No. ___

IN THE
Supreme Court of the United States

IMAD BAKOSS, M.D.,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 0510135

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Alternative-dispute resolution (ADR) agreements are generally governed by ordinary contract law. The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307, however, provides additional judicial enforcement mechanisms for "arbitration" agreements.

This case presents the following questions:

1. By electing not to define the term "arbitration," did Congress evince an intent to respect relevant state-law definitions of "arbitration," so long as applying them would not undermine the FAA's policy goals?

2. If it is proper to disregard relevant state-law definitions of "arbitration" in favor of one created by federal judges, should that definition exclude ADR that does not necessarily (a) resolve the plaintiff's entire cause of action (b) through an adversarial process?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Factual Background 1

B. District Court Proceedings 5

C. The Second Circuit's Decision 7

REASONS FOR GRANTING THE PETITION 8

I. THE SECOND CIRCUIT'S DECISION PRESENTS SEVERAL BROAD CIRCUIT SPLITS MANDATING THIS COURT'S REVIEW. 9

A. The Ruling That Relevant State Law Never Defines The Term "Arbitration" Cements A Widely Acknowledged Circuit Conflict. 10

B. The Second Circuit's Federal-Judge-Made Definition Of "Arbitration" Conflicts With Those Of Other Circuits. 13

1. The Circuits Are Split On Whether "Arbitration" Must Resolve The Plaintiff's Entire Cause Of Action..... 14

2. The Second Circuit's Definition Creates A Split On Whether "Arbitration" Requires An Adversarial Process..... 16

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FAA RULINGS AND BROADER PREEMPTION PRECEDENTS..... 17

A. The Second Circuit's Approach Ignores This Court's Case-By-Case FAA Preemption Inquiry..... 17

B. This Court Routinely Construes Federal Provisions To Look Presumptively To Relevant State Law..... 20

C. New York's Definition Of "Arbitration" Is Fully Consistent With The FAA's Purposes And Text..... 23

D. The Second Circuit Used An Incorrect Federal-Judge-Made Definition Of "Arbitration." 25

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND INESCAPABLE IN TODAY'S BUSINESS WORLD..... 26

A. The Definition Of "Arbitration" Directly Determines Which Types Of ADR Implicate The FAA's Additional Judicial Enforcement Mechanisms. 26

B. Parties Frequently Challenge ADR Provisions Like The Third-Physician Clause And Argue That They Are Not "Arbitration" Agreements. 28

CONCLUSION 35

APPENDIX A:
Opinion of the U.S. Court of Appeals for the Second Circuit (Jan. 23, 2013) 1a

APPENDIX B:
Opinion of the U.S. District Court for the Eastern District of New York (Sept. 27, 2011) 12a

APPENDIX C:
Letter from Hon. William K. Suter to E. Joshua Rosenkranz (Apr. 15, 2013) 34a

APPENDIX D:
Federal Arbitration Act, 9 U.S.C. §§ 1-307..... 36a

TABLE OF AUTHORITIES

Page(s)

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A-1 A-lectrician, Inc. v. CommonWealth REIT,
Civ. No. 12-00607 ACK-BMK, 2013 WL 1817688
(D. Haw. Apr. 26, 2013) 10, 33

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524 F.3d 1235 (11th Cir. 2008)..... 12, 14, 17

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995)..... 19, 20

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Civil No. 3:12cv730 (JBA), 2012 WL 2374728 (D. Conn. June 22, 2012) 33

AMF Inc. v. Brunswick Corp.,
621 F. Supp. 456 (E.D.N.Y. 1985) 6, 12, 15, 17

Appleby v. New York,
271 U.S. 364 (1926)..... 21

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131 S. Ct. 1740 (2011)..... 19

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503 U.S. 393 (1992)..... 22

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No. 2:10-cv-136-FtM-29DNF, 2010 WL 3293347
(M.D. Fla. Aug. 19, 2010) 33

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408 U.S. 564 (1972)..... 21

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Civil Action Nos. 11-4596, 12-727, 2012 WL
3651115 (E.D. Pa. Aug. 24, 2012)..... 33

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221 F.2d 657 (2d Cir. 1955) 22

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584 F.3d. 513 (3d Cir. 2009) 16

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726 F.2d 483 (9th Cir. 1984)..... 11

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439 F.3d. 27 (1st Cir. 2006) 16

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351 U.S. 570 (1956)..... 22

Dluhos v. Strasberg,
321 F.3d 365 (3d Cir. 2003) 12, 14

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517 U.S. 681 (1996)..... 19

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335 F.3d 742 (8th Cir. 2003), *reh'g en banc denied*
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565 F.3d 284 (5th Cir. 2009) 11

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No. 1:09-CV-00113, 2009 WL 3614931 (S.D. Ohio Oct. 28, 2009) 33

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Civil Action No. 1:07-CV-2993-JOF, 2009 WL 259401 (N.D. Ga. Feb. 3, 2009) 34

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111 F.3d 343 (3d Cir. 1997) 12, 15

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898 F.2d 1058 (5th Cir. 1990)..... 11

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484 F.3d. 496 (8th Cir. 2007)..... 16

James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC,
Civil Action No. 11-374-JBC, 2013 WL 28067 (E.D. Ky. Jan. 2, 2013)..... 33

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500 U.S. 90 (1991)..... 20

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Civil No. 08-929-JO, 2009 WL 562815 (D. Or. Mar. 2, 2009) 33, 34

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Civil Action No. DKC 12-0282, 2012 WL 718857
(D. Md. Mar. 5, 2012) 10, 33

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No. 2:06-cv-668, 2009 WL 3854227 (S.D. Ohio
Nov. 17, 2009) 32, 33

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278 F.3d 621 (6th Cir. 2002) 16

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508 U.S. 324 (1993) 22

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Civil Action No. 5:11CV164, 2012 WL 2522960
(N.D. W.Va. June 29, 2012) 33

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512 U.S. 79 (1994) 23

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..... 10, 11

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No. 07 CV 845, 2008 WL 1733591 (W.D. La. Apr.
14, 2008) 34

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549 F.3d. 303 (4th Cir. 2008)..... 16

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41 F. Supp. 2d 294 (S.D.N.Y. 1999) 23

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494 F.3d 1328 (11th Cir. 2007)..... 16

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536 U.S. 355 (2002)..... 25, 26

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455 U.S. 457 (1982)..... 21

Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.,
454 F.3d 1128 (10th Cir. 2006)..... 27

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226 S.W. 846 (Mo. 1920) 18

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41 N.E. 969 (Ind. Ct. App. 1895) 18

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550 N.W.2d 640 (Neb. 1996) 15

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95 Ill. 533 (Ill. 1880) 19

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436 N.E.2d 512 (N.Y. 1982) 6

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34 A. 278 (Me. 1896) 18

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88 N.E. 638 (Ohio 1909) 18

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67 N.E. 584 (N.Y. 1903) 18

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U.S. Const., art. I 21, 22

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9 U.S.C.
§§ 1-307 ..... 1, 5, 9
§§ 201-03 ..... 5, 28
§ 2 27
§ 3 27
§ 7 27
§ 10 ..... 16, 27
§ 16 27
§ 205 ..... 5, 28

28 U.S.C.
§ 1254 1
§ 1446 28

Pub. L. No. 68-401, 43 Stat. 883 (1925) 24

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The Second Circuit's opinion is published at 707 F.3d 140, and it is reprinted at P.A. 1a-11a.[1] The district court's opinion is not published in the *Federal Supplement*, but it is available at 2011 WL 4529668 and is reprinted at P.A. 12a-33a.

JURISDICTION

The Second Circuit issued its opinion on January 23, 2013. P.A. 1a. On April 15, 2013, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including June 7, 2013. P.A. 34a. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-307, is reproduced at P.A. 36a-52a.

STATEMENT OF THE CASE

A. Factual Background

Dr. Imad Bakoss was a practicing physician. Board-certified in internal medicine and pulmonology, he ran his own practice in Brooklyn, New York for over 25 years. J.A. 35. He also treated patients in his hospital's intensive-care unit. J.A. 79. And he

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[1] We use the following abbreviations: "P.A." for the Petition Appendix and "J.A." for the Joint Appendix in the court of appeals.

covered "night call," handling overnight emergencies. *Id.*

In early October 2006, Dr. Bakoss suffered a severe episode of chest pain. J.A. 190. He consulted Dr. John Sayad, an internist board-certified in cardiovascular disease. J.A. 275. Dr. Sayad diagnosed Dr. Bakoss with coronary artery disease and told him to "stop working immediately." J.A. 276. It was a "permanent, total disability," Dr. Sayad explained. *Id.*

Against Dr. Sayad's advice, over the next ten months, Dr. Bakoss tried multiple times to resume regularly treating patients. J.A. 190. And he continued paying premiums on all of his insurance policies, even though they did not require him to do so in the event he became disabled. *Id.* But, during that time, his coronary artery disease flared up again and caused two heart attacks. *Id.*

In July 2007, Dr. Bakoss realized that Dr. Sayad was right and that his medical career was over. J.A. 191. He filed a disability claim under his insurance policy with Lloyd's of London. J.A. 265-66, 269. Under that policy, Lloyd's promised to pay benefits in the event Dr. Bakoss became "permanently totally disabled." J.A. 251.

After a "formal review," Lloyd's said that Dr. Bakoss did not report his claim soon enough. J.A. 24; J.A. 71. The policy required that Dr. Bakoss provide Lloyd's notice within 20 days of the "potential qualifying loss, or as soon after that as is reasonably possible." J.A. 253. Dr. Bakoss did not recognize

until July 2007 that his disability would be permanent. J.A. 191. And in any event, the policy provided that he would not qualify for any benefits until he had been totally disabled for a year—that is, until October 2007. J.A. 248, 251. Yet Lloyd's said he should have given notice in October *2006*, within 20 days of when he first saw Dr. Sayad. J.A. 71.

Moreover, Lloyd's took the position that Dr. Bakoss was excluded from coverage. The Lloyd's doctor who examined him surmised that his coronary artery disease was mere "subjective pain" and actually a "mental or nervous disorder," which the policy did not cover. J.A. 68-70.

Lloyd's also concluded that Dr. Bakoss was not "permanently totally disabled." J.A. 66-67. Disagreeing with Dr. Sayad, the Lloyd's physician said Dr. Bakoss's coronary artery disease was neither a "permanent" disability nor a "total" one. *Id.*

The policy's grievance procedures permitted Dr. Bakoss to commence litigation after the company completed its "formal review." J.A. 255. But, even though Lloyd's said it had done just that, Lloyd's told Dr. Bakoss that he would have to take an additional step. Namely, he would have to submit to the policy's ADR procedure: "Should Your Physician and Our Physician not be able to agree that You are Totally Disabled, Your Physician and Our Physician shall name a third Physician to make a decision on the matter which shall be final and binding." J.A. 106-07; J.A. 251.

That "third-physician" clause applied only to the issue of "total disability." *Id.* It did not cover the issue of the whether the total disability was "permanent." *Id.* Nor did it encompass any of the other threshold criteria that Lloyd's said would in addition undermine Dr. Bakoss's claim. *Id.*

Also, the ADR clause put no restrictions upon how the third physician would conduct the "total disability" inquiry. *Id.* It did not purport to afford Dr. Bakoss a hearing on the issue, allow him to submit evidence, call witnesses, or the like. *Id.* The third physician could require a separate physical examination (or multiple such tests) and make his decision on that basis.

Dr. Bakoss did not object to third-physician ADR in principle. He did not seek to have a court (rather than a third physician) decide the issue of "total disability." Nor did he suggest that he would ask a court to vacate any third-physician ruling on "total disability" for reasons other than fraud, misconduct, or the like.

Dr. Bakoss simply told Lloyd's that, in his view, it made more sense to address the other predicate issues first. J.A. 103, 111. Third-physician ADR could end the dispute only if the result was a determination that Dr. Bakoss was not "totally disabled." Otherwise, the issue of whether his total disability was "permanent," as well as the threshold issues Lloyd's raised (like notice), would still need to be resolved. And because the third physician could require Dr. Bakoss to submit to an invasive physical examination, a battery of tests, or the like, turning

immediately to third-physician ADR had the potential to subject Dr. Bakoss to needless personal intrusion.

Dr. Bakoss sued Lloyd's in state court claiming a contractual right to his disability-insurance benefits, subject to the "total disability" ADR determination. J.A. 14-15.

B. District Court Proceedings

Lloyd's removed the state case to federal court, citing the Federal Arbitration Act (FAA). J.A. 9-12. The FAA prescribes special rules going above and beyond ordinary contract law to ensure that federal and state courts enforce "arbitration" agreements, respect "arbitration" proceedings, and confirm "arbitration" awards. *See generally* 9 U.S.C. §§ 1-307. And, in cases involving an "arbitration" agreement with a foreign party (like Lloyd's), the FAA confers federal subject-matter jurisdiction. *Id.* §§ 201-03, 205.

Arguing that the FAA did not apply, and therefore that the court lacked jurisdiction, Dr. Bakoss moved to remand the matter back to state court. J.A. 174-87, 426-37. The only ADR provision in the policy was the third-physician clause, Dr. Bakoss noted, and he contended that the limited third-physician ADR was not "arbitration." J.A. 183-87.

Dr. Bakoss argued that this Court's FAA decisions required the court to look presumptively to the definition of "arbitration" given by New York law (which the parties agreed controlled the policy). J.A.

184, 430-34. He noted that according to New York law, "arbitration" generally has two essential features. First, it "'resolves the whole controversy between the parties.'" J.A. 434 (quoting *Penn. Cent. Corp. v. Consol. Rail Corp.*, 436 N.E.2d 512, 516 (N.Y. 1982)); *see* J.A. 185. It excludes ADR that covers just one granular issue and thus may well "'leav[e] all other issues for resolution at a plenary trial.'" J.A. 434 (quoting *Penn. Cent. Corp.*, 436 N.E.2d at 516). Second, "arbitration" contemplates some sort of adversarial proceeding. J.A. 185 (citing *Penn Cent.*, 436 N.E.2d at 516); J.A. 436; *see* N.Y. C.P.L.R. § 7506. It does not include decisions reached via personal examination or the like. J.A. 436. Dr. Bakoss argued that third-physician ADR thus was not "arbitration" according to New York law.

The district court denied remand to state court. The court followed Judge Weinstein's opinion in *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985), and looked exclusively to the federal-judge-made definition of the term "arbitration." P.A. 25a-26a. "Arbitration" according to federal common law meant—tautologically—ADR that embodied "'the essence of arbitration.'" P.A. 26a (quoting *AMF*, 621 F. Supp. at 460). According to *AMF*, that "essence" included ADR that would not necessarily resolve a plaintiff's entire claim. P.A. 25a. Nor did it require any sort of adversarial proceeding. 621 F. Supp. at 460. "If the parties have agreed to submit a dispute"—no matter how limited in scope—"for a decision by a third party"—no matter how it was reached—"they have agreed to arbitration." P.A. 26a (citing 621 F. Supp. at 460). Using that

standard, the district court found that third-physician ADR was "arbitration." P.A. 27a.

Lloyd's moved for summary judgment on the notice issue, J.A. 237-39, and the court granted the motion, P.A. 32a.

C. The Second Circuit's Decision

The Second Circuit affirmed. It expressly noted that "[t]he other Courts of Appeals that have considered this question [of whether courts should look to relevant state law or federal-judge-made law for the definition of 'arbitration' under the FAA] have reached differing conclusions." P.A. 8a. Two circuits applied the relevant state-law definition of "arbitration" when doing so would not thwart the FAA's policy goals. *Id.*; *infra* pp. 10-11. Seven, in contrast, applied a kind of categorical super-preemption, using the "federal-common-law" definition in every case. P.A. 8a; *infra* pp. 11-12. The court of appeals said that those courts were motivated by the desire for a uniform federal rule. P.A. 8a-9a.

The Second Circuit expressly joined that latter camp. P.A. 9a. The court explained that it, too, felt "compell[ed]" to always look to a federal-common-law definition of "arbitration" to avoid creating the risk of "a patchwork in which the FAA will mean one thing in one state and something else in another." *Id.*

The court affirmed the grant of summary judgment for Lloyd's on the notice issue. P.A. 10a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for at least three reasons. *First*, the Second Circuit's decision implicates not one but *three* circuit conflicts. The court's threshold ruling deepens a widely acknowledged split over whether the FAA requires a court to disregard the relevant state-law definition of "arbitration" in favor of a definition created by federal judges. The Second Circuit's ruling also deepens a circuit split over what the federal-judge-created definition—which courts have adopted, ironically, in the name of uniformity—should look like. The circuits are conflicted on the key question of whether "arbitration" includes ADR procedures that do not necessarily resolve the entirety of a plaintiff's claim. And those courts are further split on whether that federal-judgment-made definition encompasses ADR procedures that do not employ an adversarial process. The result: three interrelated circuit splits generating disuniformity and unpredictability over how and when the FAA applies.

Second, the decision below contradicts this Court's approach to the FAA. States had been defining the term "arbitration" and differentiating it from other forms of ADR for years before the FAA was passed. When Congress enacted the FAA, it declined to imbue the statutory term "arbitration" with any specific federal meaning. If Congress had wanted a uniform federal standard, it would have provided one. It did not. Accordingly, this Court's cases construing the FAA make clear that courts should look presumptively to the relevant state-law definition and adhere to it unless doing so would undermine

some clear purpose of the FAA. What they should *not* do is exactly what the Second Circuit did: delegate that task to federal judges.

Third, the questions presented are important and recurrent. The issues in this case go to the heart of whether extremely popular types of ADR—like appraisal, professional-opinion ADR, non-binding ADR, and mediation—qualify for the extra layer of judicial enforcement mechanisms (beyond ordinary contract law) that the FAA provides.

I. THE SECOND CIRCUIT'S DECISION PRESENTS SEVERAL BROAD CIRCUIT SPLITS MANDATING THIS COURT'S REVIEW.

Congress enacted the FAA to give parties to "arbitration" agreements additional judicial enforcement mechanisms beyond ordinary contract law. The FAA contains a host of rules designed to ensure that federal and state courts enforce "arbitration" agreements, respect "arbitration" proceedings, and confirm "arbitration" awards. *See generally* 9 U.S.C. §§ 1-307. At issue here is the definition of the term "arbitration," and, accordingly, the scope of the FAA. The courts have long been conflicted on what source of law (state law or federal-judge-made law) provides the definition. And the subset of courts looking to federal-judge-made law for the definition in the name of nationwide uniformity ironically cannot agree on what it is. These conflicts are well formed and long standing. It is time for this Court to resolve them and provide desperately needed guidance.

A. The Ruling That Relevant State Law Never Defines The Term "Arbitration" Cements A Widely Acknowledged Circuit Conflict.

Many courts have acknowledged that "[t]he circuits are split" on whether the relevant state-law definition of "arbitration" presumptively applies for purposes of the FAA. *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012), *reh'g en banc denied* 10-2075 Docket (6th Cir. July 11, 2012); *see* P.A. 8a (decision below) ("The other Courts of Appeals that have considered this question have reached differing conclusions."); *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) (describing circuit cases taking different approach than the court in that case), *reh'g denied* 03-4256 Docket (10th Cir. Jan. 27, 2005) ("*Salt Lake Tribune Publ'g I*"); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) (describing "contrary" court of appeals rulings on this issue); *A-1 A-lectrician, Inc. v. CommonWealth REIT*, Civ. No. 12-00607 ACK-BMK, 2013 WL 1817688, at *4 n.2 (D. Haw. Apr. 26, 2013) ("There is a circuit split on this issue."); *Liberty Mut. Grp., Inc. v. Wright*, Civil Action No. DKC 12-0282, 2012 WL 718857, at *4 (D. Md. Mar. 5, 2012) (comparing conflicting circuit cases deciding this question). And the Second Circuit's decision here solidifies the split even further.

For more than 20 years, the Ninth and Fifth Circuits have "look[ed] to [relevant] state law" to define "arbitration," *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 218 F.3d 1085, 1086 (9th Cir. 2000)

(applying Oregon definition), *reh'g en banc denied* 99-35189 Docket (9th Cir. Oct. 13, 2000), so long as doing so "does not conflict" with the FAA's objectives, *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (applying California definition). *See Dwyer v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 565 F.3d 284, 286-87 (5th Cir. 2009) (applying Texas definition); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062-63 (5th Cir. 1990) (same). Their rationale is straightforward:

> While inconsistent state law is preempted, not all state law is preempted upon application of the Act. "State law should be preempted only to the extent necessary to protect the achievement of the aims of the [federal act in question]."

Wasyl, 813 F.2d at 1582 (quoting *Chevron U.S.A. Inc. v. Hammond*, 726 F.2d 483, 496 (9th Cir. 1984)) (alteration in *Wasyl*); *see Teachworth*, 898 F.2d at 1062 (finding Ninth Circuit's rationale "persuasive"); *see also Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 872 (Cal. Ct. App. 1996) ("The question of whether the parties agreed to arbitrate is answered by applying state contract law even when it is alleged that the agreement is governed by the FAA." (citing *Wasyl*, 813 F.2d at 1582)).

Eight other circuits, however (including the Second), have ruled to the contrary. These courts categorically disregard relevant state law in determining whether a particular type of ADR is "arbitration." Instead, they have decided that the better course is

to have federal judges fashion a definition. Under this federal-judge-centered approach, courts tautologically ask themselves whether the ADR at issue embodies "the essence of arbitration," *see* P.A. 6a-7a (decision below) (discussing *AMF*, 621 F. Supp. at 460); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003); *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997); *see United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001) (citing *Harrison*, 111 F.3d at 350; *AMF*, 621 F. Supp. at 460-61), *reh'g en banc denied* 00-1342 Docket (4th Cir. July 9, 2001), "how closely it resembles classic arbitration," *Evanston Ins. Co.*, 683 F.3d at 693; *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008); *Salt Lake Tribune Publ'g I*, 390 F.3d at 689; *Fit Tech*, 374 F.3d at 6, or whether treating it as "arbitration" "will significantly advance the dispute resolution process," *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 747-48 (8th Cir. 2003) (citing *Bankers Ins.*, 245 F.3d at 322; *Harrison*, 11 F.3d. at 349-50), *reh'g en banc denied* 02-2046 Docket (8th Cir. Aug. 28, 2003), *cert denied* 540 U.S. 1219 (2004).

The Second Circuit below expressly joined this anti-state-law camp. P.A. 9a. It said that looking presumptively to the relevant state-law definition could "create a patchwork in which the FAA will mean one thing in one state and something else in another," which it found unacceptable. *Id.*

This fundamental, long-standing conflict by itself merits this Court's review. As the Solicitor General has observed, when "the courts of appeals are … divided on the interpretation of a federal statute," cre-

ating a "conflict[] about whether to apply state or federal law as the rule of decision" concerning a matter on which Congress has not legislated a national rule, "[t]his Court's review is appropriate." Reply Brief for the Petitioner at 7, *Astrue v. Capato*, 132 S. Ct. 2021 (U.S. Oct. 26, 2011) (No. 11-159). That is precisely the situation here. Indeed, review is especially urgent here because two of the country's most commercially significant circuits—the Second and the Ninth—are on opposite sides of the conflict concerning this issue of great importance to the business and consumer communities.

This issue has thoroughly percolated both geographically and temporally. Ten circuits have weighed in over a period of more than 25 years. And there is no evidence to suggest that, over time, the circuits will self-adjust and bridge this deep divide. There is no reason to postpone review of this threshold FAA issue.

B. The Second Circuit's Federal-Judge-Made Definition Of "Arbitration" Conflicts With Those Of Other Circuits.

In the name of uniformity, the court of appeals here rejected any role for relevant state law in defining the term "arbitration." Its preferred solution, however—saying that "arbitration" includes whatever federal judges think reflects the "essence of arbitration"—has led to conflict, confusion, and, ironically, disuniformity. *See* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dis-*

pute Resolution, 8 Nev. L.J. 427, 439-40 (2007) (observing that this approach is "subjective").

1. The Circuits Are Split On Whether "Arbitration" Must Resolve The Plaintiff's Entire Cause Of Action.

Because the question of whether a particular type of ADR embodies the "essence of arbitration" or "classic arbitration" is highly subjective, it is hardly a surprise that this Rorschach test has produced disparate results among the circuits. The Second Circuit's decision continues that trend on two fronts.

It deepens the split on the important issue of whether an ADR procedure that does not necessarily resolve the plaintiff's entire claim constitutes "arbitration." Three circuits (of the eight that categorically resort to federal common law) take the position that it does. The Sixth Circuit has held that "arbitration" contemplates a "final … remedy" that resolves the plaintiff's claim. *Evanston Ins.*, 683 F.3d at 693-94. Similarly, in the Eleventh Circuit's view, "[t]he FAA clearly presumes that arbitration will result in an 'award' declaring the rights and duties of the parties," *i.e.*, that "purport[s] to adjudicate or resolve [the] case." *Thione Int'l*, 524 F.3d at 1239, 1240. "[A]rbitration is an alternative to litigation, not an additional layer in a protracted contest." *Id.* at 1240. According to the Third Circuit, "arbitration" excludes ADR that does not foreclose "the possibility of judicial intervention," *Dluhos*, 321 F.3d at 371, and that court has indicated that ADR is not "arbitration" if—even though it *will* resolve *some* causes of action arising from a given course of con-

duct—the "plaintiff will … have other causes of action against the [defendant] … that can only be resolved through litigation," *Harrison*, 111 F.3d at 350.

Four circuits (now including the Second), on the other hand, do not automatically exclude such limited-focus ADR from the category of procedures they call "arbitration." The First Circuit holds that ADR may qualify as "arbitration" even if it "cannot resolve the whole, or even the greater part, of the controversy between the parties" and thus may "add[] to the procedural complexity." *Fit Tech*, 374 F.3d at 7 (holding that a particular ADR is "arbitration" even though "it creates a two-track proceeding even as to claims of breach of contract"). The Fourth Circuit has held "non-binding" ADR—which by definition resolves nothing—to be "arbitration" for FAA purposes. *Bankers Ins.*, 245 F.3d at 322. The Eighth Circuit has, too. *Dow Corning*, 335 F.3d at 747 (citing *Bankers Ins.*, 245 F.3d at 322). And so has the Nebraska Supreme Court. *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640, 645 (Neb. 1996) (citing *AMF*, 621 F. Supp. 456).

The Second Circuit made clear by its decision below that it, too, does not require that "arbitration" necessarily resolve the plaintiff's entire claim. It found third-physician ADR to be "arbitration" even though such limited review does not necessarily resolve Dr. Bakoss's claim for disability-insurance benefits. All that mattered was that "'the parties ha[d] agreed to submit *a dispute*'"—even a granular, not-necessarily-dispositive one—"'for a decision by a third party.'" P.A. 7a (quoting *AMF*, 621 F. Supp. at 460 (emphasis added)).

2. The Second Circuit's Definition Creates A Split On Whether "Arbitration" Requires An Adversarial Process.

In addition to deepening an existing split on the content of the federal-judge-made definition, the Second Circuit's ruling also *creates* a split on that issue. Namely, the Second Circuit became the first court of appeals to hold that "arbitration" can encompass a decision based on personal observation—in this case, a doctor's physical examination—and does not require any sort of adversarial process.

All seven of the other circuits categorically applying the federal-judge-made definition take "arbitration" to require some sort of "'hearing'" at which the decisionmaker "'hear[s] evidence pertinent and material to the controversy'" and issues a ruling on that basis. *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d. 513, 557 n.29 (3d Cir. 2009) (quoting 9 U.S.C. § 10(a)(3)); *Qorvis Comm'cns, LLC v. Wilson*, 549 F.3d. 303, 313 (4th Cir. 2008) (same); *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (same); *Hudson v. ConAgra Poultry Co.*, 484 F.3d. 496, 504 (8th Cir. 2007) (same); *Cytyc Corp. v. DEKA Prods., Ltd. P'ship*, 439 F.3d. 27, 36 (1st Cir. 2006) (same); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 624-25 (6th Cir. 2002) (same); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206-07 (10th Cir. 2001). Put another way, these courts all take the position that in "arbitration" there is "an opportunity for each side to present its case," *Evanston Ins.*, 683 F.3d at 693; *Fit Tech*, 374 F.3d at 7 (same), to "an … adjudi-

cator … who … considers evidence and argument," *Thione Int'l*, 524 F.3d at 1239.

The Second Circuit, however, parted company with these courts. It stated that "'[a]n adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration.'" P.A. 7a (quoting *AMF*, 621 F. Supp. at 460). Accordingly, in the Second Circuit's view, "arbitration" can—and in this case did—encompass a medical check-up.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FAA RULINGS AND BROADER PREEMPTION PRECEDENTS.

A. The Second Circuit's Approach Ignores This Court's Case-By-Case FAA Preemption Inquiry.

The court below held categorically that "federal common law provides the definition of 'arbitration' under the FAA." P.A. 7a. Always. No matter what. Regardless of whether applying the relevant state-law definition in the case at hand would obstruct the FAA. The court reached that result because to do otherwise could "create a patchwork in which the FAA will mean one thing in one state and something else in another," which it found unacceptable. P.A. 9a.

That was wrong. This Court's FAA cases reject the Second Circuit's categorical approach. This Court's cases *readily accept* the potential for "a

patchwork in which the FAA will mean one thing in one state and something else in another" (P.A. 9a). "[T]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," so the going-in presumption is that relevant (and potentially divergent) state laws *will* apply to matters, like the definition of "arbitration," that the FAA does not expressly address. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Univ.*, 489 U.S. 468, 477 (1989).

That is especially true here, where states had been defining the term "arbitration" and differentiating it from other forms of ADR—using largely the same criteria that New York's definition does today—since well before the FAA was enacted.[2] The

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[2] *See, e.g.*, *Dworkin v. Caledonian Ins. Co.*, 226 S.W. 846, 848 (Mo. 1920) (ADR "does not amount to an arbitration" where it "does not oust the jurisdiction of the court" and where the decisionmaker need not "listen to and decide upon the evidence offered by the parties" but rather can "decide from their own knowledge or opinion"); *Turner v. N.Y. Cent. & Hudson River R.R. Co.*, 153 N.Y.S. 281, 284 (N.Y. App. Div. 1915) ("arbitration" presumes "submission of the entire controversy" to binding ADR); *Royal Ins. Co. v. Ries*, 88 N.E. 638, 641 (Ohio 1909) ("arbitration" agreements are "for the purpose of settling and extinguishing causes of action" and "contemplate[]" that the decisionmaker will "take testimony" rather than rely on "personal examination and observation"); *Wurster v. Armfield*, 67 N.E. 584, 586 (N.Y. 1903) (not an "arbitration" where the decisionmakers "did not avail themselves of the testimony of any witnesses sworn before them"); *Perry v. Cobb*, 34 A. 278, 279 (Me. 1896) ("an arbitration clause in a contract[] oust[s] the courts of jurisdiction"); *Germania Fire Ins. Co. v. Warner*, 41 N.E. 969, 973 (Ind. Ct. App. 1895) ("[a]rbitration is where the parties injuring and injured submit all matters in dispute" to ADR); *City of Des Moines v. Des Moines Waterworks Co.*, 64

situation for Congress could not have been clearer: those state-law definitions naturally would apply unless it affirmatively legislated a nationwide definition to displace them. It did not do so.

Not only has this Court laid out the going-in presumption in favor the relevant state law, it has further specified how that going-in presumption operates in the FAA context. Relevant state law concerning a particular issue applies so long as it will not "undermine the goals and policies of the FAA" in the case at hand and can operate "without doing violence to the policies behind … the FAA." *Id.* at 479 (applying state law because it would not "do[] [such] violence"). It should be displaced only if using it would be "antithetical" to those policies. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *see also, e.g.*, *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (preempting state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA); *Allied-Bruce Terminix*

N.W. 269, 273 (Iowa 1895) (clause providing only "that some particular fact or facts which may be the subject of controversy between [parties], shall be determined by some third person or persons" "are not … contracts which are strictly agreements for the arbitration of disputes"); *White v. Middlesex R.R. Co.*, 135 Mass. 216, 220-21 (Mass. 1883) ("an agreement to submit to arbitration" is "an attempt to oust courts of justice of all jurisdiction" whereby the case is resolved after "a hearing of the parties," as the underlying dispute does not "relate to things that … can be determined by … inspection … or other similar methods"); *Norton v. Gale*, 95 Ill. 533, 543 (Ill. 1880) ("[N]otice of the time and place that arbitrators intend to act upon the matter submitted to them is required … to enable the parties to present their case by evidence and by argument.").

Cos. v. Dobson, 513 U.S. 265, 281 (1995) (preempting state law that is "directly contrary to the Act's language and Congress's intent").

In the context of this case, the presumption thus becomes: New York's definition of "arbitration" should be applied unless doing so would undermine the FAA's purposes. But the Second Circuit below never even *asked* whether applying New York's definition of "arbitration" in this case would thwart the FAA, much less answered that question in the affirmative.

B. This Court Routinely Construes Federal Provisions To Look Presumptively To Relevant State Law.

This Court's approach of looking presumptively to state law to fill gaps in federal statutes is not peculiar to the FAA. This Court has frequently held that, when a federal statute touches upon matters of traditional state concern (like the FAA does with contract law), "[t]he presumption that state law should be incorporated … is particularly strong." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)); *see VKK Corp. v. NFL*, 244 F.3d 114, 122 (2d Cir. 2001) ("Parties expect state law to govern contracts." (discussing *Kimbell Foods*, 440 U.S. at 728-29)). "[S]olicitude for state interests" demands that relevant state law be preempted "only where clear and substantial interests of the National Government … will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966).

Accordingly, this Court has routinely interpreted federal provisions to look to state law to define key undefined terms. The Constitution proves the point. The Contracts Clause prohibits states from "enter[ing] into any … Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. The question whether a "contract" exists "is a state question" that courts must "determine … from the law of the State." *Appleby v. New York*, 271 U.S. 364, 380 (1926). The Fifth Amendment's Takings Clause protects "private property" from being "taken for public use, without just compensation." U.S. Const., amend. V. Its Due Process Clause prevents the federal government from "depriv[ing]" anyone "of life, liberty, or property, without due process of law." *Id.* And the Fourteenth Amendment's Due Process Clause prohibits the states from doing so. *Id.*, amend. XIV. And all three of those provisions take the definition of "property" from relevant state law. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1988) (Fifth Amendment); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (Fourteenth Amendment Due Process Clause).

This is even true in the bankruptcy context, where the Constitution textually purports to require Congress "[t]o … establish … *uniform* Laws on the subject of Bankruptcies." U.S. Const., art. I, § 8, cl. 4 (emphasis added). This Court has not read that clause as a "strai[]tjacket" requiring that federal common law *always* preempt "state laws [that] do not treat commercial transactions in a uniform manner." *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982). It has routinely held bankruptcy law to incorporate state law concerning tradi-

tional areas of state concern when doing so in a particular case will not undermine some congressional aim. *See, e.g.*, *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 329 (1993) (using state law to define "rights" in property for purposes of bankruptcy statute that left that term undefined); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (using state law to define "property" and "interests in property" for purposes of bankruptcy statute that left those terms undefined).

Similarly with copyright law. Judge Learned Hand stressed that the Constitution's Copyright Clause had "[u]niformity" among its "principal interests." *Capitol Records, Inc. v. Mercury Records, Corp.*, 221 F.2d 657, 667 (2d Cir. 1955) (Hand, J., dissenting). He observed that "in the 43rd number of the Federalist, Madison made this short comment on the Clause, 'The States cannot separately make effectual provision for … copyrights ….'" *Id.* Yet, just a year after Judge Hand made those observations, this Court looked to state law to define a term in an intestacy-related provision of the Copyright Act for which Congress elected not to legislate a federal definition. *De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (looking presumptively to state law to define "children").

The FAA, on the other hand, is Commerce Clause legislation. *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). And the Commerce Clause does not even purport to impose a uniformity requirement in the first place. U.S. Const., art. I, § 8, cl. 3. A fortiori, then, the possibility that "the FAA will mean one thing in one state and something else in another" (P.A. 9a) did not justify the Second Circuit's cate-

gorical resort to federal common law. "[T]hat most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994), was patently insufficient to support the Second Circuit's across-the-board abandonment of the approach prescribed by this Court: apply relevant state law so long as doing so will not thwart the statute's policy goals.

C. New York's Definition Of "Arbitration" Is Fully Consistent With The FAA's Purposes And Text.

As explained above, the Second Circuit did not even ask the correct, case-specific preemption question. That alone compels reversal. But, it is worth noting that, had the Second Circuit asked the correct question, it would have adhered to New York's definition of "arbitration." *See Questrom v. Federated Dep't Stores, Inc.*, 41 F. Supp. 2d 294, 306 & n.75 (S.D.N.Y. 1999) (applying New York definition of "arbitration"). This is because New York's definition is entirely consistent with the purposes and text of the FAA.

Congress enacted the FAA to give parties to certain ADR agreements an extra set of judicial enforcement mechanisms beyond those provided by ordinary contract law. Specifically, Congress wanted to provide additional enforcement mechanisms for agreements that outsourced the judicial function. These agreements provided for ADR that would completely "oust[] [courts] from their jurisdiction," H.R. Rep. No. 68-96, at 2 (1924), leaving nothing for the courts to decide. Thus, they "could … be pleaded

in bar of [an] action" and used to "compel [the] unwilling party to submit his cause" to ADR, thus "avoiding … litigation" altogether, S. Rep. No. 68-536, at 2-3 (1924). Moreover, the core subset of ADR agreements that were the subject of Congress's attention required the decisionmakers to resolve the case in a quasi-judicial manner, wherein the parties were "assured of" a "hearing." *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comm. on the Judiciary*, 68th Cong. 40 (1924) (brief of Julius H. Cohen); *see id.* 7 (comparing the "hearings" in the ADR procedures that were the subject of Congress's attention to those in judicial proceedings) (statement of George L. Bernheimer); S. Rep. No. 68-536, at 3 (such ADR usually "required but a single hearing" to resolve the case).

The actual language Congress enacted confirms this focus. The FAA applies to agreements for ADR that results in an "award" which (once confirmed) "shall have the same force and effect, in all respects, as … a judgment in an action," Pub. L. No. 68-401, 43 Stat. 883, 886 (1925)—language that could just as well describe the end result of a litigation on the merits. Moreover, the ADR within the purview of the FAA affords the parties a "hearing" where they may present "evidence pertinent and material to the controversy," including "witness" testimony. *Id.*, 43 Stat. at 884.

New York's definition of "arbitration"—which presumes an ADR procedure that resolves the plaintiff's entire claim through an adversarial process—tracks Congress's intent precisely. Accordingly, had

the Second Circuit asked the right question from the start and looked presumptively to New York's definition, in the end it would have adhered to that definition—and found that third-physician ADR was not "arbitration."

D. The Second Circuit Used An Incorrect Federal-Judge-Made Definition Of "Arbitration."

The courts that look exclusively to the federal-judge-made definition of "arbitration" do so because they believe it is the only way to serve the FAA's purposes. Accordingly, the same concerns that drive the usual FAA preemption analysis—respect for the statute's objectives—must determine the content of the federal-judge-made definition. Thus, for all the reasons explained above, the federal-judge-made definition should exclude ADR that does not necessarily resolve the plaintiff's entire claim through an adversarial process.

Indeed, this Court has made essentially the same observation while evaluating an ADR procedure very similar to third-physician review. In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), this Court considered the independent-physician-review process, *i.e.*, the ADR used in appeals from denials of health-insurance coverage, used to determine whether a medical procedure for which the insurer denied coverage was "medically necessary." The context was ERISA preemption: if the process was "arbitration," it would not be preempted by ERISA. *Id.* at 381. The Court observed that such ADR "confines review to a single term: the phrase

'medical necessity,'" rather than the entire claim. *Id.* at 383. Moreover, it expects physicians "to exercise independent medical judgment in deciding what medical necessity requires" (namely "receiv[ing] medical records submitted by the parties") rather than hold a "conventional evidentiary hearing." *Id.* This Court found that such ADR has "nothing to do with arbitration." *Id.* It amounts to nothing more than "obtaining another medical opinion." *Id.*

The Court may just as well have been discussing the third-physician ADR described in Dr. Bakoss's disability-insurance policy.

* * *

Not only does the Second Circuit's ruling here deepen multiple long-standing circuit conflicts, but it contradicts this Court's consistent line of FAA cases and broader preemption jurisprudence. This Court's intervention is fully warranted.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND INESCAPABLE IN TODAY'S BUSINESS WORLD.

A. The Definition Of "Arbitration" Directly Determines Which Types Of ADR Implicate The FAA's Additional Judicial Enforcement Mechanisms.

Both questions presented by the Second Circuit's decision bear fundamentally on how "arbitration" should be defined. And that, in turn, defines the dividing line between which ADR procedures trigger

the FAA's judicial enforcement mechanisms, which include:

ADR Clause Enforcement. Most basically, the FAA provides that any state substantive contract laws that uniquely burden "arbitration" agreements are preempted. 9 U.S.C. § 2. Additionally, the FAA makes immediately appealable a court's refusal to enforce an "arbitration" agreement, even if that refusal would not otherwise constitute a final appealable order. *Id.* § 16(a)(1).

Respect for the ADR Process. If one of the parties asks for it, the court must stay litigation pending "arbitration." *See id.* § 3. Moreover, "arbitrators" have subpoena power, and the failure to abide by an "arbitration" subpoena can result in a contempt finding. *See id.* § 7.

Upholding the ADR Result. The FAA permits courts to vacate "arbitration" awards only for very serious structural errors, such as when the arbitrator committed fraud. *See id.* § 10(a). Legal error alone does is not sufficient. *Contra, e.g.*, *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 454 F.3d 1128, 1134 (10th Cir. 2006) ("*Salt Lake Tribune Publ'g II*") (New Jersey law permits review of certain ADR for mistake of law).

Decisionmaker Immunity. Whether the ADR at issue is "arbitration" within the meaning of the FAA can have significant implications for the decisionmakers, themselves. "Arbitrators" are usually entitled to some level of immunity concerning their decisional activities. Other ADR

decisionmakers, however, may not be. *See, e.g.*, *Salt Lake Tribune Publ'g I*, 390 F.3d at 689 (immunity for "arbitrator" but not for "appraiser").

Federal Subject-Matter Jurisdiction. In disputes (like Dr. Bakoss's with Lloyd's) having a "reasonable relation with one or more foreign states," such as when a foreign party is involved, application of the FAA confers federal subject-matter jurisdiction—regardless of whether a separate federal question is present and regardless of whether diversity requirements are satisfied. 9 U.S.C. §§ 201-03. And in those instances, if the FAA applies, the defendant can remove a state-court case to federal court "at any time before … trial." *Id.* § 205. He is not constrained by the normal time limit of 30 days from the date of service of the state-court complaint. 28 U.S.C. § 1446(b)(1).

B. Parties Frequently Challenge ADR Provisions Like The Third-Physician Clause And Argue That They Are Not "Arbitration" Agreements.

ADR clauses are everywhere. They are found in a staggering variety of contracts across a broad array of industries. Famous actors have them in their employment contracts. Toni L. Wortherly, Note, *There's No Business Like Show Business: Alternative Dispute Resolution in the Entertainment Industry*, 2 Va. Sports & Ent. L.J. 162, 163 (2002). So do corporate executives. *See, e.g.*, Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 Wash. & Lee L. Rev. 231, 234

(2006). ADR clauses appear in scores of "everyday" agreements, too, including more than 75 percent of consumer contracts and more than 90 percent of non-executive employment contracts. *See* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J. L. Reform 871, 883 (2007). Simply put, contracting parties in nearly every line of business and of all levels of commercial sophistication use ADR clauses to structure their affairs.

These clauses regularly provide for ADR that may not resolve the plaintiff's claim, that does not employ an adversarial process, or—like the third-physician ADR at issue here—both.

Appraisal. Appraisal clauses provide that one or more individuals will determine the dollar value of a particular item that is the subject of a claim for breach of contract. Usually, the appraisers will inspect the item and assign a dollar value based upon their personal experience and observation.

Appraisal clauses are especially prevalent in the insurance industry. "Virtually every property insurance policy for both homeowners and corporations contains a provision specifying 'appraisal' as a means of resolving disputes about the 'amount of loss' for a covered claim." Timothy P. Law & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 Conn. Ins. L.J. 291, 292 (2007). Appraisal clauses appear in many other types of contracts, too, like purchase agreements and real estate leases.

Professional Opinions. Similar to appraisal is ADR that refers a particular disputed issue to the professional judgment of individuals practicing in that field. The third-physician clause in the standard-form Lloyd's disability-insurance policy at issue in this case, referring the medical issue of "Total Disability" to the judgment of a physician, is one example. J.A. 251. But it is one of many.

For example, publicly traded companies regularly use third-physician clauses in their senior-executive employment agreements. Specifically, these agreements often provide that the company may terminate the executive's employment should he become "disabled," and (if the executive's physician and the company's physician cannot agree) refer that issue to a third physician.[3] And the federal government has declared third-physician ADR as the mechanism for settling disputes concerning health

[3] *See, e.g.*, Hasbro, Inc., Current Report (Form 8-K), Exh. 10 § 4.2 (Mar. 26, 2010), available at http://www.sec.gov/Archives/edgar/data/46080/000004608010000037/bg.htm (third-physician clause in COO contract); Ticketmaster Entertainment, Inc., Current Report (Form 8-K), Ex. 10.2 § 7.b.ii (Oct. 21, 2009), available at http://www.sec.gov/Archives/edgar/data/1006637/000110465909059841/a09-31963_1ex10d2.htm (third-physician clause in CEO contract); California Pizza Kitchen, Inc., Quarterly Report (Form 10-Q), Exh. 10.1 § 4(c) (Aug. 5, 2009), available at http://www.sec.gov/Archives/edgar/data/789356/000119312509169127/dex101.htm (third-physician clause in CFO contract).

insurers' determinations that a particular procedure was not "medically necessary."[4]

And the medical profession does not have a monopoly on professional-opinion ADR. There are also third-architect clauses governing the determination of how much rentable space there is in a particular property,[5] third-engineer clauses for various electrical and scientific matters,[6] and third-accountant clauses covering financial questions.[7]

Non-Binding ADR. Non-binding ADR results in a decision, but the aggrieved party can take that

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[4] *See* U.S. Dep't of Health & Hum. Servs., Appealing Health Plan Decisions, http://www.healthcare.gov/law/features/rights/appealing-decisions/.

[5] *See, e.g.*, Fender Musical Instruments Corp., Amendment to Registration Statement (Form S-1), Exh. 10.36 § 1.1 (Apr. 16, 2012), available at http://www.sec.gov/Archives/edgar/data/767959/000119312512163467/d293340dex1036.htm (third-architect clause in office lease); Onyx Pharms., Inc., Annual Report (Form 10-K), Exh. 10.38 § 5 (Feb. 27, 2012), available at http://www.sec.gov/Archives/edgar/data/1012140/000119312512081975/d265452dex1038.htm (same).

[6] *See, e.g.*, Boingo Wireless, Inc., Amendment to Registration Statement (Form S-1), Exh. 10.10 § 46(c) (Feb. 25, 2011), available at http://www.sec.gov/Archives/edgar/data/1169988/000104746911004288/a2203546zex-10_10.htm (third-engineer clause in telecommunications network access agreement).

[7] *See, e.g.*, The Dress Barn, Inc., Current Report (Form 8-K), Exh. 10.1 § 2.6(b) (Apr. 16, 2010), available at http://www.sec.gov/Archives/edgar/data/717724/000114420410021749/v181958_ex10-1.htm (third-accountant clause in executive severance plan).

decision or leave it. The decision is essentially an advisory opinion.

Agreements for non-binding ADR are used widely. Fortune 500 companies use them to handle employment disputes. *See, e.g.*, *Mostoller v. Gen. Elec. Co.*, No. 2:06-cv-668, 2009 WL 3854227, at *2 (S.D. Ohio Nov. 17, 2009) (General Electric employer-employee ADR). Phone companies include them in cellular service contracts.[8] And Internet users agree to non-binding ADR when they register a web domain name.[9]

Mediation. Unlike non-binding ADR, mediation may conclude without having reached any result at all, not even one that the aggrieved party can take or leave. Also, the mediator is not an adjudicator. He tries to steer the parties toward agreement, rather than decide for himself which party should prevail over the other. Mediation has been experiencing an "explosion." Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. Ill. L. Rev. 1, 7 (2010). It is so popular that various ADR providers publish model mediation clauses for contracting parties to use.[10]

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[8] *See, e.g.*, Consumer Cellular, Consumer Cellular End User Service Agreement for AARP Members, http://www.consumercellular.com/Content/PDFs/AARPTermsAndConditions.pdf.

[9] ICANN, Uniform Domain Name Dispute Resolution Policy, http://www.icann.org/en/help/dndr/udrp/policy ¶ 4(a), (k).

[10] *See, e.g.*, CPR, CPR Model Clauses and Sample Language, http://www.cpradr.org/%20Resources/ALLCPR

Because these clauses are challenged regularly, courts regularly must determine whether such ADR implicates the FAA, *i.e.*, whether it is "arbitration."[11]

Articles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Language.aspx; *see also* N.Y. City Bar, The Amended Rules for Association Sponsored Mediation and Arbitration Among Lawyers, 25 (Mar. 2012), available at http://www2.nycbar.org/Publications/pdf/Amended_Rules_for_Association_Sponsored_Arbitration.pdf.

[11] *See, e.g.*, *A-1 A-lectrician,* 2013 WL 1817688, at *4 & n.2 (whether real estate appraisal is "arbitration"); *Yox v. Providence Health Plan*, No. 3:12-cv-01348-HZ, 2013 WL 865968, at *2 (D. Or. Mar. 8, 2013) (whether independent-physician review is "arbitration"); *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC*, Civil Action No. 11-374-JBC, 2013 WL 28067, at *2 (E.D. Ky. Jan. 2, 2013) (whether mediation between business partners is "arbitration"); *Bird v. Am. Bread Co., LLC*, Civil Action Nos. 11-4596, 12-727, 2012 WL 3651115, at *3 (E.D. Pa. Aug. 24, 2012) (whether employer-employee mediation is "arbitration"); *Ohio Pwr. Co. v. Dearborn Mid-West Conveyor Co., Inc.*, Civil Action No. 5:11CV164, 2012 WL 2522960, at *7 (N.D. W.Va. June 29, 2012) (whether mediation is "arbitration"); *Am. Ctr. for L. & Justice–N.E., Inc. v. Am. Ctr. for L. & Justice, Inc.*, Civil No. 3:12cv730 (JBA), 2012 WL 2374728, at *5-6 (D. Conn. June 22, 2012) (whether non-binding ADR between parent group and its subsidiary is "arbitration"); *Wright*, 2012 WL 718857, at *4-5 (whether homeowner's insurance appraisal is "arbitration"); *Bates v. Smuggler's Enters., Inc.,* No. 2:10-cv-136-FtM-29DNF, 2010 WL 3293347, at *5 (M.D. Fla. Aug. 19, 2010) (whether employer-employee mediation is "arbitration"); *Mostoller*, 2009 WL 3854227, at *2 (whether non-binding employer-employee ADR is "arbitration"); *Gate Precast Co. v. Kenwood Towne Place, LLC*, No. 1:09-CV-00113, 2009 WL 3614931, at *4-5 (S.D. Ohio Oct. 28, 2009) (whether mediation is "arbitration"); *Watts v. Allstate Indemnity Co.*, No. CIV. S-08-1877 LKK/GGH, 2009 WL 9070971, at *12 (E.D. Cal. Mar. 31, 2009) (whether automobile-insurance appraisal is "arbitration"); *Larson v. Providence Health Plan*, Civil No. 08-

And that determination necessarily implicates both questions presented here. As an initial matter, the court always must ask the first question presented and decide whether relevant state law presumptively provides the definition of "arbitration." And subsequently, even if it answers the first question in the affirmative, it must ask the second and determine whether the federal-common-law definition excludes ADR that does not necessarily resolve the plaintiff's entire claim through an adversarial process. This is because the content of the federal-judge-made definition is inextricably intertwined with the purposes of the FAA. *See supra* p. 25.

* * *

The Second Circuit's ruling that a doctor's check-up is "arbitration" within the meaning of the FAA implicates not one but *three* circuit conflicts. Additionally, it contravenes this Court's settled FAA case law and broader preemption precedents. And it pre-

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929-JO, 2009 WL 562815, at *3-4 (D. Or. Mar. 2, 2009) (whether independent-physician review is "arbitration"); *Gray v. Province-Grace, LLC*, Civil Action No. 1:07-CV-2993-JOF, 2009 WL 259401, at *3-4 (N.D. Ga. Feb. 3, 2009) (whether mediation is "arbitration"); *Prien Props., LLC v. Allstate Ins. Co.*, No. 07 CV 845, 2008 WL 1733591, at *2 (W.D. La. Apr. 14, 2008) (whether commercial-property insurance appraisal is "arbitration"); *Mauna Kea Beach Hotel Corp. v. Affiliated FM Ins. Co.*, CV. No. 07-00605 DAE-KSC, 2008 U.S. Dist. LEXIS 109962, at *5-8 (D. Haw. Mar. 7, 2008) (whether earthquake-insurance appraisal is "arbitration"); *Storm Reconstr. Servs., Inc. v. Kellogg Brown & Root Servs., Inc.*, Civil Action No. 1:06CV726-LG-JMR, 2007 U.S. Dist. LEXIS 81294, at *5 (S.D. Miss. Oct. 24, 2007) (whether non-binding ADR is "arbitration").

sents recurring questions of fundamental importance in today's ADR-dominated business world. These factors together compel this Court's immediate review.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 7, 2013

APPENDIX A

11-4371-cv
Bakoss v. Lloyds of London

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Submitted On: October 22, 2012) Decided: January 23, 2013)

Docket No. 11-4371-cv

M.D. IMAD JOHN BAKOSS,

Plaintiff-Appellant,

v.

CERTAIN UNDERWRITERS AT LLOYDS OF LONDON ISSUING CERTIFICATE NO. 0510135,

Defendant-Appellee[1].

Before: LEVAL, CABRANES, and SACK, *Circuit Judges*.

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[1] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

This appeal from a September 28, 2011 judgment of the United States District Court for the Eastern District of New York (Dora L. Irizarry, *Judge*) presents the question whether federal common law or state law provides the meaning of "arbitration" within the Federal Arbitration Act. We hold that Congress intended national uniformity regarding the interpretation of the term "arbitration," and therefore federal common law governs. Based on this holding, we conclude that the District Court had subject-matter jurisdiction. We also conclude that the District Court properly granted summary judgment in favor of defendant-appellee, Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135.

Affirmed.

Ira S. Lipsius, David BenHaim, Cheryl D. Lipsuis, Lipsius-BenHaim Law LLP, Kew Gardens, NY, *for Plaintiff-Appellant Imad John Bakoss*.

Henry Nicholas Goodman, Nicholas Goodman & Associates, New York, NY *for Defendant-Appellee Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*.

JOSÉ A. CABRANES, *Circuit Judge*:

Plaintiff-appellant Imad John Bakoss ("Bakoss") appeals from a September 28, 2011 judgment of the District Court for the Eastern District of New York (Dora L. Irizarry, *Judge*): (1) denying his motion to dismiss for lack of subject-matter jurisdiction; and (2) granting the motion for summary judgment by defendant-appellee, Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135 ("Lloyds"). *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, No. 10-CV-1455*, 2011 WL 4529668 (E.D.N.Y. Sept. 27, 2011). Lloyds removed this action, originally filed in state court, to the District Court on the basis of federal-question jurisdiction. *See* 28 U.S.C. § 1331. Bakoss raises two arguments on appeal. First, he argues that the District Court lacked subject-matter jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention" or "New York Convention"), *see* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, as implemented by the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. §§ 201-208. Second, he argues that the District Court erred in granting summary judgment on the issue of timely notification under a disputed disability policy.

DISCUSSION

We review *de novo* whether the District Court had subject-matter jurisdiction under the FAA. *See United States v. Douglas*, 626 F.3d 161, 164-165 (2d Cir. 2010). Likewise, we

review an order granting summary judgment *de novo*, drawing all factual inferences in favor of the nonmoving party. *See Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 107 (2d Cir. 2008). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting FED. R. CIV. P. 56(a)).

The parties entered into a Certificate of Insurance ("Certificate"), which they agree is an enforceable contract. *Bakoss*, 2011 WL 4529668, at *7. The Certificate provided for the payment of a benefit to Bakoss in the event he became "Permanently Totally Disabled"–a status that Bakoss could invoke if "in the opinion of a Competent Medical Authority [he] [would] not recover from the effects of a Sickness or Injury to the extent that [he] [would] ever be able to resume the Material and Substantial duties of [his] occupation."[2] *Id.* at *1 (internal quotation marks omitted). The Certificate also provides each party with the right to have Bakoss examined by a physician of its choice for the purpose of determining whether he was "totally disabled." In the event of a disagreement between each party's physician, the Certificate

[2] Bakoss did not elect coverage in the event of a non-permanent "Total Disability."

states that those two physicians "shall [jointly] name a third Physician to make a decision on the matter which shall be final and binding." *Id*. at *4.[3]

In removing this case from state court in New York to the District Court, Lloyds claimed that the third-physician clause is an arbitration agreement, thus providing federal subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), the Convention, and the FAA. *See* 9 U.S.C. §§ 201-208.[4] Applying federal common law, the District Court held that (1) the third-physician clause is an agreement to arbitrate, and (2) federal jurisdiction exits under the FAA. Bakoss

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[3] Bakoss notes that the third-physician process would only be dispositive on the question of Total Disability, but is not applicable to determining permanency. "Total Disability" is separately defined in the Certificate as existing when "due to Sickness or Injury [the claimant] cannot perform the Substantial and Material duties of [the claimant's] occupation."

[4] The FAA does not independently confer subject-matter jurisdiction on the federal courts but "provides federal jurisdiction over actions to confirm or vacate an arbitral award that is governed by the [New York Convention]." *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins*. Co., 668 F.3d 60, 71 (2d Cir. 2012); see also 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 [New York] Convention, the defendant or the defendants may . . . remove such action or proceeding to the district court of the United States . . . ."; *id*. § 203 ("An action or proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treatise of the United States.").

challenges this determination by arguing, in part, that since the FAA does not supply a definition for "arbitration," the District Court should have looked to New York law, rather than federal common law, to define that term. *See, e.g., Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012) (noting that because the FAA does not define "arbitration," the court needed to "decide which source of law provides that definition"); *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n, as Tr. for Trust No. 1*, 218 F.3d 1085, 1086 (9th Cir. 2000) (same); *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) (same).

Judge Irizarry relied upon two federal common law cases within this circuit, *see McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825 (2d Cir. 1988), and *AMF Inc. v. Brunswick Corp. ["AMF"]*, 621 F. Supp. 456 (E.D.N.Y. 1985), to determine "whether the agreement in question is in fact an agreement to arbitrate." *Bakoss*, 2011 WL 4529668, at *6. In *McDonnell Douglas Finance Corp.*, we considered the question of whether contractual language "calling for the appointment of an independent tax counsel . . . constitute[s] an enforceable arbitration clause" and concluded that it does because "the language clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution." 858 F.2d at 830. Similarly, in *AMF*, Judge Weinstein noted that under the

FAA "[a]n adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration" and held that "[i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration." 621 F. Supp. at 460.

Judge Irizarry followed these cases and held that the third-physician provision in the Certificate is an arbitration clause because the parties agreed to submit a medically-related policy dispute to "a third Physician who [would] make a final and binding decision." *Bakoss*, 2011 WL 4529668, at *7. While Judge Irizarry did not explicitly state that she was applying federal common law, her reliance on *McDonnell Douglas Fin. Corp. and AMF*, and the absence of citations to any cases applying New York law, make plain that she relied on federal common law in determining that the third-physician clause was an agreement to arbitrate. *Id*.

We have not directly addressed whether federal courts should look to state law or federal common law for the definition of "arbitration" under the FAA. We do so now and hold that federal common law provides the definition of "arbitration" under the FAA.

"Congress sometimes intends that a statutory term be given content by the application of state law," but absent "a plain indication to the contrary" we presume that "the application of the federal act [is not] dependent

on state law." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (quotation marks omitted). Unless "uniform nationwide application . . . clearly was not intended," we apply a federal standard without reference to state law. *Id.*

The other Courts of Appeals that have considered this question have reached differing conclusions. *Compare Evanston Ins.*, 683 F.3d at 693 (noting the circuit split and concluding that federal law ought to govern); *Salt Lake Tribune Pub'l Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) (applying federal law); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6-7 (1st Cir. 2004) (applying federal law), with *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061-63 (5th Cir. 1990) (applying state law); *Wasyl, Inc. v. First Bos. Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (applying state law).

The circuits that apply federal common law have relied on congressional intent to create a uniform national arbitration policy. *See Evanston Ins.*, 683 F.3d at 693 (noting that "[i]t seems counter-intuitive to look to state law to define a term in a federal statute on a subject as to which Congress has declared the need for national uniformity" (internal quotation marks omitted)); *Fit Tech*, 374 F.3d at 6 ("[W]hether what has been agreed to amounts to 'arbitration' under the Federal Arbitration Act depends on what Congress meant by the term in the federal

statute. Assuredly Congress intended a 'national' definition for a national policy."); Salt *Lake Tribune Pub'l*, 390 F.3d at 688-89 (holding that federal law governs because, among other reasons, "Congress passed the FAA to ensure that state law would not undermine arbitration agreements").

By contrast, the circuits that apply state law have "articulated few reasons for doing so." *Liberty Mut. Grp., Inc. v. Wright*, No. 12-CV-0282, 2012 WL 718857, at *4 (D. Md. Mar. 5, 2012); *see also Fit Tech*, 374 F.3d at 6 (noting that the Ninth Circuit decision in *Wasyl* "assumed without real analysis that state law governed"). Indeed, although *Wasyl* remains good law in the Ninth Circuit, a subsequent Ninth Circuit panel expressly questioned whether *Wasyl* has been correctly decided. *See Portland Gen. Elec.*, 218 F.3d at 1091 (Tashima, J., concurring); *id.* at 1091-92 (McKeown, J., specially concurring).

We agree with the compelling analysis of the circuits that have followed federal law in defining the scope of "arbitration" under the FAA. Applying state law would create "a patchwork in which the FAA will mean one thing in one state and something else in another," *Portland Gen. Elec.*, 218 F.3d at 1091 (Tashima, J., concurring), and there is no indication that Congress intended that result. Consequently, we hold that the District Court correctly applied federal common law in

determining that the third-physician clause is an "arbitration" agreement under the FAA.

Finally, Bakoss argues that the District Court improperly granted summary judgment based upon his failure to give timely notice of his potential permanent disability.[5] Having reviewed the record *de novo*, we affirm the District Court's grant of summary judgment to the defendant for substantially the reasons stated by the District Court in its Opinion and Order dated September 27, 2011.

CONCLUSION

To summarize,

(1) We hold that the meaning of "arbitration" under the Federal Arbitration Act is governed by federal common law-not state law.

(2) We conclude that the District Court–applying cases resting on federal common law–properly decided that it had subject-matter jurisdiction over this suit.

(3) We conclude also that the District Court properly granted summary judgment to the defendant.

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[5] The Certificate included a provision obligating Bakoss to give written notice of a claim within twenty days "after the date of a potential qualifying loss, or as soon after that as … reasonably possible." *Bakoss*, 2011 WL 4529668, at *8.

Accordingly, we **AFFIRM** the September 28, 2011 judgment of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IMAD JOHN BAKOSS, M.D.,

Plaintiff,

-against-

CERTAIN UNDERWRITERS AT
LLOYDS OF LONDON ISSUING
CERTIFICATE NO. 0510135

Defendant.

MEMORANDUM & ORDER

10-CV-1455 (DLI)(LB)

DORA L. IRIZARRY, United States District Judge:

Plaintiff Imad John Bakoss, M.D. ("Bakoss") initiated this action in state court against Defendant Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135 ("Underwriters") seeking $550,000 in disability benefits pursuant to the terms of the above-named policy. Defendant removed the instant action to this court pursuant to 28 U.S.C. § 1331, the Convention on the Recognition and En-

forcement of Foreign Arbitral Awards (the "Convention"), and Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.* ('the FAA"). (Docket Entry 1, Notice of Removal ¶ 7.). Defendants now move pursuant to Federal Rule of Civil Procedure 56(c) for summary judgment dismissing the complaint, or, in the alternative, for an Order compelling Plaintiff to submit to arbitration pursuant to 9 U.S.C. § 1 *et seq.* Plaintiff opposes the motion, and moves to remand this case to state court, arguing that this court lacks jurisdiction, For the reasons set forth below, the court grants Defendants' motion for summary judgment and denies Plaintiff's motion in its entirety.

BACKGROUND

Bakoss is a licensed medical doctor specializing in pulmonary and internal medicine who claims to have retired from the practice of medicine due to permanent coronary artery disease. (Notice of Removal ¶ 2; Bakoss Aff. ¶ 2.) Underwriters is comprised of numerous individuals and/or corporations or other juridical entities, at least one of which is a citizen or subject of a nation other than the United States, that are the underwriters and issuers of the insurance policy at issue. (Notice of Removal ¶ 1; Compl. ¶ 2.)

Defendants issued Plaintiff a Certificate of Insurance ("Certificate") against permanent total disability, with effective dates of January 20, 2005 through January 20, 2008, to provide coverage for his obligation to repay a bank loan if he became disabled. (Aff. of H. Nicholas Goodman ("Goodman Aff.'") Ex. A; Bakoss Aff., Ex. A (both, the "Certifi-

cate"). The Certificate provided for payment of a Principal Sum Benefit to Plaintiff in the event he became "Permanently Totally Disabled," which was defined in the Certificate as follows: "Permanent Total Disability means that, in the opinion of a Competent Medical Authority [y]ou will not recover from the effects of a Sickness or Injury to extent the that [y]ou will ever be able to resume the Material and Substantial duties of Your occupation." (Certificate at 3.) The Certificate was amended by Endorsement effective January 20, 2005 as follows: "Total Disability means that as a result of sickness or injury you cannot perform in any professional capacity as a medical doctor." (Certificate at 12.)

> The Certificate contains the following Notice of Claim provision:
>
> Written notice of a claim must be given to us within twenty (20) days after the date of potential qualifying loss, or as soon after that as is reasonably possible. Notice given to the Coverholder which is sufficient to identify You will be deemed sufficient notice.

(Certificate at 8.)

Plaintiff communicated his intent to claim benefits under the Certificate in either late July or August 2007. (C*ompare* Def. Local Rule 56.1 Stmt. of Facts ("Def. 56.1 Stmt.") at ¶ 4 *with* Pl. Resp. to Local Rule 56.1 Stmt. of Facts ("Pl. 56.1 Resp.") at ¶4.) In the "Insured's Statement Details Outlining Proof of Loss for Disability Insurance" ("Insured's State-

ment"), dated August 9, 2007, Plaintiff claimed October 7, 2006, as "Date First Noticed Sickness" and October 9, 2006, as "Date First Consulted Physician," as well as the date upon which he became permanently totally disabled and his last day of work. (Goodman Aff. Ex. B).

On or about August 20, 2007, Defendants received an Attending Physician's Statement dated July 10, 2007, signed by Dr. John Sayad ("Sayad") stating that Plaintiff suffered from "severe chest pain angina pectoris multiple acute myocardial infarctions" that began on October 9, 2006 and that Plaintiff was permanently totally disabled as of that date. (Goodman Aff. at ¶ 12, Ex. C.) In an accompanying letter, Sayad confirmed Plaintiff's "total permanent disability" as of October 9, 2006, opining that "the permanency of his condition is spelled out by the recurrent nature of his symptoms and the fact that his anaphylactic fish allergy does not allow for any contrast angiography, which is necessary for any interventional cardiac therapies." (*Id.*)

In a response to Plaintiff, dated August 30, 2007, Defendants cited the Certificate's "Notice of Claim" provision and requested an explanation for Plaintiff's delay in reporting the claim. (Goodman Aff. Ex. D.) Several subsequent letters, dated September 18, 2007, October 19, 2007, November 21, 2007, December 21, 2007, and February 15, 2008, reiterated Defendants' request for an explanation for Plaintiff's delay in reporting the claim. (Goodman Aff. Ex. E.)

On March 14, 2008, Defendants wrote to advise Plaintiff of their position. (See Goodman Aff. Ex. F.) Citing to relevant policy language, the letter explained that, because it was unclear to Defendants whether Plaintiff fell within the policy definition of permanently totally disabled, Plaintiff was requested to submit to examinations by an allergist and a cardiologist. (*Id*. at 7.) Citing to the Notice of Claim provision, the letter further stated that Defendants "continue[] to reserve their right to deny coverage for failing to give immediate advice to [Defendants] of the potential loss . . . " (*Id*. at 8.)

By letter dated April 2, 2008, counsel for Plaintiff addressed the notice of claim issue. (Goodman Aff. Ex. G.) Citing to the Elimination Period provision in the Certificate,[1] counsel maintained that, since the first day of the elimination period was October 9, 2006, Plaintiff's potential qualifying loss did not occur until October 2007, and thus Plaintiff's claim was timely filed. (*Id*.)

Plaintiff subsequently underwent two independent medical examinations arranged by Defendants. On July 2, 2008, Bernard A. Feigenbaum, M.D. ("Feigenbaum"), an allergist, examined Plaintiff to address his fear of a serious allergic reaction to the radiocontrast media ("RCM") used in cardiac intervention studies. (*See* Goodman Aff. Ex. J.)

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[1] Elimination Period is defined as "the number of consecutive days [y]ou are Totally Disabled . . . before a benefit is payable. The Elimination Period begins on the first day [y]ou are attended by a Physician who determines [y]ou to be Totally Disabled . . ." (Certificate at 3.)

Feigenbaum reported that while Plaintiff has a history suggestive of a possible food allergy to shellfish or fish, he has not undergone any testing to confirm such results. (*Id.* at 4.) Feigenbaum explained that, in the past, it was believed that a food allergy to fish or shellfish significantly increased the risk of an adverse reaction to RCM, due to iodine content, but the allergy literature no longer supports this conclusion. (*Id.* at 5-6.) Feigenbaum further opined that, if one had further concerns about the "mildly increased risk" of adverse reaction to RCM in "allergic individuals" and wanted to decrease the risk of an adverse reaction, possible prophylactic treatment options exist. (*Id.* at 6.) Feigenbaum concluded: "Because of all the issues that relate to Allergy, consultation with a treating allergist, preferably one who specializes in RCM allergy, would be suggested." (*Id.*)

On September 25, 2008, Jeffery Rade, M.D. ("Rade"), an Interventional Cardiologist, examined Plaintiff. (Goodman Aff. Ex. K.) Rade opined that, while Plaintiff likely has some degree of coronary artery disease, "[h]ow extensive that disease is, how likely it is to account for the severity of his symptoms and what the best treatment and/or revascularization options might be are unclear given his refusal to undergo coronary angiography out of a fear of experiencing a reaction to radiocontrast dye." (*Id.* at 7.) Rade concluded: "While Plaintiff appears to have some element of disability due to recurrent chest pain, at present I do not believe that he can truly be considered completely and totally unable to perform in any professional capacity as a physician." (*Id.* at 9.) Rade based his opinion on Plaintiff's continued treatment of patients in his office after the

date the disability is alleged to have begun and continuing through the date of Rade's examination, as well the objective findings of the stress echocardiogram, which indicate that Plaintiff "likely has the physical capacity to reasonably function as a physician without objective evidence of inducile ischemia." (*Id*. at 10.)

A letter dated February 10, 2009 advised Plaintiff that his claim was not covered by the policy, or was excluded from coverage. (Goodman Aff. Ex. I.) More specifically, the letter advised that the Defendants did not agree to coverage because Plaintiff had not satisfied the definition of Permanently Totally Disabled, "since without proper cardiac catheterization, it would be impossible to confirm the full extent of [his] alleged condition, if any, and whether it [was] permanent in nature." (*Id*. at 10.) Defendants maintained that Plaintiff's alleged condition, if any, can be corrected with proper medical treatment should he submit to cardiac catheterization. (*Id*. at 10-11.) Furthermore, the Certificate requires that, as a result of Total Disability, the insured cannot perform in any professional capacity as a medical doctor, and Plaintiff admittedly continued to work as a medical doctor up until sometime after the expiration of the policy in 2008. (*Id*. at 11.) Finally, Plaintiff's claim was submitted on August 9, 2007, "nearly ten (10) months after [his] alleged date of loss," and, as such, Defendants "den[ied] any obligation to indemnify [Plaintiff] for failing to effectuate timely notice of this claim." (*Id*. at 15.)

Plaintiff subsequently invoked the formal review process provided for in the Grievance Proce-

dures of the Certificate. (Goodman Aff. at ¶ 29; *see* Certificate at 10.) On December 1, 2009, Defendants completed their formal review and advised Plaintiff that Defendants continued to maintain the Plaintiff was not entitled to benefits under the Certificate. (Goodman Aff. at ¶ 30.) In subsequent correspondence, Defendants invoked the Certificate's Third Physician Provision, because of Plaintiff's continued claim of permanent disability. (*See* Goodman Aff. at ¶ 31, Ex. L.) That provision states:

> Benefits will be paid if it is determined by the Physician providing your Regular Care that You are Permanently Totally Disabled. We reserve the right to have You examined by a Physician of Our choice. Should your Physician and Our Physician not be able to agree that You are Totally Disabled, Your Physician and Our Physician shall name a third Physician to make a decision on the matter which shall be final and binding.

(Certificate at 6.)

In a letter dated December 2, 2009, Plaintiff refused to comply with the third physician provision unless Defendants conceded coverage and challenged only whether Plaintiff is permanently and totally disabled. (*See* Goodman Aff. Ex. L.) Shortly thereafter, Plaintiff commenced this action in the Supreme Court of the State of New York, Richmond County, seeking a declaratory judgment that there is coverage for Plaintiff under the Certificate, and damage of $550,000, as well as interest and costs. (Goodman

Aff. Ex. M.) Defendants removed the action pursuant to 28 U.S.C. § 1331, the Convention and the FAA. (Goodman Aff. Ex. N., Notice of Removal).

DISCUSSION

I. Subject Matter Jurisdiction

Defendants assert that the court has subject matter jurisdiction under 28 U.S.C. § 1331 by virtue of the federal question raised by application of the Convention, which is implemented by Chapter Two of the FAA, 9 U.S.C. §§ 201-208. (Def. Opp. to Rem. at 1.) Plaintiff moves to remand the case to state court, arguing that the FAA does not apply, and therefore this court lacks jurisdiction. (*See* Pl. Mot. Rem. at 1-2)

The requirement that jurisdiction be established as a threshold matter is "inflexible and without exception." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). *See Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 577 (1999). The Second Circuit has reiterated that jurisdictional questions should be addressed in the first instance by the District Court. *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 203 (2d Cir. 2005). This obligation extends to removal cases. *McRae v. Arabian American Oil Co*., 293 F. Supp. 844, 846 (S.D.N.Y. 1968).

A. Federal Jurisdiction, the Convention and the FAA

Federal question jurisdiction is invoked where the plaintiff's claim arises "under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, 9 U.S.C. § 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."

"The goal of the Convention is to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions." *Smith/Enron Cogeneration Ltd. v. Smith Cogeneration Int'l, Inc.* 198 F.3d 88, 92 (2d Cir. 1999). The adoption of the Convention by the United States promotes the strong federal policy favoring arbitration of disputes, particularly in the international context. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40 (1985). *Accord Republic of Ecuador v. Chevron Corp.*, 638 F.3d 391 (2d Cir. 2011).

The Convention and the implementing provisions of the FAA set forth four basic requirements for enforcement of arbitration agreements under the Convention: (1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope. *See Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1018 (2d Cir. 1993); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249-50 (2d Cir. 1991).

The Second Circuit has held that "when we exercise jurisdiction under Chapter Two of the FAA,

we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an argument to arbitrate is enforceable." *See Smith/Enron*, 198 F.3d at 95. *See David L. Threlkeld & Co*, 923 F.2d at 249-50; *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 299 n.5 (S.D.N.Y. 1997). Where there is a question as to whether claims are arbitrable, federal arbitration policy requires that "any doubts . . . be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Louis Dreyfus Negoce, S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 223 (2d Cir. 2001).

B. Removal pursuant to Section 205

9 U.S.C. § 205 provides that:

> 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 or division embracing the place where the action or proceeding is pending . . . [T]he 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.*

9 U.S.C. § 205 (emphasis added). *Vaden* notes that while Chapter 2 of the FAA expressly grants federal courts jurisdiction to hear actions seeking to enforce an agreement or award falling under the Convention, FAA § 205 "goes further" and overrides the well-pleaded complaint rule *pro tanto, Vaden v. Discover Bank,* 556 U.S. 49, --, 129 S. Ct. 1271 fn.9 (2009). *Accord Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 268-69 (2d Cir. 1996) (noting that when Congress has intended to create an exception to the "well-pleaded complaint rule," it has done so explicitly, as in 9 U.S.C. § 205).

Although the Second Circuit has not addressed the issue of removal pursuant to § 205 except in dicta,[2] numerous courts in the Circuit have exercised § 205 removal jurisdiction. *See Bogdan Dumitru v. Princess Cruise Lines, Ltd*., 2 F. Supp. 2d 328 (S.D.N.Y. 2010), *Celulosa Del Pacifica S.A. v. A. Ahlstrom Corp.*, 1996 WL 103826, at *1, 3 (S.D.N.Y. Mar. 11, 1996*), JF Surgutneftegaz* v. *President and Fellows of Harvard College*, 2005 WL 1863676, *2 fn.3 (S.D.N.Y Aug. 3, 2005), *York Hannover Holding A.G. v. American Arbitration Association*, 794 F. Supp. 118, 122-23 (S.D.N.Y. 1992) *Cf. Samsun Logix Corp. v. Bank of China*, 740 F. Supp. 2d 484, 478 (S.D.N.Y. 2010) (removal pursuant to Convention unwarranted where arbitration had already been completed.)

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[2] Dicta in *International Shipping Co. v. Hydra Offshore, Inc.* suggests that the Convention is enforceable where the party invoking its provisions seeks "either to compel arbitration or to enforce an arbitral award," 875 F.2d 388, 391 n.5 (2d Cir. 1989). *Chevron Corp*., 638 F.3d at 391 fn.6.

Noting at the outset that the Second Circuit had not addressed the issue specifically, the court in *Banco de Santander Cen. Hispano, Inc.* engaged in a thorough and well-reasoned analysis of the language of § 205, the relevant case law, and the legislative history, and adopted a "broad" interpretation of § 205. 425 F. Supp. 2d 421, 428 (S.D.N.Y. 2006). The court in *Banco* focused its discussion on *Beiser v. Weyler*, 284 F.3d 665, 667 (5th Cir. 2002), where the Fifth Circuit held that a district court will have jurisdiction under § 205 "over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense." 284 F.3d at 669. The court in *Banco* reasoned that if § 205 removal were limited to only state court actions seeking to compel arbitration or confirm an arbitration award, Congress would not have needed to expressly abrogate the well-pleaded complaint rule. As such, the court in *Banco* held that Congress expressly granted removal jurisdiction to a class of state court actions, even where plaintiffs did not expressly plead claims under the Convention, *i.e.*, alleging only state claims or setting out a vacatur action, so long as defendants could articulate a "federal defense" "related to" the Convention. *Id.* at 430.

C. The "Arbitration Clause"

The key issue here is whether Defendants have established that the insurance policy at issue contains an arbitration clause that falls under the Convention and provides a defense to the instant action. Defendants' petition for removal states, in pertinent part:

> This dispute is commercial and contractual, and pertains to a written contract, and at least one contracting party is not a citizen of the United States, and the written contract contains provisions requiring binding arbitration of a dispute that has arisen between the parties.

(Notice of Removal at ¶ 6.) Defendants maintain that this dispute, including "any threshold issue of arbitrability," is governed by the Convention. (Notice of Removal at ¶ 7) More specifically, Defendants contend that a dispute has arisen regarding the determination of Plaintiff's medical condition, and that the third physician provision of the Certificate constitutes an arbitration provision. Moreover, because Plaintiff continues to claim disability, but refuses to proceed with the third physician provision, Defendants assert they are entitled to a Declaration and Order compelling arbitration. (*See* Def. Reply in Supp. of Sum. Jmt. at 8.)

In determining whether the agreement in question is in fact an agreement to arbitrate, the issue posed is whether "a controversy" would be "settled" by the process set forth in the agreement. *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985). In *AMF*, the clause in question stated, in part, that "[b]oth parties agree to submit any controversy which they may have . . . to such advisory third party for the rendition of an advisory opinion. Such opinion shall not be binding upon the parties, but shall be advisory only . . . ." *Id.* at 458. Conceding that the term arbitration "eludes easy definition," (*Id.* at 459), U.S. District Judge Jack B.

Weinstein of this court concluded that case law developed following the passage of the FAA "reflects unequivocal support to have third parties decide disputes – the essence of arbitration," *Id*. at 460. Moreover, "[n]o magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to obtain the benefits of the [FAA];" thus, if the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration. *Id*; *See also McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co*., 858 F.2d 825 (2d. Cir. 1988) (where provision called for the appointment of an independent tax counsel to resolve certain disputes, the fact that the contract language did not employ the word "arbitration" was "irrelevant").

The third physician provision at issue states, in relevant part, "[s]hould your Physician and Our Physician not be able to agree that You are Totally Disabled, Your Physician and Our Physician shall name a third Physcian to make a decision on the matter which shall be final and binding." (Certificate at 6.) Here, although Plaintiff continues to pursue his claim for Total Disability, he refuses to participate in a previously agreed upon procedure for settling that controversy. The provision requires that a physician for each party name a third Physician who will make a final and binding decision on the matter of Plaintiff's disability. Neither party here disputes that an enforceable contract was formed. In agreeing to the terms of the contract, both parties agreed to this mechanism for resolving disputes as to the disability determination. Thus, heeding the presumption in favor of arbitration as described in *Moses H. Cone, supra*, at 24-26, this

court construes the third party physician provision in the Certificate as an arbitration clause. As such, Defendants have established the existence of an arbitration agreement falling under the Convention, and properly have moved to compel arbitration. Accordingly, this court has subject matter jurisdiction over the action and will proceed to the merits.

II. Summary Judgment

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The court must view all facts in the light most favorable to the nonmoving party, but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party, however, may not rely on "[c]onclusory allegations, conjecture, and speculation," *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998), but must affirmatively "set out specific facts showing a genuine issue for trial," FED. R. CIV. P. 56(e). "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight,

there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo v. Prudential Residential Servs., Ltd. P' ship.*, 22 F.3d 1219, 1224 (2d Cir. 1994) (citing *Dister v. Cont'l Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988)).

Under New York law, "an insurer's duty to indemnify arises under the insurance contract." *Atlantic Casualty Ins. Co. v. C.A.L Construction Corp.*, 2008 WL 2946060 at *4 (E.D.N.Y. July 30, 2008) (citing *Trans. Ins. Co. v. AARK Constr. Group*, 526 F. Supp. 2d 350, 356 (E.D.N.Y. 2007). Insurers seeking to deny coverage by virtue of an exclusion "must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." *Cont. Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y. 2d 640, 652 (1993). Courts interpret exclusions narrowly and resolve "[a]ny ambiguities . . . in favor of the insured." *Marino v. N.Y. Tel. Co.*, 944 F. 2d 109, 112 (2d Cir. 1991); *Cont. Cas. Co.*, 80 N.Y. 2d at 652-55. The insurer bears the burden of showing that the loss claimed by the insured is excluded from coverage. *Jakobson Shipyard, Inc. v. Aetna Cas. & Sur. Co.*, 961 F.2d 387, 389 (2d Cir. 1992).

Under New York law, an insured must comply with the notice provisions contained in its insurance policy once it is aware of a loss. *Atlantic Casualty Ins. Co*, 2008 WL 2946060 at *7. An insured is deemed to be aware of a loss "once an insured has obtained facts that would cause a reasonable person" to recognize the potential for a claim under its policy. *See, e.g., Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 122 (2d Cir. 1984). The require-

ment that an insured comply with the notice provision of an insurance policy operates as a condition precedent to coverage. *Trans. Ins. Co.*, 526 F. Supp. 2d at 358. Absent a valid excuse, the failure to comply with the notice requirement vitiates the policy, and an insurer need not demonstrate prejudice before it can assert the defense of noncompliance. *Id.*

Courts evaluate whether an insured provided timely notice under the standard of reasonableness. *Atlantic Casualty Inc. Co*, 2008 WL 2946060 at *7. An insurer establishes unreasonable delay as a matter of law by demonstrating that "(1) the facts bearing on the delay in providing notice are not in dispute and (2) the insured has not offered a valid excuse for the delay." (*Id.* citing *Trans. Inc. Co.*, 526 F. Supp. 2d at 358). *See, e.g., Safer v. Government Empls. Ins. Co.*, 254 A.D. 2d 344, 345 (2d Dep't 1998) (delay in reporting an occurrence to insurer more than one month after receiving a complaint amounts to unreasonable delay as a matter of law).

Here, Defendants contend that Plaintiff's delay in notifying Defendants of his "total and permanent disability" constitutes a breach of the notice provision, thus vitiating any duty to indemnify Plaintiff. (Def. Supp. of Sum. Jmt. Mot. at 21-26.) Plaintiff argues that there is a factual issue as to when he "had a reasonable belief that he was permanently disabled to the extent that he would never be able to resume his profession." (Pl. Opp'n to Sum. Jmt. at 7.) Therefore, the court must determine whether Plaintiff's delay in notifying Defendants is unreasonable as a matter of law.

The Notice of Claim provision in the Certificate provides that Plaintiff is required to notify Defendants within twenty days after the date of a potential qualifying loss, or as soon after that as is reasonably possible. (Certificate at 8.) It is undisputed that Sayad determined that Plaintiff had suffered a "permanent total disability" as of October 9, 2006, and it was either July or August 2007 when Plaintiff first communicated his intent to claim benefits under the Certificate of Defendants. Consequently, there was a nine- or ten-month lapse between the date when Plaintiff was declared permanently and totally disabled by Sayad, and that information was communicated to Defendants.

Plaintiff argues that a question of facts exists as to whether he reported the claim within twenty days or as soon as possible from when he reasonably determined he would never be able to resume the material and substantial duties of his profession. (Pl. Opp'n to Mot. for Sum. Jmt. at 9.) As an initial matter, the court notes that the pertinent definition of Total Disability, amended by the Endorsement effective January 20, 2005, is as follows: "Total Disability means that as a result of sickness or injury you cannot perform in any professional capacity as a medical doctor." (Certificate of 12.)

Despite Sayad's recommendation that Plaintiff cease practicing medicine after the October 7, 2006 angina attack, (Bakoss Aff. at ¶ 5.), Plaintiff was "too proud to retire," (Bakoss Aff. at ¶ 6.) Thus, Plaintiff returned to work, and suffered his first heart attack on October 24, 2006. (Bakoss Aff. at ¶ 6.) After suffering his first heart attack, Plaintiff

had Dr. Ashkar, his employee, cover his practice. (Bakoss Aff. at ¶ 7.) On or about March 23, 2007, Plaintiff returned to work to fill in for Dr. Ashkar, and suffered a second heart attack a few hours later. (Bakoss Aff. at ¶ 7.)

Despite having suffered multiple heart attacks, Plaintiff contends he believed his condition would not prevent him from resuming his practice. (Pl. Opp'n to Sum. Jmt. at 12.) Until he submitted his claim in August 2007, Plaintiff attempted to return to his medical practice in some capacity. (*Id.*) Plaintiff alleges he tried to recover and, until the summer of 2007, he believed he would be able to resume his occupation. Thus, he provided notice as soon "as is reasonable possible." (*Id.* at 10.)

In order to qualify for disability benefits under the Certificate, Plaintiff must establish that "as a result of a sickness of injury [he] cannot perform in any professional capacity as a medical doctor." (Certificate at 12.) Plaintiff submitted an Insured's Statement, dated August 9, 2007, signed under penalty of perjury, indicating October 9, 2006 as the date upon which he became totally and permanently disabled. (Goodman Aff. Ex. B.) Yet Plaintiff admits, even in the same Insured's Statement, that he did in fact work after the claimed onset date. (*Id.*) Moreover, on September 5, 2008, during his interview with Rade, Plaintiff admitted continuing to work in the office "several hours a day up to 4 days a week." (Goodman Aff. Ex. K. at 5, 10.) If, as he argues, Plaintiff was still working in some capacity after October 9, 2006, then he was not, in fact,

permanently and totally disabled as per the terms of the Certificate.

Plaintiff's argument concerning the timing of the "potential qualifying loss" is equally unavailing. Plaintiff contends that the potential qualifying loss was when Plaintiff realized he "could not recover . . . to the extent" he would ever resume the "material and substantial duties" of his profession." (Pl. Opp'n to Sum. Jmt. at 12.) A reasonable person would have recognized a potential qualifying loss when he first was determined by his physician to be permanently and totally disabled. Significantly, Plaintiff does list October 9, 2006 as the onset date of his total and permanent disability in his Insured's Statement.

Defendants have demonstrated that the facts regarding Plaintiff's delay of nearly ten months in reporting his claim are undisputed and Plaintiff has not offered a valid excuse for the delay. Therefore, the court finds that Defendants have established that Plaintiff's delay is unreasonable as a matter of law and, consequently, are not liable to Plaintiff. *Atlantic Casualty Ins. Co*, 2008 WL 2946060 at *7.

CONCLUSION

For the reasons set forth above, Plaintiff's motion for remand is denied, and Defendants' motion for summary judgment is granted in its entirety. Defendants' motion for an order to compel arbitration is denied as moot.

SO ORDERED.

Dated: Brooklyn, New York
September 27, 2011

/s/

DORA L. IRIZARRY

United States District Judge

APPENDIX C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

April 15, 2013

Mr. E. Joshua Rosenkranz
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019-6142

Re: M.D. Imad John Bakoss
v. Certain Underwriters at Lloyd's London
Application No. 12A992

Dear Mr. Rosenkranz:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on April 15, 2013 extended the time to and including June 7, 2013.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By
/s/ Jacob C. Travers
Jacob C. Travers
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

NOTIFICATION LIST

Mr. E. Joshua Rosenkranz
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019-6142

Clerk
United States Court of Appeals for the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

APPENDIX D

TITLE 9 – ARBITRATION

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any party thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such

a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed

with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method or naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them

or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district court in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course or admiralty proceedings, and the court shall then have jurisdiction to direct the parties to

proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adverse-

ly affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make and order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is

filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1928.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of the Statute doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

§ 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.

§ 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 purposed 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.

§ 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 ju-

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

§ 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 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.

§ 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 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 compliant 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.

§ 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.

§ 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.

§ 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.

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

§ 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter American Convention.

§ 303. Order to compel arbitration; appointment of arbitrators; locale

(a) 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. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition an Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

§ 306. Applicable rules of Inter-American Commercial Commission

(a) For the purpose of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

§ 307. Chapter 1; residual application

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