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One Minute Memo®

California Decision Highlights Risk Of Using Generic Choice-of-Law Clause In Agreements Requiring Arbitration

On October 9, 2012, the California Court of Appeal affirmed the denial of a motion to compel arbitration because the agreement's choice-of-law provision chose California law without also selecting applicable federal law and specifically the Federal Arbitration Act ("FAA"). Particularly for companies that often face consumer litigation involving multiple defendants, the case illustrates the importance of drafting choice-of-law provisions with arbitration in mind.

Mastick v. TD Ameritrade, Inc. involved three defendants: an accountant, an investment management company and a broker-dealer. The plaintiff had no arbitration agreement with the accountant, but she had agreed to arbitrate disputes with the investment management company before AAA and with the broker-dealer before FINRA. Unlike the FAA, the California Arbitration Act ("CAA") expressly permits courts to deny a petition to compel arbitration under certain circumstances where related litigation or other proceedings create a risk of conflicting rulings. *See* Cal. Civ. Proc. Code § 1281.2(c). Thus, when the investment management company sought to compel arbitration before AAA, the trial court denied the motion, finding that the CAA rather than the FAA applied based on the choice-of-law provision, and that inconsistent rulings could occur if a litigation and two arbitrations proceeded with respect to the same transaction. The Court of Appeal affirmed on the same grounds.

In light of *Mastick*, companies that use arbitration provisions and do business in California should revisit their choice-of-law provisions to ensure that they expressly reference federal law and the FAA, at least with respect to arbitration. In addition, *Mastick* is yet another example of a court denying an arbitration motion based on contract language outside the arbitration provision itself. In order to maximize the prospects for enforcing an arbitration clause, companies should review their entire agreement, not just the arbitration provision.

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