EIGHTH CIRCUIT RULES: ENDORSEMENT VOIDS OTHERWISE MANDATORY ARBITRATION CLAUSE IN INSURANCE POLICY

In a recent decision regarding the enforceability of agreements to arbitrate in insurance contracts, the United States Court of Appeals for the Eighth Circuit held that an endorsement that included a provision selecting Missouri law and providing for jurisdiction over disputes in Missouri courts displaced a detailed and otherwise mandatory dispute resolution and arbitration provision in the body of the contract.[1] Noting that Missouri law prohibits mandatory arbitration provisions in insurance contracts,[2] the Eighth Circuit sided with the policyholder in concluding that the two provisions could not be harmonized, and that the endorsement should trump the arbitration clause, both because it is an endorsement, and because any ambiguity created should be construed in favor of the policyholder. In doing so, the Eighth Circuit rejected the insurer's argument that the endorsement was merely a "governing law and consent-to-jurisdiction" provision. The *Union Electric* case highlights the importance of carefully constructing choice of law provisions in relation to arbitration clauses and of ensuring that the arbitration provisions harmonize with other contract provisions. The case also serves as a reminder that in some circumstances even a well-crafted mandatory arbitration clause may be undermined by selecting as the governing law the law of a jurisdiction that does not recognize the enforceability of arbitration clauses in insurance policies.

Background and Analysis

In 1925, Congress enacted the Federal Arbitration Act (the "FAA"), which has formed the basis of a liberal federal policy favoring of the enforceability of arbitration agreements.[3] In 1944, insurance was held to be subject to federal regulation, and therefore potentially subject to the FAA.[4] But the McCarran-Ferguson Act, passed only a year later in 1945, was designed to re-secure the states' preeminence in matters of insurance regulation. The McCarran-Ferguson Act provides: "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."[5] Courts have held that this provision requires

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1 *Union Electric Co. v. AEGIS Energy Syndicate 1225*, No. 12-3546, --- F.3d ---, 2013 WL 1688859 (8th Cir. Apr. 19, 2013).

2 S*ee* Mo. Ann. Stat. § 435.350,

3 *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668–69 (2012).

4 *See United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 552–53 (1944).

5 15 U.S.C. § 1012(b).

"reverse preemption" of federal statutes of general applicability that conflict with state laws enacted for the purpose of regulating the business of insurance.[6]

A large number of states have enacted statutes and regulations prohibiting mandatory arbitration clauses in insurance contracts,[7] while other state laws limit the enforceability of such clauses.[8] Courts have upheld both types of laws and regulations, despite challenges under the FAA.[9] However, when the insurance agreement involves parties of different nations and falls under the protection of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the weight of authority is that state law cannot "reverse preempt" the New York Convention, and arbitration clauses in such contracts must be enforced.[10]

In the *Union Electric* case, Union Electric had purchased an excess insurance policy from AEGIS Energy Syndicate 1225, a U.K. insurer.[11] The body of the policy contained detailed provisions regarding dispute resolution, including a provision stating that "[a]ny controversy or dispute . . . shall be settled by binding arbitration."[12] The Eighth Circuit, however, found that this language was supplanted by an endorsement to the policy that provided: "Notwithstanding

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6 *See, e.g., Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006); *McNight v. Chicago Title Ins. Co.*, 358 F.3d 854, 859 (11th Cir. 2004) (per curiam); *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823 (8th Cir. 2001); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 934–35 (10th Cir. 1992).

7 States that do not recognize mandatory arbitration provisions in insurance contracts include Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Vermont, Virginia, and Washington.

8 For example, Colorado imposes various requirements on the ability of medical malpractice insurers to require mandatory arbitration clauses in agreements relating to medical services and health care. *See* Colo. Rev. Stat. § 13-64-403(1), (3). Other states, such as Rhode Island and Maryland, prohibit mandatory arbitration clauses in specific types of insurance policies. *See* R.I. Gen. Laws. § 27-4-13 (prohibiting such clauses in life insurance policies); Md. Code Ann., Ins. § 12-209 (prohibiting such clauses in life or health insurance policies or annuity contracts); *see also* Miss. Code Ann. § 83-11-109 (prohibiting mandatory arbitration provisions for uninsured motorist coverage).

9 *See, e.g.*, *Friday v. Trinity Universal of Kan.*, 939 P.2d 869, 872–73 (Kan. 1997); *Mut. Reinsurance Bureau*, 969 F.2d at 934; *Standard Sec. Life Ins. Co. v. West*, 127 F. Supp. 2d 1064, 1069 (W.D. Mo. 2000); *Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 581–82 (D.S.C. 2003).

10 *See, e.g.*, *ESAB Group, Inc. v. Zurich Ins. plc*, 685 F.3d 376, 389 (4th Cir. 2012) ("Congress did not intend for the McCarran-Ferguson Act to permit state law to vitiate international agreements entered by the United States."); *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 722–26 (5th Cir. 2009) (same). *But see Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995) (holding that because the New York Convention was not self-executing, it had no force of law except through the FAA and could therefore be reverse preempted by state law).

11 *Union Electric*, 2013 WL 1688859 at *1.

12 *Id.*

anything contained in this Policy to the contrary, any dispute . . . shall be governed by and construed in accordance with the laws of the State of Missouri and each party agree [sic] to submit to the jurisdiction of the Courts of the state of Missouri."[13]

In arguing for enforcement of the mandatory arbitration provision, the insurer advanced the position that there was in fact no conflict between the dispute resolution and arbitration provisions in the body of the policy and the endorsement, because the latter did not discuss dispute resolution procedures or arbitration and was instead only meant as a mechanism to give Missouri courts personal jurisdiction over the parties.[14] The Eighth Circuit disagreed, holding that the language in the arbitration provisions conflicted with, and thus was superseded by, the endorsement. As a result, the Eighth Circuit found that the parties had not in fact agreed to mandatory arbitration.[15] Apparently because it held that the parties had not agreed to mandatory arbitration, the Eighth Circuit did not decide whether the arbitration agreement was subject to the New York Convention, and if it were, what effect the Missouri statute's prohibition of arbitration might have.[16]

The court also noted that even if the policy was ambiguous as to mandatory arbitration, any ambiguity would be construed against the insurer, and Union Electric would still prevail.[17] In making this determination, the court did not address a provision in the policy stating that if the policy "is deemed to be ambiguous or otherwise unclear, the issue shall be resolved . . . without any presumption or arbitrary interpretation or construction in favor of either the insured or the underwriter."[18]

Conclusion

While insurers and other contracting parties often include mandatory arbitration clauses in their contracts, cases like *Union Electric* show that it is also vital to critically analyze the arbitration clause in the context of the rest of the contract, including any endorsements and any choice of law provision.

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13 *Id.* at *1-2.

14 *Id.* at *1.

15 *Id.*

16 *Id.*

17 *Id.*

18 Addendum to Brief of Appellant at 7, *Union Electric Co. v. AEGIS Energy Syndicate 1225*, No. 12-3546 (8th Cir. Dec. 7, 2012).

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