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Supreme Court May Be Asked to Decide Whether State Insurance Laws Reverse-Preempt the New York Convention

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On August 12, 2021, the Ninth Circuit Court of Appeals decided whether Washington state law reverse-preempts the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), in which case the state law would bar the enforcement of arbitration clauses in insurance contracts in states with similar anti-arbitration laws. *CLMS Management Services LP et al. v. Amwins Brokerage of Georgia LLC et al*., –F.4th—, 2021 WL 3557591 (9th Cir. 2021). While the Ninth Circuit agreed with the defendants that state law does not reverse-preempt the Convention, plaintiffs have indicated that they will seek review in the U.S. Supreme Court. Plaintiffs point to a circuit split, since the Second Circuit has previously held that an anti-arbitration provision in Kentucky insurance law trumps the New York Convention. If plaintiffs follow through with their intended petition for certiorari, and if the High Court grants review, the Court's decision should provide insurance companies clearer guidance with respect to the arbitration clauses in their non-domestic policies, as companies should be able to determine whether they can invoke international arbitration in states that bar arbitration clauses in insurance contracts.

In *CLMS Management Services*, plaintiffs CLMS Management Services Limited Partnership ("CLMS") and Roundhill I, LP ("Roundhill") entered into an insurance contract with defendant Amrisc, LLC ("Amrisc"), underwritten by defendants Certain Underwriters at Lloyd's London ("Lloyd's"). The contract called for all disputes arising out of the contract to be resolved by arbitration in New York. In August 2017, Hurricane Harvey caused damage to a townhome complex in Texas owned by Roundhill and operated by CLMS. The damage was estimated at $5,660,000, and plaintiffs submitted a claim. Lloyd's third-party claims administrator and defendant CJW & Associates ("CJW") responded that the policy deductible was $3,600,000. Plaintiffs filed a complaint in the Western District of Washington asserting multiple claims and alleging that the deductible should be $600,000. Lloyd's and CJW filed a motion to compel arbitration, citing the arbitration clause in the contract and arguing that the arbitration provision fell within the scope of the New York Convention. Plaintiffs opposed the motion, arguing that the Washington state law bans the enforcement of arbitration provisions in insurance contracts and that because of the federal McCarran-Ferguson Act, state law reverse-preempts the New York Convention.

The McCarran-Ferguson Act is a U.S. federal law that delegates to states the right to regulate the

business of insurance. The Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. The Act also states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

In granting Lloyd's and CJW's motion to compel arbitration, the district court held that the Article II, Section 3 of the New York Convention is self-executing and not an "Act of Congress" under the McCarran-Ferguson Act. (The Federal Arbitration Act is an Act of Congress, but it does not specifically relate to the business of insurance.) Accordingly, the district court held that the New York Convention is not reverse-preempted by the McCarran-Ferguson Act. On appeal, plaintiffs argued that Article II, Section 3 of the New York Convention is merely a "general proclamation" that "provides no additional guidance as to the mechanism for enforcing [ ] an agreement to arbitration." *CLMS Management Servs. LP*, 2021 WL3557591, at *5. The Ninth Circuit disagreed, holding that Article II, Section 3 of the New York Convention is self-executing because it: (i) is addressed directly to domestic courts; (ii) mandates that domestic courts "shall" enforce arbitration agreements; and (iii) "leaves no discretion to the political branches of the federal government whether to make enforceable the agreement-enforcing rule it prescribes." *Id*. Thus, the Ninth Circuit determined that Article II, Section 3 of the New York Convention satisfies the self-execution requirements of being specific and mandatory. *Id*. at *5 ("A treaty is self-executing and has automatic force as domestic law 'when it operates of itself without the aid of any legislative provision.'") (citing to *Medellin v. Texas*, 552 U.S. 491, 505, 128 S.Ct. 1346 (2008)).

The Ninth Circuit pointed out that its decision is aligned with the Fourth and Fifth Circuits' decisions. *See ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 387 (4th Cir. 2012) (acknowledging there is "much to recommend" the position that Article II, Section 3 is self-executing); *see also Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 722 (5th Cir. 2009) (explaining that "[t]he Convention expressly states that domestic courts 'shall' compel arbitration when requested by a party to an international arbitration agreement"). Although the Fourth Circuit and the Fifth Circuit stopped short of deciding whether Article II, Section 3 is self-executing, the Ninth Circuit noted that both circuits recognized that the treaty language in Article II, Section 3 mandates application in domestic courts. *Id*.

If the Supreme Court grants certiorari and holds that Article II, Section 3 of the Convention is self-executing, companies should expect their arbitration clauses in insurance agreements to be enforceable regardless of any anti-arbitration state laws that may otherwise reverse-preempt federal law. The decision will be particularly important in the close to 20 states that have similar anti-arbitration laws that prohibit arbitration provisions in insurance contracts.

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