UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

TOWN OF VINTON	**NO. 2:23-CV-00240**
VERSUS	**JUDGE JAMES D. CAIN, JR.**
CERTAIN UNDERWRITERS AT LLOYDS, LONDON; INDIAN HARBOR INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; QBE SPECIALTY INSURANCE COMPANY; STEADFAST INSURANCE COMPANY; UNITED SPECIALTY INSURANCE COMPANY; GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA; HDI GLOBAL SPECIALTY SE; OLD REPUBLIC UNION INSURANCE COMPANY; AND SAFETY SPECIALTY INSURANCE COMPANY	**MAGISTRATE JUDGE KAY**

PLAINTIFF'S OPPOSITION TO DEFENANT'S MOTION TO COMPEL ARBITRATION

Respectfully submitted,

STUTES & LAVERGNE, LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Other Authorities

I. Preliminary Statement

Last month, this Court dispositively ruled against an insurer on a motion to compel arbitration under identical circumstances. *Bufkin Enterprises LLC v. Indian Harbor Ins. Co., et al*., 2023 WL 2393700 (W.D. La. 2023) (where the Court denied the defendant insurers' "Motion to Compel Arbitration and Stay Litigation" because the convention cannot apply to domestic insurers and the domestic insurers cannot compel arbitration through estoppel when the foreign insurer defendants were previously dismissed with prejudice).

Defendants are, nevertheless, attempting to deprive all courts of jurisdiction with an arbitration provision in a contract with a public body that is clearly prohibited by Louisiana law at La. R.S. 22:868 and La. R.S. 9:2778. "Because Louisiana law would prohibit enforcement of this arbitration provision, Defendants must rely on some preemptory law if this motion is to be granted."[1] Defendants claim the policy contracts at issue fall under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") to preempt Louisiana's anti-arbitration law. Defendants' Motion to Compel Arbitration, however, is based on the erroneous claim that there are foreign-insurer defendants—a fatal error. The Convention does not apply because the foreign insurers have been dismissed *with prejudice*; the contracts here are "entirely between citizens of the United States" and statutorily excluded from falling under the Convention.[2] The jurisprudence relied upon by Defendants is easily distinguished on the most important and dispositive facts: (1) the foreign insurers in those cases were *not* dismissed *with* prejudice; (2) the insureds were not public bodies.

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1 *City of Kenner v. Certain Underwriters at Lloyd's, London*, 2022 WL 307925, p. 1 (E.D. La. 2022).
2 9 U.S.C. §202.

The Convention also does not apply even if the foreign insurers were involved here because their contracts with Plaintiff do not contain an agreement to arbitrate, which is required for the Convention to apply. The foreign insurers' Amendatory Endorsements expressly change the policy (nullifying the arbitration provision) and require them to submit to the court in which the insured chooses to file suit for payment of "any amount claimed to be due" under the policy.

Defendants argue in the alternative that Louisiana's anti-arbitration law is preempted by the Federal Arbitration Act (the "FAA"). The McCarran-Ferguson Act, however, indisputably shields Louisiana's anti-arbitration law from preemption by the FAA because forcing arbitration through the FAA would invalidate Louisiana's anti-arbitration law.

Another of Defendants' alternative arguments is that this arbitration provision is exempt from Louisiana's anti-arbitration law under Paragraph D of La. R.S. 22:868, which may allow forum or venue selection clauses in surplus policies. In truth, an arbitration provision is not a forum or venue selection clause. Arbitration provisions "operate to deprive Louisiana courts of jurisdiction of the action against the insurer."[3] Paragraph D clarifies that "a forum or venue selection clause" is allowed in surplus policies; this is to choose one *court* over another *court*. It does not nullify the Paragraph A prohibition to any agreement in an insurance policy that deprives the courts of this state of jurisdiction. Plaintiff, as a political subdivision of the state, is also protected from the policy's arbitration provision by La. R.S. 9:2778. Defendants are not allowed to kidnap this simple insurance case from a court of law and smuggle it to a conference room in New York.

[3] See *Courville v. Allied Professionals Ins. Co.*, 2016-1354 (La. App. 1 Cir. 04/12/17), 218 So.3d 144, 148 (citing, in part, *Hobbs v. IGF Ins. Co.*, 02/26 (La. App. 3 Cir. 10/23/02), 834 So.2d 1069, 1071); See also *Sevier v. United States Fidelity & Guaranty Co.*, 497 So.2d 1380, 1385 (La. 1986); *Huntington Alloys, Inc. v. United Steelworkers of America*, 623 F.2d 335 (4th Cir. 1980).

Defendants also argue that, under federal law, equitable estoppel applies in this case to require arbitration if the contract and statutory law don't require it. Controlling federal jurisprudence, however, mandates that ordinary state law applies. Moreover, Vinton is a public body and afforded greater protection against the application of estoppel against it. Government estoppel would require four prongs of proof: "unequivocal advice from an unusually authoritative source" that the insurers reasonably relied on, causing "extreme harm" and "gross injustice."[4] Defendants can't show that any of these prongs are satisfied.

The arbitration provision has other incurable problems. It contains a choice of law clause to require New York law in the requested arbitration, which is prohibited by La. R.S. 22:868(A)(1). It also attempts to write its own substantive law by prohibiting the arbitration tribunal from awarding any kind of punitive damages regardless of whether they are allowed under New York or any other law.

This case involves agreements between domestic insurers and a Louisiana political subdivision. The Convention is explicitly inapplicable to such agreements. Defendants' Motion to Compel Arbitration and Stay the Proceedings should be denied.

II. Facts

This is a first-party insurance claim arising out of catastrophic damage caused by Hurricanes Laura and Delta in August and October 2020 to hundreds of properties owned by Plaintiff, the Town of Vinton ("Vinton"). Vinton procured a commercial insurance policy ("the policy") with a syndicate of insurers, insuring various location around Vinton, Louisiana, with a

[4] *Showboat Star Partnership v. Slaughter*, 2000-1227 (La. 4/3/01), 789 So. 2d 554, 562 (which also acknowledged, but did not reach, the argument that the mere use of the doctrine in this context was an unconstitutional infringement on sovereignty. *Id.* at n. 1.) *Id.*

named windstorm limit of $7,756,750 per occurrence.[5] This policy was in effect at the time of Hurricanes Laura and Delta.[6] The policy expressly states, in detail, that each insurer in the syndicate has its own separate contract with Vinton, each with a separate policy number.[7] The policy dictates that each insurer is separately responsible and never jointly responsible with any other insurer in the syndicate.[8] The policy also states that each insurer's several liability for loss amounts to the insured shall not exceed its allocated participation percentage.[9]

The insurers have paid only some of Vinton's damages under the policy for Hurricanes Laura and Delta. Millions of dollars are still owed under the policy, plus penalties and attorney fees for late payments and all unpaid amounts. Consequently, Vinton filed suit on August 25, 2022, against each of the insurers, individually, on this collective policy.[10] The policy designates Defendants as unauthorized insurers under the Louisiana Insurance Code, so Vinton filed suit in Calcasieu Parish as required by La. R.S. 22:442 because this is where the cause of action arose.[11] Vinton's petition meticulously identifies, separately, each insurer and its policy number, alleging individual breach of contract claims separately against each insurer. Shortly after filing suit, on September 2, 2022, Vinton dismissed, with prejudice, the only two foreign insurers, Certain Underwriters at Lloyd's, London and HDI Global Specialty SE.[12] While not included in the Defendants' Notice of Removal, the Court signed the Order of Dismissal on September 15, 2022.[13]

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5 Doc. 6-3 (Defendants' Exhibit A, the Policy), p. 1.
6 *Id.*
7 Doc. 6-3, pp. 2-5 (Contract Allocation Endorsement and Declaration Page); see also *Port Cargo Service, LLC v. Certain Underwriters at Lloyd's London*, 2018 WL 4042874 (E.D. La. 2018).
8 Doc. 6-3, pp. 2-4 (Contract Allocation Endorsement), 47-48 (Section VII – Conditions, Para. W).
9 *Id.* at p. 2-4 (Contract Allocation Endorsement).
10 Doc. 1-2 (Petition).
11 Doc. 6-3, p. 93.
12 Ex. 1 (Dismissal with Prejudice); Doc. 1, Pages 6 & 7 (Notice of Removal, Para. 14). The foreign defendants were never served with the petition.
13 Ex. 1.

III. Law and Argument

A. La. R.S. 22:868 prohibits arbitration in insurance contracts.

Louisiana law prohibits arbitration agreements in insurance policies.[14] Louisiana's anti-arbitration law is contained in La. R.S. 22:868(A)(2):

> 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 or accident policy insuring a resident of this state regardless of where made or delivered, shall contain any condition, stipulation, or agreement either:
>
> …
>
> (2) Depriving the courts of this state of the jurisdiction or venue of action against the insurer.

Moreover, La. R.S. 9:2778 prohibits provisions in a contract with a political subdivision of the state that requires an arbitration proceeding to be brought outside of Louisiana:

> A. The legislature finds that with respect to public contracts involving the state or a political subdivision of the state, provisions in such agreements requiring disputes arising thereunder to be resolved in a forum outside of this state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against the public policy of this state.
>
> B. The legislature hereby declares null, void, unenforceable, and against public policy, any provision in a contract, subcontract, or purchase order, as described in Subsection A, which either:
>
> (1) Requires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state.
>
> (2) Requires interpretation of the agreement according to the laws of another jurisdiction.
>
> C. The provisions of this Section shall apply to public contracts, as described in this Section, entered into on or after June 30, 1992.

[14] La. R.S. 22:868;(A)(2); *Kenner* and cases therein; *Glad Tidings; Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd's London*, 587 F.3d 714, 719 (5th Cir. 2009), *cert. denied*, 562 U.S. 827, 131 S. Ct. 65, 178 L.Ed.2d 22 (2010).

Vinton is a political subdivision of Louisiana, and Defendants are trying to enforce an arbitration provision to require an arbitration in New York. This provision is clearly null and unenforceable under Section 2778.

The Louisiana Department of Insurance issued a directive just one month before Hurricane Laura, reminding insurers that their policies must comply with all laws and public policy of Louisiana:

> While insurers are free to include whatever provisions they choose in their policies, the provisions must be consistent with the laws and public policy of Louisiana. ...
>
> Surplus lines insurers are hereby reminded that the use of policy provisions that are contrary to the public policy of this state constitutes sufficient grounds for removal from the list of approved unauthorized insurers pursuant to La. R.S. 22:436.[15]

Arbitration clauses in contracts are unenforceable because they operate to "deprive Louisiana courts of jurisdiction of the action against the insurer."[16] Arbitration clauses are prohibited in Louisiana as a matter of public policy because, if enforced, they deny Louisiana citizens free access to its courts—a right guaranteed by the Louisiana constitution.[17]

Kenner involved a Louisiana first-party insurance claim for Hurricane Zeta damage. The policy in *Kenner* had an arbitration provision identical to the provision here and involved the same insurers here (plus the foreign insurers who were dismissed in this case). The defendants there filed a Motion to Compel Arbitration. The court in *Kenner* noted, "Because Louisiana law would prohibit enforcement of this arbitration provision, Defendants must rely on some preemptory law

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15 Louisiana Department of Insurance Directive 175 (July 28, 2020).

16 La. R.S. 22:868(A)(2); *Courville v. Allied Professionals Ins. Co.*, 2016-1354 (La. App. 1 Cir. 04/12/17), 218 So.3d 144, 148 (citing, in part, *Hobbs v. IGF Ins. Co.*, 02-26 (La. App. 3 Cir. 10/23/02), 834 So.2d 1069, 1071); See also *Sevier v. United States Fidelity & Guaranty Co.*, 497 So.2d 1380, 1385 (La. 1986); *Huntington Alloys, Inc. v. United Steelworkers of America*, 623 F.2d 335 (4th Cir. 1980).

17 *Courville*, supra, at 148.

if this motion is to be granted."[18] The same is true here. The alleged preemptory law Defendants rely on here is the Convention.

B. The Convention does not apply.

1. The Contracts here involve only American citizens.

Louisiana law interprets insurance policies under "the general rules of interpretation of contracts set forth in the Louisiana Civil Code" in conjunction with "a heavy dose of public policy considerations at every turn."[19] Words are given their plain, ordinary meaning unless provided otherwise."[20] Any ambiguity in the policy provisions is interpreted "against the insurer."[21]

Defendants claim the policy contracts at issue fall under the Convention to preempt Louisiana's anti-arbitration law. Two of the mandatory four elements for an agreement to fall under the Convention are: (1) a foreign citizen must be a party to the subject contract; and (2) the subject contract must have an agreement to arbitrate disputes.[22] Defendants cannot satisfy either of the elements.

There are no foreign defendant-insurers and no foreign citizens who could ever be held liable to Vinton to pay any amounts on this policy. There are only domestic-insurer defendants, each with a separate contractual agreement with Vinton that does not include the foreign insurers.[23] Vinton purchased a surplus lines insurance policy. The policy contains a Notice that declares it is "delivered" "under the Louisiana Insurance Code."[24] The policy goes through painstaking efforts

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18 *Kenner*, supra, at 1. The Court in *Kenner* found that the Convention applied because there were contracts at issue there with foreign-insurer citizens who were still defendants.

19 *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 206 (5th Cir. 2007) (citing *Cadwallader v. Allstate Ins. Co.*, 848 So.2d 577, 580 (La. 2003); La. Law. Civ. Treat., § 15:3 (4th ed. 2022).

20 *Id.*; La. Civ. Code art. 2047.

21 *Cadwallader*, at 580.

22 9 U.S.C. §2; 9 U.S.C. §202 ; See also, *Freudensprung v. Offshore Technical Servs., Inc.* 379 F.3d 327, 339 (5th Cir. 2004); *Glad Tidings v. Indian Harbor Ins. Co.*, No. 2:21-cv-01009, (W.D. La. 2021).

23 Doc. 6-3, pp. 2-5 (Contract Allocation Endorsement and Declaration Page). *Port Cargo, supra* at p. 6.

24 Doc. 6-3, p. 93 (Surplus Notice).

to make it conspicuously clear that each insurer has a separate contract with Vinton. There is one collective insurance policy document as to all of the insurers identified by an "Account" number.[25] Ten individual insurance companies share the risk on the policy.[26] Each insurer receives a portion of the premium in accordance with its proportion of the risk.[27] Two of the insurance companies, Certain Underwriters at Lloyd's, London and HDI Global Specialty SE, are citizens of foreign countries.[28] As such, they are foreign insurers. The remaining eight insurance companies—the only defendants—are citizens of the United States of America and are domestic insurers.[29]

The declarations page lists individual policy numbers as to each insurer.[30] The Contract Allocation Endorsement that lists the allocated percentage of liability for each insurer on the policy repeatedly uses the plural term "contracts" when referring to the collective policy document and provides that the "contract shall be constructed as a separate contract between the insured and each of the Underwriters."[31] The policy continues to explain that the evidence of coverage consists of "separate policies issued by the insurance company(ies)."[32] The policy also states the following in the Contract Allocation Endorsement reiterating the separate, individual nature of the contracts and liability for each insurer[33]:

- **Liability limited to allocated percentage:** "The liability of each Underwriter on this contract with the Insured is limited to the participation amount shown in the schedule below."

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25 Doc. 6-3, p. 5 (Declaration Page).
26 *Id.*
27 *Id.*
28 Doc. 1, pp. 6-7 (Notice of Removal, ¶ 14).
29 *Id.*
30 Doc. 6-3, p. 5 (Declaration Page).
31 Doc. 6-3, pp. 2-4 (Contract Allocation Endorsement).
32 *Id.*
33 *Id.*

- **Liability is several, never joint:** "The liability of each separate contract listed and for each Underwriter represented thereby for any loss or losses or amounts payable is several as to each and shall not exceed its participation percentage shown below and there is no joint liability of any Underwriters pursuant to this contract.
- **Can't be liable for another insurer's wrongdoing:** "An Underwriter shall not have its liability hereunder increased or decreased by reason of failure or delay of another Underwriter… ."
- **Not a joint certificate of coverage:** "This evidence of coverage does not constitute in any manner or form a joint certificate of coverage by Underwriters at Lloyd's with any other insurance company(ies)."

Section VII-Conditions, Paragraph W of the policy drives home, once again, the separate contractual relationship and liability for each insurance company:

> "The liability of an insurer under this Policy is several and not joint with other insurers party to this Policy. An insurer is liable only for the proportion of liability it has underwritten. An insurer is not jointly liable for the proportion of liability of any other insurer that may underwrite this Policy."[34]

Vinton has a separate contract with each insurer as a matter of fact and law.[35] Vinton dismissed its claims, with prejudice, against each foreign insurer with which it had a contractual agreement. "A judgment of dismissal with prejudice shall have the effect of a final judgment of absolute dismissal after trial."[36] Accordingly, the foreign insurers on this policy do not have any dispute of any kind with Vinton, are not a party to this suit, and can never be responsible for payment of any amount

[34] Doc. 6-3, p. 47.
[35] *Port Cargo, supra;* La. Civ. Code art. 1906.
[36] La. Code Civ. P. art. 1673.

whatsoever to Vinton on this policy. The two foreign insurers—Lloyd's and HDI—are collectively allocated 21.5% of the syndicate, so Vinton has forfeited 21.5% of its claim.[37]

As a matter of law, the dismissal of the foreign insurers with prejudice necessarily means the separate contractual agreements with the domestic insurers before this court do *not* fall under the Convention. Any alleged agreement to submit to arbitration arising out of an insurance policy that "is entirely between citizens of the United States shall be deemed not to fall under the Convention…."[38] In other words, even if there were an enforceable arbitration agreement before this court, it must be in a contract between Vinton and a foreign citizen. There is no such contract with a foreign citizen before this court or that can be enforced. Every contract in dispute is between Vinton and Defendants—all U.S. citizens—and are distinctly outside the Convention.

This is all consistent with the policy behind the Convention as well. "The Convention is an international treaty that provides citizens of the signatory countries with the right to enforce arbitration agreements. The Supreme Court of the United States has explained that 'the goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'"[39] The Convention is meant to address "concerns of international comity, respect for the capacities of foreign and transnational tribunals,

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[37] Doc. 6-3, p. 2 (Contract Allocation Endorsement); La. Code Civ. P. art. 1673.

[38] 9 U.S.C. §2; 9 U.S.C. §202; *Port Cargo, supra*. The court in *Port Cargo* ultimately reached a different outcome and ordered arbitration, not because it was required by law, but under the court's discretionary authority through equitable estoppel principles. There are dispositive differences between *Port Cargo* and this matter, which include: (1) the foreign insurers had not been dismissed with prejudice, and those contracts with a foreign citizen were before the court; (2) the insurers claimed the insured made its own written demand for arbitration; and (3) the insured was attempting to split the case such that it would proceed against the domestic insurers in state court while simultaneously proceeding in arbitration against the foreign insurers. None of this is true in this case.

[39] *Port Cargo,* p. 3, citing *Scherk v. Alberto-Culver*, 94 S.Ct. 2449, 2457 n. 15 (1974).

and sensitivity to the need of the international commercial system for predictability in the resolution of disputes."[40]

The policy was delivered in Louisiana under the Louisiana Insurance Code. [41] The producer of the policy is AmWINS Brokerage of Texas, Inc. in Texas.[42] The program manager for the insurance companies is AmRisc, LLC in Texas.[43] And the arbitration provision attempts to compel arbitration in New York. Every contractual dispute here is between American citizens. There are no international parties, commerce, or concerns to protect in this matter. In the end, Defendants are simply domestic U.S. insurance companies trying to use an international treaty meant for non-U.S. citizens.

2. Endorsements nullify the arbitration provision in the standard form.

In addition to the requirement of a foreign-citizen party to the contract, 9 U.S.C. §2 and §202, together, prohibit contractual disputes from falling under the Convention unless the contract has an enforceable agreement to arbitrate. Section 202 reads, in pertinent part, "An arbitration agreement…arising out of a …contract or agreement described in Section 2 of this title, falls under the Convention."

Section 2 requires there to be an agreement by the parties in their written contract to arbitrate disputes. Even if we could consider Vinton's contracts with Lloyd's and HDI, Vinton does not have an agreement to arbitrate any dispute with them. Vinton's contracts with Lloyd's and HDI are governed by Amendatory Endorsements that replace the arbitration provision and

40 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).
41 Doc. 6-3, p. 93 (Surplus Notice) Ex. 2 (Vice Declaration).
42 Doc. 6-3, p. 5 (Declaration Page).
43 *Id.*

require Lloyd's and HDI to submit to the court in which the insured chooses to file suit. When "a conflict between the endorsement and the policy exists, the endorsement prevails."[44]

The arbitration provision is contained in the Conditions Section of the "Commercial Property Form" part of the policy.[45] It purports to refer "all matters of difference between the Insured and the Companies" in relation to the insurance to an arbitration tribunal in New York. The arbitration provision goes further out of bounds requiring the application of New York law in the arbitration proceeding, something that would never be allowed in a Louisiana court or any court applying Louisiana law.[46] The provision then embarks on a legislative journey and writes substantive law that prohibits the tribunal from awarding "exemplary, punitive, multiple, consequential, or other damages of a similar nature" regardless of whether those awards are allowed under New York or any other law.

Finally, the last paragraph of the arbitration provision specifically instructs and limits where suit may be filed to enforce an award by the arbitration tribunal: "If either of the parties should fail to carry out any award the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business."

The two foreign insurers, Lloyd's and HDI, however, each have very specific Service of Suit Clause Endorsements that change their policies and eradicate the arbitration provision by agreeing to submit to a court of competent jurisdiction in the United States in which the insured

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44 *Bennett v. Hartford Ins. Co. of Midwest*, 890 F.3d 597, 605 (5th Cir. 2018).
45 Doc. 6-3, p. 41.
46 La. R.S. 22:868(A)(1).

chooses to file suit for any amount claimed under the policy.[47] Here is the relevant part of Lloyd's Endorsement[48]:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LLOYD'S OF LONDON AMENDATORY

WITH RESPECT TO THE COVERAGE PROVIDED BY **CERTAIN UNDERWRITERS AT LLOYD'S, LONDON**, THE FOLLOWING CLAUSES (SERVICE OF SUIT and APPLICABLE LAW) SHALL APPLY:

Service of Suit Clause (U.S.A.)
NMA 1998 4/24/86 (USA date)

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon

1. California Insureds:
Foley & Lardner, LLP
555 California Street, Suite 1700
San Francisco, CA 94104-1520
USA

2. All other Insureds:
Lloyd's America, Inc.
Attention: Legal Department
280 Park Avenue, East Tower, 25th Floor
New York, NY 10017
USA

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.

Lloyd's takes it one step further and states that the "insurance" "shall" be subject to state law as determined by the court in which the insured files suit[49]:

> This Insurance shall be subject to the applicable state law to be determined by the court of competent jurisdiction as determined by the provisions of the Service of Suit Clause (USA).

And here is the nearly identical relevant Endorsement language for HDI[50]:

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47 Doc. 6-3, pp. 62, 87.
48 Highlighted emphasis added.
49 Doc. 6-3, p. 62.
50 Doc. 6-3, p. 87, highlighted emphasis added.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

VARIOUS COMPANIES' SERVICE OF SUIT CLAUSES

WITH RESPECT TO THE COVERAGE PROVIDED BY:

GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA; OR
HDI GLOBAL SPECIALTY SE; OR
LEXINGTON INSURANCE COMPANY; OR
OLD REPUBLIC UNION INSURANCE COMPANY; OR
UNITED SPECIALTY INSURANCE COMPANY; OR
SAFETY SPECIALTY INSURANCE COMPANY.

THE FOLLOWING APPLICABLE CLAUSES SHALL APPLY TO THE INDICATED COMPANY(IES), PROVIDED THAT COMPANY IS PARTICIPATING ON THE POLICY:

Service of Suit Clause(s)

It is agreed that in the event of the failure of the Company hereon to pay any amount claimed to be due hereunder, the Company hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of the Company's rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon:

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and that in any suit instituted against any one of them upon this contract, the Company will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The plain wording of the Endorsements and the law, of course, require the endorsement to prevail over the arbitration provision. This makes practical sense too. Endorsements are conscious decisions and extra efforts to change the default provisions in the policy form so each insurer can customize its agreement with the insured to meet its specific desires. That's what Lloyd's and HDI did with these Endorsements. Accordingly, there is no agreement to arbitrate contractual disputes in the Lloyd's and HDI's contracts with Vinton. The Convention is not applicable.

Lloyd's and HDI aren't the only insurers who make this conscious effort to eradicate the arbitration provision. Seven of the eight defendant insurers, all domestic, have a Service of Suit Endorsement that "changes the policy" requiring the insurers to submit to the jurisdiction of the court in which the insured chooses to file suit for payments owed under the policy.[51] Indian Harbor

[51] Doc. 6-3, pp. 75, 80, 87.

is the one defendant insurer whose Service of Process Endorsement language is a little different but still contemplates the insured filing suit for "any" kind of action or proceeding.[52]

Vinton anticipates Defendants will argue that, under *McDermott Intern., Inc. v. Lloyd's Underwriters of London*, the Service of Suit Endorsements should be interpreted consistent with the arbitration provision to apply to suits concerning enforcement of an arbitration award and not suits like this one for payment of amounts due under the policy. [53] But unlike the provision in *McDermott*, the plain language of the arbitration provision in this case makes that interpretation impossible. The arbitration provision here already provides a very specific instruction and limitation on where suit may be filed to enforce an arbitration award: "If either of the parties should fail to carry out any award the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business." In contrast, the Service of Suit Endorsement changes the policy and requires the insurer to submit to the jurisdiction of a court in which the insured chooses to file suit. The Service of Suit Endorsement and arbitration provision clearly conflict, and the Endorsement changes the policy to replace the arbitration provision exactly the way the Endorsement describes and the law requires.[54]

There's also evidence that Lloyd's includes language in its Service of Suit clause in policies with other insureds to limit its application to enforcing arbitration agreements when that is indeed Lloyd's intent. Lloyd's Service of Suit Clause in a policy with a different Louisiana insured reads: "This Clause is intended as an aid to compelling arbitration or enforcing such arbitration or arbitral award, not as an alternative to such Arbitration provision for resolving disputes arising out of this

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52 Doc. 6-3, p. 65.

53 944 F.2d 1199 (5th Cir. 1991); See also, La. Civ. Code art. 2056: "A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party."

54 *McDermott* also dealt with different issues surrounding a question about waiver of removal rights. The court noted there that the parties "recognize" that the suit concerned an arbitration agreement and was not entirely between United States citizens. That is not the case here.

contract of insurance (or reinsurance)." [55] There is no such language anywhere in the Service of Suit Endorsement in this case.

C. Louisiana's anti-arbitration law is shielded from the Federal Arbitration Act.

Defendants assert, regardless of whether the Convention applies, the Federal Arbitration Act (the "FAA") preempts Louisiana's anti-arbitration law. Under the McCarran-Ferguson Act, however, state laws regulating insurance are exempted from FAA preemption if, among other things, the FAA would invalidate, impair or supersede state law.[56] Application of the FAA to enforce an arbitration provision in an insurance contract would undoubtedly invalidate Louisiana's anti-arbitration law in La. R.S. 22:868(A)(2). Therefore, McCarran-Ferguson allows La. R.S. 22:868(A)(2) to "reverse-preempt" the FAA's provisions on the enforceability of arbitration agreements in insurance contracts.[57]

Curiously, Defendants argue that the test under McCarran-Ferguson is whether the FAA would impair a *New York* law instead of a Louisiana law. Defendants are seeking application of the FAA to preempt Louisiana law, not New York law. If New York's law were the applicable law here and allows arbitration as Defendants claim, then Defendants wouldn't have any need to apply the FAA to preempt it.

D. Arbitration is not allowed in this surplus policy, especially with a public body.

Defendants' other alternative argument is that this arbitration provision, in a surplus policy, is exempt from Louisiana's anti-arbitration law under Paragraph D of La. R.S. 22:868, which allows "a forum or venue selection clause" in surplus policies. Defendants are wrong as a matter

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55 Ex. 3, at Mitchell 0053 (Mitchell Underwriters at Lloyd's London policy).
56 15 U.S.C. §§ 1011, 1012.
57 *Glad Tidings*; *See, e.g., Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490 (5th Cir. 2006).

of law. An arbitration provision is not a forum or venue selection clause as used in Paragraph D. On this point, Paragraph A of §868 specifically prohibits any "condition, stipulation, or agreement" in an "insurance contract" that "deprives the courts of this state of the jurisdiction or venue of action against the insurer." "Compulsory arbitration provisions in insurance contracts are prohibited as a matter of public policy" because they operate to "deprive Louisiana courts of jurisdiction" of the action against the insurer.[58]

Paragraph D states only that a forum or venue selection clause is allowed in a surplus policy. Forum and venue selection clauses allow the preference of one *court* over another *court*. Unlike arbitration provisions, forum and venue selection clauses arguably do not deprive courts of jurisdiction.[59] Forum and venue selection clauses are essentially the same thing. To that end, courts and the procedural rules treat forum the same as venue as well. This court recently noted that although "forum" selection clauses were once enforced through motions to dismiss for improper "venue," they are now enforced through motions to transfer "venue."[60] This court further elaborated on the specific meaning of "forum" in La. R.S. 22:868, explaining that "venue" was added to Paragraph A of §868 to impose a clear limitation on "forum" selection clauses.[61] Accordingly, Paragraph D does not create some new, invisible law to give immunity for arbitration provisions in surplus policies.

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58 *Courville v. Allied Professionals Ins. Co.*, 2016-1354 (La.App. 1 Cir. 4/12/17), 218 So.3d 144, 148, citing, in part, *Hobbs v.IGF Ins. Co.*, 02-26 (La.App. 3 Cir. 10/23/02), 834 So.2d 1069, 1071; *See also Sevier v. United States Fidelity & Guaranty Co.*, 497 So.2d 1380, 1385 (La. 1986); *Huntington Alloys, Inc. v. United Steelworkers of America*, 623 F.2d 335 (4th Cir. 1980).

59 See e.g., *Creekstone Juban I, L.L.C. v. XL Ins. America, Inc.*, 18-748 (La. 05/08/19), 282 So.3d 1042.

60 *Oak Haven Management, LLC v. Starr Surplus Lines Ins. Co*., 2021 WL 4134033, p. 1 (W.D. La. 2021)

61 *Oak Haven*, p. 2.

E. The arbitration provision contains an unlawful choice-of-law clause.

All insurers doing business in Louisiana must comply with its Insurance Code.[62] La. R.S. 22:868(A)(1) prohibits any "condition, stipulation, or agreement" in an insurance contract "requiring it to be construed according to the laws of any other state." In addition, La. R.S. 9:2778 prohibits "any provision in a contract" "involving …a political subdivision of the state" that "requires interpretation of the agreement according to the laws of another jurisdiction." The arbitration provision contains a New York choice-of-law clause: "The seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance." The choice-of-law clause goes further by legislating its own law to choose: "The Arbitration Tribunal may not award exemplary, punitive, multiple, consequential, or other damages of a similar nature." Under the policy's language, this law would be mandated regardless of whether it is allowed or required under New York or any other law. This, of course, would allow Defendants to unlawfully contract around Louisiana's laws regulating how insurance companies handle first-party claims and allowing penalties, damages, and attorney fees for certain misconduct.[63]

F. Equitable estoppel cannot apply here to force arbitration.

One of Defendants' theories is that, regardless of their actual contractual rights, "equitable estoppel" would allow them a back door into arbitration anyway. But equitable estoppel is

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62 La. R.S. 22:12.

63 La. R.S. 22:1892, 1973. New York has no corollary to La. R.S. 22:1892 and 1973. It does not recognize a cause of action for first-party insurer bad faith or impose the same process for first-party claims. *See* N.Y. Ins. Law § 2601 (McKinney); *Tri-Union Seafoods LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156, 1168 (S.D. Calif. Feb. 5, 2015) (finding Starr's New York choice-of-law provision unenforceable because it was contrary to the "fundamental policy" of the insured's home state.) See also, *Manuel v. La. Sheriff's Risk Mgmt. Fund*, 95-0406 (La. 11/27/95), 664 So.2d 81, 85 ("public policy" statutes of this type are invulnerable to charges…that they impair the obligations of contracts.")

foreclosed from the outset. These insurers are defending themselves from a Louisiana policyholder that is also a Louisiana political subdivision. This state's Insurance Code already strips them of a direct right to arbitrate.[64] And when it comes to matters of contract with a political subdivision, the Legislature also strips them of any "equity" claim. All contracts with a political subdivision like Vinton are subject to La. R.S. 9:2778, which declares arbitration with a public body in another state to be "inequitable and against the public policy of this state." They are also subject to a heightened estoppel test that could never be satisfied here. There is no way to achieve arbitration against Vinton through equity.

In *Port Cargo Services v. Certain Underwriters at Lloyd's London*, the Eastern District of Louisiana used equitable estoppel to force the plaintiff to arbitrate with all its insurers out of concern for the ones who were foreign and parties to the case.[65] The idea was that the plaintiff's claims against its domestic insurers were so "interdependent" that it would be unworkable to spin off the foreign insurers into arbitration while the others stayed in court. The court correctly noted that the plaintiffs "cannot be compelled by the Convention to arbitrate their claims against the domestic insurers," who were not covered by that law.[66] But it used a discretionary equitable estoppel remedy to avoid unfairness in having separate, simultaneous litigation.[67]

Port Cargo wanted "fairness" for the foreign insurers, not the domestic ones (whose direct right to arbitrate was questioned, but not reviewed.)[68] The court was worried that it might "thwart the intentions of the Convention" by allowing separate litigation simultaneous with their arbitration.[69] Equitable estoppel was a discretionary way for the court to fashion a remedy.[70] *Port*

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64 La. R.S. 22:868.
65 2018 WL 4042874, pp. 2, 8 (E.D. La. Aug. 24, 2018).
66 *Id.* at 6.
67 *Id.* at 7.
68 *Id.*
69 *Id.*
70 *Id.*

Cargo was not faced with a Louisiana sovereign public body being dragged from a Louisiana forum in violation manifestly proclaimed Louisiana public policy. It was also using the wrong test for equitable estoppel. *Port Cargo* used a two-track analysis for equitable estoppel in arbitration from *Grigson v. Creative Artists Agency LLC*, 210 F.3d 524, 527 (5th Cir. 2000). As Justice Dennis pointed out almost a decade ago, the Fifth Circuit's *Grigson* test no longer governs estoppel here. It is a matter of state law.

Grigson's analysis was federal common law borrowed from another circuit.[71] It forced arbitration on signatories and nonsignatories to an arbitration agreement when allegations against them were "interdependent."[72] Judge Dennis dissented in *Grigson*, complaining that "ordinary state law" contract principles should govern the interpretation of arbitration provisions and who is bound by them.[73] Later, he was proven right. Since *Grigson*, the Supreme Court has twice held that state law, not federal common law, governs the scope of arbitration agreements in FAA cases.[74] Justice Dennis noted *Grigson*'s demise in 2014, collecting a string cite of courts from across the country that used state law in accordance with the Supreme Court's instructions.[75] One of them was the Eleventh Circuit, the source of *Grigson*'s test. It found that to the extent any of its earlier decisions, including the ones *Grigson* cited, had been using federal common law rather than state law for estoppel, "those indications are overruled or at least undermined to the point of abrogation" by the Supreme Court.[76]

As noted above, choice of law in this case points directly to Louisiana. The law requires it, and so do the pertinent contacts that Louisiana has to this case. Louisiana has already found it

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71 210 F.3d 524 at 527-28.
72 *Id.*
73 *Id.* at 537.
74 *Arthur Andersen LLP v. Carlile*, 556 U.S. 624, 631 (2009); *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA LLC*, 140 S.Ct. 1637, 1643 (2020).
75 *Crawford Professional Drugs Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 261-62, n. 9 (5th Cir. 2014).
76 *Id.*, quoting *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011).

"inequitable" to force arbitration with one of its political subdivisions or for domestic insurers to put arbitration clauses in insurance policies.[77] In any event, Louisiana's regard for the theory of estoppel is low. Here, equitable estoppel is a disfavored doctrine of "last resort."[78] It is narrowly construed.[79] There are three requirements to invoke it[80]:

1. Representation by conduct or work;
2. Justifiable reliance thereon; and
3. A change of position to one's detriment because of the reliance.

These elements apply to "false or misleading representations of fact," not a procedural posture, which is why the Louisiana Supreme Court refused to apply the doctrine in *MB Industries LLC* to the question of whether a decision not to appeal could prevent a legal malpractice action later.[81]

The requirements for estoppel against a government entity like Vinton are even stronger. Estoppel does not even apply against government entities absent heightened evidence so stringent that it could never have any bearing here.[82] Government estoppel would require four prongs of proof: "unequivocal advice from an unusually authoritative source" that the insurers reasonably relied on, causing "extreme harm" and "gross injustice."[83] None of those things is present or even alleged by the insurers in this case.

Even if the domestic insurers could go forward with a state-law equity analysis despite the state law that declares what they are doing to be "inequitable," they have not alleged any facts to

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77 La. R.S. 9:2778; La. R.S. 9:2778.

78 *MB Industries LLC v. CNA Ins. Co.*, 2011-0303 (La. 10/25/11), 74 So. 3d 1173, 1180; *Howard Trucking Co. Inc. v. Stassi*, 485 So. 2d 915, 918 (La. 1986); see also *Moroux v. Toce*, 2006-831 (La. App. 3 Cir. 11/2/06), 943 So. 2d 1263; *May v. Harris Management Corp.*, 928 So. 2d 140, 145 (La. App. 1 Cir. 12/22/05).

79 *MB Industries LLC*, 74 So. 3d 1173 at 1181.

80 *Id.* at 1180.

81 *Id.* at 1181.

82 *Showboat Star Partnership v. Slaughter*, 2000-1227 (La. 4/3/01), 789 So. 2d 554, 562 (which also acknowledged, but did not reach, the argument that the mere use of the doctrine in this context was an unconstitutional infringement on sovereignty. *Id.* at n. 1).

83 *Id. at 562.*

satisfy an equity test. All they did was track the *Port Cargo* decision with arguments about why disputes against the insurers should be handled together. Arbitration is not necessary to achieve that. No one here is trying to break the litigation apart, unlike the plaintiffs in *Port Cargo.* The fact that the insurers' adjusters and consultants "were all shared" was not a representation by Vinton.[84] It was a decision the insurers made themselves. Under the policy, each insurer can pay for its "own adjusters or independent adjusters or consultants" if it "elects" to do so.[85] And perhaps some did. There has been no discovery yet to show whether some insurers relied on their own consultants in addition to the ones Vinton knew about.

The party at risk from a false "representation" here is Vinton, not any of these defendants. Like the insurers in *Port Cargo*, each insurer in this case has a "separate contract" with Vinton to cover losses without any "joint liability" or possibility for an insurer's liability to be "increased or decreased by reason of failure or delay on the part of another Underwriters, its successors, assigns, or legal representatives."[86] The domestic insurers separated themselves from each other contractually, disclaiming any responsibility for one insurer to pay for decisions another one makes. Now, they declare themselves "equally empowered" to borrow arbitration agreements that they could never have made legally as their separate contractual selves. In truth, equity would strongly disfavor allowing the domestic insurers to use its separate contractual provisions of the policy as a shield from any liability of any other carrier yet simultaneously allow it to ignore the separate nature of the contracts and use the arbitration provision as a sword to ship local governments into arbitration in New York. These are domestic insurers forbidden from arbitration

[84] Doc. 6-2, p. 2.
[85] Doc. 6-3, p. 43.
[86] Doc. 6-3. p. 2.

with a political subdivision. No representation by Vinton could have possibly changed that. This is why Louisiana requires estoppel to be grounded in *fact*.

Legal rights are what they are. Louisiana does not care whether these other insurers prefer to arbitrate. It voids arbitration clauses in their policies.[87] It is absurd to think that this state's disfavored "estoppel" theory would then write such a clause into existence via "equity" for them anyway. It is not justified at all for a domestic insurer to maintain a "separate contract" with Vinton, only to claim later that it has an "intertwined" set of facts that allows it to blend contracts to create otherwise illegal results. Nor is it alleged or even explained what detriment the insurers think exists here. Do the insurers believe that arbitration should be considered an advance guarantee of a different outcome in this case? If not, then how are they the current victims of detrimental reliance? Do they know in advance the costs of arbitration or how to weigh them against the costs of litigating here, where there is a streamlined settlement process, special master, and mediators at their disposal for quick resolution? There is no detrimental reliance here; there is only an attempt to evade the law. For reasons that foreclose estoppel to begin with, the Court should find that there is no application of the Convention and deny arbitration. If, for some reason, any analysis of the insurers' right to force arbitration hinges on estoppel, the insurers should lose it.

Conclusion

Plaintiff, the Town of Vinton, respectfully asks this Honorable Court to deny Defendants' Motion to Compel Arbitration and Stay the Proceedings.

[87] La. R.S. 22:868(C); La. R.S. 9:2778.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2023, a copy of the foregoing was uploaded to and filed electronically with the Clerk of Court's CM/ECF system, which will send notification of this filing to all counsel of record by operation.

s/ Russell J. Stutes, Jr.
RUSSELL J. STUTES, JR.