Filed 10/24/03 The Regents of the U. of Cal. v SSW, Inc. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Plaintiff and Respondent, v. SSW, INC. et al., Defendants and Appellants.	A097298, A096947 (San Francisco County Super. Ct. No. 304352)

Introduction

Tuthill Corporation (Tuthill) and SSW, Inc. (SSW) appeal from an order of the San Francisco Superior Court denying their petitions to compel arbitration of claims filed against them by the Regents of the University of California (Regents). The trial court denied the petitions under Code of Civil Procedure section 1281.2, subdivision (c)[1] (hereafter section 1281.2(c)), which allows the court to stay arbitration pending resolution of related litigations where there is a possibility of conflicting rulings and contradictory judgments. The court ruled that the contracting parties had agreed that their arbitration agreement would be governed and enforced by California law (including section 1281.2(c)) and that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) did not preempt that state statute.

Tuthill and SSW contend that provisions of their contracts—and particularly the choice-of-law provisions—do not demonstrate an intention to make the contracts subject

[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

to section 1281.2(c). Consequently, they argue that the California statute is preempted by the FAA and that the FAA requires enforcement of the arbitration agreement despite the potential for conflicting results. We shall affirm the order.

Facts and Procedural Background

In early 1994, the Regents contracted with Walsh Construction Company (Walsh) for construction and renovation of the Parnassus Central Utilities Plant at the University of California at San Francisco. Tuthill and SSW[2] are out-of-state corporations who were subcontractors for the design and construction of heat recovery steam generators, the steam turbine generator, and auxiliary boilers on the cogeneration power plant project. After the project was underway, Walsh's parent company filed for bankruptcy. Project sureties, Fidelity and Deposit Company of Maryland and Universal Underwriters Insurance Company, took assignment of Walsh's obligations and rights under Walsh's contract with the Regents. In June 1999 the Regents filed suit against the sureties to recover on the performance bond and alleged that Walsh had failed to fulfill its obligations on the project. On June 8, 2001, the Regents amended their original complaint to include causes of action against Tuthill and SSW based upon the Regents' status as a third party beneficiary to the Walsh subcontracts and alleging numerous defects and inadequate construction in the equipment designed, built, or supplied by Tuthill and SSW.

The subcontracts between Walsh and Tuthill and Walsh and SSW contained identical choice-of-law provisions:

"Governing laws. This Contract Order shall be governed by, construed, and enforced in accordance with the laws of the State of California, exclusive of conflicts by laws provisions."

The arbitration provisions of the subcontracts were also identical and provided:

"Arbitration: If the forgoing procedures do not resolve the dispute, the dispute shall be decided by arbitration in accordance with the Construction Industry Arbitration

Rules of the American Arbitration Association then prevailing as supplemented by Sections 1282.6, 1283 and 1283.05 of the California Code of Civil Procedure, unless the parties mutually agree otherwise. Selection of arbitrators shall be in accordance with rules of the American Arbitration Association. The Arbitrator(s) shall be bound by, and apply California law. Each party hereto expresses consent and agrees that any arbitration arising of or relating to this Agreement, or the breach thereof, may, at the option of either party, include by consolidation, joinder or in any other manner, other persons involved in or affected by such claim, dispute or other matter. . . . The forgoing agreement to arbitrate . . . shall be specifically enforceable under the prevailing Arbitration Law. The award rendered by the Arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. All arbitration proceedings hereunder shall, unless all parties hereto otherwise agree, be conducted in the County of San Francisco."

The prime contract between the Regents and Walsh did not contain a mandatory arbitration provision.

Tuthill and SSW filed demurrers and petitions to compel arbitration. The Regents opposed the petitions to compel arbitration on the ground that the court should exercise the discretion afforded it under section 1281.2(c) to refuse to compel arbitration because of the potential for inconsistent rulings if the controversy were adjudicated in multiple forums. Tuthill and SSW responded that the FAA, which gives the court no discretion to deny arbitration on such grounds, preempted section 1281.2(c). After briefing and hearing before the Honorable Stuart Pollak, the court denied the demurrers and the petitions to compel arbitration. The court ruled that *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468 (*Volt*) controlled. Accordingly, the court found that the parties to the arbitration agreements had agreed that the subcontracts not only would

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2 SSW obtained or assumed the assets and liabilities of its predecessor National Dynamics Corporation on June 23, 1998. For ease of reference, SSW shall refer either to SSW or to its predecessor National Dynamics.

be "governed" by California law, but would be "enforced" in accordance with California law, including section 1281.2(c), and the FAA did not preempt California law.[3]

Tuthill and SSW filed timely appeals to the court's order denying their petitions to compel arbitration.[4] On April 15, 2002, we granted the Regents' motion to consolidate the two appeals. After briefing was complete, the parties requested that we defer disposition of the appeal pending settlement. In May 2003, having been notified of the failure of settlement negotiations, we returned the case to the regular calendar.

Discussion

"Congress passed the FAA 'to overcome courts' refusals to enforce agreements to arbitrate.' [Citations.]" (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 55 (*Mastrobuono*); see also, *Volt, supra,* at p. 474.) The federal statute was intended to place arbitration agreements " 'upon the same footing as other contracts . . . .'" (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 511.) As explained in *Southland Corp. v. Keating* (1984) 465 U.S. 1, "the FAA not only 'declared a national policy favoring arbitration,' but actually 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by

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3 In his order denying the petitions to arbitrate, Judge Pollak reasoned:

"The Petitions to Compel Arbitration by SSW, Inc. and Tuthill Corporation are DENIED. The rule enunciated in *Volt Information Sciences v. Board of Trustees* (1989) 489 U.S. 468 is still controlling, and has been reaffirmed in the most recent decisions cited by the moving parties. (*E.g., Hyundai America, Inc. v. Meissner & Wurst GMBH & Co.* (1998) 26 F.Supp.2d 1217, 1219 ('The *Volt* Court held that the FAA did not preempt the California Arbitration Act's provision allowing a court to stay arbitration pending resolution of related litigation where the parties had agreed that their arbitration agreement would be governed by California law'). [] None of the other cases cited by the parties are to the contrary. In the present case, the controlling contract explicitly specifies not only that it shall be governed by California law, but that it will be 'enforced in accordance with the laws of the State of California.' In this critical respect, the contract provision differs from the contract language in *Warren-Guthrie v. Health Net* (2000) 84 Cal.App.4th 804. Since the subcontract is governed by California law, CCP section 1281.2(c) applies, and is not preempted."

4 An order dismissing a petition to compel arbitration is appealable pursuant to section 1294.

arbitration.' 465 U.S., at 10." (*Mastrobuono, supra,* at p. 1216.) "State laws that apply to contracts generally can be applied to arbitration agreements, but '[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.' (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687.)" (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 718 (*Mount Diablo*).)

"Section 1281.2(c) authorizes the court to refuse to enforce a contractual arbitration provision if arbitration threatens to produce a result that may conflict with the outcome of related litigation not subject to arbitration." (*Mount Diablo, supra,* at p. 717.)[5] The FAA contains no similar provision. Nevertheless, in *Volt, supra,* 489 U.S. 468 (*Volt*), the United States Supreme Court held that application of section 1281.2(c) is not pre-empted by the FAA in cases "where the parties have agreed that their arbitration agreement will be governed by the law of California." (*Volt, supra*, at p. 470; see also *Mastrobuono, supra,* at p. 57.)

The *Volt* Court recognized that the primary purpose of the FAA is to "ensure[] that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate [citation], so too may they specify by contract the rules under which that arbitration will be conducted. Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is

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5 Section 1281.2 provides that on petition of a party to an arbitration agreement, the court shall order the parties to arbitrate the controversy "unless it determines that . . . . [¶] . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action . . . 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," in which case "the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action . . . ; (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 . . . pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action . . . ."

fully consistent with the goals of the FAA, even if the result is that the arbitration is stayed where the Act would otherwise permit it to go forward." (*Id*. at p. 479.)

Following *Volt,* California courts examine the underlying contract containing the arbitration clause to determine whether the parties have agreed to application of section 1281.2(c) to their agreement. (*Mount Diablo, supra,* at p. 717; *Warren-Guthrie v. Health Net* (2000) 84 Cal.App.4th 804, 808.) Consequently, the key issue in this case is whether, by the choice-of-law and arbitration provisions of the subcontracts, the parties agreed to application of section 1281.2(c). This issue presents a question of law subject to de novo review by this court. (*Mount Diablo, supra,* at p. 717; *Warren-Guthrie v. Health Net*, *supra,* at p. 814; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212.)

The particular choice-of-law clause involved in *Volt* provided that "'[t]he Contract shall be governed by the law of the place where the Project is located.'" (*Id*. at p. 470.) The California Court of Appeal concluded that by this choice-of-law provision "the parties had incorporated the California rules of arbitration, including § 1281.2(c), into their arbitration agreement." (*Volt*, *supra*, at p. 472.) "The Supreme Court held that the parties had thereby 'agreed that arbitration would not proceed in situations which fell within the scope of [section 1281.2(c)]' (*Volt*, *supra*, at p. 475) and that the FAA did not prevent application of this provision to stay the arbitration. (*Id*. at p. 477.) '[A]pplication of the California statute is not pre-empted by the [FAA] in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.' (*Id*. at p. 470.)" (*Mount Diablo, supra,* at p. 719.)

The Regents contend, and the trial court agreed, that *Volt* controls. Tuthill and SSW counter that the Supreme Court in *Volt* did not itself determine whether the state appellate court's construction of the choice-of-law provision in the contract was correct, but considered itself bound to accept that court's interpretation of the contract. (See *Volt, supra,* at p. 474.) Tuthill and SSW rely instead upon the later-decided *Mastrobuono*, *supra,* 514 U.S. 52 and upon federal cases that have followed it, contending that the use of a "generic" choice-of-law provision does not evince an intent by the parties to choose

California arbitration law in preference to federal arbitration law. Building upon *Mastrobuono,* Tuthill and SSW contend that the arbitration clause and choice-of-law clause in the subcontracts here did not incorporate section 1281.2(c); that section 1281.2(c) cannot be used to delay or avoid arbitration of a contract dispute governed by the FAA; and that any interpretation of the subcontracts to incorporate section 1281.2(c) results in ambiguity that must be resolved in favor of arbitration.

Mastrobuono involved interpretation of a standard-form contract between a securities brokerage firm and its customers requiring arbitration, but which expressly provided that "it 'shall be governed by the laws of the State of New York,'. . ." (*Id.* at p. 53.) New York law allowed courts, but not arbitrators, to award punitive damages. A panel of arbitrators awarded punitive damages. A federal district court and federal Court of Appeals disallowed the punitive damages award. The Supreme Court reversed, citing *Volt*. The choice-of-law provision could reasonably be read in isolation to be "merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship" (*id.* at p. 59) and New York law would be pre-empted by the FAA because the provision did not show the parties' intention to preclude the award of punitive damages by arbitrators. The clause might also be read to "include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals." (*Id.* at p. 60.) Consequently, the court concluded the clause was "not, in itself, an unequivocal exclusion of punitive damages claims." (*Ibid.*) Rejecting a broader reading of the clause, the court refused to defer to the lower courts' interpretation of the contract. *Mastrobuono* distinguished *Volt*, in which the Supreme Court "deferred to the California court's construction of its own States law" on the grounds that, in *Mastrobuono,* it was reviewing a lower *federal* court's interpretation of the contract and the only deference arguably called for was to the arbitrator. (*Mastrobuono, supra,* at p. 60, fn. 4.) The *Mastrobuono* majority then contrasted the choice-of-law provision with the arbitration provision which authorized arbitration in accordance with NASD rules, and "strongly implie[d]" that arbitrators might appropriately award punitive damages. (*Id.* at pp. 60-61.) The court reasoned that

the choice-of-law clause at most, "introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages. As we pointed out in *Volt,* when a court interprets such provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.' 489 U.S., at 476 . . . ." (*Id.* at p. 62.) Finally, the court concluded the "best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable." (*Id.* at pp. 63-64.)

Considering itself "bound by *Mastrobuono,*" the Ninth Circuit in *Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205 (*Wolsey*), held that a choice-of-law clause providing that " '[t]his Agreement . . . shall be interpreted and construed under the laws of the State of California, U.S.A.' " did not incorporate section 1281.2(c). (*Id.* at p. 1213.) *Wolsey* read *Mastrobuono* as dictating that generic choice-of-law clauses do not incorporate state procedural rules governing the allocation of authority between courts and arbitrators. (*Wolsey, supra,* at pp. 1212-1213.) It determined the choice-of-law clause before it was "general" and did not contain a specific reference to the state arbitration rule at issue. (*Id.* at p. 1212.) Therefore, it proceeded to determine "whether section 1281.2(c) is a 'substantive principle that [California] courts would apply' or is instead 'a special rule[] limiting the authority of arbitrators.'" (*Ibid*.) *Wolsey* concluded that section 1281.2(c) did not affect " 'only [California's] substantive rights and obligations,'" but affects [California's] allocation of power between alternative tribunals.' [Citation.] It therefore reversed the district court's refusal to compel arbitration. (*Id.* at p. 1213.)

In *Mount Diablo, supra,* 101 Cal.App.4th 711, an opinion published after briefing was completed in this case, another division of this court wrestled with " 'the thorny question of contract construction raised by the generic choice-of-law clause' in an agreement calling for the resolution of disputes by arbitration.[**6**]" (*Id.* at p. 714.) In a comprehensive**7** and thoughtful opinion, former Judge, now Justice Pollak, distinguished *Mastrobuono* and disagreed "with the implicit determination in *Wolsey* that section 1281.2(c) is ' "a special rule[] limiting the authority of arbitrators"' [citation], as was the New York rule involved in *Mastrobuono.*" (*Mount Diablo, supra,* at p. 725.) Justice Pollak explained that "[t]his view contradicts the characterization of section 1281.2(c) by the Supreme Court itself not only in *Volt* . . . . (*Volt, supra,* 489 U.S. at p. 476, fn. 5) but in the subsequent decision in *Doctor's Associates, Inc. v. Casarotto, supra,* 517 U.S. 681. In rejecting a Montana statute requiring arbitration agreements to contain a particular form of notice in order to be enforceable, the Supreme Court contrasted that statute with section 1281.2(c): 'The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. We held that applying the state rule would not "undermine the goals and policies of the FAA," [citation], because the very purpose of the Act was to "ensur[e] that private agreements to arbitrate are enforced according to their terms.' (517 U.S. at p. 688; [citation].)" (*Mount Diablo, supra,* at pp. 725-726.)

Mount Diablo rebuffed the attempt to lump all choice-of-law clauses that do not explicitly reference arbitration under the rubric "generic," recognizing that "the term has no precise definition" and pointing out that if such "generic" provision were insufficient to incorporate state law regarding the enforcement of arbitration agreements without further elaborating the specific provisions of state law to which it applies, such a redundancy would also logically be required of other provisions incorporated by choice-

6 "Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption* (2002) 115 Harv.L.Rev. 2250, 2251 . . . .)"

of-law clauses, "e.g., provisions treating indemnification rights or termination events in contracts involving the interstate transportation of products.' [Citation.]" (*Id.* at p. 722.)

Therefore, *Mount Diablo* rejected a " 'default rule' that '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.' [Citation.]" (*Id.* at p. 721.) Rather than requiring " 'extrinsic evidence of the parties' intent to contract out of the FAA's default regime' " or an express reference to particular state statutes which the parties intend to incorporate into their agreement, *Mount Diablo* followed the traditional approach of attempting to discern the intention of the parties from the language of the agreement, affirming that the "starting point in the interpretation of the choice-of-law clause, like any contractual provision, is with the language of the contract itself." (*Id.* at p. 722.) In undertaking to discern the parties' intentions from the language of the agreements, the *Mount Diablo* court "agree[d] with the observation of the concurring judge in *Roadway Package* [*System, Inc. v. Kayser* (3d Cir. 2001) 257 F.3d 287, cert. den.], . . . that '[t]he choice-of-law almost invariably is meant to encompass the entire agreement' (*id.* at p. 308)." (*Id.* at p. 722.)

The broad choice-of-law clause in *Mount Diablo* provided that " '[t]he validity, construction, interpretation *and enforcement* of this Agreement' shall be governed by California law." (*Id.* at p. 722, italics added.) Although the clause was "generic" in the sense that it does not mention arbitration or any other specific issue that might become a subject of controversy" (*id.* at p. 722), it was "nonetheless broad, unqualified and all encompassing. . . . The explicit reference to enforcement reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court or before an arbitrator." (*Id.* at p. 722.) Moreover, only a "strained" reading of this broad choice-of-law provision could exclude reference to the chapter in which section 1281.2 appears,

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7 Observing that [t]he decisions in *Volt* and *Mastrobuono* have given rise to a good bit of commentary as well as criticism" (*id.* at p. 720), the *Mount Diablo* opinion canvasses that commentary. (*Id.* at pp. 720-721, and fn. 7.)

Chapter 2 of title 9 of part III of the Code of Civil Procedure, titled "Enforcement of Arbitration Agreements." (*Ibid.*)

Mount Diablo contrasted this broad and unqualified provision with the choice-of-law provision of the agreement in *Mastrobuono*, which provided only that it '"shall be governed by the laws of the State of New York."' [Citation.]" (*Mount Diablo, supra,* at p. 723.) *Mount Diablo* also contrasted the choice-of-law provision in the agreement before it with that interpreted by the California appellate court in *Warren-Guthrie v. Health Net, supra,* 84 Cal.App.4th 804 (*Warren-Guthrie*), providing only that "[a]ll Arbitration shall be *conducted* in accordance with the California Code of Civil Procedure, commencing with Section 1280." (*Id.* at p. 815, italics added; *Mount Diablo, supra,* at p. 723.)

Based on the narrow language of that choice-of-law clause, *Warren-Guthrie* concluded that the parties had not agreed that the *enforceability* of the arbitration agreement would be determined by California law. (*Warren-Guthrie* at pp. 815-816.) While reaffirming *Volt's* holding that a petition to compel arbitration may be denied pursuant to section 1281.2, where the parties have agreed to application of California law for this purpose, *Warren-Guthrie* focused upon the use of the term "conducted" in the narrow choice-of-law provision before it, reasoning: "There is no express language indicating that California law shall be determinative as to whether or not arbitration is required. Unlike in *Volt,* the parties did not agree that California law shall apply for all purposes. Rather, the agreement limits application of California law to California contractual arbitration law, and further limits the scope of California law to that pertaining to the manner in which the arbitration is to be conducted." (*Id.* at p. 815.) The "key term" of the choice-of-law provision was "*conducted*" (*ibid.*), leading *Warren-Guthrie* to conclude that "[a]greement to apply California contractual arbitration law is expressly limited to that law which bears on how the arbitration shall be conducted, as distinguished from agreeing the plan shall be governed by California law for all purposes, including the determination as whether or not arbitration is required. There being no such express language to the contrary, and in light of the overriding state and federal

policy of enforcing privately negotiated agreements to arbitrate in accordance with their terms [citations]," the court concluded that the choice-of-law provision "does not allow nonarbitration based on the section 1281.2(c) exception to arbitration. [Citation.]" (*Id.,* at p. 816.)

In reconciling the disparate authorities, the *Mount Diablo* court emphasized the difference in language of the various choice-of-law clauses being construed, pointing out that several of the federal cases following *Mastrobuono* "contain choice-of-law provisions that use language similar to that in *Mastrobuono* and *Wolsey*, to the effect that the agreement would be governed by the law of a particular jurisdiction, without reference to enforcement. [Citations.]" (*Id.* at p. 723.) The significance of this difference in language was recognized in *Warren-Guthrie, supra,* and by the Court of Appeals of New York in *Smith Barney, etc. v. Luckie* (1995) 85 N.Y.2d 193.) (*Id.* at p. 724 [language that New York law governs the agreement *and its enforcement* indicates intent to arbitrate to the extent allowed by New York law, even if application of state law would relieve parties of their responsibility under the contract to arbitrate].) (*Mount Diablo, supra,* at p. 724.)

Having determined that the language of the choice-of-law clause before it was "unquestionably" "broad enough to include state law on the subject of arbitrability," *Mount Diablo* proceeded to analyze "whether the particular provision of state law in question is one that reflects a hostility to the enforcement of arbitration agreements that the FAA was designed to overcome. If so, the choice-of-law clause should not be construed to incorporate such a provision, at least in the absence of unambiguous language in the contract making the intention to do so unmistakably clear. In *Mastrobuono* itself, the state law in question would have denied an arbitrator the ability to award the same relief as a court, and the Supreme Court held that the ambiguity in the contract should be resolved by reading the choice-of-law clause 'not to include special rules limiting the authority of arbitrators.' (*Mastrobuono, supra,* 514 U.S. at p. 64 . . . .)" (*Id.* at p. 724.) Cases concluding application of state law would contravene the FAA, often involved state rules, like the New York rule in *Mastrobuono,* that "tended to restrict

rather than to facilitate the use of arbitration . . . ." (*Id.* at p. 725.) In contrast, "where the state arbitration provision is not inconsistent with the FAA policy of enforcing arbitration procedures chosen by the parties, choice-of-law clauses making no explicit reference to arbitration commonly have been interpreted to incorporate the state's law governing the enforcement of arbitration agreements. [Citations.]" (*Id.* at p. 725.)

Mount Diablo recognized that section 1281.2(c) is "part of California's statutory scheme designed to enforce the parties' arbitration agreements, as the FAA requires. Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement. The California provision giving the court discretion not to enforce the arbitration agreement under such circumstances—in order to avoid potential inconsistency in outcome as well as duplication of effort—does not contravene the letter or the spirit of the FAA. That was the explicit holding in *Volt* and nothing in *Mastrobuono* casts doubt on that conclusion." (*Id.* at p. 726.) *Mount Diablo* therefore concluded that section 1281.2(c) was not designed to discourage the use of arbitration or to limit the rights of parties choosing to arbitrate. (*Ibid.*)

Having determined that the language of the choice-of-law provision was broad enough to incorporate section 1281.2(c) and that the statute did not reflect a hostility to the enforcement of arbitration agreements and was not inconsistent with the FAA policy of enforcing arbitration procedures chosen by the parties, *Mount Diablo* affirmed the superior court order denying the petition to compel arbitration. (*Id.* at pp. 724-727.)

The choice-of-law clause in the case before us is of similar breadth to that interpreted in *Mount Diablo*, providing that the contract "shall be *governed by*, construed, *and enforced* in accordance with the laws of the State of California, exclusive of conflicts by laws provisions." (Italics added.) We agree with *Mount Diablo*, that such broad language—particularly use of the term "enforced" evinces the intention of the parties to apply California law (including section 1281.2(c)) to enforcement of the agreement.

Nothing in the arbitration clause itself is inconsistent with our reading of the choice-of-law clause presented here. Tuthill and SSW contend that the specific

references to other sections of California's arbitration law, specifically sections 1282.6 [issuance of subpoenas], 1283 [depositions], and 1283.05 [manner of taking depositions], demonstrate an intent to exclude other provisions not specifically mentioned, including section 1281.2(c). We disagree. These particular code sections are included in the arbitration clause itself, which sets forth the rules by which the arbitration is to be conducted. That clause provides for arbitration in accordance "with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing as supplemented by Sections 1282.6, 1283 and 1283.05 . . . ." Specifying the particular rules under which the arbitration is to be *conducted* does not conflict with the parties' choice of California law to govern how the agreement is *enforced.* (See *Warren-Guthrie, supra,* at p. 815; *Mount Diablo, supra,* at pp. 723-724.) The subcontracts clearly require that they be "enforced" according to California law and we construe them to incorporate section 1281.2(c). Nothing in the arbitration provision or any other provision of the subcontracts conflicts with this choice-of-law or creates an "ambiguity" which must be resolved in favor of FAA preemption of section 1281.2(c). (See *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25.)

Nor do we find *Mastrobuono* requires a different result. As *Mount Diablo* explains, the circumstances in that case were very different from those involved in the present case. The choice-of-law clause at issue in *Mastrobuono* was considerably narrower than that present here. Moreover, the New York arbitration law at issue in *Mastrobuono* "would have denied an arbitrator the ability to award the same relief as a court" in contravention of the FAA and it tended to restrict the use of arbitration. In contrast, section 1281.2(c) is not inimical to or discouraging of arbitration, but rather "is part of California's statutory scheme designed to enforce the parties' arbitration agreements, as the FAA requires." (*Mount Diablo, supra,* at p. 726.) The statute addresses a particular problem arising in when an arbitrable controversy affects claims by or against others not bound by the arbitration agreement. By giving the trial court discretion not to compel arbitration in order to avoid potential inconsistency in outcome

and duplication of effort, section 1281.2(c) contravenes neither the letter nor the spirit of the FAA. (*Mount Diablo, supra,* at p. 726.)

SSW relies extensively upon *Energy Group, Inc. v. Liddington* (1987) 192 Cal.App.3d 1520 which held that section 1281.2(c) applied only to contracts subject to arbitration and was therefore preempted by the FAA to the extent it was used to avoid or delay arbitration. (*Id.* at pp. 1522, 1528.) The case predates *Volt* and the court did not undertake to interpret the contract to determine whether the parties intended to incorporate section 1281.2(c) *Volt, Mastrobuono,* and subsequent cases have rendered its analysis obsolete. We agree with the analysis of *Mount Diablo* and reiterate the observation of the Supreme Court in *Volt* that California's arbitration laws generally foster the goals of the FAA and that "California has taken the lead in fashioning a legislative response to this problem [of multiparty contractual disputes leading to potentially inconsistent rulings and contradictory judgments]. . . ." (*Volt, supra,* 489 U.S. at p. 476, fn. 5.) Insofar as *Warren-Guthrie, supra,* and *Energy Group, Inc. v. Liddington, supra,* could be viewed as supporting the proposition that the FAA bars the operation of section 1281.2(c) solely because it constitutes a special rule for arbitration, without examining the roots of the rule, we believe they were wrongly decided.

In summary, the subcontracts call for arbitration of disputes. By providing in a broad conflict-of-law clause that the contract "shall be governed by, construed, and enforced in accordance with the laws of the State of California, exclusive of conflicts by laws provisions," the parties to the subcontracts demonstrated an intention to incorporate section 1281.2(c) and thus agreed to allow a court to stay arbitration in situations falling within the scope of that statute. As the Supreme Court recognized in *Volt*, section 1281.2(c) is not hostile to the goals and policies of the FAA, and the FAA does not preempt the statute in these circumstances. (*Id.* at p. 1324.)

Disposition

The order denying Tuthill and SSW's petition to compel arbitration is affirmed. Regents shall recover costs on appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.