LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What 9th Circ. Arbitration Case May Mean For Insurance

By **Neil Popović, Shin Hahn and William de Sierra-Pambley**
(October 4, 2021, 4:41 PM EDT)

Neil Popović

Shin Hahn

William de Sierra-Pambley

On Aug. 12, in CLMS Management Services LP v. Amwins Brokerage of Georgia LLC, the U.S. Court of Appeals for the Ninth Circuit decided whether Washington state insurance law reverse-preempts the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, in which case the state law would bar the enforcement of arbitration clauses in insurance contracts in Washington and other states with similar anti-arbitration laws.[1]

While the Ninth Circuit agreed with the defendants that state law does not reverse-preempt the convention, the plaintiffs have indicated that they will seek review in the U.S. Supreme Court. The plaintiffs point to a circuit split, since the U.S. Court of Appeals for the Second Circuit had held in 1995 in Stephens v. American International Insurance Co. that an anti-arbitration provision in Kentucky insurance law trumps the New York Convention.[2]

If the plaintiffs follow through with their intended petition for certiorari, and if the high court grants review, the court's decision should provide insurance companies clearer guidance with respect to the arbitration clauses in their nondomestic policies, as companies should be able to determine whether they can invoke international arbitration in states that bar arbitration clauses in insurance contracts.

The decision will be important to the insured as well, since it will determine whether they would be able to litigate their claims in a court of competent jurisdiction or instead could be forced to arbitrate, regardless of whether they agreed to arbitration when executing the insurance agreement.

In this case, the plaintiffs CLMS Management Services LP and Roundhill I LP entered into an insurance contract with defendant Amrisc LLC, underwritten by defendants Certain Underwriters at Lloyd's London. The contract called for all disputes arising out of the contract to be resolved by arbitration in New York.

In August 2017, Hurricane Harvey caused damage to a townhome complex in Texas owned by Roundhill and operated by CLMS. The damage was estimated at $5.66 million and the plaintiffs submitted a claim.

Lloyd's third-party claims administrator and defendant CJW & Associates responded that the policy deductible was $3.6 million. The plaintiffs filed a complaint in the U.S. District Court for the Western District of Washington asserting multiple claims and alleging that the deductible should be $600,000.

Lloyd's and CJW filed a motion to compel arbitration, citing the arbitration clause in the contract and arguing that the arbitration provision fell within the scope of the New York Convention. The plaintiffs opposed the motion, arguing that Washington state law bans the enforcement of arbitration provisions in insurance contracts, and that because of the federal McCarran-Ferguson Act, state law reverse-preempts the New York Convention.

The McCarran-Ferguson Act is a U.S. federal law that delegates to states the right to regulate the business of insurance. The act declares that

> the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.[3]

The act also states 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."[4]

In granting Lloyd's and CJW's motion to compel arbitration, the district court held that Article II, Section 3 of the New York Convention is self-executing and not an act of Congress under the McCarran-Ferguson Act. The Federal Arbitration Act is an act of Congress, but it does not specifically relate to the business of insurance.

Accordingly, the district court held that the New York Convention is not reverse-preempted by the McCarran-Ferguson Act.

On appeal, the plaintiffs argued that Article II, Section 3 of the New York Convention is merely a "general proclamation" that "provides no additional guidance as to the mechanism for enforcing ... an agreement to arbitration."[5]

The Ninth Circuit disagreed, holding that Article II, Section 3 of the New York Convention is self-executing because it:

- Is addressed directly to domestic courts;
- Mandates that domestic courts "shall" enforce arbitration agreements; and
- "[L]eaves no discretion to the political branches of the federal government whether to make enforceable the agreement-enforcing rule it prescribes."[6]

Thus, the Ninth Circuit determined that Article II, Section 3 of the New York Convention satisfies the self-execution requirements of being specific and mandatory.[7]

The Ninth Circuit pointed out that its decision is aligned with those of the U.S. Court of Appeals for the Fourth Circuit in the 2012 decision ESAB Group Inc. v. Zurich Insurance PLC and the U.S. Court of Appeals for the Fifth Circuit in the 2009 decision Safety National Casualty Corp. v. Certain Underwriters at

Lloyd's, London.[8]

Although the Fourth Circuit and the Fifth Circuit stopped short of deciding whether Article II, Section 3 is self-executing, the Ninth Circuit noted that both circuits recognized that the treaty language in Article II, Section 3 mandates application in domestic courts.[9]

If the Supreme Court grants certiorari and holds that Article II, Section 3 of the convention is self-executing, companies should expect their arbitration clauses in insurance agreements to be enforceable regardless of any anti-arbitration state laws that may otherwise reverse-preempt federal law.

Among other things, such a result would mean that insurers and policyholders could have different dispute resolution options depending on whether an insurance policy calls for international, as opposed to domestic, arbitration and thus falls within the scope of the New York Convention.

The Supreme Court's decision will be particularly important in the nearly 20 states that have similar anti-arbitration laws that prohibit arbitration provisions in insurance contracts. Companies may be able to take advantage of the nonpublic and confidential nature of private arbitrations as well as being able to self-appoint arbitrators. Companies may also expect their disputes to be resolved more quickly than they would have in a court in the U.S. Limited discovery may also be an appealing factor for some insurance companies.

On the other hand, the insured will be incentivized to carefully select insurance policies if they do not want to resolve disputes through arbitration, especially when their state prohibits mandatory arbitration clauses in insurance policies, presumably for reasons of public policy.

Neil A.F. Popović is a partner, Shin Y. Hahn is an associate and William de Sierra-Pambley is a law clerk at Sheppard Mullin Richter & Hampton LLP.

[1] CLMS Management Services LP et al. v. Amwins Brokerage of Georgia LLC et al., --F.4th—, 2021 WL 3557591 (9th Cir. 2021).

[2] Stephens v. American International Insurance Co., 66 F.3d 41 (2d Cir. 1995).

[3] 15 U.S.C. § 1011.

[4] 15 U.S.C. § 1012(b).

[5] CLMS Management Servs. LP, 2021 WL3557591, at *5.

[6] Id.

[7] Id. at *5 ("A treaty is self-executing and has automatic force as domestic law 'when it operates of itself without the aid of any legislative provision.'") (citing to Medellin v. Texas, 552 U.S. 491, 505, 128 S.Ct. 1346 (2008)).

[8] See ESAB Group, Inc. v. Zurich Ins. PLC, 685 F.3d 376, 387 (4th Cir. 2012) (acknowledging there is "much to recommend" the position that Article II, Section 3 is self-executing); see also Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 722 (5th Cir. 2009) (explaining that "[t]he Convention expressly states that domestic courts 'shall' compel arbitration when requested by a party to an international arbitration agreement").

[9] Id.