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Determining Arbitrability of the Dispute: The Clear and Unmistakable Standard for Choice of Law in Arbitration Agreements

Kristen Sanocki

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Cape Flattery Ltd. v. Titan Mar., LLC[1]

I. INTRODUCTION

In *Cape Flattery Ltd. v. Titan Mar., LLC*, the Ninth Circuit addressed the issue of whether or not parties may contract to apply non-federal arbitrability law in an agreement to arbitrate disputes arising under the contract.[2] The Ninth Circuit's decision also discusses the issue of whether or not choice of law provisions contained within arbitration clauses are dispositive of the choice of law to be applied in determining arbitrability, and additionally, sets forth a standard to be used in determining arbitrability.[3] After examining Supreme Court precedent in which the court has recognized the viability of non-federal rules of arbitration contained within a contract, this note will explore additional federal precedent related to the interpretation of choice of law clauses as applied to arbitrability. The various federal circuit court interpretations of the scope of arbitration clauses will be addressed because the scope of the clause may be governed by federal arbitrability law if the parties have not sufficiently contracted to apply non-federal arbitrability law.

This note will also address the "clear and unmistakable" standard adopted by the Ninth Circuit and used to determine whether or not parties have agreed to apply non-federal arbitrability law.[4] Based on the Ninth Circuit's reasoning in *Cape Flattery Ltd. v. Titan Mar., LLC*, this Note concludes that the court properly extracted a standard normally used to determine whether a court decides arbitrability as applicable to determining whether parties have sufficiently contracted for non-federal arbitrability law. Lastly, this Note will address the interpretation of arbitration clauses under federal law.

II. FACTS AND HOLDING

On February 2, 2005, Cape Flattery, a motor vessel, became grounded along a coral reef in Oahu, Hawaii.[5] As a result of the vessel running aground, the U.S. Coast Guard delivered a Notice of Federal Interest to Cape Flattery Limited and

1. Cape Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914 (9th Cir. 2011).
2. *Id.* Non-federal arbitrability law refers to state or foreign rules of arbitration.
3. *Id.*
4. *Id.*
5. *Id.* at 916.

ordered the Unified Command[6] to alleviate the risk of an oil spill from the vessel.[7] Immediately following the Notice and Order, 33 U.S.C. § 2702 required Cape Flattery Limited ("Cape Flattery"), the owner of the motor vessel, to pay for and begin removal of the ship from the coral reef.[8] Cape Flattery executed an agreement with Titan Maritime, LLC ("Titan Maritime") to act reasonably in removing the vessel from Barbers Point and to deliver the vessel back to Cape Flattery.[9] The agreement also included an arbitration clause requiring that "any dispute arising under" the agreement would be settled in London, England under the English Arbitration Act of 1996.[10] The agreement did not specifically state whether English law also applied in determining the scope of the arbitration clause.[11]

Upon execution of the agreement, Titan Maritime removed the ship from the coral reef.[12] Although an oil discharge did not occur, at some point during the vessel's grounding or removal the submerged coral reef became severely damaged.[13] Consequently, the United States government informed Cape Flattery of its liability under 33 U.S.C. § 2702 for damages to the reef resulting from the ship's grounding.[14] On August 8, 2008, the United States government estimated that Cape Flattery would be liable for damages greater than $15 million.[15] Two months later on October 24, 2008, Cape Flattery brought an action against Titan Maritime in federal district court for the District of Hawaii.[16] Cape Flattery sought indemnity and contribution under 33 U.S.C. § 2709 for the alleged damage Titan Maritime caused in removing the vessel.[17] Cape Flattery also alleged that Titan Maritime caused the damage as a result of gross negligence and further sought to prevent Titan Maritime from compelling arbitration.[18] In response to Cape Flattery's complaint, Titan Maritime filed a motion to compel arbitration

6. The Unified Command is a group that is established under the United States government. The Unified Command brings together each Incident Commander of all possible groups involved in handling incidents, including both governmental and non-governmental organizations. *See What is a Unified Command*, UNITED STATES DEPARTMENT OF LABOR, http://www.osha.gov/SLTC/etools/ics/what_is_uc.html (last visited Apr. 23, 2013).

7. *Cape Flattery Ltd.*, 647 F.3d at 916.

8. *Cape Flattery Ltd.*, 647 F.3d at 916; 33 U.S.C. § 2702(a) (2012). Section 2702, any party who is responsible for a vessel that may discharge oil into navigable waters is liable if there is a substantial threat of oil discharge. 33 U.S.C. § 2702.

9. *Cape Flattery Ltd*, 647 F.3d at 916. Cape Flattery Limited is the company that owns the motor vessel Cape Flattery. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Cape Flattery Ltd.*, 647 F.3d at 916; 33 U.S.C. § 2702(a). Under section 2702, if a vessel has harmed or destroyed natural resources in navigable waters, the owner of the vessel is liable for damages. 33 U.S.C. § 2702(a).

15. *Cape Flattery Ltd.*, 647 F.3d at 916.

16. *Id.*

17. *Cape Flattery Ltd.*, 647 F.3d at 916-17; 33 U.S.C. § 2709 (2012). Section 2709 allows a liable party to bring a civil action for contribution against any other party who also may be liable under the statute. 33 U.S.C. § 2709.

18. *Cape Flattery Ltd.*, 647 F.3d at 917. Cape Flattery alleged that Titan Maritime acted grossly negligent by using an improper type of tow line that damaged the coral reef. *Cape Flattery Ltd. v. Titan Mar. LLC*, No. 08–00482, 2012 WL 3113168 *1 (D. Haw. July 31, 2012). Cape Flattery further alleged that Titan Maritime knew that the heavy tow line would cause damage to the reef. *Id.*

pursuant to the towing agreement's arbitration clause.[19] The district court denied the motion and refused to compel arbitration.[20]

In denying the motion to compel arbitration, the district court stated that English law did not govern the arbitrability of the dispute; rather, federal arbitrability law governed in determining the scope of the arbitration clause.[21] The court expressed doubt as to whether federal arbitrability law permitted parties to for non-federal arbitrability law, even though Cape Flattery and Titan Maritime agreed to arbitrate disputes under English law.[22] The district court ultimately found that the dispute over the damages to the coral reef did not come within the scope of the arbitration agreement, applying a narrow construction of the agreement's language.[23] Because Titan Maritime had a duty to remove the grounded vessel without damaging the coral reef under federal law, and that distinct duty fell outside of the scope of the arbitration agreement entered into with Cape Flattery, the district court did not find the tort claim arbitrable.[24]

Titan Maritime appealed the denial of the motion to compel arbitration to the U.S. Court of Appeals for the Ninth Circuit.[25] While Cape Flattery contended that federal arbitrability law always applied to determine the arbitrability of the dispute, Titan Maritime contended that federal arbitrability law mandated that the terms of the parties' agreement be enforced, especially when the parties agreed to apply non-federal arbitrability law.[26] Titan Maritime also maintained that if federal arbitrability law applied, the "any dispute arising under" portion of the arbitration clause entered into with Cape Flattery should be construed broadly to maintain the presumption in favor of arbitration.[27]

The Ninth Circuit affirmed the district court's ruling and held that when parties enter into a written contract under which arbitrability will be governed by non-federal arbitrability law, courts should enforce the agreement as written only if there is "clear and unmistakable evidence" the contracting parties intended to use non-federal arbitrability law.[28] Because the agreement entered into between Cape Flattery and Titan Maritime established that English arbitration law applied but did not present "clear and unmistakable" evidence that the parties also intended to use English arbitrability law, federal arbitrability law applied.[29] The court, applying federal arbitrability law, construed the agreement's "any dispute arising

19. *Cape Flattery Ltd.*, 647 F.3d at 917.

20. *Id.* The district court denied the motion to compel arbitration after a hearing and after taking several briefs from the parties. *Id.*

21. *Id.* (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that federal arbitrability law applied even though the parties' agreement stated that Japanese arbitration law governed the dispute's arbitrability)).

22. *Id.* The court also noted that even if the parties could contract out of federal arbitrability law, Cape Flattery and Titan Maritime had not successfully contracted out of that law. *Id.*

23. *Id.* (citing Mediterranean Enters., Inc. v. Ssangyong Constr. Co., 708 F.2d 1458 (9th Cir. 1983); Tracer Research Corp. v. Nat'l Envtl. Servs. Co., 42 F.3d 1292 (9th Cir. 1994)).

24. *Cape Flattery Ltd.*, 647 F.3d at 917.

25. *Cape Flattery Ltd.*, 647 F.3d at 917; 9 U.S.C. § 16(a)(1)(B)-(C) (2012). Section 16 allows a party to appeal the denial of its motion to compel arbitration. 9 U.S.C. § 16.

26. *Cape Flattery Ltd.*, 647 F.3d at 918-19. Titan Maritime implicitly argued that the English choice of law clause applied to the scope of the arbitration clause. *Id.* at 921.

27. *Id.* at 922.

28. *Id.* at 924.

29. *Id.*

under" arbitration clause narrowly and not include the tort claim brought by Cape Flattery.[30]

III. LEGAL BACKGROUND

Prior to the decision in *Cape Flattery*, neither the United States Supreme Court nor the Ninth Circuit had decided whether federal arbitrability law permits parties entering into an arbitration agreement to agree to use foreign arbitrability law.[31] Likewise, neither court had stated how to determine whether parties had sufficiently contracted to apply foreign arbitrability law. This section will address the Supreme Court's recognition of agreements to arbitrate under state rules and the decisions in which federal circuits have recognized arbitration agreements applying state or foreign arbitrability law. This section will also address two Supreme Court decisions, *Kaplan* and *Mastrobuono*, which may point to the reasoning that the Supreme Court would apply in determining whether or not parties have contracted to apply non-federal arbitrability law. Finally, this section will address the interpretation of arbitration clauses, including the narrow interpretation adopted by the Ninth Circuit and the broad interpretation adopted by several other federal circuits.

A. Arbitration Agreements Enforced Containing State or Foreign Choice of Law Provisions

The Supreme Court has recognized the ability of parties to contract for application of state rules of arbitration and federal circuit courts have recognized the ability of parties to contract for application of both state and foreign rules of arbitration. In *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*,[32] the Supreme Court held that parties may contract for state arbitration rules to govern disputes subject to arbitration, even if the Federal Arbitration Act ("FAA") would have preempted the rules contracted for in the agreement.[33] In *Volt*, the parties entered into an agreement for the installation of electrical conduits at Stanford University in California.[34] The agreement included an arbitration clause for "all disputes . . . arising out of or relating to this contract or the breach thereof" and a choice of law provision stating, "[t]he Contract shall be governed by the law of the place where the project is located."[35] The Court found that the choice of law provision incorporated the California Rules of Arbitration to govern every dispute subject to arbitration, even though the dispute pertained to interstate commerce, an area the FAA traditionally governed.[36] The Court stated that although the FAA

30. *Id.*

31. "Arbitrability law" is a term of art used to refer to whether a dispute is subject to arbitration. Whether a dispute is arbitrable may depend on national law establishing a court's jurisdiction over a particular dispute and laws or rules relating to arbitration itself. Stavros Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori* 101 (Queen Mary University of London, School of Law Legal Studies Research Paper No. 21/2009).

32. 489 U.S. 468 (1989).

33. *Id.* at 470.

34. *Id.*

35. *Id.*

36. *Id.* at 472.

preempts *conflicting* state law, the FAA does not prevent the parties from agreeing to arbitrate under rules that are different than those established in the FAA.[37] In holding that California state arbitration law applied, the Supreme Court recognized the importance of party autonomy in contracting for state arbitration law and denied preclusive effect of the FAA where a contract states otherwise.[38]

Ultimately, the Court determined that choice of law provisions will be enforced in an agreement to arbitrate under non-federal rules of arbitration.[39] The Court also cited a key provision of the FAA which stated that "arbitration proceed in the manner provided for in [the parties'] agreement."[40] Although parties may not use state law to prevent enforceability of arbitration clauses, the Court recognized that the FAA does not require parties to adhere to a specific set of rules pertaining to arbitration.[41] In recognizing the ability of parties to contract for state rules of arbitration, the Supreme Court laid the groundwork to honor arbitration agreements containing foreign rules of arbitration, as both state and foreign rules of arbitration fall into the category of non-federal law.[42]

In addition to the Supreme Court's recognition of parties' ability to contract for state rules of arbitration in cases traditionally governed by the FAA, federal circuits have also recognized the ability of the parties to use state or foreign law in cases that are governed by the FAA.[43] In *Ford v. Nylcare Health Plans*,[44] the Fifth Circuit considered whether the Texas General Arbitration Act governed the arbitrability of the claim when the FAA also covered the scope of the arbitration agreement.[45] The dispute in *Ford* arose out of a contract between a physician and a Health Management Organization ("HMO").[46] The physician agreed to provide medical services to the HMO's patients, and in exchange, the HMO would compensate the physician.[47] The agreement contained an arbitration clause stating that "any claim must be settled 'in accordance with the Texas General Arbitration Act.'"[48] The contract also stated that the "agreement [was] subject to arbitration under the Texas General Arbitration Act."[49] When the physician brought a false

37. *Id.* at 479.

38. *Volt Info. Scis.*, 489 U.S. at 479.

39. *Id.* at 472. The Supreme Court in *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth* also dealt with the issue of arbitrability and foreign choice of law clauses. *Mitsubishi Motor*, 473 U.S. 614 (1985). Mitsubishi and Soler Chrysler-Plymouth entered into a car sales agreement with a clause providing for disputes to be settled by arbitration in Japan using the rules set forth by the Japan Commercial Arbitration Association. *Id.* at 617. The Court did not reach the issue of whether the parties could contract to apply Japanese arbitration rules because the Court found that the anti-trust claims were subject to arbitration under the American Arbitration Act. *Id.* at 627.

40. *Volt Info. Scis.*, 489 U.S. at 474-75; 9 U.S.C. § 4 (2012).

41. *Volt Info. Scis.*, 489 U.S. at 476.

42. *See generally*, Ronald C. Peterson, *International Arbitration Agreements in United States Courts*, DISP. RESOL. J., Feb. 2000, at 47.

43. *See* Ford v. Nylcare Health Plans, 141 F.3d 243 (5th Cir. 1998); Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004); In re Oil Spill by Amoco Cadiz, 659 F.2d 789 (7th Cir. 1981).

44. 141 F.3d 243 (5th Cir. 1998).

45. *Id.* at 248.

46. *Id.* at 245.

47. *Id.*

48. *Id.* at 246.

49. *Ford*, 141 F.3d at 246.

advertising and deceptive practices claim against the HMO, the two parties disagreed over the arbitrability of the claims.[50]

The court held that the agreement, on its face, pointed to the Texas General Arbitration Act as the choice of law for arbitration, including its scope.[51] Given the totality of the circumstances, including the fact that no other provision expressly stated that the arbitrability of the dispute would not be governed by Texas law, and further that Texas law itself provided rules on the scope of arbitration clauses, the court determined that Texas law governed the arbitrability of the claim.[52] After applying Texas law, the court found that the claims did not arise out of the agreement, and therefore, the physician could proceed to litigate the claims.[53] The Fifth Circuit also pointed to the Supreme Court's decision in *Volt*, noting that if the Supreme Court held that parties may agree to the rules of arbitration, parties may also choose the law that determines the scope of arbitration.[54]

The Second Circuit has also recognized that parties may contract to apply foreign arbitrability law. In *Motorola Credit Corp. v. Uzan*,[55] the Second Circuit held that the dispute between Motorola and Uzan was not arbitrable under Swiss law, which the parties had agreed to apply in a sales contract containing an arbitration clause.[56] Uzan, the defendant, argued that the FAA should be applied to the dispute pertaining to misrepresentation and false claims of kidnapping.[57] Uzan relied solely on the notion that the FAA ensured uniform arbitrability law.[58] The court rejected this argument, noting that if parties chose the law to govern the arbitrability of the dispute, the choice would be honored to enforce the agreement and avoid forum shopping.[59]

The *Uzan* court applied the Swiss choice of law clause to the arbitrability issue, even though the clause did not specifically state that Swiss law determined the scope of the arbitration clause.[60] The court reasoned that because Swiss arbitration law dictates that arbitration is only binding on parties bound by the contractual agreement, the dispute was not arbitrable.[61] The claims against Uzan involved parties other than Motorola and Uzan, the only two parties who had entered into the contractual agreement containing the Swiss choice of law clause.[62] The Second Circuit also cited the Supreme Court's decision in *Volt* where the

50. *Id.* The HMO wanted to arbitrate the claims, while the physician had organized a class action against the HMO. *Id.*

51. *Id.* at 249.

52. *Id.* The scope of the arbitration agreement is another way of phrasing whether a dispute is subject to arbitration, or namely, the arbitrability of the dispute. *Id.*

53. *Id.* at 252.

54. *Ford,* 141 F.3d at 248 (citing Volt Info. Sys., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989)).

55. 388 F.3d 39 (2d Cir. 2004).

56. *Id.* at 65.

57. *Id.* at 44, 51.

58. *Id.* at 51.

59. *Id.* The court expressed concerns over forum shopping in choosing to override the choice of law the parties agreed to have binding on the dispute. The court believed that choice of law clauses were the only way to ensure uniform interpretation among two parties entering into an agreement, each from different countries. *Id.*

60. *Motorola Credit Corp.*, 388 F.3d at 50.

61. *Id.* at 51-52.

62. *Id.* at 52-53.

Court emphasized the importance of honoring a choice of law agreement.[63] By recognizing the parties' ability to contract for foreign arbitrability law, the Second Circuit has also extended the Supreme Court's reasoning in *Volt*, where the Court upheld state choice of law provisions in arbitration agreements.

Similarly, the Court of Appeals for the Seventh Circuit has applied English arbitrability law to a party's agreement to arbitrate under the rules of English salvage law.[64] *In re Oil Spill*involved a crude oil carrier owned by Amoco that suffered a steering failure at sea.[65] The owner of a salvage tug, the Pacific, entered into an agreement with Amoco to rescue the carrier, and thereafter attempted to gain control of the carrier by attaching a tow line.[66] The Pacific's rescue attempt proved unsuccessful when the carrier ran aground and split apart.[67] Subsequently, Amoco claimed negligence against Bugsier, the owner of the Pacific.[68] The court resolved the dispute by mandating arbitration under the rules of English salvage law, as stated inthe terms of the rescue agreement.[69] The agreement contained an arbitration clause for "any difference arising out of this agreement" and included a choice of law clause providing for English salvage law.[70] The agreement, however, did not specifically state that English salvage law governed the scope of the arbitration clause.[71] The court reasoned that the claim alleged against Bugsier pertained to the rescue attempt, which fell under the agreement and related to the subject matter of the arbitration clause.[72] Since English salvage law corresponded to the disputes subject to arbitration, the parties proceeded to arbitration.[73]

The Supreme Court has recognized the ability of parties to contract for state rules of arbitration and federal circuit courts have recognized the ability of parties to contract for both state and foreign arbitration law. The Supreme Court has not, however, specifically recognized the ability of parties to contract for foreign arbitrability law.

B. Interpreting Whether Non-Federal Arbitrability Law Applies

Courts have recognized the ability of parties to contract for arbitration agreements that apply state or foreign arbitration law during arbitration proceedings, but in determining whether the choice of law applies to the arbitrability of the dispute, the Supreme Court has not directly addressed the issue.[74] Two cases

63. *Id.* at 51 (citing Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

64. In re Oil Spill by the "Amoco Cadiz" Off the Coast of France March 16, 1978, 659 F.2d 789, 793-94 (7th Cir. 1981).

65. 659 F.2d 789, 790-91 (7th Cir. 1981).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 795.

70. *In re Oil Spill*, 659 F.2d at 791-92.

71. *Id.*

72. *Id.* at 794.

73. *Id.* at 796.

74. Federal courts have addressed the issue. *See* Ford v. Nylcare Health Plans, 141 F.3d 243, 248 (5th Cir. 1998) (stating that the Texas arbitration choice of law clause determined that the parties intended the state law to apply to the "scope of the arbitration."); *but c.f.* Becker Autoradio U.S.A., Inc.

point to the reasoning that the Supreme Court could apply when the issue is whether or not parties have adequately contracted to apply non-federal arbitrability law.[75] First, the Court has stated how other courts should interpret whether the parties have agreed to arbitrate the question of arbitrability.[76] Second, the Court has held that separate, general choice of law clauses[77] do not determine the applicable arbitrability law.[78] In *First Options of Chicago, Inc. v. Kaplan*,[79] the Supreme Court applied principles of contract interpretation to determine whether an arbitration clause is sufficient in scope to allow parties to arbitrate the question of arbitrability.[80]

In the dispute before the Court in *Kaplan*, Kaplan and First Options disagreed over whether the arbitrator should determine the whether the dispute was arbitrable.[81] The arbitration agreement, silent on the issue, limited the claims subject to arbitration.[82] In determining whether the arbitrator determined arbitrability, the Court proceeded cautiously, noting that parties cannot be forced arbitrate issues outside of the scope of the arbitration clause.[83] The Court stated that subsequent courts faced with the same issue should not interpret silence or ambiguity as dispositive of arbitrability.[84] The Court noted that the effect would be to force parties to arbitrate an issue that they may have thought a court of law would decide, especially since the traditional role of the court included deciding the arbitrability of the dispute, not an arbitrator.[85] Further, the Court noted, no assumption should be made that parties have agreed to arbitrate the question of arbitrability unless "clear and unmistakable evidence" is present to show otherwise.[86]

The Court in *Kaplan* decided that silence or ambiguity in a general arbitration agreement requires the interpreting court to adopt a presumption against arbitrating the question of arbitrability, as opposed to the usual presumption in favor of arbitration.[87] The Court reasoned that the presumption is against arbitrating the question of arbitrability because the courts determine whether a dispute is subject to arbitration or a court proceeding.[88] "Clear and unmistakable evidence," however, can overcome the presumption.[89] Because the Supreme Court has required

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v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978) (holding that general choice of law arbitration clauses are not enough to override the application of federal arbitrability law).

75. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Mastrobuono v. Shearman Lehman Hutton, Inc., 514 U.S. 52 (1995).

76. *See infra* note 81.

77. Separate, general choice of law clauses are found in a contract that also contains an arbitration clause. The issue is whether the separate, general choice of law clause is sufficient in determining the choice of law to be used during arbitration and in determining the arbitrability of the dispute. *See infra* note 83.

78. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63-64 (1995).

79. 514 U.S. 938 (1995).

80. *Id.* at 944.

81. *Id.* at 941. Whether the arbitrator would determine if the dispute is subject to arbitration is the issue of arbitrating arbitrability. *Id.*

82. *Id.* at 946.

83. *Id.* at 945.

84. *First Options*, 514 U.S. at 945.

85. *Id.*

86. *Id.* at 944.

87. *Id.* at 944-45.

88. *Id.*

89. *Id.*

"clear and unmistakable evidence" that parties agreed to arbitrate the question of arbitrability,[90] the Supreme Court may require the same standard to be applied in cases concerning whether or not foreign arbitrability law has been sufficiently contracted for, especially given the presumptive role of federal arbitrability law.

The Supreme Court has also determined that including a general choice of law clause within a contract will not determine the arbitrability law to be applied.[91] A general choice of law clause in a contract is a clause separate from the arbitration clause.[92] The choice of law clause will broadly refer to a particular law as governing the entire contract.[93] The Supreme Court held in *Mastrobuono v. Shearson Lehman Hutton, Inc.*[94] that federal courts should not read a general state choice of law clause in a contract as applying the state's law of arbitrability.[95] The parties in *Mastrobuono* agreed to a securities trading contract that stated New York law governed the entire agreement.[96] The agreement also contained an arbitration clause, separate from the choice of law clause, providing that "any controversy" was subject to arbitration.[97] In considering the interplay of the two clauses, the Court applied contract interpretation principles to reach its conclusion that although New York law governed the contract, New York law did not determine the arbitrability of punitive damages, the issue in dispute.[98] Because the general choice of law provision simply provided for New York law to govern disputes, the Court refused to automatically deem the provision as dispositive of the issue of arbitrability.[99]

The Court reasoned that choice of law clauses pertain to legal rights and duties the parties have agreed to, while the arbitration clause solely covers arbitration.[100] Noting that arbitrability of a dispute is a different legal concept than the substantive law used to determine the outcome of the dispute, the Court refused to apply New York law to determine arbitrability of the punitive damages issues.[101] Because the choice of law clause did not contain an express exclusion of the punitive damages issue from the scope of the arbitration clause, the court refused to read the provision as narrowing the scope of arbitrable issues to those arbitrable under New York law.[102] Given the ambiguity in determining arbitrability, the Court applied federal arbitrability law to determine the issues arbitrable under the agreement.[103] Although the Supreme Court declined to extend general choice of law clauses to determine the arbitrability law, the *Mastrobuono* decision leaves open the possibility that arbitration clauses may specifically state the law to be

90. *First Options,* 514 U.S. at 944-45.
91. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63-64 (1995).
92. For more information on choice of law clauses in contracts, *see* Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 282-83 (1993).
93. *Id.* at 246.
94. 514 U.S. 52 (1995).
95. *Id.* at 63-64.
96. *Id.* at 58-59.
97. *Id.* at 59.
98. *Id.*
99. *Id.* at 62.
100. *Id.* at 64.
101. *Id.* at 62, 64.
102. *Id.* at 62.
103. *Id.*

used in determining the scope of arbitration.[104] Together, the Court's decision in *Kaplan* and the Court's decision in *Mastrobuono* state that choice of law clauses in arbitration agreements must clearly state the law to be applied and the context in which the law will apply.[105]

C. Application of Federal Arbitrability Law

If parties have not contracted for non-federal arbitrability law, federal arbitrability law applies to determine the scope of arbitration.[106] Federal arbitrability law is split on whether the scope of arbitration is governed by a broad or narrow interpretation of the arbitration clause.[107] The Ninth Circuit relies on a narrow interpretation under common law principles of contract interpretation, as announced in *Mediterranean Enterprises*.[108] The issue in *Mediterranean Enterprises* formed from a construction contract containing an arbitration clause for "any dispute arising hereunder."[109] Mediterranean Enterprises contested the arbitration of issues independent from the contract, including conversion, quantum meruit, and conspiring to induce breach of contract.[110] The court found that the language of the clause "arising hereunder" should be narrowly construed and applied only to disputes "arising under the agreement."[111] The court noted that if parties intend to create a broad arbitration provision, the clause should include language similar to "arising out of or relating to" the contract.[112] Because of the narrow language used in the contract, the court held that Mediterranean's claims were outside of the contract and similarly were not arbitrable.[113]

The Ninth Circuit stated in *Tracer Research Corp. v. Environmental Services, Co.*[114] that narrowly written arbitration clauses will preclude issues falling outside of the scope of the clause from being subject to arbitration.[115] The parties contracted for a licensing and nondisclosure agreement, including a provision to arbitrate "any controversy or claim arising out of [this] Agreement."[116] Tracer alleged a tort claim against Environmental Services for misappropriation of trade secrets.[117] The court held that the tort claim, independent from the breach of the contract claim, could not be subject to arbitration under the scope of the agree-

104. *See Ford*, 141 F.3d at 26. The parties in *Ford* specifically stated that the "agreement is subject to arbitration under the Texas General Arbitration Act." *Id.* The *Ford* case provides an example of an agreement that states the law to be sued in determining the scope of arbitration. *Id.*

105. *Mastrobuono*, 514 U.S. at 62; *Kaplan*, 514 U.S. at 944-45.

106. Doulgas H. Yarn & Gregory Todd Jones, *Applicable Arbitration Law*, Ga. ADR Prac. & Proc. § 9:11 (3d ed).

107. *See* Mediterranean Enterprises v. Ssangyong Corp., 708 F.2d 1458, 1461 (9th Cir. 1983) (interpreting the scope of the arbitration agreement narrowly); *but c.f.* Gregory v. Electro-Mechanical Corp., 83 F.3d 382, 386 (11th Cir. 1996) (interpreting the scope of the arbitration agreement broadly).

108. Mediterranean Enterprises v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983); *see also* Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292 (9th Cir. 1994).

109. Mediterranean Enterprises v. Ssangyong Corp., 708 F.2d 1458, 1460-61 (9th Cir. 1983).

110. *Id.* at 1461.

111. *Id.* at 1463-64.

112. *Id.* at 1464.

113. *Id.* at 1465.

114. 42 F.3d 1292 (9th Cir. 1994).

115. *Id.*

116. *Id.* at 1293, 1295.

117. *Id.* at 1294.

ment.[118] The court also rejected the argument that the claim would not have occurred but for the parties' licensing agreement.[119] The court concluded that the parties had written the arbitration clause to narrowly include only those issues under the contract.[120]

Other circuits have disagreed with the Ninth Circuit's narrow interpretation of arbitration agreements using the "arising out of" language in favor of the federal presumption toward arbitration.[121] The Sixth Circuit has held that arbitration clauses requiring "any dispute arising out of" the agreement is subject to a broad interpretation, given the strong federal policy in favor of arbitration.[122] In *Highlands Wellmont Health Network*,[123] the dispute occurred over whether a fraudulent inducement claim related to the contract as whole, such that the dispute would be subject to the arbitration clause.[124] Wellmont, a health management organization subject to the claim, argued that the claim related to but did not arise out of the contract, and therefore, a narrow interpretation would require that the claim be resolved in court.[125] The court held that because there was a strong presumption toward arbitration and that a broad interpretation of the clause dictates that everything is subject to arbitration unless otherwise stated, the fraudulent inducement claim was subject to arbitration.[126]

The Eleventh Circuit has also rejected a narrow interpretation of arbitration clauses using the "arising hereunder" language because doubts about the scope of arbitration are said to be resolved in favor of the issue subjected to arbitration.[127] The dispute in *Gregory v. Electro-Mechanical Corp.*[128] occurred over whether tort claims arising from the agreement entered into were subject to the agreement's "arising hereunder" arbitration clause.[129] The court looked at the facts alleged in the complaint rather than the legal claims asserted to determine that the claims arose under the agreement.[130] The Eleventh Circuit, unlike the Ninth Circuit, adheres to a broad interpretation of arbitration agreements containing the "arising hereunder" or "arising under" language.[131]

The Second Circuit, which previously adopted a narrow scope of arbitration agreements using the "arising under" language,[132] is shifting toward a broader interpretation of similar language because of the federal policy favor of arbitra-

118. *Id.* at 1295.
119. *Id.*
120. *Id.*
121. *See* Highlands Wellmont Health Network v. John Deere Health Plan, 350 F.3d 568, 578 (6th Cir. 2003); Gregory v. Electro-Mechanical Corp., 83 F.3d 382, 386 (11th Cir. 1996).
122. Highlands Wellmont Health Network v. John Deere Health Plan, 350 F.3d 568, 578 (6th Cir. 2003). In *Volt*, the Supreme Court announced a federal policy in favor of arbitration. 489 U.S. 468, 475 (1989).
123. 350 F.3d at 575.
124. *Id.*
125. *Id.* at 576.
126. *Id.* at 577-78.
127. *See* Gregory v. Electro-Mechanical Corp., 83 F.3d 382, 386 (11th Cir. 1996).
128. 83 F.3d 382 (11th Cir. 1996).
129. *Id.*
130. *Id.* at 384.
131. *Id.*
132. *See* In re Kinoshita & Co., 287 F.2d 951, 953 (2d Cir. 1961) (holding a fraudulent inducement claim not arbitrable because the arbitration clause did not include broad language such as "relating to this contract" or "in connection with" the contract.)

tion.[133] Under its broad interpretation of arbitration clauses, the Second Circuit has recognized that all issues fall within the scope of arbitration unless the clause expressly states otherwise.[134] In *Ace Capital*, a dispute arose over whether a fraudulent inducement claim pertaining to a reinsurance contract was subject to arbitration when the scope of the arbitration clause limited arbitrable disputes to those under the reinsurance agreement.[135] The court held that the arbitration clause, which required arbitration of any dispute within the agreement, included the fraudulent inducement claim.[136] The court saw the arbitration clause as written broadly and without any limitation on the scope of the issues subject to arbitration.[137] The Second Circuit, in recognizing the growing federal policy toward arbitration, has broadly construed "arising under" language to favor arbitration.[138]

The Ninth Circuit has also begun a shift from precedent in favor of a narrow construction toward a broader construction of arbitration agreements. In *Simula, Inc. v. Autoliv, Inc.*,[139] the court held that arbitration clauses using the language "arising in connection with this agreement" were to be construed broadly and in favor of arbitrating all disputes related to the contract.[140] Like other circuits, the Ninth Circuit cited the increasing importance of the federal policy in favor of arbitration.[141] To date, *Simula* is the only case to veer from the circuit's precedent establishing a narrow construction of arbitration agreements.[142]

Although the Supreme Court and the Ninth Circuit have not determined whether or not parties may contract to apply foreign arbitrability law, and further what standard would determine whether non-federal arbitrability law has been contracted for, several decisions have provided guidance on the issue. First, the Supreme Court has recognized that parties may contract to apply state rules of arbitration, even when the FAA governs the dispute.[143] Other federal circuits have recognized the parties' ability to agree to apply state or foreign rules of arbitration, including arbitrability law.[144] This recognition does not rule out the possibility that parties may contract to apply foreign arbitrability law. Second, the Supreme Court held that parties must clearly and unmistakably state in an agreement to arbitrate that the arbitrator determines arbitrability, as silence on the issue is not enough.[145] The Court has also held that general choice of law clauses do not determine the arbitrability law to be applied.[146] Together, these two decisions imply

133. *See* Ace Capital Re Overseas Ltd. v. Central United Life Ins. Co., 307 F.3d 24, 26 (2d Cir. 2002).
134. *Id.* at 29.
135. *Id.* at 26.
136. *Id.* at 34-35. *See also Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967) (holding that a fraudulent inducement claim related to an agreement is generally covered by an arbitration clause using the language "arising out of or relating to this agreement.").
137. *Ace Capital Re Overseas Ltd.*, 307 F.3d at 34-35.
138. *Id.* at 33.
139. 175 F.3d 716 (9th Cir. 1999).
140. *Id.* at 718.
141. *Id.* at 719.
142. *See Mediterranean Enterprises*, 708 F.2d at 1461; *Tracer Research Corp.*, 42 F.3d 1292.
143. *See supra* note 39.
144. Dr. Kenneth Ford v. NYLCare Health Plans of Gulf Coast, Inc., 141 F.3d 243, 248 (5th Cir. 1998).
145. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995).
146. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995).

that parties wishing to apply non-federal arbitrability law must clearly state the applicable law.

Finally, if parties have not contracted for non-federal arbitrability law, federal arbitrability law is split on whether the scope of arbitration is governed by a broad or narrow interpretation of the arbitration clause.[147] Until *Cape Flattery*, the issue of contracting to apply foreign arbitrability law seemed unclear; however, in its holding, the court announced principles of contract interpretation in reliance on the reasoning of the Supreme Court in similar cases and on Ninth Circuit precedent.[148]

IV. INSTANT DECISION

In *Cape Flattery Ltd. v. Titan Maritime, LLC*, the United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling and held that when parties entered into a written contract agreeing arbitrability would be governed by non-federal arbitrability law, courts should enforce the agreement as written only if there is "clear and unmistakable evidence" the contracting parties intended to use non-federal law.[149] Because the agreement entered into between Cape Flattery and Titan Maritime established that English arbitration law applied but did not present "clear and unmistakable" evidence that the parties intended to use English arbitrability law, federal arbitrability law applied.[150] The court further held that federal arbitrability law construed the agreement's "any dispute arising under" arbitration clause narrowly and not inclusive of the tort claim brought by Cape Flattery.[151] The Ninth Circuit began by addressing the dispositive issue of whether parties can contract to apply foreign arbitrability law.[152] If the parties could not do so, then the case would be resolved by federal arbitrability law, while if the parties could do so, the issue would require further analysis.[153]

In concluding that courts should enforce a foreign arbitrability clause that parties have expressly provided for in a contract, the *Cape Flattery* court relied on the Supreme Court's decision in *Volt Information Science, Inc. v. Board of Trustees*.[154] The court pointed to the Supreme Court's emphasis on the fact that the FAA does not require a particular set of rules to be used for arbitration.[155] In *Volt*, the Supreme Court held that parties could contract to apply the California Arbitration Act, a state law.[156] Titan Maritime's argument guided the court in adopting the Supreme Court's reasoning in *Volt*.[157] Titan Maritime argued that if the Supreme Court enforced parties' agreements to use non-federal rules of arbitration,

147. *See supra* note 109.
148. Cape Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914, 921 (9th Cir. 2011).
149. *Id.* at 924.
150. *Id.* at 921.
151. *Id.*
152. *Id.* at 918.
153. *Id.*
154. *Id.* at 919.
155. *Id.*
156. *Id.* (citations omitted).
157. *Id.*

then so too should the Ninth Circuit enforce the parties' agreements to use non-federal arbitrability law.[158]

In response to Titan Maritime's argument, Cape Flattery Ltd. raised the argument applied in *Mitsubishi Motors*.[159] Although the *Cape Flattery* court recognized the case, the court ultimately dismissed the reasoning as applied to this issue.[160] Neither party in the *Mitsubishi* case argued that Japanese arbitration law applied to determine arbitrability.[161] Thus, the court never addressed the issue of whether parties may agree to apply foreign arbitrability law.[162] The court also pointed to language in *Volt*, stating that a private agreement to arbitrate should be enforced according to its terms.[163] This language suggested to the *Cape Flattery* court that foreign arbitrability law may be contracted for in an agreement to arbitrate.[164]

Because parties may agree to have arbitrability governed by foreign arbitrability law, the court then grappled with the more complex question of how to decide whether the parties had sufficiently contracted to apply foreign arbitrability law.[165] The Supreme Court's reasoning in *First Options of Chicago, Inc. v. Kaplan*, where the court held that "clear and unmistakable evidence" is required to show that parties intended to arbitrate the question of arbitrability, guided the *Cape Flattery* court's decision in interpreting the contract.[166] *Cape Flattery* pointed to the principle of contract interpretation pronounced by the Supreme Court that no assumption should be made about arbitrating the question of arbitrability unless it is clear that the parties intended to submit the issue of arbitrability to the arbitrator.[167]

The *Cape Flattery* court also recognized that other courts have resolved similar issues related to arbitrability by adopting a "standard contractual analysis" and not a heightened burden as in *Kaplan*.[168] The court pointed to other decisions, which have stated that general choice of law clauses are separate from arbitration clauses, and thus not relevant in determining arbitrability law.[169] Courts that have recognized general choice of law clauses as separate from arbitration clauses have stated that the separate clauses are not enough to overcome "the overriding basis the FAA creates for applying federal arbitrability law."[170]

After examining the different approaches in interpreting whether parties have agreed to a choice of law for arbitrability of the dispute, the *Cape Flattery* court rested its decision on the reasoning of *Kaplan*.[171] First, the court agreed with the

158. *Id.*
159. *Cape Flattery*, 647 F.3d at 918-19. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 1985) (holding that federal arbitrability law applied even though the parties' agreement stated that Japanese arbitration law governed the dispute's arbitrability).
160. *Id.* at 919.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Cape Flattery*, 647 F.3d at 919-920.
166. *Id.* at 920.
167. *Id.*
168. *Id.*
169. *Cape Flattery*, 647 F.3d at 920; *see* ; (S.D. Cal. 2000); .
170. *Cape Flattery*, 647 F.3d at 920-21 (citing (S.D. Cal. 2000)).
171. *Cape Flattery Ltd.*, 647 F.3d at 921.

Supreme Court's concern that a general agreement does not specifically state the parties' true intent on a silent issue.[172] Second, the court analogized the issue in *Kaplan* ("who should decide arbitrability") with the present issue of "what law governs arbitrability?"[173] The court found the issue in *Kaplan* to be sufficiently similar to the present issue.[174] Consequently, the court stated that silence or ambiguity may not be construed to apply non-federal arbitrability law.[175] Otherwise, parties may be required to use foreign arbitrability law when they intended for federal arbitrability law to apply.[176] Following *Kaplan*, the court stated that without "clear and unmistakable evidence" to the contrary, courts should apply federal arbitrability law.[177]

The court next examined the agreement between Cape Flattery and Titan Maritime to see if the parties had in fact agreed to apply English arbitrability law.[178] The court found that the agreement did not state whether English arbitrability law applied.[179] The agreement referenced the English Arbitration Act, but the language did not provide "clear and unmistakable evidence" that English law also decided arbitrability of the tort claim against Titan Maritime.[180] As a result, the court applied federal arbitrability law to determine whether the case was subject to arbitration.[181]

The final question the court had to resolve pertained to the application of federal arbitrability law to the gross negligence claim filed against Titan Maritime.[182] The court relied on its own precedent in *Mediterranean* and *Tracer*.[183] In those cases, the Ninth Circuit held that using language such as "arising hereunder" or "any controversy or claim arising out of this Agreement" established a narrow interpretation of the arbitration agreement.[184] The *Cape Flattery* court concluded that the language used in the *Mediterranean* and *Tracer* cases was the same or similar to the language used in the agreement between Cape Flattery and Titan Maritime.[185] As a result, a narrow interpretation of the arbitration clause would determine its scope.[186] The court rejected Titan Maritime's argument that the presumption in favor of arbitration should override the *Mediterranean* and *Tracer* line of reasoning because the policy came about after *Mediterranean* and *Tracer*.[187] The adoption of a new federal policy is not an adequate basis, the court noted, for disregarding the decisions of *Mediterranean* and *Tracer*.[188]

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 922.
184. *Cape Flattery Ltd.*, 647 F.3d at 921 (citing Mediterranean Enterprises v. Ssangyong Corp., 708 F.2d 1458 (9th Cir. 1983); Tracer Research Corp. v. Nat'l Envtl. Servs. Co., 42 F.3d 1292 (9th Cir. 1994)).
185. *Cape Flattery Ltd.*, 647 F.3d at 922.
186. *Id.*
187. *Id.* at 922-923.
188. *Id.* at 923.

Titan Maritime also argued that a narrow interpretation of the agreement should be rejected because other circuits have construed the same language broadly.[189] The *Cape Flattery* court rejected this argument as well, noting that the Ninth Circuit's own precedent established in *Mediterranean* and *Tracer* is a far more convincing precedent to follow than out-of-circuit cases.[190] Titan Maritime also argued that the Ninth Circuit has restricted the importance of *Mediterranean* and *Tracer*.[191] The court stated that although the application of *Mediterranean* and *Tracer* is limited by the specific language in the agreement at issue, the cases should still be followed.[192]

Finally, in applying *Mediterranean* and *Tracer*, the court held that Cape Flattery could pursue the gross negligence claim filed against Titan Maritime in court.[193] The court pointed to the fact that a federal statute granted Cape Flattery authority to bring a civil action against any person responsible for damage under the statute.[194] Under the narrow interpretation of "arising under," the present dispute did not fall within the scope of the arbitration clause, and therefore the claim was not subject to arbitration.[195] Accordingly, the decision of the District Court of Hawaii was affirmed.[196]

V. COMMENT

The issues pertaining to arbitrability and choice of law had not been previously addressed by either the Supreme Court or the Ninth Circuit. These specific issues presented a challenge to the court in determining the appropriate application of foreign arbitrability law. In concluding that parties could contract to apply foreign arbitrability law, the court stood directly with the Supreme Court's reasoning in *Volt*.[197] There, the Supreme Court upheld party autonomy when it stated that the FAA permits parties to contract for and use state arbitration rules, even when the dispute is within the purview of the FAA.[198] The *Volt* decision laid the groundwork for the *Cape Flattery* court to recognize that parties may also contract to use foreign arbitrability law to determine the disputes subject to arbitration.[199] In determining the application of foreign arbitrability law, the Ninth Circuit created a new standard for drafting arbitration clauses.[200] This section will first examine the "clear and unmistakable" standard announced by the court and then will examine the court's use of precedent to interpret the arbitration agreement.

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 924.
194. *Id.*; 33 U.S.C. § 2709 (2012).
195. *Cape Flattery Ltd.*, 647 F.3d at 924.
196. *Id.*
197. Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989).
198. *Id.*
199. Volt, 489 U.S. 468; International Arbitration Agreements in United States Courts, DISP. RESOL. J., Feb. 2000, at 44, 49.
200. *Cape Flattery Ltd.*, 647 F.3d at 921.

A. The "Clear and Unmistakable" Standard

The Ninth Circuit properly extracted the *Kaplan* "clear and unmistakable standard" to determine whether the parties had sufficiently contracted to apply foreign arbitrability law in all disputes arising under the contract. The court concluded that although Cape Flattery and Titan Maritime expressly agreed to arbitrate disputes under English arbitration law, the parties had not sufficiently contracted to include English arbitrability law to govern whether the dispute was arbitrable.[201] Instead, the Ninth Circuit relied on federal arbitrability law because there was no "clear and unmistakable" evidence that the parties intended to apply English arbitrability law.[202] The Ninth Circuit adopted the "clear and unmistakable" standard by following the reasoning of the Supreme Court in *Kaplan*, where the court held that parties would be subject to arbitrating arbitrability if there was "clear and unmistakable" evidence that the parties wanted an arbitrator to decide whether a dispute was subject to arbitration.[203]

In following the reasoning of *Kaplan*, the Ninth Circuit analogized the dispute before the court—whether the parties had contracted to apply English arbitrability law—with the issue before the Supreme Court in *Kaplan*—whether the parties had agreed to subject the arbitrability determination to an arbitrator.[204] The *Cape Flattery* court properly extracted and applied the standard from *Kaplan*, which, according to Steven H. Reisberg, has been misapplied to arbitration jurisprudence.[205]

Reisberg asserted that the holding in *Kaplan* applied the "clear and unmistakable" standard to agreements where the issue was whether parties had contracted for the arbitrator to determine arbitrability, or generally, where the scope of arbitration was at issue.[206] However, courts have applied the standard to arbitrability in a different sense, namely to disputes over whether an arbitration agreement was valid and enforceable.[207] In situations involving the validity of the arbitration agreement, courts misapply the *Kaplan* standard by allowing the issue to be resolved by arbitrators when there is "clear and unmistakable evidence" the parties wanted the arbitrator to decide if the agreement was valid.[208] A proper *Kaplan* analysis, according to Reisberg, requires the court to validate the enforceability of the arbitration agreement, and then determine whether "clear and unmistakable evidence" exists to show that the parties wanted the arbitrator, not the court, to determine arbitrability of the claim.[209] In short, a proper *Kaplan* analysis applies the "clear and unmistakable standard" to the scope of a valid arbitration agreement, not to the agreement's validity.[210]

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201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*; *Kaplan*, 514 U.S. at 944.
205. Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT'L ARB. 159 (2009).
206. *Id.* at 176, 178.
207. *Id.* at 180-181.
208. *Id.*
209. *Id.* at 189.
210. *Id.*

The *Cape Flattery* court did not misapply the *Kaplan* analysis in announcing a new principle of arbitration jurisprudence; rather, the court used the standard to state how choice of law determined the scope of the arbitration agreement.[211] By adopting the "clear and unmistakable" standard, parties will be able to draft arbitration agreements that resolve the issue of choice of law in arbitrability. If the arbitrability issue has not been clearly stated within an arbitration clause, parties may also rely on a court to interpret the choice of law as applicable only to arbitration, not to arbitrability. The *Cape Flattery* court's holding that parties may contract to apply non-federal arbitrability law with "clear and unmistakable" evidence allows for greater predictability in resolving potential disputes and reorients future *Kaplan* analyses toward the general rule of law established: "clear and unmistakable" evidence determines the scope of a *valid* arbitration agreement.

B. Interpretation of Arbitration Clauses

The Ninth Circuit's decision to preserve a narrow interpretation of arbitration agreements using "arising under" language maintains uniformity of the law and well-known drafting principles for arbitration agreements. After concluding that Cape Flattery and Titan Maritime had not sufficiently contracted to apply English arbitrability law, the court had to interpret the arbitration clause to determine whether federal arbitrability law required that the claim proceed to arbitration.[212] The gross negligence claim, the Ninth Circuit stated, was not subject to arbitration because of the contractual language used to describe the arbitrable disputes.[213] Titan Maritime and Cape Flattery agreed to arbitrate any dispute "arising under" the agreement.[214] This, the court stated, meant that a narrow interpretation applied, as established by Ninth Circuit precedent in *Mediterranean* and *Tracer*.[215]

The *Cape Flattery* court could have decided to follow the growing trend of several other federal circuits, which hold that arbitration clauses should be construed broadly in favor of the presumption toward arbitration.[216] A broad interpretation of an arbitration clause means that the court will order arbitration of the dispute even if the clause is unclear on whether the dispute is subject to arbitration, and only clear language stating that the particular dispute is excluded from arbitration will make the claim non-arbitrable.[217] Even more recently, the Ninth Circuit eroded the narrow construction doctrine in favor of a broader interpretation of the arbitration clause.[218] The *Cape Flattery* court recognized that the growing presumption in favor of arbitration had arisen since the narrow construc-

211. *Cape Flattery Ltd.*, 647 F.3d at 921.
212. *Id.* at 924.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*; *but see* Highlands Wellmont Health Network v. John Deere Health Plan, 350 F.3d 568, 578 (6th Cir. 2003); Gregory v. Electro-Mechanical Corp., 83 F.3d 382, 386 (11th Cir. 1996). *See generally* Michael A. Hanzman, *Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Questions: An Often Overlooked Task*, FLA. B.J., Dec.1996, at 14, 22.
217. Hanzman, *supra* note 219.
218. *Simula, Inc. v. Autoliv, Inc.*175 F.3d 716, 726 (9th Cir. 1999). *See also* 1 Litigation of International Disputes in U.S. Courts § 7:26 (noting the Ninth Circuit's split regarding the interpretation of arbitration clauses).

tion precedent was established in *Mediterranean* and *Tracer*, but the court declined to disregard the precedent because of a new federal policy.[219]

Doak Bishop, based upon the narrow interpretation followed by the Ninth Circuit in *Mediterranean*, advised parties who are drafting or negotiating an arbitration agreement to consider the disputes they want subjected to arbitration and subjected to litigation.[220] To restrict the arbitrable issues to mere contractual disputes, a narrow arbitration clause is required; while keeping all potential issues within the realm of arbitration, including tort and statutory claims, requires a broad-form clause.[221] Bishop suggests "arising under" should be used for a narrow agreement, and "all disputes arising out of" should be used for a broad arbitration agreement.[222] Michael Hanzman recommends that arbitration provisions should be drafted to clearly state that parties have chosen to arbitrate all claims arising from the contract or only claims referring to the contract.[223] Although the Ninth Circuit refused to apply a broader interpretation of the arbitration clause to support the growing federal policy in favor of arbitration, the court maintained uniformity of the law by preserving the well-known drafting principles for arbitration agreements.[224] The *Cape Flattery* court has preserved the rule that "arising under" language will cause the provision to be construed narrowly, resulting in claims within the contract not subject to arbitration; whereas "arising out of" language will construe the clause broadly, ultimately resulting in almost all claims subject to arbitration.[225]

When future disputes arise, both parties and courts can rely on precedent to guide the resolution of the dispute. The decision to apply a narrow construction of the clause fits well with the court's view that federal arbitrability law applies unless "clear and unmistakable" evidence stated otherwise.[226] When taken together, a narrow interpretation of "arising under" language and the principle that parties must state the arbitrability law to be used if intending non-federal law, parties will be able to determine, beforehand, whether a dispute is subject to arbitration or a court proceeding. Additionally, parties will be able to determine the applicable law in each stage of the proceeding.

VI. CONCLUSION

The *Cape Flattery* decision reflects the reasoning of the Supreme Court in *Volt*, which recognized that parties may contract to apply state rules of arbitration even when the FAA governs,[227] but goes one step further and extends the principle

219. *Cape Flattery Ltd.*, 647 F.3d at 923.

220. Doak Bishop, *Drafting Arbitration Agreements in the International Arena*, 25 THE ADVOC. (Texas) 32, 34 (2003) (citing Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464-65 (9th Cir. 1983); In re Kinoshita & Co., 287 F.2d 951, 952 (2d Cir. 1961)).

221. Doak Bishop, *Drafting Arbitration Agreements in the International Arena*, 25 The Advoc. (Texas) 32, 34 (2003).

222. *Id.*

223. Michael A. Hanzman, *supra* note 219, at 14, 22.

224. *Id.*

225. *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 922 (9th Cir. 2011).

226. *Id.* at 921.

227. Volt Info Scis., Inc. v. Bd. of Trs. Of the Leland Stanford Junior Univ., 489 U.S. 468, 472 (1989).

to foreign arbitrability law. The Ninth Circuit did not, however, provide carte blanche to parties seeking to contract out of the federal forum entirely. The "clear and unmistakable" standard must be applied to determine whether parties have in fact applied non-federal arbitrability law to scope of the arbitration agreement. This heightened burden requires parties to explicitly state the arbitrability law to be used in an agreement to arbitrate, or else federal arbitrability law applies.

Ultimately, the "clear and unmistakable" standard established by the Ninth Circuit will signal to parties drafting arbitration agreements that merely identifying the choice of law for an arbitration proceeding will not establish the arbitrability law to be applied to the dispute. The Ninth Circuit's adherence to a narrow interpretation of arbitration agreements under federal arbitrability law will guide parties in drafting future agreements. Parties seeking to arbitrate all claims must include a broad-form arbitration clause, while parties seeking to arbitrate claims under the contract only must include a narrow-form arbitration clause. The *Cape Flattery* decision adds to arbitration jurisprudence by providing the clear and unmistakable standard for choice of arbitrability law in arbitration agreements.

KRISTEN SANOCKI