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The New York Convention and Reverse Preemption

Roger Alford (General Editor) (Notre Dame Law School) · Tuesday, November 17th, 2009

The Fifth Circuit earlier this month issued a highly unusual decision addressing whether state law could "reverse preempt" the New York Convention. As any student of international arbitration knows, state law occasionally attempts to limit the enforceability of arbitration agreements. Such a policy is preempted by the New York Convention as implemented by the Federal Arbitration Act. But there is one narrow category of insurance disputes governed by the McCarran-Ferguson Act that is subject to a federal requirement of "reverse preemption."

In *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*, the Fifth Circuit concluded that a non-self-executing treaty, as implemented by federal statute, was not reverse preempted by state law. A Louisiana statute prohibits the arbitration of insurance disputes, domestic or international. Normally that prohibition would be preempted by provisions of the Federal Arbitration Act implementing the New York Convention. But another federal statute, the McCarran-Ferguson Act, 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 such Act specifically relates to the business of insurance." Thus, federal law requires that state insurance law reverse preempt acts of Congress.

The Fifth Circuit concluded that an "Act of Congress" within the meaning of McCarran-Ferguson did not cover treaties, including non-self-executing treaties implemented by federal statute:

> 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."… We do not consider it reasonable to construe the term "Act of Congress" in the McCarran-Ferguson Act as an indication of congressional intent to permit state law to preempt implemented, non-self-executing treaty provisions but not to preempt self-executing treaty provisions…. Because here the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the McCarran-Ferguson Act's provision that "no Act of Congress" shall be construed to supersede state law regulating the business of insurance is inapplicable…. We find no indication from the text of the McCarran-Ferguson Act that Congress intended to signal a distinction between self-executing and non-self-executing-but-implemented treaties in the McCarran-Ferguson's reverse-preemption clause.

In other words, it is not the FAA, but the New York Convention as implemented by the FAA, that

is doing the preempting, and therefore McCarran-Ferguson does not authorize state law to reverse preempt the federal mandate requiring international insurance disputes subject to an arbitration agreement to be submitted to arbitration.

Of course, what the Fifth Circuit did was carve out arbitration of international insurance disputes as a special category from domestic insurance disputes. Following *Safety National Casualty*, only international insurance agreements can be submitted to arbitration; domestic insurance disputes are non-arbitral by virtue of the reverse preemption of Louisiana law.

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