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Litigation Minute: International Arbitration Clauses in Insurance Policies: Are They Valid in States with Anti-Arbitration Insurance Statutes?

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

The New York Convention typically requires U.S. courts to enforce written arbitration agreements covering international disputes, including arbitration clauses in contracts with foreign entities.[1] Over a dozen U.S. states, however, have enacted laws prohibiting mandatory arbitration clauses in insurance policies.[2] So, is an international arbitration clause in an insurance policy governed by such state law enforceable? A number of courts across the country have grappled with this issue and the results are mixed.

In a minute or less, here is what you need to know about the impact of anti-arbitration insurance statutes on the enforceability of international arbitration clauses in insurance policies, and some considerations to keep in mind.

CAN STATE INSURANCE LAWS BANNING ARBITRATION CLAUSES SUPERSEDE THE NEW YORK CONVENTION?

In general, the Supremacy Clause of the U.S. Constitution mandates that a state law give way to conflicting federal law, including treaties. Therefore, if the New York Convention and state anti-arbitration insurance statutes were the only provisions at issue, the state laws would likely be preempted. However, the McCarran-Ferguson Act complicates the issue because it affords states the right to regulate the insurance industry, and specifically provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[3]

In *CLMS Management Services Ltd. Partnership v. Amwins Brokerage of Georgia, LLC*, which involved an insurance policy between U.S.-based policyholders and foreign insurers containing a

mandatory arbitration provision, the Ninth Circuit Court of Appeals considered whether the McCarran-Ferguson Act allowed a Washington state insurance statute to "reverse-preempt" the New York Convention.[4] The Ninth Circuit held that Congress did not intend to include a treaty within the scope of an "Act of Congress" when it used those words in the McCarran-Ferguson Act, and thus the New York Convention was not subject to reverse preemption by the McCarran-Ferguson Act.[5]

Conversely, the Second Circuit has previously concluded that the New York Convention's requirements do not supersede a Kentucky anti-arbitration insurance statute.[6] According to the Second Circuit, because the New York Convention "relies upon an Act of Congress for its implementation," i.e., the Federal Arbitration Act, it is subject to the McCarran-Ferguson's above-referenced prohibition.[7]

Outside of circuits that have addressed this issue, some district courts have taken an approach similar to the Ninth Circuit, while others have aligned more closely with the Second Circuit.[8]

CONSIDERATIONS FOR POLICYHOLDERS

State anti-arbitration insurance statutes, like most insurance laws, are intended to protect policyholders. However, with the U.S. Supreme Court recently declining to review *CLMS Management Services* and resolve this area of the law, U.S. policyholders that have international arbitration clauses in policies with foreign insurers may not be able to rely upon state anti-arbitration insurance statutes to avoid such arbitration agreements. The following are some considerations for policyholders:

1. Policyholders should carefully review any dispute resolution clauses in their policies, both during initial placement and on a continuing basis.

2. If a policy calls for arbitration of international disputes, and if the law governing the arbitration clause is a state with an anti-arbitration insurance statute, policyholders should understand how that law may affect the clause's enforceability.

3. The likelihood of an arbitration clause being enforced is also an important factor for policyholders to be mindful of when making strategic decisions concerning whether, when, and where to initiate an action.

FOOTNOTES

[1] Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 et seq., incorporates the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") into U.S. law.

[2] WASH. REV. CODE ANN. § 48.18.200 (2019); ARK. CODE ANN. § 16-108-233(b) (2011); GA. CODE. ANN. § 9-9-2(c)(3) (2019); HAW. REV. STAT. § 431:10-221 (1987); KY. REV. STAT. ANN. § 417.050(2) (2019); LA. STAT. ANN. § 22:868 (2020); MD. CODE ANN., CTS. & JUD. PROC. § 3-206.1 (2009); MO. ANN. STAT. § 435.350 (1996); NEB. REV. STAT. ANN. § 25-2602.01(f)(4) (2010); OKLA. STAT. tit. 12, § 1855(D) (2008); 10 R.I. GEN. LAWS ANN. § 10-3-2 (1998); S.C. CODE ANN. § 15- 48-10(b)(4) (1978); S.D. CODIFIED LAWS § 21-25A-3 (1997); VA. CODE ANN. §

38.2-312 (1986).

[3] 15 U.S.C. § 1012(b).

[4] 8 F.4th 1007, 1009 (9th Cir. 2021).

[5] *Id*. at 1018. In its decision, the Ninth Circuit stated that its conclusion was supported by reasoning from the Fourth and Fifth Circuits. Id. at 1016 (citing ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 387 (4th Cir. 2012) and Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 722 (5th Cir. 2009)).

[6] Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45–46 (2d Cir. 1995).

[7] *Id*. (citing 9 U.S.C. §§ 201–208).

[8] Compare J.B. Hunt Transp., Inc. v. Steadfast Ins. Co., 470 F. Supp. 3d 936, 943–45 (W.D. Ark. 2020) (holding that the McCarran-Ferguson Act does not permit Arkansas law to reverse-preempt the New York Convention), *with* Foresight Energy, LLC v. Certain London Mkt. Ins. Cos., 311 F. Supp. 3d 1085, 1101 (E.D. Mo. 2018) (holding that a Missouri statute, through the McCarran-Ferguson Act, reverse-preempts federal legislation implementing the New York Convention).

Peter M. Ayers also contributed to this article.

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