

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-30817

United States Court of Appeals
Fifth Circuit

FILED

May 13, 2019

Lyle W. Cayce
Clerk

MCDONNELL GROUP, L.L.C.,

Plaintiff - Appellant

v.

GREAT LAKES INSURANCE SE, UK BRANCH, Improperly named as
Certain Underwriters at Lloyd's, London; LLOYD'S SYNDICATES, CNP
4444 and CNP 958, Improperly named as Certain Underwriters at Lloyd's,
London; INTER HANNOVER, Improperly named as Certain Underwriters at
Lloyd's, London,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JOLLY, JONES, and DENNIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, relating to arbitration under the Convention on the
Recognition and Enforcement of Foreign Arbitral Awards,¹ we address

¹ June 10, 1958, 21 U.S.T. 2517. Congress implemented the Convention by enacting
Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 201 *et seq.*

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whether a “conformity to statute” provision² amends the insurance contract so as to conform with a conflicting, but preempted, state statute forbidding arbitration in insurance contracts.

McDonnel Group, L.L.C. purchased an insurance policy from the defendants that included a written agreement to arbitrate disputes. After the Insurers denied McDonnel’s claim, McDonnel initiated this declaratory and breach of contract action in federal district court. The Insurers moved to dismiss based on the policy’s arbitration provision. McDonnel responded that the arbitration provision was “amended out” of the contract through the contract’s conformity to statute provision because arbitration conflicted with a Louisiana statute. The district court held, however, that the allegedly conflicting Louisiana statute was preempted by the Convention, and therefore dismissed the case in favor of arbitration. We must decide whether the policy’s conformity provision negates the agreement to arbitrate. We hold that it does not and thus AFFIRM the district court.

I.

In fall 2015, McDonnel Group, L.L.C. obtained a builder’s risk insurance policy from a group of insurers³ for a construction project on a property located in New Orleans, Louisiana. Two years later, according to McDonnel, the property suffered significant water damage. McDonnel submitted a claim that the Insurers refused to pay.

² The conformity provision in this case provides: “In the event any terms of this *Policy* are in conflict with the statutes of the jurisdiction where the *Insured Property* is located, such terms are amended to conform to such statutes.”

³ The insurers consist of Great Lakes, Insurance SE, UK Branch; International Insurance Company of Hannover SE; and Lloyd’s syndicates CNP 4444 and CNP 958. For the sake of brevity, we will refer to them collectively as “the Insurers.”

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McDonnel then filed the instant action seeking declaratory relief and damages for breach of contract and breach of the duty of good faith and fair dealing. The Insurers responded by filing a motion to dismiss for lack of subject-matter jurisdiction and improper venue.⁴ Fed. R. Civ. P. 12(b)(1), (3). As to both defenses, the Insurers invoked the contract's arbitration provision, which provides:

Any dispute, controversy or claim arising out of, relating to, or in connection with this *Policy*, shall be finally settled by arbitration. The arbitration shall be conducted in accordance with the International Arbitration Rules of the American Arbitration Association in effect at the time of the arbitration. The seat of the arbitration shall be New York, New York, in the United States of America.

The Insurers argued that the arbitration provision should be enforced, and the case dismissed in favor of arbitration pursuant to the Convention.

The policy, however, also contained a "conformity to statute" provision, stating: "In the event any terms of this *Policy* are in conflict with the statutes of the jurisdiction where the *Insured Property* is located, such terms are amended to conform to such statutes." Invoking that provision, McDonnel responded that any obligation to arbitrate under the Convention did not apply to the instant dispute because the policy's arbitration agreement was, as a matter of law, invalid. The arbitration provision was contrary to La. Rev. Stat. Ann. § 22:868(A)(2), which prohibits arbitration agreements in insurance contracts covering property located in the state. Thus, the conformity provision, McDonnel argued, "amended" the arbitration provision out of the contract in order to "conform" with Louisiana law. Consequently, the dispute between McDonnel and the Insurers was not subject to the Convention.

⁴ The Insurers also asserted other alternative grounds for dismissal that are not relevant to this appeal.

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The district court disagreed. Relying on the decision of our en banc court in *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's*, the court held that the Convention superseded La. Rev. Stat. Ann. § 22:868. 587 F.3d 714 (5th Cir. 2009). Because the state statute was preempted by federal law, the court determined that no conflict existed between the policy and state law so as to trigger the conformity provision of the policy. Thus, the arbitration agreement remained valid. The district court, therefore, dismissed the action in favor of arbitration. The parties, accordingly, present a precise issue in this appeal: does the contractual agreement to conform to state statutes apply when the conflicting state statute has been held as a matter of law to have been preempted by the Convention.

II.

The standard of review for a dismissal pursuant to both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(3) is de novo.⁵ See *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 237–38 (5th Cir. 2009). The well-pleaded factual allegations in the complaint are taken “as true and [we] view them in the light most favorable to the plaintiff.” See *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 199, 205 (5th Cir. 2007)).

⁵ Our court has not decided whether Rule 12(b)(1) or 12(b)(3) is the proper vehicle for a motion to dismiss based on an arbitration provision. See *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472 n.3 (5th Cir. 2010). We have, however, accepted Rule 12(b)(3) as a proper method for seeking dismissal in favor of arbitration. See *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005). The parties have not raised whether dismissal under Rule 12(b)(1) would also be proper and therefore we will not address this issue.

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III.

A.

Although quite elemental to say, it is relevant here to point out that under our constitutional system, federal law, including the treaties of the United States, are the “supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. From the Supremacy Clause stems our preemption doctrine: when federal and state law conflict, the state law is nullified. *See Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982). This case presents such a conflict. We thus begin our discussion with a review of the state and federal laws at issue.

First the state law: Louisiana’s insurance code. *See* La. Rev. Stat. Ann. § 22:1 *et seq.* Specifically, § 22:868(A)(2) provides that “[n]o insurance contract delivered or issued for delivery in [Louisiana] and covering subjects located . . . in [Louisiana] . . . shall contain any condition, stipulation, or agreement . . . [d]epriving the courts of [Louisiana] of the jurisdiction of action against the insurer.” Louisiana’s state courts have interpreted § 22:868 as rendering void arbitration provisions in insurance contracts. *See, e.g., Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982) (“Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable under [§ 22:868].”).

Next the federal law. In 1958, the United States joined and adopted the Convention, an international commercial treaty, to “encourage the recognition . . . of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The Convention requires signatory states to “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or

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which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” Convention art. II(1). When the Convention is applicable, courts of signatory states must “at the request of one of the parties, refer the parties to arbitration, unless it finds that the . . . agreement is null and void, inoperative or incapable of being performed.” *Id.* at art. II(3). This court has succinctly described the Convention’s trigger as consisting of four elements; a district court must dismiss a case in favor of arbitration “if (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen.” *Francisco v. STOLT ACHIEVEMENT MT*, 293 F.3d 270, 273 (5th Cir. 2002). Like all treaties, the Convention ordinarily preempts conflicting state laws. *See, e.g., Lim*, 404 F.3d at 904.

But the appeal today presents a twist. The McCarran–Ferguson Act, passed by Congress in 1945, protects state laws regulating the insurance industry from the preemptive effect of federal law. This Act “declares that the continued regulation . . . 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 . . . of such business by the several States.” 15 U.S.C. § 1011; *see also* 15 U.S.C. § 1012(a) (“The business of insurance . . . shall be subject to the laws of the several States.”). To shield state regulation from unintended federal interference, the Act provides 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

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insurance.”⁶ *Id.* § 1012(b). In other words, the McCarran–Ferguson Act permits states to reverse-preempt an otherwise applicable “Act of Congress” by enacting their own regulations of the insurance industry.

Against this background, in *Safety National*, our en banc court addressed whether, under the McCarran–Ferguson Act, La. Stat. Rev. § 22:868 reverse-preempted the Convention or its implementing legislation. 587 F.3d at 717. We found that it did not. An “Act of Congress,” as referred to in the McCarran–Ferguson Act, does not include a treaty, such as the Convention, which “remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress.” *Id.* at 723 (footnotes omitted). This governing principle is true whether the treaty is self-executing or requires implementing legislation. *Id.* at 723–24. And, importantly, the FAA itself points towards the Convention, stating that “[i]t is *the Convention* [not the congressional legislation] under which legal agreements ‘fall.’” *Id.* at 724 (quoting 9 U.S.C. § 202). It is therefore the Convention itself, *i.e.*, the treaty, not the FAA, *i.e.*, the federal statute that codified the treaty, that supersedes Louisiana law. *Id.* at 724–25. Thus, the en banc court held that, because “the Convention, an implemented treaty . . . 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 725. To the point: the McCarran–Ferguson Act does not permit state laws to reverse-preempt the Convention. *Id.* at 732. This appeal is not yet resolved, however.

⁶ The Act does contain an exception if the “Act [of Congress] specifically relates to the business of insurance.” 15 U.S.C. § 1012(b). The Convention does not relate to the business of insurance, so this exception does not apply. *See Safety Nat’l*, 587 F.3d at 720.

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B.

We now turn to the analysis of the precise issue before us, which we break down as follows: whether (1) an agreement to arbitrate (2) provided in an insurance policy (3) is voided by the policy's conformity provision (4) when the conflicting state law prohibiting arbitration (5) has been preempted by the Convention.⁷ McDonnell argues that the arbitration provision was amended by deletion from the contract *ab initio* because it conflicts with La. Rev. Stat. Ann. § 22:868. The Insurers respond that there is no conflict between the contract and § 22:868 because the Convention preempts this state law.

This issue, which is only a question of contract interpretation, is of first impression. Although *Safety National* has already decided the more difficult questions regarding preemption and reverse preemption, the insurance contract in that case did not contain a conformity provision. So, what does the contract between McDonnell and the Insurers provide? We focus on two provisions. First, it contains a conformity provision, which amends the terms of the contract to conform to state statutes. But that provision only applies “[i]n the event any terms of [the] *Policy* are in conflict with the statutes of the jurisdiction where the *Insured Property* is located.” Second, the policy contains an arbitration provision. It is the arbitration provision of the insurance policy that is said not to conform with La. Rev. Stat. Ann. § 22:868, a statute prohibiting arbitration agreements. This state statute, however, as we held in *Safety National*, is preempted by the Convention.⁸ Because the state statute,

⁷ A reminder that we have already held that the Convention preempts this Louisiana statute. See *Safety Nat'l*, 587 F.3d at 732.

⁸ The Convention's requirements are clearly met in this case. The provision is a written agreement to arbitrate the dispute; it provides for arbitration in a signatory country, the United States; it arises from a commercial legal relationship, an insurance contract; and the Insurers are not American citizens. See *Francisco*, 293 F.3d at 273.

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i.e., La. Rev. Stat. Ann. § 22:868, is preempted by the Convention, the statute does not and cannot apply to McDonnell’s policy. And because the statute does not apply to the policy, there is no conflict between the policy and the state statute. With that premise established, the conformity provision is not triggered; its inapplicability leads only to the conclusion that the arbitration provision survives, undiminished by state law.⁹ The district court judgment in favor of the Insurers will be and is

AFFIRMED.

⁹ Our holding is consistent with our precedent that conformity provisions in insurance contracts are not triggered when the conflicting state law is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* See *La. Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 533 (5th Cir. 2006) (“Neither [conformity] provision displaces the preemption analysis in this case. ERISA plans must always conform to state law, but only state law that is valid and not preempted by ERISA.”); *Light v. Blue Cross & Blue Shield of Ala., Inc.*, 790 F.2d 1247, 1248 (5th Cir. 1986) (holding that because “ERISA pre-empts state law, there is no applicable state law to which the administrator must conform”).

United States Court of Appeals

FIFTH CIRCUIT
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May 13, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-30817 McDonnell Group, L.L.C. v. Certain
Underwriters at Lloyd, et al
USDC No. 2:18-CV-2804

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that plaintiff-appellant pay to defendants-appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Nancy F. Dolly".

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Dylan Torvald Leach
Mr. Robert Douglas Morgan
Mr. J. Geoffrey Ormsby
Mr. Randall Alan Smith
Mr. Jacob Thomas Evans Stutzman
Ms. Lee Ann C. Thigpen