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Out to Sea in the Ninth Circuit: Bungling Questions of Arbitrability

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Some of the readers of this blog may have missed the Ninth Circuit's recent decision in *Cape Flattery Ltd. v. Titan Maritime LLC*, 647 F.3d 914 (9th Cir. 2011)—in which the court addressed the critical question of how a court is to determine whether a dispute is "arbitrable" for purposes of a motion to compel—and then proceeds to make a complete hash of it.

The M/V Cape Flattery had run aground on a submerged coral reef off Hawaii; the vessel entered into a salvage agreement with Titan Maritime that contained an arbitration clause: "Any dispute arising under this Agreement shall be settled by arbitration in London . . . in accordance with the English Arbitration Act 1996 . . ., English law and practice to apply." In the course of the operation, serious damage was inflicted on the reef, for which the U.S. Government informed Cape Flattery that it would be held liable; Cape Flattery brought a suit in federal district court against Titan seeking indemnity and/or contribution for its "gross negligence," and Titan moved to compel arbitration. The district court denied the motion, and the Ninth Circuit affirmed.

The first issue, the court said, was "what law applies to determine the arbitrability of the dispute"–and this was held to be not English law, but the "federal law of arbitrability." While under the *Volt* case the parties indeed "have the power to agree to apply non-federal arbitrability law," the *Kaplan* case teaches that "courts should be cautious in determining whether the parties have agreed to arbitrate arbitrability"–and should not hold that they have done so in the absence of "clear and unmistakable evidence." While English law "clearly applies to disputes that are subject to arbitration," the agreement "is ambiguous concerning whether English law also applies to determine whether a given dispute is arbitrable in the first place."

Applying "federal law," then, the court held that the dispute was not arbitrable: Under this "narrow" arbitration clause "only those disputes relating to the interpretation and performance of the contract itself" are arbitrable; the parties' dispute by contrast was based on the Oil Pollution Act of 1990 and did not "turn on an interpretation of any clause in the contract."

Now there are no prizes for noticing all the things that went wrong here:

(1) To begin with, the court confuses, on the one hand,

(a) talk of "using federal law in distinction to state law"–which is a preemption question–that is, a vertical choice of law question, the question directly raised in cases like *Volt* and

Mastrobuono–with, on the other hand,

(b) talk of "using U.S. law in distinction to the law of another nation as dictated by a choice-of-law clause."

"Federal law" is an ignorant shorthand for both problems, but they are obviously quite distinct.

(2) And then, the court confuses its role

(a) when asked to determine the respective adjudicative roles of courts and arbitrators–which is the only question raised in cases like *First Options v. Kaplan*–with its role

(b) when asked to determine whether the parties have chosen to subject themselves to the supervisory power of a foreign court–or (c)–something which is different and arguably even a lesser thing still–have chosen to be governed by a foreign law.

In its discussion of neither point did the court betray any awareness of the importance attributed in international commercial transactions to the proper choice of the "seat" of the arbitration–or awareness of what are usually understood to be the implications of that choice–or awareness of the vast learning devoted to this question in the international literature.

(3) And finally, having put aside English law in favor of "federal law," the court immediately reverted to the tired and abstract dichotomy between clauses "narrowly" drafted to cover only disputes "arising out" of a transaction, and those covering disputes "relating to" a transaction as well.

That contracting parties may, when drafting agreements, have consciously averted to this distinction is, I suppose, a possibility–but I suspect it is far more likely that this was done through inadvertence and happenstance. Parties who wish to exclude "non-contractual" claims from arbitration can be expected to deploy the sophistication to do so with somewhat greater clarity. The court's distinction is not a commercial one–and I would have thought that it would by now have been safely relegated to the dustbin of obsolete and antiquated notions; see *Bristol-Myers Squibb Co. v. SR Int'l Bus. Ins. Co. Ltd.*, 354 F.Supp.2nd 499 (S.D.N.Y. 2005)(grumbling that its holding, although dictated by circuit precedent, "is out of step with the overwhelming body of law favoring arbitration in circumstances like these").

Now while I understand that application to the Supreme Court is a distinct possibility, it seems most unlikely that the Court would want to venture into these murky and esoteric waters–all the more so as it really deserves a breather from so much strenuous recent activity in the arbitration field. On the other hand, there does exist much conflicting authority in lower federal courts with respect to both the first and the third issues, and this might be a hook for cert. (Perhaps I may be forgiven for noting that I wrote about the first issue in a recent article in the American Review of International Arbitration: Understanding (and Misunderstanding) "Primary Jurisdiction," 21 Amer. Rev. of Int'l Arb. 47 (2010); the relevant bits are at pp. 168-173.). As it stands, the case is a trap for the unwary–and suggests the need for considerable caution in entering transactions with parties who might think one day to invoke the courts of California or Hawaii.

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