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Arbitration, Arbitrability, and Who Decides: Avoiding Arbitration Surprises

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A recent Ninth Circuit case provides a lesson on how experienced legal counsel can help in drafting arbitration agreements to avoid surprises and keep the parties out of court.

Most arbitration provisions specify the scope of the issues to be arbitrated, the type of arbitration, the locale of the arbitration, and the parties' choice of law. Is that enough to keep the parties out of court? Not quite. An arbitration provision involving interstate or foreign commerce should also address some additional questions: namely, what law will determine whether a dispute is arbitrable; and who will decide questions of arbitrability? The facts in *Cape Flattery Ltd. v. Titan Maritime, LLC* illustrate the problem, and the outcome is one the drafter of the arbitration provision almost certainly did not anticipate or intend.

The *Cape Flattery* case is a dispute between the owner of a ship that ran aground on a submerged coral reef off the coast of Oahu, Hawaii, and the company the owner hired to remove the ship from the reef and salvage it. After the work was completed, the United States government notified the owner that the owner would be liable for damages exceeding $15 million based on damage to the reef. The owner sued the salvage company in federal court in Hawaii for indemnity and contribution, alleging that the salvage company was responsible for the damage. The salvage company countered with a motion to compel arbitration, based on an arbitration provision in the parties' contract calling for "any dispute arising under this Agreement" to be settled by arbitration in London, England, "in accordance with the English Arbitration Act of 1996," and further specifying "English law and practice to apply."

Did the court compel arbitration? The answer, perhaps surprisingly, is the court did not. Delivering a combination one-two-three punch to the salvage company, the court ruled that:

- The question of arbitrability must be decided under the Federal Arbitration Act and related federal law, because "the agreement is ambiguous concerning whether English law also applies to determine whether a given dispute is arbitrable in the first place"
- Under federal arbitrability law, there is a presumption against allowing an arbitrator – rather than a court – to decide whether a case should be arbitrated, and this presumption was not overcome because there was no clear and unmistakable evidence that the parties intended to arbitrate arbitrability
- Under federal arbitrability law, the provision to arbitrate disputes "arising under this Agreement" should be interpreted narrowly, and therefore did not include the owner's claim for indemnification and contribution, which was based on federal law (the Oil Pollution Act of 1990)

The lesson? When drafting arbitration provisions, specify:

- Whether the law of a particular state or foreign jurisdiction will govern the question of arbitrability
- Whether questions of arbitrability will be decided by an arbitrator or the court
- Whether all disputes relating to the agreement will be subject to arbitration

As the *Cape Flattery* case demonstrates, merely identifying the governing law without specifically addressing questions of arbitrability, and limiting arbitration to disputes "arising under" a particular agreement, may not be enough to keep the parties out of court.