

Federal Court Calls for Clear Showing of Intent in Maritime Arbitration Clauses

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The U.S. Court of Appeals for the Ninth Circuit made several key rulings about determining the scope of a maritime arbitration agreement in its decision in the case of *Cape Flattery Ltd. v. Titan Maritime, LLC* issued on July 26, 2011. The court held that although parties could choose a law other than the Federal Arbitration Act to govern a determination of arbitrability, such an agreement requires a strong showing of such intent, and a general choice of law provision isn't enough. The court further held that a clause calling for arbitration of matters "arising under" the agreement is a narrow one, limited to only those disputes that relate to the interpretation and performance of the agreement; while an arbitration clause addressing matters "arising under *or related to*" the agreement would sweep more broadly. The court noted that some Circuits (such as the Third, Fourth, Sixth, and Eleventh Circuits) read arbitration clauses more broadly, but also observed that its own precedents, and those of New York's Second Circuit, have applied a narrow reading based on the view that parties should clearly indicate the scope of arbitration they intend.

Notably, the arbitration language in the contract at issue in the *Cape Flattery* case was similar to the language found in many standard form charters, such as Wreckhire 99, the Japan Shipping Exchange Salvage Agreement, Americanized Welsh Coal Charter, New York Produce Exchange 93 Time Charter, and Shelltime 4-03, while several more recent charter forms, such as Towcon, Towhire, Barecon 2001, and Supplytime 2005 have the updated, and more broad, Bimco standard dispute resolution clause, which goes beyond matters arising under the agreement to include matters "relating to," or "in connection with" the agreement. To avoid unpleasant surprises, parties who elect to include arbitration clauses in their contracts would be well-advised to ensure that the arbitration language clearly reflects the parties' intent with regard to what matters will be within the scope of the arbitration agreement, and what law will apply to the determination of the arbitrability issue.

A copy of the *Cape Flattery* decision is available via the attached PDF.

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