopher J. Valente et al., *Litigation Minute: International Arbitration Clauses in Insurance Policies: Are They Valid in States with Anti-Arbitration Insurance Statutes?*, K&L GATES (Feb. 7, 2022), https://www.klgates.com/Litigation-Minute-International-Arbitration-Clauses-in-Insurance-Policies-Are-They-Valid-in-States-With-Anti-Arbitration-Insurance-Statutes-2-7-2022.

183. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (arguing that the federal government must be unified in its policy when regulating international commercial relations).

184. *Contra* Quan, *supra* note 65, at 686 (arguing that a foreign policy approach to the MFA is "preferable to the federal intent approach because it satisfies important foreign policy goals and retains the overall integrity of the McCarran-Ferguson Act").

185. *See Green Enters.*, 68 F.4th at 664–65; *CLMS Mgmt.*, 8 F.4th at 1017; *ESAB Grp.*, 685 F.3d at 395; *Safety Nat'l*, 587 F.3d at 732–37.

186. *See* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995) (arguing that "courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements").

consumer protection in their analysis of the conflict between the New York Convention and MFA to compensate for the overemphasis placed on foreign policy.[187]

Courts can conduct a modified interest-balancing analysis by reframing their analysis of the MFA and New York Convention to address its current lack of consideration for consumer protection and state sovereignty in arbitration disputes.[188] First, courts should consider the plain language of the MFA to prevent the application of the Convention as domestic law.[189] Second, courts should weigh the legislative intent and history as the First, Second, Fourth, Fifth, and Ninth Circuits did.[190] Finally, and only after weighing the aforementioned factors carefully, courts may consider policy implications.[191]

Since forced arbitration clauses tend to favor companies rather than consumers, perhaps legislators should reconsider whether it is appropriate to resolve international commercial disputes.[192] Specifically, given that international commercial arbitration assumes equal bargaining power, underwriters and insurers have an advantage over policyholders because they write the policy.[193] Consequently, arbitration could be viewed as an inappropriate method of dispute resolution when it involves insurance

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187. *See id.*

188. *See supra* note 185.

189. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 400 (1998) (arguing that "if treaty power is immune from federalism restrictions, as the nationalist view maintains, then it may be a vehicle for the enactment of legislative changes that fall outside of Congress's domestic lawmaking powers").

190. *See supra* note 185; Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 46 (2d Cir. 1995).

191. *See* Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 946 (2012) ("[F]oreign policy implications should not comprise the foundations of stare decisis for purely domestic statutes.").

192. *See* AM. ASS'N FOR JUST., THE TRUTH ABOUT FORCED ARBITRATION 12–13 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451316 (noting that consumers are significantly less successful in forced arbitration); *see also How Insurance Arbitration Clauses Negatively Impact Policyholders*, RAIZNER SLANIA L. (Jan. 3, 2023), https://www.raiznerlaw.com/blog/how-insurance-arbitration-clauses-negatively-impact-policyholders/ (noting the various ways mandatory arbitration clauses harm commercial policyholders).

193. *See* Karen A. Lorang, Comment, *Mitigating Arbitration's Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218, 224 (2011) (stating that the Federal Arbitration Act assumed arbitration would occur between companies with similar bargaining power).

contracts between U.S. policyholders and a foreign insurer.[194] Regardless of whether the policyholder is a large corporation or small business owner, they lack bargaining power when it comes to drafting the insurance policy, which is instead left to the insurer and its underwriters.[195] This gives American consumers less protection by limiting access to jury trials and discovery that might otherwise provide a more neutral ground to litigate their case in U.S. courts.[196] To combat the "increasingly litigious nature of international arbitration," U.S. courts will ultimately have to consider whether uniform enforcement of arbitration clauses is worth the risk of American consumers in insurance disputes potentially being forced to arbitrate their disputes internationally despite their lack of bargaining power and potential residency in a state with anti-insurance arbitration statutes.[197]

V. CONCLUSION

International commercial arbitration poses a significant challenge to U.S. courts seeking to balance the country's obligations as signatories to treaties with the weight of domestic laws.[198] By adjusting their analysis, U.S. policyholders can be better protected than they have been in recent court decisions.[199] Analyzing the plain language of the MFA and construing an "act of Congress" to prohibit the New York Convention from preempting the MFA ultimately better protects U.S. policyholders and prevents abuse of an international insurance arbitration framework that currently favors large insurance companies over individual consumers.

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194. *See id.*

195. *See* Krupar, *supra* note 47, at 904 (arguing that insurance policies should be construed in favor of the policyholder because of the lack of bargaining power between the insurer and insured).

196. *See* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 472 (2006) (explaining the arbitration process).

197. *See* Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 ICSID REV. 17, 17 (2017) (noting increasing disillusionment with international arbitration as a result of an abuse of process in international arbitration). *See generally* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIA. L. REV. 831, 838 (2002) (arguing that arbitration clauses prevent consumers from accessing the courts, which is often necessary to win disputes in the first place).

198. *See* Krupar, *supra* note 47, at 905.

199. *See* Green Enters. v. Hiscox Syndicates Ltd., 68 F.4th 662, 677 (1st Cir. 2023).