FIFTH CIRCUIT RULES *EN BANC* THAT ARBITRATION TREATY TRUMPS STATE INSURANCE LAWS

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November 21, 2009

In *Safety National Casualty Corporation v. Certain Underwriters At Lloyd's, London*, --- F.3d ----, 2009 WL 3722727 (5th Cir. (La.)), the Fifth Circuit considered *en banc* the question of whether the McCarran-Ferguson Act caused Louisiana state law to "reverse-preempt" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) or its implementing legislation (the Convention Act).

Procedural and Factual Background

Safety National involved workers' compensation insurance for the Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT), which obtained excess insurance from Lloyd's of London. The agreements between LSAT and Lloyd's contained an arbitration provision. LSAT engaged in a loss portfolio transfer with Safety National Casualty Corporation which Lloyd's refused to recognize. Safety National sued Lloyd's in federal court to enforce LSAT's policies with Lloyd's. Lloyd's filed an unopposed motion to stay and compel arbitration, which the court granted. However, the arbitration broke down when the parties were unable to agree on arbitrator selection. Lloyd's then filed a motion to lift the district court's stay in order to join LSAT as a party and compel it to arbitrate as well. LSAT then intervened in the case, moved to lift the stay and to quash arbitration, arguing that the arbitration agreements were

unenforceable under Louisiana law. The district court granted the motion to quash, reasoning that although the Convention required arbitration, Louisiana law prohibited arbitration agreements in insurance contracts. The court held that Louisiana law reverse-preempted the Convention because of the McCarran-Ferguson Act's reservation of insurance regulation to the states.

The district court certified its ruling for an immediate appeal to the Fifth Circuit under 28 U.S.C. §1292(b). A panel of the Fifth Circuit reversed the trial court, holding that McCarran-Ferguson did not cause reverse preemption of the Convention. The Fifth Circuit then granted rehearing *en banc*.

A "Treaty" is not an "Act of Congress"

Fourteen judges joined in Judge Owen's November 9, 2009 opinion holding that the McCarran-Ferguson Act did not cause reverse preemption of the Convention. Judge Elrod's vigorous dissent was joined by Judges Garza and Smith. Judge Clement concurred in a separate opinion. The court held that McCarran-Ferguson did not apply to the Convention because the Convention is a "treaty" rather than an "Act of Congress" as the latter term is used in the McCarran-Ferguson Act. The majority was of the view that Congress did not intend to include treaties within the scope of the phrase "Act of Congress."

McCarran-Ferguson provides that no Act of Congress "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," unless the federal statute specifically relates to the business of insurance. 15 U.S.C. §1012(b). The court noted that neither the Convention nor the Convention Act specifically

relates to the business of insurance. All parties agreed that the Louisiana statute in question did regulate the business of insurance within the meaning of the McCarran-Ferguson Act.[1] Thus, if the Convention were an "Act of Congress," it would be reverse-preempted.

LSAT contended that the Convention was not "self-executing" and could only go into effect in the United States when the Convention Act was passed. It argued that since the Convention Act itself was an "Act of Congress," the reverse preemption provisions of McCarran-Ferguson were triggered. LSAT conceded, however, that if the Convention were self-executing, it would be a "treaty" and not an "Act of Congress" within the meaning of the McCarran-Ferguson Act. The court stated that it was unclear whether in fact the Convention was self-executing. However, it held that:

> Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress. The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."

2009 WL 3722727 at *5. (Citations omitted.) The court found it "untenable" that the phrase "Act of Congress" in McCarran-Ferguson was meant to encompass treaties that were implemented by federal legislation but not self-executing treaties. The court seemed to believe that such a distinction would be irrational. The dissenting opinion accused the court of manufacturing this distinction when there is no record that the Congress that passed McCarran-Ferguson thought about this issue.

[1] The Court assumed this for purposes of its decision but fn. 21 makes clear that it was not entirely sure that this concession by Lloyd's was correct. 2009 WL 3722727 at *3.

Perhaps the better argument put forward by the Fifth Circuit is that it is the treaty itself (the Convention), rather than its enabling act, that is the document to be construed. The Convention requires signatory nations to recognize proper arbitration agreements. The command to enforce international arbitration agreements comes from the Convention and not the Convention Act. In concluding that the Convention was not reverse-preempted, the court also relied on the national policy favoring arbitration of commercial agreements.

Conflict between the Fifth & Second Circuits May Lead to Supreme Court Decision

The Fifth Circuit noted that its decision was in conflict with the Second Circuit's decision in *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995). The Second Circuit had held that the Convention was not self-executing and relied on an "Act of Congress" for its implementation. With a conflict among circuits identified, there may be a Supreme Court decision in this area on the horizon. However, it may not be the *Safety National* case. As sometimes happens with cases certified for appeal, the issue certified was a narrow one. The parties made significant concessions that took some important questions out of the case. If the Supreme Court were to deal with the Convention's alleged conflict with McCarran and state insurance law again, it would probably want a case in which the issues were fully developed.

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