MINUTE ENTRY
McNAMARA, J.
MAY 29, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MCDERMOTT INTERNATIONAL, INC.	*	CIVIL ACTION
VERSUS	*	NO. 91-841 & CC
UNDERWRITERS AT LLOYD'S, ET AL	*	SECTION "D" (5)

Before the court are the following cross-motions:

(1) "Application for Order Confirming Arbitral Award and Entry of Judgment" filed by John Richard Youell, as representative of those Certain Underwriters at Lloyd's, London ("Lloyd's Underwriters") subscribing to Policy of Insurance No. 552/832127500 and certain Companies of the Institute of London Underwriters ("Companies") subscribing to Policy of Insurance No. 552/832127500 issued by the Institute of London Underwriters (Lloyd's Underwriters and Companies being collectively referred to as "Underwriters"); and

(2) "Post-Arbitration Motion to Remand" filed by McDermott International, Inc. ("McDermott").

Both motions, which are respectively opposed, were set for hearing on Wednesday, May 22, 1996, but they are before the court on briefs without oral argument. Having considered the memoranda of counsel and the applicable law, the court now rules.

DATE OF ENTRY MAY 31 1996

(15)

I. Background

McDermott, a Panamanian corporation headquartered in Orleans Parish, purchased an all risks installation floater policy from Underwriters which covered the operations of Babcock & Wilcox Company ("B&W"), one of McDermott's subsidiaries. The policy required arbitration of "(a)ll differences arising out of this contract."[1]

In 1989, McDermott submitted a policy claim for alleged losses incurred by B&W when a chemical reaction irreparably damaged two air heat exchangers that B&W was installing for Baltimore Gas & Electric Co. Marson Young Associates, Inc, was retained to adjust the loss. Underwriters denied coverage and, in 1990, McDermott consequently filed two suits in Louisiana state court against Underwriters for contract damages (No. 91-0841) and for declaratory

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[1] The policy's Arbitration Clause states in full:

9. Arbitration

All differences arising out of this contract shall be referred to the decision of any arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by each of the parties and in case of disagreement between the two arbitrators to the decision of any umpire to be appointed in writing by the arbitrators or by a court of competent jurisdiction within the limits of the United States of America. It is agreed that the place of arbitration shall be designated by the Assured and the expenses in connection with the arbitration shall be borne equally between the parties in difference.

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judgement to block arbitration (No. 91-0871).

Invoking Section 205 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 205, Underwriters removed both actions here. This court consolidated and remanded the cases to state court, holding that the policy's Service-of-Suit clause[1] waived Underwriters' removal rights, but the Fifth Circuit vacated that order. McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991) (McDermott I).

On remand, McDermott had voluntarily dismissed its declaratory judgment action against Underwriters (No. 91-0871), but filed a separate suit against the Companies seeking a money judgment for sums allegedly due under the subject policy (No. 91-3601). This court consolidated McDermott's first suit against Lloyd's Underwriters (No. 91-0841) with McDermott's suit against the Companies (91-3601) and three additional suits: two diversity suits by Underwriters against the adjuster Maxson Young, seeking indemnification for any damages awarded McDermott against Underwriters (Nos. 91-3437 and 91-3469) and a state court suit by McDermott against Maxson Young, removed through diversity (No. 91-3842).

In February 1992, this court granted Underwriters' Motion to Compel arbitration of McDermott's policy claims against Lloyd's Underwriters and the Companies (Nos. 91-0841 and 91-3601) and stayed litigation of the Maxson Young cases (Nos. 91-3437, 91-3469 and 91-3842) pending arbitration. (See February 18, 1992, Minute Entry, Doc. No. 93). McDermott appealed these orders, but the Fifth Circuit dismissed the appeal for lack of jurisdiction holding that the orders were interlocutory and § 16 of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., prohibits appeal from such orders. McDermott Int'l, Inc. v. Underwriters at Lloyds, 981 F.2d 744 (5th Cir. 1993), cert. denied, 508 U.S. 951, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993) (McDermott II).[2] Likewise, the Fifth

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[1] The policy's "Service of Suit Clause" provides in relevant part:

> B. Service of Suit Clause
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> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.
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> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount, Three Park Avenue, New York, N. Y. 10016 and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such court or of any Appellate Court in the event of an appeal.

[2] The McDermott II court explained:

> Circuit precedent firmly establishes that in pending, nonindependent suits, an order compelling arbitration accompanied by a stay of the proceedings pending arbitration is not a final decision for purposes of § 16(a)(3). Although presently stayed, the indemnification claims between Underwriters and Young remain pending before the district court, and will have to be addressed following arbitration. And, McDermott's claim against Young, based on the alleged unauthorized

Circuit denied McDermott's alternative application for a writ of mandamus. Id.'

In March and May 1995, arbitration proceeded before a three-member panel consisting of one arbitrator (Robert M. Duncan) designated by McDermott, another arbitrator (Robert E. Leake, Jr.) designated by Underwriters, and the third arbitrator (Professor Francis E. McGovern) appointed by this court. The actual arbitration consisted of an evidentiary hearing which was conducted in two sessions lasting approximately four weeks.' At the hearing,

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> coverage letter, also awaits resolution. Additionally, further proceedings between McDermott and Underwriters will be required not only to confirm an arbitral award, but also to determine the effect of arbitration on McDermott's original contract claims against Underwriters. With these matters still pending, the district court's orders clearly did not 'end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.'

981 F.2d at 748 (citations omitted).

' Because the appeal in McDermott II turned on the issue of jurisdiction, the Court did 'not reach the issues raised by McDermott--essentially, whether compelling arbitration was erroneous.' 981 F.2d at 746.

' The parties also participated in numerous pre-hearing conferences to discuss arbitration procedures, discovery and briefing schedules, and the issues to be presented to the arbitration panel. (See Shaw Affidavit, Exhibit B to Underwriters Consolidated Response, Para. 4).

Counsel for McDermott and Underwriters negotiated and submitted to the arbitration panel a set of 'Agreed Arbitration Procedures,' which detailed the rules governing the arbitration hearing. (See Agreed Arbitration Procedures, attached as Exhibit 1 to Shaw Affidavit).

Before the actual arbitration sessions, the parties (1) took the depositions of 29 witnesses (19 fact witnesses; 10 expert witnesses); (2) submitted and exchanged 12 pre-hearing memoranda and 11 expert reports; and (3) agreed to the use of more than 600 common hearing exhibits, plus other resource, contract and miscellaneous documents. (See Shaw Affidavit, Para. 7).

the arbitration panel received and considered some 275 hearing exhibits and 8 expert reports offered by the parties. The panel heard opening arguments, the sworn testimony of 20 live witnesses (11 fact witnesses and 9 expert witnesses) and closing arguments.' Further, the deposition testimony of 10 fact witnesses was submitted. The arbitration proceedings were not transcribed by a reporter.

On March 5, 1996, the arbitration panel issued its final award in a one paragraph letter which states:

> It is the decision of the arbitration panel, by majority vote,' that the damages claimed by McDermott International, Inc., are not within the coverage of the insuring agreement provided through Underwriters at Lloyd's, London, and all claims of McDermott against Underwriters are accordingly denied. Each party shall bear its own costs and the costs of holding proceedings shall be borne equally.'

' Pursuant to Paragraph 5 of the Agreed Arbitration Procedures, the arbitration panel chairman, Professor McGovern, administered an oath to each of the 20 witnesses who testified before the panel. Each of the 10 witnesses whose testimony was submitted through deposition transcript was sworn in by the court reporter. All witnesses were subject to full direct and cross examination. (See Shaw Affidavit, Paras. 12-13).

' The majority consisted of the arbitrator designated by Underwriters and the arbitrator appointed by the court. The arbitrator designated by McDermott dissented.

' Counsel for McDermott proposed, over Underwriters' initial objections, Paragraph 18 to the Agreed Arbitration Procedures requiring that '[t]here shall be no written opinion submitted by the Arbitrators with the decision or award.' (See Shaw Affidavit, Para. 6).

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Now, pursuant to § 207 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 207, Underwriters apply for an order which (1) confirms the award entered by the arbitration panel against McDermott, (2) dismisses McDermott's claims against Underwriters in Nos. 91-0841 and 91-3601 with prejudice, and (3) enters judgment in Underwriters' favor and against McDermott.

Mcdermott opposes such an order and maintains that the Arbitration Award in nonbinding. McDermott further moves this court to remand Nos. 91-0841 and 91-3601 to state court pursuant to 28 U.S.C. §§ 1367(c)(3) and 1447(c), and the Service of Suit Clause contained in the subject policy.

II. Legal Analysis

In McDermott I, the Fifth Circuit stated: "The parties recognize that this suit concerns an arbitration agreement and is not entirely between United States citizens, so the Convention Act governs this case. 9 U.S.C. § 202." McDermott I, 944 F.2d at 1208. The Court also gave a backdrop of the Convention Act stating:

> [I]n 1970, Congress ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) to secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and awards made in this and other signatory nations. *See* 21 U.S.T. 2517, T.I.A.S. 6997, *reprinted following* 9 U.S.C.A. § 201 (West Supp. 1991). To gain rights under the Convention, though, Congress had to guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in United States courts. . . . So Congress promulgated the Convention Act in 1970 to establish procedures for our courts to implement the Convention. 9 U.S.C. § 201, et seq.

Id. at 1207-08.

> "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to . . . unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

Id. at 1212 (citations omitted).

> Where parties have executed valid arbitration agreements, judicial enforcement of arbitration agreements and awards ought to be "summary and speedy" out of respect for the parties' bargain to keep their disputes out of court.

Id. at 1213.

Underwriters initially removed this matter under Section 205 of the Convention and now they seek an order confirming the Arbitral Award and entry of judgment pursuant to Section 207 of the Convention. Section 207 provides:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207 (emphasis added).

McDermott opposes Underwriters' Application and initially argues that the arbitration clause of the policy is null and void

under the Louisiana Insurance Code, specifically LSA-R.S. 22:629(A)(2),' as given effect by the McCarran-Ferguson Act, 15 U.S.C. § 1101 et seq.[11] Thus, McDermott contends that the policy is not within the scope of the Convention and Underwriters improperly invoked this court's jurisdiction pursuant to Section 205 of the Convention, 9 U.S.C. § 205. However, the court is not persuaded by this resurrected argument which this court first rejected when the court granted Underwriters' Motion to Compel Arbitration. (See February 18, 1992, Minute Entry, Doc. No. 93).[11]

In support of its resurrected McCarran-Ferguson argument, McDermott offers no new Supreme Court or Fifth Circuit authority, but instead offers as "new" appellate authority the Second Circuit case of Stephens v. American Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995). In Stephens, the Kentucky Commissioner of Insurance, acting as Liquidator of an insolvent Kentucky insurance company, sued several domestic and foreign reinsurance companies (the "Cedents") which had ceded their risk to the insolvent company. The Cedents moved to compel arbitration which the Liquidator opposed based upon an anti-arbitration provision of the Kentucky Insurers Rehabilitation and Liquidation Law.

The Second Circuit reversed the district court and held that the McCarran-Ferguson Act preserved the anti-arbitration provision from preemption by the Federal Arbitration Act and the Liquidator could not be compelled to arbitration. In so holding, the court addressed the foreign reinsurers' argument (which had not been addressed by the district court) that even if the Kentucky Liquidation Act was not preempted by the Federal Arbitration Act as

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' LSA-R.S. 22:629(A)(2) states:

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state or any group health and accident policy insuring a resident of this state, regardless of where made or delivered shall contain any condition, stipulation, or agreement:
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer. . . .

[11] McCarran-Ferguson preserves state statutes, enacted "for the purpose of regulating the business of insurance," from preemption and leaves the business of insurance to the states. Under McCarran-Ferguson,

> [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.

15 U.S.C. § 1012(b).

Pursuant to this authority, Louisiana has prohibited arbitration clauses in insurance policies. Doucet v. Doucet, 412 So.2d 1383, 1384 (La. 1982); West of England Ship Owners Mutual Ins. Ass. v. American Marine Corp., 981 F.2d 749, 750 n. 5 (5th Cir. 1993).

[11] When the court granted Underwriters' Motion to Compel Arbitration, the court found that "The McCarran-Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce." (See February 18, 1992 Minute Entry, Doc. No. 93, p. 8).

After this court initially rejected McDermott's McCarran-Ferguson argument, the Louisiana Department of Insurance judicially stipulated that LSA-R.S. 22:629 does not apply to the subject policy. (See "Notice of Joint Stipulation in Separate Proceeding," Doc. No. 133).

to the domestic reinsurer, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as implemented by the FAA, 9 U.S.C. § 201, et seq.) would still require arbitration of their claims because the Convention supersedes the Kentucky Liquidation Act. The court rejected this argument, reasoning that "the Convention is not self-executing, and therefore, relies on an Act of Congress for Implementation. See 9 U.S.C. §§ 201-208 (1994)." Id. at 45.

This court finds Stephens distinguishable from the present case because the Stephens court was not concerned with the state regulation of extra-territorial conduct, but rather with the application of state law to a domestic insurance company in liquidation. Further, while the Stephens court failed to give the Convention treaty preemptive force because it was implemented by the Convention Act, this court disagrees with such an analysis and finds that the Convention of its own force preempts state law.

Finally, Stephens failed to discuss or apply the Supreme Court's decision to "decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions [to arbitrability] where Congress has not expressly directed the courts to do so." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 n. 21, 105 S.Ct. 3346, 3360 n. 21, 87 L.Ed.2d 444 (1985). No such express exception exists for the McCarran-Ferguson Act.

McDermott alternatively maintains that even if the policy is within the scope of the Convention, entering judgment on or

confirming the Arbitration Award would be contrary to the certain defenses provided by the Convention. McDermott specifically argues that there should be no judgment or confirmation because the Arbitration Award is nonbinding under Article V(1)(e) and contrary to public policy under Article V(2)(b).[12] The court declines to

[12] Article V of the Convention sets forth the grounds for refusal of recognition and enforcement of the Arbitral Award. Article V states in full:

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award in invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions

apply these defenses because the court finds that: (1) the Arbitration Award is indeed binding on the parties as it is not subject to further arbitral review;[11] and (2) enforcement of the

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on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[11] Article III of the Convention states:

> contracting States shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following rules. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this

arbitral award would comport with the strong federal policy in favor of arbitration, particularly in the context of international agreements. Further,

> While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the [claims presented] and actually decided them.

Mitsubishi, 473 U.S. at 638, 105 S.Ct. at 3360. Based upon the record and the briefs and attachments of counsel in this case, the court finds that the Arbitration Panel obviously took cognizance of the claims and decided them.

In its post-arbitration Motion to Remand, McDermott seeks to have Nos. 91-0841 and 91-3601 remanded to state court arguing that the policy's "Service of Suit Clause" allows McDermott to have its disputes resolved in the forum of its choosing and it waives Underwriters' right to remove these disputes to this court, and only the Louisiana state court can decide whether enforcement or confirmation of the Arbitration Award would be proper. However, this rehashed argument is contingent on acceptance of McDermott's McCarran-Ferguson argument, i. e., that the Arbitration Clause is

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> Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

McDermott argues that Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, requires that there be express consent to entry of judgment on the Arbitral Award and there is no express consent here. However, this court finds that § 9 of the FAA does not apply in Convention Act cases, because the Convention Act contains its own provision for enforcement in § 207, and thus there is no need to resort to the FAA's enforcement provision.

null and void and this court lacks jurisdiction under the Convention, 9 U.S.C. § 205. Thus, because the court has already rejected McDermott's rehashed McCarran-Ferguson argument, the court now rejects McDermott's rehashed Service-of-Suit argument.

Finally, McDermott also argues that Underwriters never placed the issue of the arbitrability of the parties' insurance coverage dispute before the Arbitration Panel for resolution and thus, the Arbitration Award lacks a legal foundation and McDermott should be allowed to proceed with a jury trial in state court. The court finds that this is not a ground for remand, and that the issue of arbitrability was decided by this court[11] so it did not have to be reconsidered by the Arbitration Panel.

III. Conclusion

For the reasons given above,

IT IS ORDERED that Underwriters' Application for Order Confirming Arbitral Award and Entry of Judgment be and is hereby **GRANTED**;

IT IS FURTHER ORDERED that McDermott's Post-Arbitration Motion to Remand be and is hereby **DENIED**;

[11] See February 18, 1992, Minute Entry, Doc. No. 93.

IT IS FURTHER ORDERED, on the court's own motion, that Underwriters' indemnification claims against Maxson Young Associates, Inc. (Nos. 91-3437 and 91-3469) and McDermott's suit against Maxson Young Associates, Inc., based on an alleged unauthorized coverage letter, (No. 91-3842), be and are hereby **DE-CONSOLIDATED** from the single judicial unit of No. 91-0841 & CC to permit the "summary and speedy" judicial enforcement of the Arbitral Award rendered in Nos. 91-0841 and 91-3601). McDermott I, 944 F.2d at 1213; see also, McDermott II, 981 F.2d at 747-48 (discussing the broad scope of consolidation orders);

IT IS FURTHER ORDERED that Nos. 91-3437, 91-3469, and 91-3842 ("the Maxson Young cases") be and are hereby **CONSOLIDATED** among themselves, and they remain **STAYED** pending further orders from this court.

* * * * * *

Enforcement: Preemption of state law: insurance - Ferguson Act doesn't apply to contracts made under NYC.

(10)

(new)

Enforcement of award

14TH CASE of Focus printed in FULL format.

MCDERMOTT INTERNATIONAL, INC. VERSUS UNDERWRITERS AT LLOYD'S, ET AL

US 227
XXII

CIVIL ACTION NO. 91-841 & CC SECTION "D" (5)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1996 U.S. Dist. LEXIS 7822

May 29, 1996, Decided

May 30, 1996, FILED; May 31, 1996, ENTERED

COUNSEL: [*1] For MCDERMOTT INTERNATIONAL, INC., plaintiff: John Villars Baus, Nan Roberts Eitel, Jones, Walker, et al, New Orleans, LA. Bruce Jones Brumfield, Mississippi Chemical Corporation, Yazoo City, MS. Rockne Locke Moseley, Moseley & Associates, New Orleans, LA. Neal R. Brendel, Peter J. Kalis, Kirkpatrick & Lockhart, Pittsburgh, PA.

For LLOYDS UNDERWRITERS OF LONDON, John Richard Ludbrooke Youell, as rep of those certain underwriters Subscribing to memorandum of insurance no. 104207, defendant: Luther T. Munford, Phelps Dunbar, L.L.P., Jackson, MS. Danny Gerald Shaw, James H. Roussel, Harry S. Redmon, Jr., Bruce Victor Schewe, Gerardo R. Barrios, Phelps Dunbar, L.L.P., New Orleans, LA.

JUDGES: A. J. McNamara, Judge

OPINIONBY: A. J. McNamara

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(1) "Application for Order Confirming Arbitral Award and Entry of Judgment" filed by John Richard Youell, as representative of those Certain Underwriters at Lloyd's, London ("Lloyd's Underwriters") subscribing to Policy of Insurance No. 552/832127500 and certain Companies of the Institute of London Underwriters ("Companies") subscribing to Policy of Insurance No. 552/832127500 issued by the Institute [*2] of London Underwriters (Lloyd's Underwriters and Companies being collectively referred to as "Underwriters"); and

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Before the actual arbitration sessions, the parties (1) took the depositions of 29 witnesses (19 fact witnesses; 10 expert witnesses); (2) submitted and exchanged 12 pre-hearing memoranda and 11 expert reports; and (3) agreed to the use of more than 600 common hearing exhibits, plus other resource, contract and miscellaneous documents. (See Shaw Affidavit, Para. 7).

[*7]

n6 Pursuant to Paragraph 5 of the Agreed Arbitration Procedures, the arbitration panel chairman, Professor McGovern, administered an oath to each of the 20 witnesses who testified before the panel. Each of the 10 witnesses whose testimony was submitted through deposition transcript was sworn in by the court reporter. All witnesses were subject to full direct and cross examination. (See Shaw Affidavit, Paras. 12-13).

On March 5, 1996, the arbitration panel issued its final award in a one paragraph letter which states:

It is the decision of the arbitration panel, by majority vote, n7 that the damages claimed by McDermott International, Inc., are not within the coverage of the insuring agreement provided through Underwriters at Lloyd's, London, and all claims of McDermott against Underwriters are accordingly denied. Each party shall bear its own costs and the costs of holding proceedings shall be borne equally. n8

n7 The majority consisted of the arbitrator designated by Underwriters and the arbitrator appointed by the court. The arbitrator designated by McDermott dissented.

[*8]

n8 Counsel for McDermott proposed, over Underwriters' initial objections, Paragraph 18 to the Agreed Arbitration Procedures requiring that "there shall be no written opinion submitted by the Arbitrators with the decision or award." (See Shaw Affidavit, Para. 6).

Now, pursuant to § 207 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *9 U.S.C. § 207*, Underwriters apply for an order which (1) confirms the award entered by the arbitration panel against McDermott, (2) dismisses McDermott's claims against Underwriters in Nos. 91-0841 and 91-3601 with prejudice, and (3) enters judgment in Underwriters' favor and against McDermott.

Mcdermott opposes such an order and maintains that the Arbitration Award in nonbinding. McDermott further moves this court to remand Nos. 91-0841 and 91-3601 to state court pursuant to *28 U.S.C. §§ 1367*(c)(3) and 1447(c), and the Service of Suit Clause contained in the subject policy.

II. Legal Analysis

In McDermott I, the Fifth Circuit stated: "The parties recognize that this suit concerns an arbitration agreement [*9] and is not entirely between United States citizens, so the Convention Act governs this case. *9 U.S.C. § 202." McDermott I, 944 F.2d 1199, 1208.* The Court also gave a backdrop of the Convention Act stating:

In 1970, Congress ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) to secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and awards made in this and other signatory nations. See 21 U.S.T. 2517, T.I.A.S. 6997, reprinted following *9 U.S.C.A. § 201* (West Supp. 1991). To gain rights under the Convention, though,

Congress had to guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in United States courts. . . . So Congress promulgated the Convention Act in 1970 to establish procedures for our courts to implement the Convention. *9 U.S.C. § 201*, et seq.

Id. at 1207-08.

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to . . . unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory [*10] countries."

Id. at 1212 (citations omitted).

Where parties have executed valid arbitration agreements, judicial enforcement of arbitration agreements and awards ought to be "summary and speedy" out of respect for the parties' bargain to keep their disputes out of court.

Id. at 1213.

Underwriters initially removed this matter under Section 205 of the Convention and now they seek an order confirming the Arbitral Award and entry of judgment pursuant to Section 207 of the Convention. Section 207 provides:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207 (emphasis added).

McDermott opposes Underwriters' Application and initially argues that the arbitration clause of the policy is null and void under the Louisiana Insurance Code, specifically LSA-R.S. [*11] 22:629(A)(2), n9 as given effect by the McCarran-Ferguson Act, *15 U.S.C. § 1101* et seq. n10 Thus, McDermott contends that the policy is not within the scope of the Convention and Underwriters improperly invoked this court's jurisdiction pursuant to Section 205 of the Convention, *9 U.S.C. § 205.* However, the court is not persuaded by this resurrected argument which this court first rejected when the court granted Underwriters' Motion to Compel Arbitration. (See February 18, 1992, Minute Entry, Doc. No. 93).

n11

n9 LSA-R.S. 22:629(A)(2) states:

A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state or any group health and accident policy insuring a resident of this state, regardless of where made or delivered shall contain any condition, stipulation, or agreement:

(2) Depriving the courts of this state of the jurisdiction of action against the insurer. . . .

n10 McCarran-Ferguson preserves state statutes, enacted "for the purpose of regulating the business of insurance," from preemption and leaves the business of insurance to the states. Under McCarran-Ferguson,

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).

Pursuant to this authority, Louisiana has prohibited arbitration clauses in insurance policies. *Doucet v. Dental Health Plans Mgmt. Corp., 412 So. 2d 1383, 1384 (La. 1982); West of England Ship Owners Mutual Ins. Ass. v. American Marine Corp., 981 F.2d 749, 750 n. 5 (5th Cir. 1993).*

[*12]

n11 When the court granted Underwriters' Motion to Compel Arbitration, the court found that "The McCarran-Fergueon Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce." (See February 18, 1992 Minute Entry, Doc. No. 93, p. 8).

After this court initially rejected McDermott's McCarran-Ferguson argument, the Louisiana Department of Insurance judicially stipulated that LSA-R.S. 22:629 does not apply to the subject policy. (See "Notice of Joint Stipulation in Separate Proceeding, 11 Doc. No. 133).

In support of its resurrected McCarran-Ferguson argument, McDermott offers no new Supreme Court or Fifth Circuit authority, but instead offers as "new" appellate authority the Second Circuit case of *Stephens v.*

American Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995). In Stephens, the Kentucky Commissioner of Insurance, acting as Liquidator of an insolvent Kentucky insurance company, sued several domestic and foreign reinsurance companies (the "Cedents") which had ceded their risk to the insolvent company. [*13] The Cedents moved to compel arbitration which the Liquidator opposed based upon an anti-arbitration provision of the Kentucky Insurers Rehabilitation and Liquidation Law.

The Second Circuit reversed the district court and held that the McCarran-Ferguson Act preserved the anti-arbitration provision from preemption by the Federal Arbitration Act and the Liquidator could not be compelled to arbitration. In so holding, the court addressed the foreign reinsurers' argument (which had not been addressed by the district court) that even if the Kentucky Liquidation Act was not preempted by the Federal Arbitration Act as to the domestic reinsurer, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as implemented by the FAA, *9 U.S.C. § 201*, et seq.) would still require arbitration of their claims because the Convention supersedes the Kentucky Liquidation Act. The court rejected this argument, reasoning that "the Convention is not self-executing, and therefore, relies on an Act of Congress for Implementation. See *9 U.S.C. §§ 201*-208 (1994)." *Id. at 45.*

This court finds Stephens distinguishable from the present case because the Stephens court [*14] was not concerned with the state regulation of extra-territorial conduct, but rather with the application of state law to a domestic insurance company in liquidation. Further, while the Stephens court failed to give the Convention treaty preemptive force because it was implemented by the Convention Act, this court disagrees with such an analysis and finds that the Convention of its own force preempts state law.

Finally, Stephens failed to discuss or apply the Supreme Court's decision to "decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions [to arbitrability] where Congress has not expressly directed the courts to do so." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 n. 21, 105 S. Ct. 3346, 3360 n. 21, 87 L. Ed. 2d 444 (1985).* No such express exception exists for the McCarran-Ferguson Act.

McDermott alternatively maintains that even if the policy is within the scope of the Convention, entering judgment on or confirming the Arbitration Award would be contrary to the certain defenses provided by the Convention. McDermott specifically argues that there should be no judgment [*15] or confirmation because the Arbitration Award is nonbinding under Article V(1)(e) and contrary to public policy under Article V(2)(b). n12 The court declines to apply these defenses because the court finds that: (1) the Arbitration Award is indeed binding on the parties as it is not subject to further arbitral review; n13 and (2) enforcement of the arbitral award would comport with the strong federal policy in favor of arbitration, particularly in the context of international agreements. Further,

While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the [claims presented] and actually decided them.

Mitsubishi, 473 U.S. at 638, 105 S. Ct. at 3360. Based upon the record and the briefs and attachments of counsel in this case, the court finds that the Arbitration Panel obviously took cognizance of the claims and decided them.

n12 Article V of the Convention sets forth the grounds for refusal of recognition and enforcement of the Arbitral Award. Article V states in full:

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award in invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which con-

tains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[*16]

n13 Article III of the Convention states:

Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following rules. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

McDermott argues that Section 9 of the Federal Arbitration Act ("FAA"), *9 U.S.C. § 9*, requires that there be express consent to entry of judgment on the Arbitral Award and there is no express consent here. However, this court finds that § 9 of the FAA does not apply in Convention Act cases, because the Convention Act contains its own provision for enforcement in § 207, and thus there is no need to resort to the FAA's enforcement provision.

In its post-arbitration Motion to Remand, McDermott seeks to have Nos. 91-0841 and 91-3601 remanded to state court arguing [*17] that the policy's "Service of Suit Clause" allows McDermott to have its disputes resolved in the forum of its choosing and it waives Underwriters' right to remove these disputes to this court, and only the Louisiana state court can decide whether enforcement or confirmation of the Arbitration Award would be proper. However, this rehashed argument is contingent on acceptance of McDermott's McCarran-Ferguson argument, i. e., that the Arbitration Clause is null and void and this court lacks jurisdiction under the Convention, *9 U.S.C. § 205*. Thus, because the court has already rejected McDermott's rehashed McCarran-Ferguson argument, the court now rejects McDermott's rehashed Service-of-Suit argument.

Finally, McDermott also argues that Underwriters never placed the issue of the arbitrability of the parties' insurance coverage dispute before the Arbitration Panel for resolution and thus, the Arbitration Award lacks a legal foundation and McDermott should be allowed to proceed with a jury trial in state court. The court finds that this is not a ground for remand, and that the issue of arbitrability was decided by this court n14 so it did not have to be reconsidered by the Arbitration [*18] Panel.

n14 See February 18, 1992, Minute Entry, Doc. No. 93.

III. Conclusion

For the reasons given above,

IT IS ORDERED that Underwriters' Application for Order Confirming Arbitral Award and Entry of Judgment be and is hereby GRANTED;

IT IS FURTHER ORDERED that McDermott's Post-Arbitration Motion to Remand be and is hereby DENIED;

IT IS FURTHER ORDERED, on the court's own motion, that Underwriters' indemnification claims against Maxson Young Associates, Inc. (Nos. 91-3437 and 91-3469) and McDermott's suit against Maxson Young Associates, Inc., based on an alleged unauthorized coverage letter, (No. 91-3842), be and are hereby DECONSOLIDATED from the single judicial unit of No. 91-0841 & CC to permit the "summary and speedy" judicial enforcement of the Arbitral Award rendered in Nos. 91-0841 and 91-3601). *McDermott I, 944 F.2d 1199, 1213;* see also, *McDermott II, 981 F.2d 744, 747-48* (discusssing the broad scope of consolidation orders); [*19]

IT IS FURTHER ORDERED that Nos. 91-3437, 91-

3469, and 91-3842 ("the Maxson Young cases") be and are hereby CONSOLIDATED among themselves, and they remain STAYED pending further orders from this court.

A. J. McNamara