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Horizontal Uniformity and Vertical Chaos: State Choice of Law Clauses and Preemption under the Federal Arbitration Act

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Horizontal Uniformity and Vertical Chaos: State Choice of Law Clauses and Preemption Under the Federal Arbitration Act

Security Insurance Co. of Hartford v. TIG Insurance Co.[1]

I. INTRODUCTION

Although the goal of arbitration is speedy and efficient resolution of disputes, these goals may be frustrated by judicial interpretation of choice of law provisions in commercial agreements.[2] There is uncertainty as to the law that a court will apply in deciding a motion to stay or otherwise interfere with an arbitration.[3] There is further uncertainty surrounding whether the law governing arbitration is the Federal Arbitration Act (FAA), the arbitration law of the state where the arbitration is taking place, or that of the state mentioned in a choice of law clause.[4] The federal courts have adopted conflicting standards so that similarly situated litigants are treated differently, solely based on where the initial suit was filed.[5] The United States Supreme Court has addressed the issue in two seminal cases, *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*,[6] and *Mastrobuono v. Shearson Lehman Hutton.*[7] The federal circuits have construed the mandates of *Volt* and *Mastrobuono* differently.[8] This Note explores the impact that choice of law clauses in commercial agreements have on the strong federal policy favoring arbitration as construed by the federal courts.

1. 360 F.3d 322 (2d Cir. 2004).
2. *Id.* at 323.
3. *Id.*
4. *Id. See generally* Zhaodong Jiang, Note, *Federal Arbitration Right, Choice of Law Clauses and State Rules and Procedure*, 22 SW. U. L. REV. 159, 168-189 (1992).
5. *See* Action Indus., Inc. v. United States Fid. & Guar. Co., 358 F.3d 337, 343 (5th Cir. 2004); Porter Hayden Co. v. Century Indem. Co., 136 F.3d 380, 382-83 (4th Cir. 1998); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 937-38 (6th Cir. 1998); PaineWebber, Inc. v. Elahi, 87 F.3d 589, 594 (1st Cir. 1996).
6. 489 U.S. 468 (1989) (holding that the FAA did not preempt California procedural rules because the California Court of Appeals made an unreviewable factual determination that the parties had agreed to it).
7. 514 U.S. 52 (1995) (holding that enforcement of a state rule in a choice of law clause must be harmonized through the application of substantive federal policy favoring arbitration).
8. *See* UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998) (holding that a choice of law clause should not be interpreted as displacing the FAA absent a clear expression of such intent); Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 323 (2d Cir. 2004) (holding that there was no inherent conflict between the parties' decision to submit all issues to arbitration and their adoption of a choice of law clause that permitted courts to preempt the decisions of arbitrators).

II. FACTS & HOLDING

In 1998, TIG Insurance Company (TIG) entered into an agreement (Reinsurance Agreement) with Security Insurance Company of Hartford (Security), under which Security agreed to indemnify TIG for a portion of TIG's liability arising out of certain worker's compensation insurance policies.[9] The Reinsurance Agreement contained an arbitration clause[10] and a choice of law clause, which designated California state law as governing the agreement.[11] Security subsequently entered into another contract (Retrocession Agreement) with Trustmark Insurance Company (Trustmark) "whereby Trustmark agreed to reinsure Security for 100% of the risk that Security had assumed from TIG under the Reinsurance Agreement."[12] The Retrocession Agreement did not contain an arbitration clause.[13] Both contracts were negotiated by WEB Management (WEB), who acted as Security's agent in both deals.[14]

In November 2001, "Trustmark informed Security that [it believed] TIG had defrauded WEB in connection with the Reinsurance Agreement," thereby defrauding Trustmark under the terms of the Retrocession Agreement.[15] Trustmark suggested that Security rescind the Reinsurance Agreement, but failed to offer Security any proof of TIG's alleged fraud.[16] On November 26, 2001, Trustmark informed Security that it was rescinding their Retrocession Agreement.[17]

Security subsequently filed a complaint against Trustmark in federal district court in Connecticut, seeking a declaration that Trustmark was not entitled to rescind and that Trustmark remained liable for all losses covered by the agreement.[18] Trustmark, in turn, filed a third party complaint against TIG on May 3, 2002, alleging that TIG had defrauded WEB during the Reinsurance Agreement negotiations, and fraudulently induced the Retrocession Agreement between Trustmark and Security.[19] After Security suspended further payments to TIG

9. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 323 (2d Cir. 2004).

10. *Id.* The arbitration clause stated: "As a condition precedent to any right of action hereunder, any irreconcilable dispute between parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting a place [sic] to be agreed by the board." *Id.* at 303 n.1.

11. *Id.* The choice of law clause (referred to by the parties as the "governing clause") read as follows: *"This Agreement shall be governed by and construed according to the laws of the state of California*, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, the domiciliary state's laws shall prevail." *Id.* at 323 n.2 (emphasis added).

12. *Id.* at 324. The coverage periods for the Reinsurance agreement and the Retrocession Agreement covered the same twenty four month period beginning January 1, 1999. Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 2002 U.S. Dist. LEXIS 27348, at *2 (D. Conn. 2002).

13. *Trustmark Ins. Co.*, 2002 U.S. Dist. LEXIS 27348, at *2.

14. *Id.* WEB "is an underwriting agency that serves as a Managing General Underwriter" (MGU) to other insurers. *Id.* at *1. An MGU underwrites, administers, and manages a portfolio on behalf of a principal. *Id.* at *2. In early 1997, WEB became MGU for Trustmark; WEB also became MGU for Security on December 1, 1998. *Id.*

15. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 324 (2d Cir. 2004).

16. *Id.*

17. *Id.*

18. *Id.*

19. Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 283 F. Supp. 2d 602, 604 (D. Conn. 2003). Trustmark further alleged that the Reinsurance Agreement constituted an attempt by TIG to transfer

based on Trustmark's allegations of fraud, TIG invoked the arbitration clause in the Reinsurance Agreement.[20]

Security proposed that Trustmark undertake the defense of TIG's claims against Security and suggested resolving all pending issues in arbitration.[21] Security and Trustmark failed to reach an agreement and the arbitration between Security and TIG continued.[22] TIG and Security selected arbitrators and umpires, and submitted positional statements to the arbitration panel.[23] The arbitral panel adopted a briefing and hearing schedule that provided for an evidentiary hearing in New York to begin on August 11, 2003.[24] Prior to the evidentiary hearing, Security requested the arbitration proceedings cease, pending the federal litigation.[25] The panel denied Security's motion.[26]

Security also requested that the district court stop the arbitration until the litigation had been completed.[27] Security argued that while the Reinsurance Agreement fell under the scope of the FAA, by including the California choice of law provision, Security and TIG evinced their intent to have California procedural and substantive law govern their dispute.[28] Security argued that a stay was warranted because the Reinsurance Agreement's choice of law provision incorporated California's Civil Procedure Code as well as California's substantive law.[29] Section 1281.2(c)(4) authorizes the stay of arbitration where one of the parties is also a party to a pending lawsuit arising out of the same transaction because there is a possibility of conflicting rulings.[30] TIG opposed the motion on the basis that a

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tens of millions in losses from its failing worker's compensation business to its reinsurers, Security and Trustmark. *Id.*

20. *Id.*

21. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 324 (2d Cir. 2004).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. CAL. CIV. PROC. CODE § 1281.2 (West 2004). The code provides:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

. . . .

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition

. . . .

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the court action or special proceeding.

general choice of law provision was insufficient as a matter of law to incorporate state procedural rules and that the United States Supreme Court's decision in *Mastrobouno* compelled a different result.[31]

The district court granted Security's motion and issued an order preventing the arbitration from proceeding.[32] The court determined that the United States Supreme Court's decision in *Volt* resolved the issue of whether the California statute was preempted by the FAA.[33] The court reasoned that because the interpretation of contracts is usually an issue of state law, and state law provides the tools by which the intent of the parties was ascertained, the case is controlled by California contract interpretation principles.[34]

The district court also rejected TIG's contention that the Supreme Court's decision in *Mastrobuono* required a different result, highlighting that *Mastrobuono* turned on the application of New York law, not California law, and that the New York procedural rule was hostile to arbitration.[35] The court noted that in *Volt*, California's section 1281.2, did not, as a matter of law, undermine the goals and policies of the FAA, but instead fostered the federal policy favoring arbitration.[36]

The Second Circuit affirmed the district court decision and held that the FAA did not preempt the California rule. The court concluded that the choice of law clause providing that the parties' agreement would be "governed by" California law incorporating California procedural rules of arbitration, and that Security's participation in preliminary arbitration proceedings did not waive its right to seek a stay in arbitration proceedings.[37]

III. LEGAL BACKGROUND

Before Congress passed the Federal Arbitration Act (FAA),[38] courts treated contractual provisions to arbitrate disputes with hostility.[39] The FAA curtailed judicial hostility to arbitration agreements within contracts involving commerce, declaring those agreements valid and enforceable.[40] Section 2 of the FAA describes the proper scope and application of the FAA's provisions and explicitly requires that courts enforce arbitration clauses in contracts involving interstate commerce.[41] Section 4 of the FAA requires courts to enforce arbitration agreements in the manner provided by the parties' agreement.[42]

Id.

31. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2nd Cir. 2004).

32. *Id.*

33. Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 283 F. Supp. 2d 602, 605 (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989)).

34. *Id.*

35. *Id.*

36. *Id.* at 610 (quoting *Volt*, 489 U.S. at 470-72).

37. *TIG Ins.*, 360 F.3d at 328-29.

38. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2004)).

39. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). The FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by the American courts . . . ." *Id.*

40. 9 U.S.C. § 2 (2004).

41. *Id. See also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (holding that the FAA creates "a body of federal substantive law of arbitrability, applicable to any

After the passage of the FAA, states enacted their own arbitration statutes recognizing the validity of arbitration agreements.[43] However, many of those state statutes contain restrictions on arbitration that are not present in the FAA.[44] Some of those restrictions are substantive, and exclude certain types of disputes from arbitration,[45] while others are procedural and require that certain conditions be met for an arbitration agreement to be enforceable.[46] The California statute at issue in *TIG Insurance* is like those of some jurisdictions which permit a permanent or temporary stay of arbitration if related disputes involving parties not subject to the arbitration agreement are being litigated.[47]

In a series of cases, the United States Supreme Court addressed the extent to which the FAA preempts restrictive state arbitration laws in the absence of a choice of law clause.[48] Those cases held that "state as well as federal courts are bound by the provisions of the FAA concerning the [validity and] enforceability of arbitration agreements . . . involv[ing] commerce."[49] Further, those cases articulate Congressional intent that the FAA applies to all contracts within its power

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arbitration agreement within the coverage of the Act"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967) (the FAA is a body of substantive law promulgated under the Commerce Clause that governs arbitration clauses in transactions involving interstate commerce).

42. 9 U.S.C. § 4 (2004). The FAA requires that questions of arbitrability be addressed with a healthy regard for the federal policy favoring arbitration and that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration. *Moses H.*, 460 U.S.at 24-25. *See also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (stating "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability according to their terms, of private agreements to arbitrate"); Southland Corp. v. Keating, 465 U.S. 1 (1984) (stating that the FAA is a substantive statute promulgated under the Commerce Clause, and establishes the supremacy of the FAA over arbitration agreements); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996) (articulating the principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which has not so agreed to submit").

43. Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect on the Federal Arbitration Act: Recognizing the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 37 (1997); Jessica Thrope, Comment, *A Question of Intent: Choice of Law*, 54 DISP. RESOL. J. 16 (1999).

44. Diamond, *supra* note 43, at 38. *See, e.g.*, MO. REV. STAT. § 435.350 (2004); MONT. CODE ANN. § 27-5-114 (1995); KAN. STAT. ANN. § 5-401 (1995).

45. Diamond, *supra* note 43, at 37-38. *See, e.g.*, IND. CODE ANN. § 34-57-2-22 (Michie 1999); MONT. CODE ANN. § 25-5-114(2)(b) (1995) (excluding arbitration in transactions for goods or services in which the consideration was $5000 or less); N.Y. GEN. BUS. LAW. § 399-c.2 (McKinney 1996).

46. Diamond, *supra* note 43, at 38. *See e.g.*, CAL. CIV. PROC. CODE § 1295 (West 1982) (mandating arbitration agreements concerning health care claims be in bold print and state that the parties are waiving their right to a jury trial); MO. REV. STAT. § 435.460 (2004) (requiring arbitration clause be in ten point capital letters above or adjacent to the signature line on the first page of a contract).

47. Diamond, *supra* note 43, at 38 (explaining that some jurisdictions permit a stay of arbitration where related disputes outside the scope of arbitration agreement are being litigated). *See e.g.* CAL. CIV. PROC. CODE § 1281.2(c) (West 1982); IND. CODE § 34-57-2-3 (1986).

48. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Southland Corp. v. Keating, 465 U.S. 1 (1984); Perry v. Thomas, 482 U.S. 483 (1987); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996).

49. Thomas A. Diamond, *supra* note 43, at 39. *See also* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 271-72 (1988) (noting the Supreme Court's uncompromising stand on the preemptive effect of the FAA on conflicting state arbitration laws); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1309 (1985); Janet L. Herold, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes*, 54 MISS. L.J. 571 (1984).

to regulate.[50] Thus, no state law may "impose restrictions upon the enforceability of arbitration agreements [involving commerce] that exceed those provided [in] the FAA."[51] When interpreting an arbitration clause, courts are instructed to resolve all doubts in favor of arbitration.[52] Consequently, when state laws seek to "limit the enforceability of arbitration agreements contained in contracts, [those] involving commerce are [typically] preempted by . . . the FAA."[53]

Unfortunately the Supreme Court has not clearly explained when a state's restrictive arbitration statutes may be applicable through a choice of law clause.[54] While the Supreme Court has held that parties have the power to contract around the provisions of the FAA, it has not articulated a cogent standard for determining when the parties have so agreed.[55] When forced to analyze a generic choice of law clause's meaning, the lower courts "have struggled to determine whether these clauses were intended to supply only the general substantive law of the selected forum, or instead to supply both that forum's substantive law and its arbitration rules."[56] The effect of a choice of law clause will depend on whether a court interpreting the agreement must apply the designated state's rules of construction or whether the underlying policies of the FAA require a rule of construction that preempts state law.[57]

TIG Insurance presents the issue of what impact a choice of law provision in a contract with an arbitration clause has on whether the pro-arbitration rules and policies embedded in the FAA will be applied.[58] Preemption issues like the one in

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50. Diamond, *supra* note 43, at 39 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 277 (1995)).

51. Diamond, *supra* note 43, at 39.

52. *Moses H.*, 460 U.S. at 24-25; *Southland Corp.*, 465 U.S. at 16; *Perry*, 482 U.S. at 492 n.9; *Allied-Bruce*, 513 U.S. at 281; *Doctor's Assocs.*, 517 U.S. at 686. "Courts may not . . . invalidate arbitration agreements under state law applicable only to arbitration provisions . . . . By enacting § 2 [of the FAA], we have several times said, Congress precluded states from singling out arbitration provisions for suspect status . . . ." *Id.*

53. Diamond, *supra* note 43, at 40.

54. Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2251 (2002) [hereinafter *Unnecessary Choice of Law*].

55. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Diamond, *supra* note 43, at 61. Diamond explains three possible interpretations of a choice of law clause:

> First, the clause may be interpreted as a conflict of laws resolver, designating which among the fifty states' laws should govern, and leaving undisturbed the applicable federal law. Second, it may be interpreted as an agreement to apply the designated state's substantive law, unencumbered by otherwise applicable federal law, but not encompassing the state's allocation of powers between courts and arbitrators, allowing the preemptive effect of the FAA to remain intact. Third, it may be interpreted as an agreement to apply the designated state's laws, including its arbitration laws, over all other state and federal laws, thereby excluding the FAA.

Id. at 40-41.

56. *Unnecessary Choice of Law*, *supra* note 54, at 2250-51. *See generally* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3rd Cir. 2001) (explaining that such clauses are problematic as well as ubiquitous in commercial agreements).

57. *See generally* Jiang, *supra* note 4. If the policies underlying the FAA mandate a rule of construction that preempts state law, courts also must determine what that rule should be and when such a rule should be imposed.

58. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 326 (2d Cir. 2004). By adopting a California choice of law clause, the parties had consensually displaced the requirements of the FAA, that an arbitration proceed, even if the result is that arbitration is stayed where the FAA would otherwise permit it to go forward. *Id.* (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989)). *But see* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 223

TIG Insurance arise where the parties include a state choice of law provision in their agreement, but disagree as to whether such a provision includes the state's arbitration rules as well as rules of decision.[59] There is inconsistency among the federal appellate courts on this issue in the wake of the Supreme Court's decisions in *Volt*[60] and *Mastrobuono*.[61] Indeed, the state and federal courts have struggled, if not failed to establish clear rules about the effect of choice of law clauses on the proper application of the FAA.[62] This split in authority on the choice of law applicable to allocate authority between courts and arbitrators frustrates the efforts of commercial practitioners seeking to ensure that disputes are arbitrated and that arbitration will be governed by the FAA and not the restrictive state arbitration law.[63]

In *Volt*, the parties contracted for the construction of electrical conduits on California's Stanford University campus.[64] The contract contained an arbitration clause and a provision that provided in pertinent part that "the contract shall be governed by the law of the place where the project is located."[65] After a dispute arose over whether Volt was entitled to compensation for extra work on the project, Volt demanded that the dispute be submitted to arbitration.[66] Stanford subsequently filed a civil suit in California state court alleging fraud and breach of contract.[67] The court denied Volt's petition to compel arbitration and instead stayed arbitration pending the outcome of Stanford's litigation with Volt and two other defendants joined by Stanford who did not have arbitration agreements.[68] The California appellate court affirmed, holding that while the FAA governed the arbitration agreement, and did not permit a stay, the parties had agreed to apply California's arbitration law and that honoring the agreement was consistent with the FAA.[69]

The United States Supreme Court affirmed the California appellate court, noting that "the interpretation of private contracts is ordinarily a question of state law, which this court does not sit to review."[70] While the FAA requires that any doubts as to whether a dispute is arbitrable are to be "addressed with a healthy regard for . . . arbitration,"[71] and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration,"[72] the Supreme Court held that these princi-

(1985) (holding that the FAA is applicable, with few exceptions, to all arbitrations in interstate commerce, and that an arbitration must be allowed to proceed, even if the arbitration may yield decisions that could have inconvenient res judicata effects in other litigation).

59. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2d Cir. 2004). Both parties agreed that the Reinsurance Agreement fell under the scope of the FAA, but disagreed as to whether including the California choice of law provision evidenced their intent to employ California arbitration rules. *Id.*

60. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989).

61. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

62. *TIG Ins.*, 360 F.3d at 323 (stating that "[t]his case presents a recurring and troubling theme").

63. *See* Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998).

64. *Volt*, 489 U.S. at 470.

65. *Id.*

66. *Id.*

67. *Id.* at 470-71.

68. *Id.* at 471.

69. *Id.* at 471-72.

70. *Id.* at 474.

71. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

72. *Id.* at 24-25.

ples were not offended by interpreting a choice of law clause to exclude application of the FAA.[73]

In *Volt*, the California appellate court had held as a matter of fact that the parties had agreed to apply California arbitration rules to their arbitration.[74] On review, the Supreme Court accepted this finding, holding that the FAA applied to the arbitration since it involved interstate commerce, but required that it be carried out as the parties agreed, under California rules, allowing a California judge to stay the arbitration.[75]

In *Mastrobuono*, investors opened a brokerage account with Shearson Lehman Hutton.[76] Their contract contained an arbitration clause providing for arbitration in accordance with arbitration code of the National Association of Securities Dealers (NASD).[77] The investors subsequently sued in federal district court against Shearson alleging mishandling of their account and violations of state and federal law.[78] Shearson moved to stay proceedings and compel arbitration; the motion was granted and the dispute was arbitrated.[79] The arbitral panel ruled in favor of the Mastrobuonos and awarded both compensatory and punitive damages.[80] Shearson paid the compensatory damages, but filed a motion in federal district court to vacate the punitive damages award on the basis that that the contract's choice of law clause required the application of New York arbitration law which prohibits the award of punitive damages by an arbitrator.[81] The district court agreed and vacated the punitive damages award.[82] The Seventh Circuit affirmed.[83]

The United States Supreme Court granted the Mastrobuono's petition for writ of certiorari, reversed the lower court decisions and reinstated the punitive damage award.[84] The Court held that while the parties had the right to contract around the provisions of the FAA,[85] they had not actually done so in this case.[86] Rather, the choice of law clause was ambiguous and could be interpreted in one of three ways.[87] Of the three possible interpretations, the Court determined that only an intent to apply New York's laws, including its arbitration laws over all other laws both state and federal, would reflect an intent to bypass the provisions of the FAA.[88] Because the choice of law clause was ambiguous, it should have been

73. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (speaking of the "Moses H. Cone principle").

74. *Id.* at 468. *See also* Jiang, *supra* note 4, at 159 (noting the United States Supreme Court's refusal to review the California court's interpretation of the choice of law clause).

75. *Id.*

76. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54 (1995).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 54-55.

82. *Id.* at 54.

83. *Id.*

84. *Id.* at 55.

85. *Id.* at 57.

86. *Id.* at 61.

87. *See generally id.* at 58-64.

88. *See id.* at 63.

construed to incorporate the FAA; the FAA does not prevent arbitrators from awarding punitive damages.[89]

The Supreme Court justified its holding on the basis that while a choice of law clause introduces ambiguity into an arbitration agreement, when a court interprets such provisions in an agreement covered by the FAA, the court must give due regard to the federal policy favoring arbitration.[90] Further, ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration.[91] The Court also took a bifurcated approach to interpreting the contract by determining that the choice of law provision covers the rights and duties of the parties and the arbitration clause covers arbitration.[92] Unlike *Volt*, *Mastrobuono* articulated limits on a court's ability to construe a choice of law clause to restrict the application of the FAA.[93]

Lower courts have interpreted the mandates of *Volt* and *Mastrobuono* differently, and have suggested different solutions to this conflict. The minority position articulated by the Second Circuit and the District of Columbia Circuit is that broad choice of law provisions are sufficient as a matter of law to opt out of the FAA's default rules and invoke state arbitration laws.[94]

The majority position, followed by eight of the federal circuits, holds that the inclusion of a general choice of law provision in a contract containing an agreement to arbitrate will not oust application of the FAA in favor of state law arbitration standards.[95] Rather, they establish a "strong default presumption" that the FAA, not state law, supplies the rules for arbitration.[96] The leading case on the majority position is *Roadway Package System v. Kayser*, in which the Third Circuit interpreted a choice of law clause that provided that the contract "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania."[97] The court concluded that the issue of "contract construction" of an arbitration agreement to which the FAA applied is not governed by state law, but is governed by federal law, and that a general choice of law clause, standing

89. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

90. *Id.*

91. *Id.*

92. *Id.* at 64 (stating that "[t]he choice of law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other"). *See also* Thrope, *supra* note 43, at 82.

93. The *Mastrobuono* court attempted to reconcile its holding in *Volt* with that of *Mastrobuono* in a footnote, which provides:

> In *Volt* . . . we did not interpret the contract de novo. Instead, we deferred to the California court's construction of its own State's law . . . . In the present case, by contrast, we review a federal court's interpretation of this contract, and our interpretation accords with that of the only decision-maker arguably entitled to deference—the arbitrator.

Mastrobuono, 514 U.S. at 60 n.4. Few commentators have found this attempt at reconciliation persuasive. *See generally* Thrope, *supra* note 43, at 81-85.

94. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 328 (2d Cir. 2004); Ekstrom v. Value Health, Inc., 68 F.3d 1391, 1393 (D.C. Cir. 1995).

95. *See* Action Indus., Inc. v. United States Fid. & Guar. Co., 358 F.3d 337, 343 (5th Cir. 2004); Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002); Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 300 (3d Cir. 2001); Porter Hayden Co. v. Century Indem. Co., 136 F.3d 380, 382 (4th Cir. 1998); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 937 (6th Cir. 1998); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998); PaineWebber Inc. v. Elahi, 87 F.3d 589, 594 (1st Cir. 1996); Kelley v. Michaels, 59 F.3d 1050, 1055 (10th Cir. 1995).

96. *Sovak*, 280 F.3d at 1269.

97. *Roadway*, 257 F.3d at 290.

alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards.[98]

The Sixth Circuit promulgated a similar analysis, holding that the parties' inclusion of an Ohio choice of law clause did not preclude the application of the FAA.[99] Rather, the choice of law provision gave "no indication that the parties intended to incorporate Ohio law" to govern the scope of their agreement to arbitrate.[100] The court underscored the importance of its holding that a general choice of law provision does not displace the FAA.[101] The court noted that "[m]ost contracts include a choice of law clause, and thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases."[102] Indeed, "such an interpretation of the FAA would effectively emaciate the Act itself."[103]

IV. INSTANT DECISION

In *Security Insurance Co. of Hartford v. TIG Insurance Co.*, the Second Circuit went against the majority rule and held that the parties' adoption of a California choice of law clause to govern their commercial agreement subjected a New York-based arbitration to a rule of the California Civil Procedure Code.[104] The California rule authorizes a court to stay an arbitration while the court undertakes to make its own decision of issues of fact and law that are common to the arbitration and the lawsuit involving not only the parties to the arbitration, but also a third party who has not agreed to arbitrate.[105] By adopting a California choice of law clause, the court held that the parties had consensually displaced the preemptive requirements of the FAA.[106]

The Second Circuit treated the issue as one of contract interpretation, and focused its analysis on whether the choice of law provision at issue was a "general" one, and whether the language of the choice of law clause indicated the parties' intent for California substantive and procedural law to govern.[107] After applying California contract law, the court determined that the parties had *as a matter of law* contracted around the FAA's default standard.[108] Relying heavily on *Volt*, the

98. *Id.* at 300.
99. *See Ferro Corp.*, 142 F.3d at 933.
100. *Id.* at 937.
101. *Id.*
102. *Id.* at 938.
103. *Id.*
104. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 328-329 (2d Cir. 2004).
105. *Id.* at 324.
106. *Id.* at 328.
107. *Id.*
108. *Id.* (emphais added). This is an important distinction, since the Supreme Court in *Volt* gave deference to the California Court of Appeals findings of fact as to whether the parties intended to include state arbitration rules via the contractual choice of law provision. *Id.* at 327-328. *See also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989). The court in *TIG Insurance* held that as a matter of California law, a choice of law provision providing that California law will govern a commercial agreement is sufficient to evade the FAA's substantive and procedural requirements. 360 F.3d at 328.

court further articulated that their construction did not negate the strong federal policy favoring arbitration.[109]

The Second Circuit distinguished *TIG Insurance* from *Mastrobuono* on the basis that the latter case construed New York law not California law, and that the statute in *Mastrobuono* imposed substantive restrictions on the authority of the arbitrator, while the California statute in the instant case, does not impose the same restrictions.[110] The court further stated that its opinion did not upset the balance of authority between the courts and the arbitrator, but merely changed the order of proceedings.[111]

Both the Second Circuit and the district court looked to the California appellate court decision in *Mt. Diablo Medical Center v. Health Net of California*,[112] to determine how California law would treat the choice of law provision in the parties' contract.[113] In *Mt. Diablo*, the disputed contract included a broad choice of law clause which stated that "[t]he validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the state of California."[114] The court held that while the choice of law clause was generic and did not mention arbitration, it was still "broad, unqualified and all-encompassing."[115] Thus, the choice of law provision was construed to incorporate California's procedural rules regarding arbitration.[116] Under *Mt. Diablo*, a "broad" California choice of law clause incorporates California arbitration rules.[117] However, the forum for the arbitration in *Mt. Diablo* was California, and the choice of law clause in *Mt. Diablo* notably included the term "enforcement."[118] The agreement in *TIG Insurance* by its own terms applied only to "validity, construction, and interpretation."[119]

The court in *Mt. Diablo* emphasized that "enforcement" could refer to enforcement through arbitration and cited a New York case for that proposition: the New York case applied New York statutory restrictions on arbitration on the ground that the parties had agreed that the contract and its "enforcement" should be governed by New York law, as arbitration was a type of "enforcement."[120] The court in *TIG Insurance* noted that there was no reference to "enforcement" in the choice of law clause before it, but discounted this point.[121]

The court's construction of California law in *TIG Insurance* also relied heavily on a recent California Supreme Court decision, *Nedlloyd Lines B.V. v. Superior*

109. Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 326 (2d Cir. 2004).
110. *Id.* at 327.
111. *Id.*
112. 101 Cal. App. 4th 711 (Cal. Dist. Ct. App. 2002).
113. *TIG Ins.*, 360 F.3d at 327.
114. *Id.* at 328 (quoting Mt. Diablo Med. Ctr. v. Health Net of Cal., Inc., 101 Cal. App. 4th 711, 716 (Cal. Dist. Ct. App. 2002)).
115. *Id.* (quoting *Mt. Diablo*, 101 Cal. App. 4th at 722).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* (comparing the *TIG Insurance* agreement to the *Mt. Diablo* agreement and calling the *TIG Insurance* choice of law clause "similarly broad and all encompassing").
120. Mt. Diablo Med. Ctr. v. Health Net of Cal., Inc., 101 Cal. App. 4th 711, 724 (Cal. Dist. Ct. App. 2002) (citing Smith Barney v. Luckie, 647 N.E.2d 1308 (N.Y. 1997)).
121. Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 329 n.5 (2d Cir. 2004).

Court,[122] which broadly construed a Hong Kong choice of law clause.[123] In *Nedlloyd*, the court held that by adopting Hong Kong law to govern a commercial agreement (that did not call for arbitration), the parties had adopted Hong Kong law to govern non-contractual aspects of their relationship.[124] Since the court in *Nedlloyd* gave a broad interpretation to a choice of Hong Kong law in a contract governed by that law, the Second Circuit concluded it would give a broad interpretation to a choice of California law.[125] However, the *Nedlloyd* court did not indicate that it would have adopted Hong Kong rules of civil procedure in place of the California rules of procedure.[126]

V. COMMENT

In *TIG Insurance*, the Second Circuit was faced with a chance to apply the mandates of *Volt* and *Mastrobuono* to the question of whether adopting a California choice of law clause governing the "validity, construction, and interpretation"[127] of a commercial agreement also included an implicit agreement to displace the FAA's requirement that an arbitration must be allowed to proceed regardless of whether the arbitration may create decisions that could have an inconvenient res judicata impact on other litigation.[128] While answering that question in the affirmative,[129] the court highlighted its departure from the majority position that a general choice of law clause should not be interpreted as displacing the FAA absent a clear showing of intent to do so.[130] *Mastrobuono* and the decisions of other federal appellate courts hold that issues of contract interpretation should be made with deference to the arbitral panel.[131] *TIG Insurance* appears to be in conflict with those courts.

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122. 834 P.2d 1148 (Cal. 1992).

123. Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 328 (2d Cir. 2004).

124. *Id.*

125. Nedlloyd Lines B.V. v. Super. Ct., 834 P.2d 1148 (Cal. 1992) (explaining that California abides by the general proposition that sophisticated commercial parties intend a general choice of law clause to control the entire agreement).

126. *Id.*

127. *TIG Ins.*, 360 F.3d at 323.

128. *See* 9 U.S.C. § 4 (2004).

129. *TIG Ins.*, 360 F.3d at 322.

130. *See generally* Action Indus., Inc. v. United States Fid. & Guar. Co., 358 F.3d 337 (5th Cir. 2004); Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1269-70 (9th Cir. 2002); Roadway Package System, Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926 (6th Cir. 1998); Porter Hayden Co. v. Century Indem. Co., 136 F.3d 380, 382-83 (4th Cir. 1998) (establishing a presumption that the parties intended the FAA to govern the agreement absent a clear expression of the parties to invoke state arbitration law and "squarely rejecting the argument that a federal court should read a contract's general choice of law provision as invoking state arbitration law"); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998) (holding that the court would not "interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear"); Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129 (2d Cir. 1996); PaineWebber Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996); Kelley v. Michaels, 59 F.3d 1050, 1054 (10th Cir. 1995).

131. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 60 n.4 (1995) (distinguishing *Volt* and holding that the only decision maker arguably entitled to deference is the arbitrator); Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79, 85 (2002) (holding that issues that arise out of an arbitration, like contract interpretation, presumptively should be resolved by the arbitrator); Pacificare Health Sys.,

TIG Insurance also raises questions about the "strong federal policy in favor of arbitration" and the allocation of power between courts and arbitrators in most commercial agreements. Most commercial agreements contain both arbitration and choice of law provisions, and the practical result of staying arbitration pending litigation is to shift the balance of authority over the dispute from the arbitrator to the courts.[132] The ruling in *TIG Insurance* seriously curtails the arbitrator's authority and undermines the arbitrator's presumptive responsibility for resolving issues of contract interpretation and procedural questions arising out of arbitration.[133]

United States Supreme Court precedent suggests that the Second Circuit overreached in *TIG Insurance*.[134] Under the Supreme Court's holding in *Howsam*, the Second Circuit was bound to either allow the arbitral panel to decide whether the parties had intended to incorporate state arbitration rules into their agreement, or at a minimum, afford appropriate deference to the arbitral panel's refusal to grant a stay pending litigation.[135] The Second Circuit's holding also conflicts with the other federal circuits on the question of whether arbitrators or courts should resolve the issue of contract interpretation relating to the conduct of the arbitration.[136] Under res judicata principles, the arbitrator will be bound by a court's legal and factual findings, and subsequent arbitration will be a pointless formality.[137] The Second Circuit's analysis is inconsistent with Supreme Court precedent and effectively deprives the parties of their right to arbitrate instead of litigate.

The ruling by the Second Circuit in *TIG Insurance*, that California's section 1281.2 does not restrict an arbitrator's power, is clearly wrong. The arbitration clause at issue in *TIG Insurance* addresses the default order of proceedings before the arbitral panel.[138] At a minimum, the court's decision withdraws from the arbitrators any ability to control the timing of the arbitral hearing or the panel's ultimate decision. Rather, "belated enforcement of the arbitration clause . . . signifi-

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Inc. v. Book, 538 U.S. 401, 407 (2003) (holding that procedural questions that arise out of the dispute and bear on its final disposition are presumptively not for the judge, but for the arbitrator to decide).

132. *Compare* Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 327 (2nd Cir. 2004) (holding that although a stay would prevent the arbitral panel from issuing any decision, the court's interference with the arbitral process "does not limit . . . the arbitrator's power to resolve the dispute"), *with* Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1212 (9th Cir. 1998) (holding that section 1281.2 (c) "assuredly does effect California's allocation of power between alternative tribunals").

133. *See Mastrobuono*, 514 U.S. at 60 n.4.

134. *See Howsam*, 537 U.S. at 84 (applying *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) and explaining that "'procedural questions which grow out of [a] dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide"); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (holding that the First Circuit rightly "reserve[d] judgment on the choice of law question, as it must be decided in the first instance by the arbitrator"); Pacificare Health Sys., Inc. v. Book, 583 U.S. 401, 406-07 (2003) (holding that a court should not "take upon [itself] the authority to decide the antecedent question of how [an ambiguous contract term] is to be resolved").

135. *Howsam*, 537 U.S. at 84-85.

136. *See* Bailey v. Ameriquest Mortgage Co., 346 F.3d 821, 823-24 (8th Cir. 2003) (applying *Howsam* and other principles to conclude that "the extent of an arbitrator's procedural and remedial authority are issues for the arbitrator to resolve in the first instance"); Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc., 343 F.3d 355, 363 (5th Cir. 2003) (holding that arbitrators should decide questions of contract construction).

137. Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 300 (3d Cir. 2001).

138. *See* Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 327 (2nd Cir. 2004).

cantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement."[139]

This decision also goes against the "substantive rights" guaranteed by the FAA, and its application to commercial agreements to arbitrate.[140] In rejecting the majority approach, the Second Circuit adopted a rule that restricts the scope of the FAA, fails to give effect to the FAA's policy favoring arbitration, and creates a complex legal framework that undermines Congressional intent to promote arbitration as a quick and efficient means of dispute resolution.[141]

The Second Circuit defended its holding in *TIG Insurance* in part by distinguishing between "substantive" and "procedural" state law arbitration provisions.[142] The court claimed that because section 1281.2(c) was "procedural" in nature, it did not offend the substantive law of the FAA.[143] However, as explained by the Third Circuit, distinguishing between "procedural" and "substantive" provisions "would unduly complicate the law in this area."[144]

Indeed, if a party "complained about multiple issues, at least one of which was 'procedural' and at least one of which [was] 'substantive,'" separate determinations would have to be made, balancing "multiple legal regimes within the same case."[145] Introduction of this additional level of complexity in this context should be rejected, as it is unlikely to reflect the actual intent of the parties.[146] Rather, it is "most unlikely that any sizeable number of parties would wish to be bound by some federal standards and some state ones."[147] This added complexity undermines one of the principle benefits of arbitration—its status as a less expensive alternative to litigation.[148]

Under the minority view articulated in *TIG Insurance*, choice of law provisions will be read to reinstate the type of state arbitration standards that the FAA was enacted to displace.[149] Based on the rationale of the Second Circuit, the FAA would apply only when the parties to contracts containing general choice of law provisions affirmatively excluded application of state arbitration rules and expressly stated their intention to be bound by the FAA.[150] Such a holding runs contrary to the Supreme Court's earlier conclusion that Congress intended the FAA to apply broadly to the full extent of its power under the Commerce Clause even when there is no showing that the parties contemplated that the FAA would govern their agreement to arbitrate.[151]

Under *Mastrobuono*, "regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself [must be]

139. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring).
140. *See id.*
141. *Id.*
142. Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 327 (2nd Cir. 2004).
143. *Id.* at 328-29.
144. *See* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 299 (3d Cir. 2001).
145. *Id.*
146. *Id.*
147. *Id.*
148. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).
149. *Id.*
150. Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 328 (2nd Cir. 2004) (holding that "if the parties intended for only California substantive law to govern, they could have easily made their intentions clearer with a second exclusion for California's arbitration rules").
151. *See Allied-Bruce*, 513 U.S. at 274-75.

resolved in favor of arbitration."[152] The notion that the federal policy favoring arbitration should not inform the determination whether the parties rejected the FAA in favor of state procedural rules reflects a misunderstanding of the FAA.

The "substantive provisions" of the FAA are designed to protect the arbitral procedures chosen by the parties. Indeed, the purpose of the FAA was to allow private parties to exchange the "procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[153] In this sense, section 2 of the FAA is a "congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[154] The notion that the federal policy favoring arbitration should not inform the determination whether the parties rejected the FAA in favor of state procedural rules is contrary to United States Supreme Court precedent.[155]

The majority approach establishes a default rule that choice of law provisions do not displace the FAA in favor of state arbitration laws absent a clear expression of the parties' intent to displace the FAA.[156] Indeed, these courts articulate a default rule which is designed to "minimize the frequency with which parties will be found to have opted out of the FAA's default regime when they did not intent to do so."[157] This presumption also would make it "easy for arbitrators and district courts to determine whether parties have opted out of federal standards."[158] Further, such a rule preserves "the ability of parties to contract around the default federal standards."[159]

Some commentators have attacked the majority position on the basis that displaces state contract law and raises federalism concerns.[160] Opponents of the majority position argue that establishing a presumption of FAA preemption in the absence of a clear showing of intent to contract around the default FAA provisions constitutes overreaching by the federal circuits and creates federalism issues; this concern is overstated.[161] Under *Mastrobuono*, and the majority's interpretation of

152. Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 62 n.8 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) and Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

153. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

154. *See Moses H.*, 460 U.S.at 25. *See also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) (holding that the FAA "requires that we rigorously enforce agreements to arbitrate, even if . . . the result is 'piecemeal' litigation").

155. *Dean Witter Reynolds*, 470 U.S. at 221.

156. *See* Action Indus., Inc. v. United States Fid. & Guar. Co., 358 F.3d 337, 342 (5th Cir. 2004) (quoting Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) and stating "a generic choice of law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards"); Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002) (holding that a general choice of law provision provides the substantive, decisional law but does not trump the presumption that the FAA supplies the rules for arbitration); *Roadway*, 257 F.3d at 295-96; Porter Hayden Co. v. Century Indem. Co., 136 F.3d 380, 382-83 (4th Cir. 1998) (interpreting *Mastrobuono* as "squarely reject[ing] the argument that a federal court should read a contract's general choice of law provision as invoking state law of arbitrability and displacing federal arbitration law").

157. *See Roadway*, 257 F.3d at 296.

158. *Id.* at 296-97.

159. *Id.* at 297.

160. *Unnecessary Choice of Law*, *supra* note 54, at 2251.

161. *Id.* at 2262-63.

that case, state law will continue to govern the interpretation of choice of law clauses when the designated law affects arbitration procedure.[162] Federal law "will be applicable irrespective of whether the matter is being resolved in state or federal court."[163]

VI. CONCLUSION

The lower federal courts have failed to construe the mandates of *Volt* and *Mastrobuono* in a cogent manner. As such, transactional practitioners will have to consider the lack of uniformity among the federal courts on the effect a choice of law provision has on a commercial agreement also containing an arbitration clause. Practitioners will also need to keep in mind that, depending on the jurisdiction, they may need to specify that the FAA applies to arbitration, while the choice of law specifies the rules of decision to be applied by the arbitrator or panel.

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162. Diamond, *supra* note 43, at 65.
163. *Id.*