# Kluwer Arbitration Blog

## Ninth Circuit Holds Article II, Section 3 of the New York Convention is "Self-Executing" and Not an "Act of Congress," Thereby Affirming Order to Compel Arbitration

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In *CLMS Mgmt. Servs. et al. v. Amwins Brokerage et al.*, the U.S. Court of Appeals for the Ninth Circuit considered whether a state law (by operation of the federal McCarran-Ferguson Act, which gives states the authority to regulate the business of insurance) voiding arbitration agreements in insurance contracts reverse-preempted Article II, Section 3 of the New York Convention. Normally, Article VI, Clause 2 of U.S. Constitution (the "Supremacy Clause") mandates that state law gives way to conflicting federal law, but the McCarran-Ferguson Act provides that state insurance law preempts conflicting federal law. Faced with this question, the Ninth Circuit held that Article II, Section 3 of the New York Convention is "self-executing," not an "act of Congress," and not subject to reverse-preemption by the McCarran-Ferguson Act. Accordingly, the Ninth Circuit affirmed the district court's order compelling arbitration, as further discussed and analyzed in this post.

### The Interplay Between the Supremacy Clause, the McCarran-Ferguson Act, State Law, and the New York Convention

The U.S. Constitution's Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land" (emphasis added). This means that "state law gives way to conflicting federal law."

However, Congress enacted the McCarran-Ferguson Act in 1945, which was "in response to the U.S. Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944)," holding that insurance is subject to federal regulation under the U.S. Constitution's Commerce Clause. In pertinent part, the Act provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." § 1012(a). And, "[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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." § 1012(b) (emphasis added). Thus, in the insurance industry, "the McCarran-Ferguson Act transformed the legal landscape by overturning the normal rules of pre-emption" (internal quotation marks omitted).

Within this legal framework, the State of Washington enacted laws to regulate insurance within its state. Relevant here, § 48.18.200 of the Revised Code of Washington provides: "No insurance contract … shall contain any condition, stipulation, *or agreement* … depriving the courts of this state of the jurisdiction of action against the insurer … Any such condition, stipulation, or agreement in violation of this section *shall be void* …" (emphasis added). The Ninth Circuit explained that "[t]he Washington Supreme Court has interpreted § 48.18.200 to 'prohibit binding arbitration agreements in insurance contracts,' and held that pre-dispute binding arbitration provisions in insurance contracts are unenforceable."

However, central to the matter in *CLMS Mgmt. Servs.*, Article II, Section 3 of the New York Convention provides: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds the said agreement is null and void, inoperative or incapable of being performed." The Ninth Circuit stated that the New York Convention obligates courts when seized of a matter where the parties have agreed to arbitrate: "(1) to recognize and enforce written agreements to submit disputes to foreign arbitration and (2) to enforce arbitral awards issued in foreign nations" (quoting *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 381 (4th Cir. 2012)).

Therefore the issue on appeal was whether the State of Washington's law, by operation of the McCarran-Ferguson Act, reverse-preempts the New York Convention.

## The Ninth Circuit Holds Article II, Section 3 of the NYC is Self-Executing and Not an Act of Congress

The Ninth Circuit analyzed the foregoing issue by considering whether it was the treaty of the New York Convention, itself, that compels enforcement of an arbitration agreement, or whether it was certain federal laws which amended the Federal Arbitration Act (*i.e.*, acts of Congress) "to accommodate implementation" of the New York Convention that compel enforcement of the arbitration agreement.

The Ninth Circuit explained that the U.S. Supreme Court has "'long recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not themselves function as binding federal law'" (quoting *Medellin v. Texas*, 552 U.S. 491, 504 (2008)). "A treaty is self-executing and has automatic force as domestic law 'when it operates of itself without the aid of any legislative provision." *Id.* at 505. "When, in contrast, 'treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.'" *Id.* "We have said that, 'at its core, the

question of self-execution addresses whether a treaty provision is directly enforceable in domestic courts'" (quoting *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1193 (9th Cir. 2017)).

To interpret Article II, Section 3 of the New York Convention, the Ninth Circuit began with the "time-honored" approach of beginning with the text of the treaty itself. In particular, the Ninth Circuit focused on the words: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, ***shall*** … refer the parties to arbitration …" (emphasis added). The Ninth Circuit ultimately concluded that Article II, Section 3 is self-executing and not an act of Congress.

The Ninth Circuit supported its decision with U.S. Supreme Court precedent, legislative history, and secondary, scholarly authority (citing H.R. Rep. No. 90-1181, at 3603 (1970) and Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 147 (2018) (arguing that the enactment of the New York Convention shows "only that Congress wanted to ensure the effective and efficient enforcement of the Convention's self-executing substantive terms in U.S. courts" by providing "procedural and ancillary mechanisms" that "could not sensibly" be addressed by a multilateral treaty with a large number of Contracting States)).

The Ninth Circuit importantly relied on the U.S. Supreme Court's decision in *Medellin* to explain the difference between a self-executing a non-self-executing treaty. *Medellin* addressed an International Court of Justice (ICJ) judgment which held that, "based on violations of the Vienna Convention, 51 named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States." *Medellin*, 552 U.S. at 497-98. In addressing this judgment, the U.S. Supreme Court "considered whether a judgment of the [ICJ] was directly enforceable as domestic law. The Court explained that 'the obligation on the party of signatory nations to comply with ICJ judgments derives … from Article 94 of the United Nations Charter,' which provides that 'each Member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party.' The Court concluded Article 94 is non-self-executing, and therefore ICJ decisions are not automatically enforceable, because Article 94 'is not a directive to domestic courts' and 'does not provide that the United States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.'" The Ninth Circuit noted it had previously relied "on similar textual clauses [in another Ninth Circuit decision] to conclude that Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is non-self-executing." *See generally Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017).

The Ninth Circuit reasoned that Article II, Section 3 of the New York Convention "stands in stark contrast" to the treaty provisions in *Medellin* and *Marshall Islands*, which speak rather in "broad, aspirational terms." In particular, as noted above, the Ninth Circuit focused on the word "shall" in Article II, Section 3 of the New York Convention as evidence that the Convention is self-executing and directly applicable to U.S. federal and state courts. Therefore, the Ninth Circuit found that "[t]he plain text of Article II, Section 3 and the Convention's relevant drafting and negotiation history

leads us to conclude that Article II, Section 3 is self-executing."

**Conclusion**

There are additional reasons why the Ninth Circuit's decision in *CLMS Mgmt. Servs. et al. v. Amwins Brokerage et al.* upheld the U.S.'s "liberal federal policy favoring arbitration agreements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985). While not exhaustive for purposes of this blog, as discussed in Gary Born's law article entitled *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115 (2018), the Ninth Circuit's holding affirms "one of the Convention's fundamental objectives: the establishment of uniform rules of international law governing the international arbitral process." *Id.* at 116. To that point, Born correctly posits that if the New York Convention were non-self-executing, "its terms would not apply directly in either state or federal courts. As a consequence, international arbitration agreements and awards would be subject to a confusing array of different and uncertain legal rules in different American courts, with, on any view, state law being applicable to significant categories of such agreements and awards in U.S. state courts." *Id.* at 131. That is, if the New York Convention were non-self-executing, then the acts of Congress which amended the Federal Arbitration Act to accommodate implementation of the New York Convention would have been applicable to only U.S. federal courts and not U.S. state courts. Such a result would run counter to the fundamental objective of the New York Convention. *See e.g., id.* at 151.

The Ninth Circuit's holding is also in line with many other New York Convention Contracting States' interpretation of the treaty as being self-executing. As Born further explains, a 2008 report published by the UNCITRAL Secretariat found that "for a vast majority of States, the New York Convention was considered as 'self executing." *Id.* at 169. Therefore, while U.S. jurisprudence is controlling on whether a treaty is self-executing in the U.S., the Ninth Circuit's holding reaffirms the New York Convention's principal objective of establishing uniform rules of international law governing the international arbitral process.

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