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## INSURANCE LAW

### Arbitration Clauses in International Insurance Contracts Trump State Law Restrictions

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The Fifth Circuit recently held that the McCann-Ferguson Act, which prohibits an “Act of Congress” from invalidating, impairing or superseding state law unless it specifically relates to the business of insurance, does not apply to the international arbitration convention. See the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (June 10, 1958, 21 U.S.T. 2517, 330 U.N.T. 3). In *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s of London, et al.*, 587 F.3d 714 (5th Cir. 2009) (en banc), the Fifth Circuit was asked to determine whether the McCann-Ferguson Act (15 U.S.C. Sections 1011-15) authorizes a state law to reverse-pre-empt the convention or its implementing legislation (Pub. L. No. 91-368, 84 Stat. 692 (1970), codified at 9 U.S.C. Section 2001-8, the “Convention Act”). The statute at issue — La. Rev. Stat. Ann. Section 22:868 (the “Louisiana Statute”) — provides, in pertinent part, that “[n]o insurance contract delivered or issued for delivery in this state and covering subjects located,

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resident, or to be performed in this state . . . shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this state of the jurisdiction of this action against the insurer.”

The Fifth Circuit held that the Louisiana Statute did not reverse-pre-empt federal law on two grounds. First, Congress did not intend to include a treaty within the McCann-Ferguson’s “Act of Congress” language. Second, the court held that when construing a treaty, the convention, rather than the Convention Act, is used to determine the parties’ rights and obligations and whether state law is superseded. Since most states have similar prohibitions against compulsory arbitration clauses in insurance contracts, this article will detail the *Safety Nat’l* decision and address its ramifications on arbitration clauses in international insurance contracts.

#### Facts

Certain underwriters at Lloyd’s (the “Underwriters”) provided excess workers’ compensation insurance to Louisiana Safety Association of Timbermen — Self Insurers Fund (“LSAT”) by reinsuring claims for occupational-injury occurrences that exceeded LSAT’s self-insured retention. All of the reinsurance

agreements contained compulsory arbitration provisions. Underwriters refused to recognize LSAT’s purported assignment of its rights under the reinsurance agreements to Safety National. Safety National sued the underwriters, who moved to stay the proceedings and compel arbitration, pursuant to the compulsory language in the reinsurance agreements. After a dispute arose over the selection of the arbitrators, the underwriters moved to lift the stay, join LSAT as a party, and to compel arbitration of the dispute. LSAT moved to intervene to lift the stay and quash arbitration on the grounds that the arbitration clauses were unenforceable under the Louisiana Statute. Underwriters then filed a separate action against LSAT and Safety National seeking recovery of unpaid premiums. This second suit was consolidated with the original suit.

The district court granted LSAT’s motion to quash arbitration. The court concluded that although the convention would require arbitration, the Louisiana Statute was controlling and reverse-pre-empted the convention due to the application of the McCann-Ferguson Act. The district court subsequently certified the matter for interlocutory appeal.

On appeal, the underwriters argued: (i) the convention is an “Act of

Congress” within the meaning of the McCann-Ferguson Act; (ii) the McCann-Ferguson Act applies to international commercial transactions; and (iii) the convention takes precedence over the McCann-Ferguson Act, even if the latter applies to international transactions. LSAT, in turn, argued that the McCann-Ferguson Act resolves the conflict in favor of the application of state law because the Louisiana Statute regulates the business of insurance.

By way of background the convention provides that each signatory nation “shall recognize an agreement in writing under which the parties shall undertake to submit to arbitration.” Additionally, the convention contemplated enforcement of an arbitration provision in the signatory nation’s courts when requested by a party to an international arbitration agreement. The Convention Act states that the convention “shall be enforced in United States courts in accordance with this chapter,” and establishes federal court jurisdiction and venue. Faced with the language of the convention, the Convention Act and the tenets of the McCann-Ferguson Act, the parties agreed that requiring arbitration of this dispute would contravene the Louisiana Statute.

#### **The McCann-Ferguson Act Is Trumped by the Convention Act**

In its opinion, the Fifth Circuit concluded that Congress did not intend the term “Act of Congress” as used in the McCann-Ferguson Act to reach a treaty such as the convention. Moreover, the court noted that this conclusion was buttressed by the terms of the Convention Act, which provided that “[a]n action or proceeding falling under the convention shall be deemed to arise under the laws and treaties of the United States.” The court noted that this was an indication that Congress thought that for jurisdic-

tional purposes, an action falling under the convention arose not only under the laws of the United States but also under treaties of the United States. Thus, the court concluded that even in the act of Congress that was necessary to implement the convention in domestic courts, Congress recognized that jurisdiction over actions to enforce rights under the convention did not arise solely under an “Act of Congress.”

Equally important to the Fifth Circuit’s analysis was the fact that it was a treaty, i.e., the convention, as opposed to an act of Congress, i.e., the Convention Act, which the court construed to supersede the Louisiana Statute. The court noted that the Convention Act states that the convention “shall be enforced in United States courts in accordance with this chapter.” The Convention Act defines when an arbitration agreement “falls under the Convention” — principally when it is “commercial” and does not “aris[e] out of . . . a [legal] relationship which is entirely between citizens of the United States . . . unless that relationship involves property located abroad, or has some other reasonable relation with one or more foreign states.” The court found that the Convention Act provides United States courts with jurisdiction over “[a]n action or proceeding falling under the Convention . . . regardless of the amount in controversy.” However, the court noted that the Convention Act does not operate without reference to the contents of the convention. “It is the Convention under which legal arguments ‘fall’; it is an action or proceeding under the Convention that provides the court with jurisdiction; such an action or proceeding is ‘deemed to arise under the laws and treaties’ of the United States, the treaty in this case being the Convention; and when Chapter 1 of title 9 . . . conflicts with the Convention,” and thus when anything conflicts with the convention, the Fifth Circuit held that

“the Convention applies.” The court held that because the convention mandates enforcement of arbitration agreements, it conflicts with and therefore pre-empts Louisiana law. On that basis, the court vacated the district court’s denial of the motion to compel arbitration and remanded for further proceedings.

The scathing dissent accused the majority opinion of “trail-blazing” and noted that “[t]he court’s effort to frame this case as a conflict between the Convention itself and Louisiana law puts the cart before the horse by failing to consider basic pre-emption doctrine before analyzing the McCann-Ferguson Act. Fundamentally, this is a Supremacy Clause case.” “From the perspective of the Supremacy Clause, [the Louisiana Statute] applies unless the Underwriters carry the burden to show that some specific source of federal law pre-empts it. If the proposed pre-emptive law is a statute like the Convention Act, then the McCann-Ferguson Act applies. If the proposed pre-emptive law is the convention itself, then the court is correct that McCann-Ferguson does not apply. But there is still no pre-emption — and the district court must be affirmed — unless the Convention is actually capable of superseding [the Louisiana Statute] as a matter of Supremacy Clause law.”

This writer joins in the dissent’s assessment that this is a Supremacy Clause case and that the underwriters failed to carry their burden that some federal law, i.e., the Convention Act, as opposed to the convention itself, pre-empted the Louisiana Statute’s prohibition against compulsory arbitration. That being said, the Fifth Circuit has saddled practitioners with a holding that state laws that restrict or prohibit arbitration involving international insurance contracts are trumped by the Convention and has set the tenets of the McCann-Ferguson Act on its ear. ■