NINTH CIRCUIT COURT OF APPEALS ENFORCES ARBITRATION CLAUSE SAYING QUESTION OF ARBITRABILITY WAS FOR ARBITRATORS TO DECIDE

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In May 2007, the assets of seven Mastro's fine dining restaurants were sold. In connection with the sale, the selling entities and investors in those entities entered into an Asset Allocation Agreement, which provided for the allocation of the gross selling price among the selling entities. But that was not the only purpose of the Asset Allocation Agreement. It also included a broad covenant not to sue and a broad release of claims, known or unknown, arising from facts or events preceding the sale. Finally, Section 4 of the Asset Allocation Agreement contained the following arbitration clause: "If a dispute arises out of or relates to this Agreement, the relationships that result from this Agreement, the breach of this Agreement or the validity or application of any of the provisions of this Section 4, and, if the dispute cannot be settled through negotiation, the dispute shall be resolved exclusively by binding arbitration." (Emphasis added.)

A Las Vegas criminal defense lawyer named John Momot was an investor in three of the limited liability companies that sold their assets in the May 2007 sale. He signed the Asset Allocation Agreement. Despite the language of the arbitration clause, he filed suit against three of the Mastros in Nevada state court alleging a variety of claims arising out of their operation and management of the restaurant chain before the sale. The Mastros removed that case to the U.S. District Court in Las Vegas and moved to stay the case under Section 3 of the Federal Arbitration Act (9 U.S.C. § 3);

they also commenced an arbitration proceeding in Arizona and filed a petition in the U.S. District Court in Phoenix, Arizona under Section 4 of the Federal Arbitration Act to compel Mr. Momot to participate in that arbitration in Phoenix.

The federal judge in Nevada ruled that Mr. Momot's claims were not subject to arbitration and unilaterally issued an injunction terminating the arbitration proceeding. In light of that ruling, the federal judge in Arizona refused to compel Mr. Momot to arbitrate. The Mastros appealed both orders to the United States Court of Appeals for the Ninth Circuit. I represented the Mastros in both actions and appeals.

On June 22, 2011, the Ninth Circuit decided both appeals in favor of the Mastros. In a published opinion (*Momot v. Mastro*, __ F.3d __, 2011 WL 2464781 (9th Cir. June 22, 2011)), the Ninth Circuit held that the Asset Allocation Agreement "clearly and unmistakably indicates the parties' intent to arbitrate the question of arbitrability." The Court stated:

> Although gateway issues of arbitrability presumptively are reserved for the court, the parties may agree to delegate them to the arbitrator. The Supreme Court recently reaffirmed this principle in *Rent-A-Center, West, Inc. v. Jackson*, holding that courts must enforce the parties' "agreement to arbitrate threshold issues" regarding the arbitrability of their dispute, and may do so by staying federal litigation under section 3 of the FAA or compelling arbitration under section 4.

Id. at *5 (citations omitted). The Court held that such intent must be clearly and unmistakably expressed, but it concluded that the language used in Section 4 of the Asset Allocation Agreement was such a clear and unmistakable expression of intent.

> Because the parties' agreement clearly and unmistakably indicates their intent for the arbitrators to decide the threshold question of arbitrabililty, we hold that the district court erred in failing to stay the action under section 3 of the FAA and in enjoining the arbitration.

Id. at *6. The Ninth Circuit reversed the Nevada federal court and remanded with instructions to stay its proceedings and to dissolve the permanent injunction.

In a non-published Memorandum Decision issued the same day, the Ninth Circuit vacated the Arizona federal court's Order declining to compel Mr. Momot to arbitrate and remanded with instructions to grant the Mastros' motion to compel arbitration. *See Mastro v. Momot*, 2011 WL 2469548 (9th Cir. June 22, 2011).

These cases provide important and useful guidance for lawyers and others who draft arbitration clauses in their commercial agreements. If, in fact, they wish to remove from the courts the issue of whether a claim or issue is subject to arbitration under the agreement, and authorize the arbitrators to decide that threshold issue, they may now safely use the language in the Asset Allocation Agreement – at least in the Ninth Circuit. That is, the agreement should provide that the validity or application of any of the provisions of the arbitration clause itself are subject to mandatory arbitration.