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Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London: Does the McCarran-Ferguson Act Authorize State Insurance Law to Reverse-Preempt the New York Convention?

Lucy Reed (International Council for Commercial Arbitration) · Monday, April 12th, 2010 · Freshfields Bruckhaus Deringer

In *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009), the Fifth Circuit addressed the following question: does the McCarran-Ferguson Act authorize state law prohibiting arbitration agreements in insurance contracts to reverse-preempt the New York Convention or the New York Convention's implementing legislation (the Federal Arbitration Act, or FAA)? In comparison to the Second Circuit (which had already decided a similar question), the Fifth Circuit held that the New York Convention trumps the state law in this instance, thereby permitting compulsion under an arbitration agreement.

The McCarran-Ferguson Act proscribes Acts of the U.S. Congress from preempting state insurance law unless the Act of Congress specifically relates to the business of insurance, stating 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" (15 U.S.C. § 1012(b)). In passing the McCarran-Ferguson Act in 1945, Congress declared that it was in the public interest to allow the several states to continue to regulate and tax the insurance industry (15 U.S.C. § 1011).

In *Safety National*, a dispute arose among three insurers regarding arbitration agreements. The Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT), which provides workers' compensation insurance to its members, entered into reinsurance agreements with Certain Underwriters at Lloyd's, London (Underwriters) that contained arbitration agreements. Safety National Casualty Corporation (Safety National), which is also a provider of excess insurance coverage, alleged that LSAT transferred its rights under these reinsurance agreements to Safety National. Underwriters refused to recognize this assignment, arguing that LSAT's rights under the reinsurance agreements were non-assignable.

After Safety National filed suit against Underwriters in federal district court, Underwriters filed a motion (which was unopposed) to stay the proceedings and compel arbitration, which the district court granted. Once the arbitration began, however, the parties (Underwriters, Safety National and LSAT) could not agree on the process for selecting arbitrators. Therefore, Underwriters filed a motion in the district court to lift the stay of the proceedings in order to join LSAT as a party to the

litigation and also to compel arbitration to determine the process for selecting arbitrators. LSAT then moved to intervene, lift the stay and quash arbitration, arguing that the arbitration agreements in the reinsurance agreements were not enforceable under Louisiana state law.

The U.S. District Court for the Middle District of Louisiana granted LSAT's motion on the grounds that the New York Convention, which would otherwise operate to compel arbitration, was reverse-preempted under the McCarran-Ferguson Act by a Louisiana state law prohibiting arbitration agreements in insurance contracts. The Fifth Circuit reversed the District Court's decision, holding that the McCarran-Ferguson Act did not allow the Louisiana state law to reverse-preempt the New York Convention or the FAA.

The Fifth Circuit then considered the case en banc and reversed the District Court's decision on the grounds that the McCarran-Ferguson Act does not apply to the New York Convention. The majority held that the Louisiana state law did not reverse-preempt the New York Convention for two reasons: (1) a treaty (such as the New York Convention) is not an "Act of Congress" for the purposes of the McCarran-Ferguson Act; and (2) it is the New York Convention, rather than the FAA, which determines the parties' rights and obligations, and supersedes state law.

Writing for the majority, Judge Priscilla Owen stated that while it was "unclear" whether the New York Convention is a self-executing treaty, "[t]he fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an 'Act of Congress'" (*Safety National*, 587 F.3d at 721, 723). The majority also stated that the FAA "does not in this case operate without reference to the contents of the [New York] Convention," and "[b]ecause here the [New York] Convention, an implemented treaty, rather than the [FAA], 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" (id. at 724, 725).

In her concurring opinion, Judge Edith Brown Clement stated that she would hold that Article II of the New York Convention is self-executing and, as such, preempts the Louisiana state insurance law through the operation of the Supremacy Clause. In determining whether Article II is self-executing, Judge Clement utilized the interpretative framework established in *Medellin v. Texas*, 552 U.S. 491 (2008), which first looks to the text of the treaty, and also to its "negotiation and drafting history" and the signatories' "postratification understanding" (*Medellin*, 552 U.S. at 506-07 (citations omitted)). Judge Clement determined that Article II(3) is self-executing because it specifically addresses the courts of the Contracting States (as opposed to the Contracting States themselves) and contains mandatory (as opposed to discretionary) language. As such, Judge Clement concluded that Article II is enforceable in U.S. courts on its own terms because it does not require Congress to pass implementing legislation.

Judge Jennifer Walker Elrod wrote a dissenting opinion, which was joined by Judges Jerry E. Smith and Emilio M. Garza. The dissent concluded that the New York Convention is a non-self-executing treaty and that the majority was incorrect to frame the question before the en banc court as whether the New York Convention is an "Act of Congress" for the purposes of the McCarran-Ferguson Act. Rather, the dissent maintained that the appropriate question is whether the FAA, as the New York Convention's implementing legislation, is an Act of Congress. Upon addressing this reformulated question, the dissent determined that the FAA is indeed an Act of Congress, which would be reverse-preempted according to the McCarran-Ferguson Act because the FAA does not specifically relate to the business of insurance.

Moreover, the dissent declared that the concurrence was incorrect to address the issue of whether

the New York Convention was self-executing because Underwriters failed to preserve their argument that Article II is self-executing before the en banc court (which the majority also noted in passing). The concurrence responded to the dissent's point, stating that Underwriters merely focused their argument before the en banc court on the question presented by the panel, and therefore did not waive their argument that Article II is self-executing.

The Fifth Circuit's *en banc* decision in *Safety National* acknowledged that it created a circuit split with the Second Circuit's holding in *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995). In *Stephens*, the Second Circuit held that the New York Convention was reverse-preempted under the McCarran-Ferguson Act by a Kentucky state law regulating the business of insurance, which would render the arbitration agreement between the parties unenforceable. In reaching its holding, the Second Circuit declared that the New York Convention is "not self-executing, and therefore, relies upon an Act of Congress for its implementation" (*Stephens*, 66 F.3d at 45).

The Fifth Circuit addressed the Second Circuit's holding in *Stephens* by stating: "[b]ecause we give the phrases 'Act of Congress' and 'such Act' their usual, commonly understood meaning, we conclude that implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act" (*Safety National*, 587 F.3d at 731). A petition for certiorari was filed on February 5, 2010 in *Safety National*. It will be interesting to see if the Supreme Court grants certiorari to resolve this circuit split.

by Katie Duglin and Lucy Reed

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