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I. INTRODUCTION

As one of the two Academic Advisors to the Drafting Committee appointed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to revise the Uniform Arbitration Act, I was assigned primary responsibility for the two most important issues pertinent to the Drafting Committee's framing of the Revised Uniform Arbitration Act ("RUAA"). The first—the issue of federal preemption—set the baseline for the scope and character of the RUAA by defining for the Drafting Committee the areas of the substantive law of arbitration in which the states are free to regulate, the Federal Arbitration Act ("FAA") notwithstanding. The second—the issue of vacatur—is by far the most significant dimension of substantive arbitration law open to state regulation. This article describes the manner in which the RUAA Drafting Committee engaged and resolved the issues of federal preemption and vacatur.

II. THE RUAA AND FEDERAL PREEMPTION

When NCCUSL promulgated the original Uniform Arbitration Act ("UAA") in 1955, the preemptive effect of the FAA and attendant federal case law on state arbitration statutes was not a major concern. The FAA was moribund, having been effectively subsumed by the long-standing common law rule whereby executory agreements to arbitrate were deemed unenforceable.[1] Even if the FAA had not been hamstrung, the UAA presented no significant preemption concerns because its substantive provisions did little more than mimic the terms of the FAA.

American arbitration, circa 1955, was for the most part limited to a few business-to-business venues and arbitration arising under collective-bargaining agreements between employers and the unions representing their employees. These were comparatively simple arbitration mechanisms that were not considered surrogates

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1. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-21 (1924), *cited in* Lincoln Mills of Alabama v. Textile Workers Union of Am., 230 F.2d 81, 84 (5th Cir. 1956), *rev'd on other grounds*, Textile Workers of Am. v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) (noting the discussion in *Red Cross Line* of the common law rule against enforcement of executory agreements to arbitrate). "In the absence of statute [sic] it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced . . . . If there be a right to a specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress." *Textile Workers*, 353 U.S. at 456-57.

for adjudication in a court of law. Consequently, NCCUSL, in its quest to provide the states with a uniform framework for legislation that would override the common law rule of non-enforceability, saw no need for state arbitration statutes to address any matters beyond the very basic concerns of enforceability and vacatur that are the core of the FAA regulatory scheme.

A. Commercial Arbitration Circa 1996—A Whole New World

In 1996, when the RUAA Drafting Committee was charged with fashioning a replacement for the forty-plus year old UAA, the arbitration landscape had changed drastically. In a remarkable series of fourteen opinions handed down from 1983 through 1996, the Supreme Court eviscerated the common law rule rendering executory arbitration agreements unenforceable and resuscitated the FAA.[2] The Court divined in the FAA a sweeping pro-arbitration public policy that, once recognized, it deemed sufficient to override many decades of judicial hostility toward the arbitration process outside the labor-management sphere. An integral dimension of this new legal framework for commercial arbitration is the Supreme Court's emphatic and repeated assertion that the pro-arbitration public policy of the FAA preempts contrary state law.

As a result of this drastic alteration in the federal legal landscape, the use of arbitration as an alternative to litigation in a court of law in the commercial sector (including non-union employment arbitration) exploded in the last decade of the twentieth century. The intersection of these two dynamics has greatly increased the demands placed on the law regulating commercial arbitration, revealing the gaps in the FAA's skeletal structure. Arbitration organizations like the American Arbitration Association and Judicial Arbitration and Mediation Services ("JAMS") have attempted to fill the interstices in the FAA by revising and expanding their commercial arbitration rules. Admirable as those efforts are, they are not an effective substitute for well thought-out legislative reform.

Despite the Supreme Court's enthusiastic embrace of commercial arbitration and the remarkable proliferation of commercial arbitration agreements in recent years, Congress has shown no significant interest in retooling the federal legal paradigm for the process. Consequently, by the mid-1990s it became clear to the Uniform Laws Commissioners that the task of comporting the statutory framework for arbitration with the increasingly complex nature of commercial arbitration will, for the foreseeable future, fall to the states. Because it was the first public policy-making body charged with fashioning a statutory template for regulating an

2. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); First Options of Chicago v. Kaplan, 514 U.S. 938 (1995); Vimar Seguros Y Reaseguros S.A. v. Sky Reefer, 515 U.S. 528 (1995); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Allied-Bruce Terminix Cos., v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Perry v. Thomas, 482 U.S. 483 (1987); Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

arbitration process that has morphed into a full-blown surrogate for litigation in the courts, the Drafting Committee confronted a question that had never before demanded an answer. That question asks: When undertaking to frame and enact a comprehensive legal framework for today's complex, high stakes arbitration process, what aspects of arbitration law remain open to regulation by the states in the face of the preemptive effect of the Federal Arbitration Act as identified and defined by the Supreme Court?

I was assigned responsibility for divining the reach and effect of FAA preemption on the states' regulatory discretion and creating standards for the Drafting Committee to follow in fashioning the new RUAA. Set forth below are the essential elements of the guide to action I presented to the Drafting Committee. This is the preemption template on which the RUAA is built.

B. The Essential Predicate: The Supreme Court's Take on FAA Preemption

The six recent Supreme Court opinions defining the law of preemption under the FAA spring from the Court's earlier opinions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*[3] and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[4] In those cases, the Court stated its belief that the FAA is an exercise of the Commerce Clause authority creating a body of federal substantive law governing arbitration, applicable in both the federal and state courts. There are two dimensions to the law of preemption.[5] The first concerns the direct preemption of conflicting state laws by the FAA and is represented by *Southland Corp. v. Keating*,[6] *Perry v. Thomas*,[7] *Allied-Bruce Terminix Cos. v. Dobson*[8] and *Doctor's Associates v. Casarotto*.[9] The second element of the law of FAA preemption centers on interpretation of the parties' contractual agreements to arbitrate in the course of determining the effect of those agreements on the state law-FAA interaction. It is embodied in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[10] and *Mastrobuono v. Shearson Lehman Hutton, Inc.*[11] Each element is examined separately below.

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3. 388 U.S. 395 (1967).
4. 460 U.S. 1.
5. For a full discussion of this line of United States Supreme Court case law see Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996).
6. 465 U.S. 2.
7. 482 U.S. 483.
8. 513 U.S. 265.
9. 517 U.S. 681.
10. 489 U.S. 468.
11. 514 U.S. 52.

1. The Direct Interface Between the Federal Arbitration Act and State Law

In *Southland* the Supreme Court found in the legislative history of the FAA clear indication that Congress meant the statute's rule, making otherwise valid contractual agreements to arbitrate enforceable, to have a broad reach unencumbered by state law constraints.[12] The Court identified two problems enactment of the FAA was intended to resolve: (1) the old common law hostility toward arbitration, and (2) the failure of state arbitration acts to require the enforcement of contractual agreements to arbitrate.[13] It then opined that confining the reach of the substantive law created by the FAA to the federal courts would frustrate the intent of Congress to fashion a statutory scheme that would ameliorate these two significant problems by foreclosing state legislative (and state court) attempts to undercut the enforceability of arbitration agreements.[14] *Southland* unmistakably establishes that when a conflict arises between state law (particularly state law intended to limit the enforceability and effect of arbitration agreements) and the Federal Arbitration Act, pursuant to the rule of federal preemption, the FAA prevails, both in state and federal court.

The Supreme Court intoned *Southland* in *Perry v. Thomas*, finding an unmistakable conflict between § 2 of the FAA and a California statute guaranteeing claimants asserting a violation of its substantive terms a judicial forum, even if they had entered into private agreements to arbitrate such claims.[15] In so doing the Court reaffirmed the rule of *Southland* that Congress intended to foreclose state legislatures undercutting the enforceability of arbitration agreements.

The Supreme Court held that the § 2 FAA directive making enforceable *a priori* agreements to arbitrate extends to the full range of contracts falling within the reach of the interstate commerce authority of Congress.[16] Finding no significance in the use in § 2 of the phrase "evidencing a transaction involving interstate commerce" in lieu of the far more common statutory phrase "affecting commerce," the Court applied the "commerce in fact" standard whereby the FAA's provisions are triggered when a transaction actually involves interstate commerce, regardless of the contemplation of the parties to the transaction as to its interstate or local (intrastate) nature.[17]

In *Terminix*, the Court noted that states, through their power to regulate contracts under general contract law principles, retain a method for protecting consumers (employees, and others in an unequal bargaining power position) against being unduly pressured into agreeing to contractual arbitration provisions.[18] It made clear, however, that the states do not possess the power to decide that a contract is

12. *Southland*, 465 U.S. at 14-16.
13. *Id.* at 14.
14. *Id.* at 14-16.
15. *Perry*, 482 U.S. at 489-92.
16. *Id.* at 489.
17. *Allied-Bruce Terminix*, 513 U.S. at 273-81.
18. *Id.* at 281.

fair and enforceable with regard to its basic terms, but not fair enough to enforce its arbitration clause.[19] The Court observed that for a state to do so would place arbitration agreements on an "unequal footing" with other contracts, a result barred by the language of the FAA and the intent of Congress underlying that language.[20]

That the Supreme Court meant what it said in this regard is clearly indicated by its 1996 opinion in *Casarotto*. In that case, the Court struck down a Montana statute requiring that any contract containing an arbitration provision so indicate on the first page of the contract in typed, underlined capital letters.[21] Declining to view this statutory command as a minor procedural requirement with no substantive impact on the arbitration process, the Court framed the question presented as whether the "first page notice" requirement of the Montana statute placed arbitration agreements on an unequal footing with other contracts.[22] Because the statute singled out arbitration contracts for treatment different from all other contracts, the Court found it to be preempted by the FAA.[23] Thus, *Casarotto* demonstrates that state law efforts at regulating arbitration through the law of contracts cannot be effected via arbitration-specific rules.

Read in concert, *Southland*, *Perry*, *Terminix* and *Casarotto* confirm that the FAA preempts state law conflicting with any of its terms. The substantive law of commercial arbitration is that set out in the Federal Arbitration Act, at least with regard to the issues expressly addressed in the FAA. The state courts are obliged to apply that law, even in the face of contrary state statutory or case law. This line of cases repeatedly signals that the Supreme Court will not tolerate efforts by state legislatures or state courts to undermine the seminal purpose of the FAA—the enforcement of contractual agreements to arbitrate. Further evidence that the Court views commercial arbitration under the FAA as a matter of contract, and the role of the judiciary under the FAA primarily to be a simple matter of enforcing otherwise valid agreements to arbitrate, is provided by the two cases discussed immediately below.

2. The Contract-Based Caveat to the Broad Rule of FAA Preemption

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc.* and *Mastrobuono*. The focus here is on the effect of FAA preemption on the choice of law provisions frequently included in commercial contracts. Plain and simple, in *Volt* the Supreme Court held that the intent of the parties to an arbitration agreement, as expressed in the contract between them, to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA.[24] State law controls even when the contractual choice of law

19. *Id.*
20. *Id.* at 281-82.
21. *Doctor's Assocs.*, 517 U.S. at 688.
22. *Id.* at 687.
23. *Id.* at 687-89.
24. *Volt*, 489 U.S. at 478.

provision results in an arbitration conducted in a manner inconsistent with the substantive law of commercial arbitration set out in the FAA.[25]

In *Volt*, the Court did not view the choice of law provision in the parties' contract as constituting a waiver of the federally-guaranteed right to compel arbitration of their dispute, a matter undoubtedly controlled by federal rather than state law.[26] It stated: "§ 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'"[27] The Court observed there is no federal policy requiring commercial arbitration to be conducted under any particular set of rules.[28] It stated: "[a]rbitration under the [FAA] 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 issue which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted."[29] Thus, if the parties elect to govern their contractual arbitration mechanism by the law of a particular state and thereby limit the issues they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored—as long as the state law principles invoked by the choice of law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced.

In *Mastrobuono*, the Supreme Court further clarified its view of the circumstances when a contractual choice of law provision can block FAA preemption and permit an arbitration to be conducted under procedures or other terms not consistent with the FAA. In *Mastrobuono*, the Court was asked to decide whether a boilerplate contractual choice of law provision (not specific to the arbitration agreement contained in the underlying contract) invoking New York law rendered inarbitrable the claimant's prayer for punitive damages.[30] Unlike *Volt*, where great deference was paid a state court's interpretation of the effect of a choice of law clause, *Mastrobuono* gave the Court an opportunity to engage in a de novo analysis of the proper interpretation and effect of the disputed contract provisions. The way the Court analyzed the choice of law provision in the subject contract, juxtaposing it with the contractual arbitration clause, reveals it is willing to go to some length to avoid applying the rule of *Volt* in a manner that results in a contractual choice of law provision precluding an arbitral award of punitive damages.

The court achieved that result by characterizing the issue before it as a question of what the parties' contract had to say about the arbitrability of the claimant's prayer for punitive damages.[31] In its effort to ascertain the mutual intent of the parties in that regard, the Court looked first to the choice of law provision (which

25. *Id.* at 479.
26. *Id.* at 474-75.
27. *Id.* (quoting 9 U.S.C. § 4 (1994)) (emphasis in original).
28. *Id.* at 476.
29. *Id.* at 479 (citations omitted).
30. *Mastrobuono*, 514 U.S. at 56.
31. *Id.* at 58.

made no reference to arbitration).[32] It found there no indication that the parties, by virtue of their general invocation of New York law, intended to preclude arbitral awards of punitive damages.[33] The Court next moved to an interpretation of the arbitration clause of the parties' contract, finding there strong implication that an arbitral award of punitive damages was appropriate.[34] It ultimately concluded that "at most, the choice of law provision introduced an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards."[35] Citing to *Volt*, the Court asserted that in an arbitration agreement governed by the FAA due regard must be given to the strong federal policy favoring arbitration, and consequently, ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration.[36]

Mastrobuono sends a forceful message as to the manner in which the Court believes the rule of *Volt* should be applied in the course of interpreting contractual choice of law provisions. By electing to read the choice of law provision before it in conjunction with the arbitration clause of the parties' contract, the *Mastrobuono* Court evidenced its belief that judicial interpretation of choice of law provisions designating state law inconsistent with the FAA should be glossed with a predisposition toward the strong federal policy favoring arbitration and a concomitant rule of (statutory and contract) interpretation which teaches that ambiguities as to the reach of the arbitration clause are to be resolved in favor of arbitration (and application of the FAA).

Thus, *Mastrobuono* establishes that choice of law provisions are properly interpreted to exclude a particular matter from arbitration, or to limit the arbitration proceeding in a manner inconsistent with the FAA, only when the parties' contract clearly and unequivocally evidences a mutual intent to that effect and where the state law doctrine contrary to the FAA is indisputable. Given the *pro forma* nature and vague wording of the typical contractual choice of law provision, that result seems unlikely in most cases. The mode of contract interpretation approved in *Mastrobuono* will, in the absence of a definitive decision by the parties to invoke state law inconsistent with the FAA, serve to ensure that the law of commercial arbitration remains a matter of federal substantive law controlled first by the FAA. That standard for application of the rule of *Volt* is entirely consistent with the position taken by the Court in *Southland*, *Perry*, and *Terminix* regarding preemption of state law by the FAA.

C. The Preemption Paradigm Relied Upon by the Drafting Committee

To date, the definitive FAA preemption case law has centered on the prime purpose of the Federal Arbitration Act—enforcement of contractual agreements to arbitrate. State laws of any ilk mooting contractual agreements to arbitrate invariably

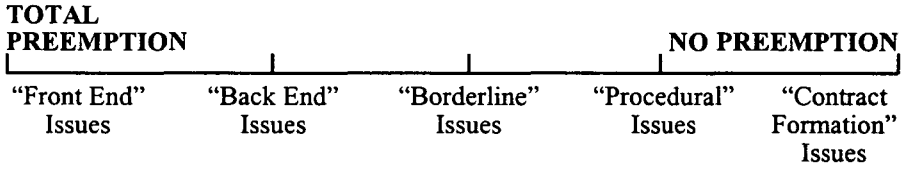
32. *Id.* at 58-59.
33. *Id.* at 59-60.
34. *Id.* at 60-61.
35. *Id.* at 62.
36. *Id.* at 57.

must give way to the pro-arbitration public policy articulated in §§ 2, 3, and 4 of the FAA. This body of law also makes clear that determination of when an agreement to arbitrate has been made is a matter to be decided exclusively under state contract law principles. No matter how strong the pressure brought to bear by various special interest groups, this body of Supreme Court case law leaves no doubt that special rules intended to protect persons in positions of inferior economic power (e.g., employees, franchisees, and borrowers) from being unduly pressured into agreeing to arbitrate, by creating special "arbitration-only" rules, will not be tolerated. The only "safety net" for such "little guys" is the common law of contracts.

1. The Preemption Continuum

These dimensions of the relevant Supreme Court case law define the two poles of a "preemption continuum" that guided the Drafting Committee's determinations of when, and to what extent, it was free to act.

Figure 1. The Preemption Continuum



At the left-hand pole of the above continuum lie what can be described as the "front end" issues—those concerned with enforcement of the agreement to arbitrate, determinations of substantive arbitrability, and any of the other questions raised when a party attempts to evade an otherwise valid arbitration contract. In this domain the FAA rules and there is no role for state law that does not mirror the FAA as interpreted by the federal courts. At the other continuum extreme lie the issues pertaining to the determination of when an agreement to arbitrate has been made. These "contract formation" issues are matters to be decided solely under state contract law principles. There is no role for the FAA, unless the common law or statutory law of a particular state singles out agreements to arbitrate for treatment different from that afforded other contracts, such rules being subject to preemption by the FAA.

Three additional intermediate points can be identified on the preemption continuum. The first lies nearest the left-hand, "front end" issues pole and concerns what can be dubbed "back end" issues—vacatur, confirmation and modification of awards—as addressed in §§ 9, 10(a), 11 and 12 of the FAA. In contrast to the "front end" issues of enforceability of the agreement to arbitrate and arbitrability, there is no definitive case law specifying the preemptive effect of the FAA on these "back end" issues. This aspect of FAA preemption of state arbitration law is

further complicated by the uniform view among the United States courts of appeal that the § 10(a) FAA standards are not the exclusive grounds for vacatur.[37]

Nevertheless, because the "front end" and the "back end" issues speak to the most essential dimensions of the commercial arbitration process (in that both go to the essence of the agreement to arbitrate and the role of the judiciary in holding parties to those agreements), a clear parallel can be drawn between them. Vacatur, confirmation, and modification of the award (most particularly vacatur) all concern effectuation of the result of the arbitration process and thereby serve to effectively culminate enforcement of contractual agreements to arbitrate. Consequently, the Drafting Committee was advised, and worked under the presumption, that FAA preemption of conflicting state law with regard to these "back end" issues is likely.

Granted, at present the law of vacatur under the FAA is in great disarray and the law pertaining to confirmation, modification, and correction of awards scant. Regardless, the language of § 10(a) (as well as §§ 9, 11 and 12) of the FAA is relatively straightforward, providing a clear set of decision rules. State law cannot conflict with those decision rules without raising the specter of FAA preemption. As the subsequent commentary shows, the difficulty the Drafting Committee encountered in attempting to ascertain the precise parameters of the nonstatutory "common law of vacatur" now emerging from the federal courts was a primary factor in the somewhat conservative approach the RUAA takes with regard to vacatur.

In the center of the preemption continuum are a number of "borderline" issues like the authority of arbitrators to award punitive damages, the standards for arbitrator disclosure of conflicts of interest, the authority of the courts and arbitrators to direct provisional remedies, and the right of parties to representation by an attorney. While these "borderline" issues concern significant dimensions of the arbitration process, they are not expressly addressed in the FAA and only the first two (punitive damages and arbitrator disclosure) are the subject of extensive federal court case law arising under the FAA. In further contrast to the "front end" and "back end" issues, these matters do not go to the essence of the agreement to arbitrate or effectuation of the results of the process.

Therefore, it seems likely that the states are free to regulate with regard to the "borderline" issues not the subject of the definitive federal case law of arbitration, presuming the rules they establish sufficiently respect the FAA's pro-arbitration public policy. Such state law rules are subject to preemption by existing federal law touching on the same subject(s) or new federal law that may subsequently arise, either through amendment of the FAA or an extension of the current federal case law. However, *Volt* and *Mastrobuono* clearly indicate that the Supreme Court sees a role for state law in these areas, even where it establishes standards contrary to the relevant federal rules. If the parties' arbitration agreement unequivocally demonstrates a mutual intent to govern their arbitrations under state law, and the

37. For a full analysis of the developing law of vacatur in the federal courts, see Stephen L. Hayford, *Law in Disarray: Judicial Standard for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) and Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 4 (2000).

subject dimension(s) of state law comports with the FAA's pro-arbitration public policy, the FAA will not preempt and the designated state law will control.

The final point on the preemption continuum indicated by the current case law falls close to the right-hand pole. It concerns what can generally be termed "procedural" issues (e.g., prehearing discovery, consolidation of claims, and arbitrator immunity). With the exception of the very minimalist language of § 7 of the FAA pertaining to the authority of arbitrators to summon witnesses to the arbitration hearing and order them to bring with them documents constituting material evidence, these issues are not addressed in the FAA and definitive federal court case law.[38] These matters are of less substantive importance to the nature and integrity of the arbitration process than are the "borderline" issues positioned at the center of the preemption continuum. For that reason, and because of the general absence of definitive federal law on the issues, it is likely that even in the absence of a choice of law provision the Supreme Court would be willing to defer to rules of procedure of this nature set forth in a state arbitration act, provided those rules are intended to foster the arbitration process and do not conflict with the seminal directive of the FAA that otherwise valid contractual agreements to arbitrate are enforceable.

The Drafting Committee considered these matters to be a prime area for its attention. The FAA is silent on most of these "procedural" issues and there is substantial diversity of practice with regard to them. Thus, the Drafting Committee concluded that a widely-adopted set of uniform, baseline procedural standards (facilitated via the RUAA) could do much more to stabilize the commercial arbitration process and ensure its institutionalization over the long run.

38. Section 7 is the FAA's only provision that speaks to the type of "procedural" issues contemplated here. It is entitled "Witnesses before arbitrators; fees; compelling attendance" and states in relevant part:

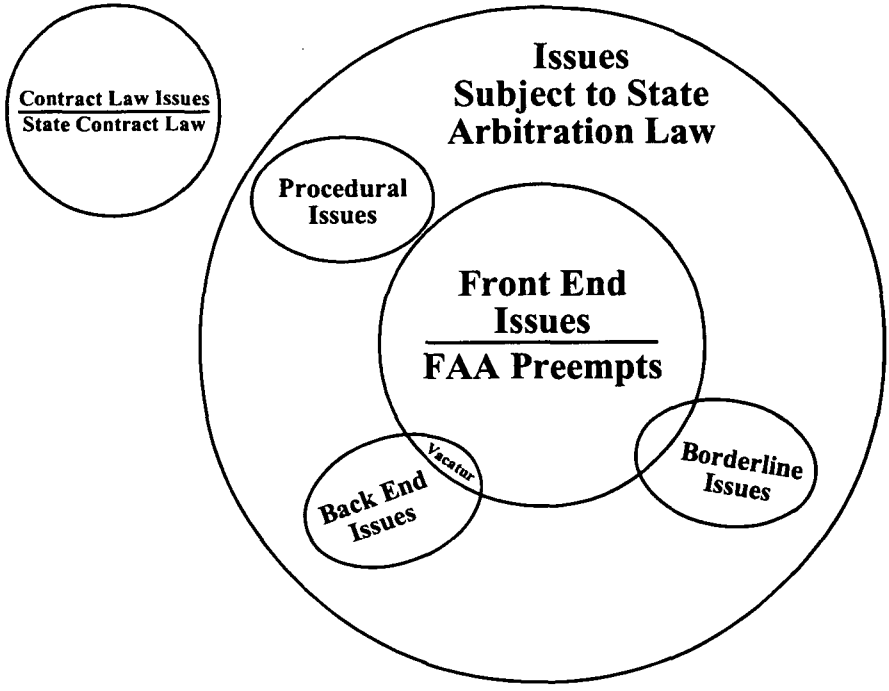
> The Arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

9 U.S.C. § 7.

2. An Alternate Depiction of FAA Preemption

At the Drafting Committee's initial June 1997 meeting in Cincinnati, Ohio, a second Venn diagram conceptualization of the FAA preemption dynamic was devised.

Figure 2. Preemption Venn Diagram



The largest circle on the diagram represents the totality of the issues that are subject to regulation by the states. The smaller circle centered within the larger circle depicts the issues for which FAA preemption is complete—permitting the states only to imitate the federal statute. Nestled within this space are the "front end" issues of enforceability and substantive arbitrability.

The overlap between the center circle and the two ellipses representing the "borderline" issues and the "back end" issues indicates the uncertain reach of FAA preemption with regard to these matters—due either to the confusing state of the case law (regarding vacatur) or the voids in the FAA and attendant case law (regarding the "borderline" issues). The third ellipse within the largest circle represents the "procedural" issues pertaining to the arbitration process itself that, but for the portion of FAA § 7 that speaks to the subpoena authority of arbitrators, are not addressed by the definitive federal law of arbitration. The placement of the ellipse with a portion of its border co-joined with the border of the "FAA Preempts"

center circle indicates the fact that any state law regulation of these matters must comport with the very limited, yet unambiguous language of § 7 of the FAA.[39]

The small circle to the left of the "Issues Subject to State Arbitration Law" circle depicts the contract formation rules, founded on the general law of contracts in each state, that determine when and how exceptions to the FAA's sweeping command that otherwise valid agreements to arbitrate arise. The placement of this smallest circle outside the realm of topics amenable to regulation by the states through their state arbitration acts reflects the Supreme Court's "equal footing" rule. That preemption-based principle bars the states from establishing specific, arbitration-only standards that create special criteria for the enforcement of arbitration agreements that do not apply equally to all contracts.

The two constructs just described provided the touchstone for the RUAA Drafting Committee's ongoing determinations of what topics it was permitted to address, as well as its assessments of the appropriate depth and character of the regulation it would suggest to the states. The section immediately below briefly describes how those decisions were influenced and shaped by the preemptive effect of the Federal Arbitration Act.

D. Effectuation of the Preemption Paradigm

The RUAA Drafting Committee found the Venn diagram version of the preemption paradigm to be a more useful drafting guide than the preemption continuum. Relying primarily on that framework, the Drafting Committee designated the diagram's "FAA Preempts" center circle and the small "Contract Formation Issues" circle as the "red zone," denoting the two issues bundles where the FAA's preemptive effect is paramount.

The Drafting Committee concluded that it could not act to ameliorate the plight of employees, consumers, franchisees, and other "little guys" who often are pressured into arbitration agreements by others with superior economic power without running afoul of the Supreme Court's "equal footing" rule. Special "arbitration-only" enforceability standards, whether effected via a state arbitration act, a specific anti-arbitration statute or a common law rule cannot stand in the face of the directive of § 2 of the FAA that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[40]

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39. Of course, any state arbitration act provision fashioned after the RUAA and addressing "procedural" issues cannot conflict with § 7 of the FAA without inviting preemption. However, nothing in the relevant FAA preemption case law (*Volt* or otherwise) indicates that state legislative action intended to flesh out the framework for pre-hearing and hearing procedure is proscribed merely because § 7 of the FAA speaks to the subpoena authority of arbitrators. There is no evidence in the legislative history of the FAA, or elsewhere, indicating that Congress intended that § 7 of the FAA would constitute the only permitted regulation of procedural matters pertaining to arbitration. Where there is no conflict between a state law provision regulating "procedural" issues and an express provision of the FAA or the attendant definitive case law, there is no objective basis for inferring that the states are proscribed from supplementing the scant language of § 7 in an effort to strengthen and facilitate the arbitration process.

40. 9 U.S.C. § 2.

As a result, section 6 of the RUAA, entitled "Validity of Agreement to Arbitrate," says nothing regarding the standards for deciding whether a challenged arbitration agreement is enforceable beyond mimicking § 2 of the FAA.[41] In an effort to further track relevant federal law arising under the FAA, the Drafting Committee added provisions codifying the federal rules pertaining to arbitrability decisions—that substantive arbitrability issues are for the courts while procedural arbitrability questions are appropriate for arbitral decision.[42]

As the Drafting Committee's attention turned beyond the "red zone" of total FAA preemption, it encountered the "back end" and "borderline" issues bundles. It is the absence of definitive rules of federal law, like those that exist for the "front end" issues and the "contract formation issues" just addressed, that liberate the states to legislate with regard to these subjects. However, the possibility that the federal law may crystallize in the future caused the Drafting Committee to move in a very methodical fashion when drafting language pertinent to these matters that fall in the interface between the "red zone" of total FAA preemption and the remainder of the preemption paradigm sphere defining the realm of state law issues.

The Drafting Committee's conversation pertaining to the "back end" issues quickly reduced to a dialogue as to the likely effect of FAA preemption on efforts by the states to legislate with regard to the issue of vacatur. The manner in which the Drafting Committee chose to deal with this second, book-end issue is the subject of the final substantive section of this article. Therefore, it will not be addressed further here.

As noted earlier, the "borderline" issues concern significant dimensions of the arbitration process but do not go to the essence of the agreement to arbitrate or the effectuation of the results of that agreement. In deciding how to deal with the "borderline" issues, the Drafting Committee again moved in a deliberate fashion. When addressing subjects where there are identifiable federal standards (e.g., arbitrator disclosure and punitive damages), the Drafting Committee fashioned statutory language intended to track that federal law. When dealing with matters not presently the subject of definitive federal law (e.g., provisional remedies and the right of parties to representation by an attorney) the Drafting Committee endeavored to create standards intended to foster the arbitration process and ensure that it functions efficiently and fairly. By doing so, it created a "firewall" that should ensure that even if the FAA is subsequently amended or interpreted in a manner inconsistent with a state arbitration statute founded on the RUAA with

41. Section 6(a) of the FAA states: "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to an agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract."

42. Section 6(b) of the RUAA states: "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." Section 6(c) states: "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing an agreement to arbitrate is enforceable."

regard to one of these borderline issues, the state law provision would remain operative if clearly designated by the parties' arbitration agreement as a substitute for the FAA.[43]

The general absence of definitive federal law regarding the "procedural" issues led the Drafting Committee to determine that there is no palpable threat of federal preemption in this sphere, especially when state law addressing these matters is intended to further, not hinder, the commercial arbitration process. The need for a uniform set of standards to govern matters pertaining to notice, consolidation, arbitrator immunity, pre-hearing procedure and discovery, court enforcement of pre-award arbitral rulings, and the like has become more apparent as the demands and expectations placed on commercial arbitration have ratcheted up in recent years.

There is little likelihood that the FAA will be amended in the foreseeable future to address these aspects of the process. Therefore, the states provide the only realistic venue for this type of legislative action so important to fleshing out the current, skeletal legal framework and bringing it into the twenty-first century. This effort in constructing, for the first time, a comprehensive, well thought-out legal framework for the procedural dimensions of the arbitration process was among the most important tasks undertaken by the Drafting Committee.

E. Conclusion

In devising a paradigm for ascertaining the reach and effect of the federal law of commercial arbitration, the RUAA Drafting Committee was greatly concerned with promulgating a uniform statute that would provide the states a template for updating their arbitration acts that minimizes concerns that those legislative efforts might eventually be mooted by the FAA. Nowhere was the specter of FAA preemption more prevalent than it was in the Drafting Committee's deliberations over the primary "back end" issue of vacatur. The section below describes how the Drafting Committee approached this crucial topic.

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43. The degrees of freedom afforded the Drafting Committee with regard to the "borderline" issues was expanded by the Supreme Court's opinions in *Volt* and *Mastrobuono*. As noted earlier, those opinions make clear the Court's belief that there is a role for the states in these areas even if the state law provisions do not jibe exactly with the FAA or the attendant federal court case law. As long as the state law generally comports with the pro-arbitration public policy of the FAA and if the parties to an arbitration agreement have unequivocally opted to govern their arbitration proceedings under the law of that state, the state law will govern. Thus, for example, a state arbitration act provision establishing rules for disclosure of potential conflicts by neutral arbitrators stricter than the standards reflected in the relevant federal court case law would not be preempted by that federal law, if the parties' arbitration agreement clearly indicates their intent that the subject arbitration is to be governed by the state arbitration act.

III. THE RUAA AND VACATUR

The vacatur section of an arbitration statute serves a very important, and often unarticulated purpose—to bring the arbitration proceeding to closure by ensuring that the grounds for vacatur are not so numerous or far reaching as to provide parties dissatisfied with the arbitral result a vehicle for easily escaping the arbitration bargain. The importance the Drafting Committee attributed to vacatur is reflected in its decision to take up this core "back end" issue at its first meeting, immediately after the discussion and adoption of the preemption model just described. The Drafting Committee quickly agreed that the RUAA should recodify the four statutory grounds for vacatur set out in § 10(a)(1)-(4) of the FAA. Thus, RUAA section 23(a) provides that the courts shall vacate challenged awards:

- if the award was procured by corruption, fraud or other undue means;
- when there was evident partiality by a neutral arbitrator or corruption by any arbitrator;
- when misconduct by an arbitrator prejudices the rights of a party;
- where the arbitrator refused to postpone a hearing upon a showing of sufficient cause for postponement, refused to consider material evidence so as to substantially prejudice the rights of a party; or
- where the arbitrator exceeded the powers afforded the arbitral office under the parties' arbitration bargain.[44]

That decision having been made, the remainder of the Drafting Committee's deliberations regarding vacatur centered on three dimensions of the relevant law:

1. consideration of the ways in which the existing statutory standards for vacatur (set out in section 12(a) of the 1955 Uniform Arbitration Act and § 10(a) of the FAA) could be clarified and sharpened;
2. the decision as to whether the RUAA should codify and attempt to clarify any grounds for vacatur beyond those set out in the FAA; and
3. the advisability of incorporating in the RUAA an express statutory authorization of what came to be called "opt-in" review provisions in arbitration agreements, whereby the parties contract for judicial or appellate arbitral review of disputed awards.

The manner in which the Drafting Committee resolved these three matters is the subject of the commentary below.

44. The precise text of section 23(a) of the RUAA can be found in Appendix A on pp. 63-64.

A. Sharpening the Existing Statutory Grounds for Vacatur

Three sections of the RUAA resulted from the Drafting Committee's efforts to sharpen, and where warranted, supplement the current statutory FAA-UAA scheme for vacatur. The first effort of this nature is reflected in section 23(a)(2) of the RUAA. The provision is founded on section 12(a)(2) of the UAA and § 10(a)(2) of the FAA and is intended to achieve several purposes.

First, the Drafting Committee opted to divide section 23(a)(2) into three subsections in order to clarify that among the three grounds for vacatur it lists—evident partiality (by a neutral arbitrator), corruption, and misconduct by an arbitrator—only the latter requires proof of prejudice to the interests of a party for vacatur to be warranted. Thus, section 23(a)(2) establishes a definitive rule that vacatur for evident partiality by a neutral (non-party) arbitrator or corruption by any arbitrator will trigger vacatur of an award challenged on that ground, regardless of whether the rights of the party petitioning for vacatur were prejudiced.

Next, the Drafting Committee decided to create a new statutory ground for vacatur—section 23(a)(5)—establishing that an award can be vacated because there is no valid agreement to arbitrate. Under section 23(a)(5) a party's ability to raise a challenge based on this ground is predicated on that claim being raised not later than the beginning of the arbitration hearing, as provided by section 15(c) of the RUAA.[45] The obvious purpose here is to oblige parties who believe the arbitration agreement is unenforceable to advance their objection to the arbitration in a timely manner. Under the terms of section 23(a)(5) a party may not take part in the arbitration and await its outcome (i.e., wait to see if they lose in arbitration) before deciding to assert that there is no enforceable arbitration bargain. However, a party that refuses to participate in or appear at the arbitration proceeding reserves the right to seek vacatur of the award on this ground.

Section 23(a)(6) establishes a second new statutory ground for vacatur that is similar in thrust and character to section 23(a)(5). It provides that vacatur shall occur when "the arbitration was conducted without proper notice of the initiation of an arbitration as required by Section 9 [of the RUAA] so as to prejudice substantially the rights of a party to the arbitration proceeding."[46] By sanctioning vacatur for absence of proper notice at the outset of an arbitration, and predicating vacatur on a finding of substantial prejudice, the Drafting Committee sought to ensure a minimum level of due process to responding parties in arbitration.

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45. Section 15(b) provides that a party that fails to interpose an objection as to lack or insufficiency of notice not later than the commencement of the arbitration hearing and makes an appearance at the hearing waives any notice-based objection.

46. R.U.A.A. § 23(a)(6). Section 9(a) of the RUAA establishes the manner in which a person initiates an arbitration by giving notice to the other parties to the arbitration and specifies that such notice must describe the nature of the controversy and the remedy sought. Pursuant to section 4(a) of the RUAA, the parties to an arbitration may waive or vary the notice requirements of section 9(a).

B. Codification of Additional Grounds for Vacatur

Seminal among the numerous nonstatutory grounds for vacatur created by the federal courts in recent years are the "manifest disregard of the law" ground originating in the obiter dictum of the Supreme Court's 1953 opinion in *Wilko v. Swan*[47] and the "public policy" ground first articulated by the Court in its 1983 opinion in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*[48] and further clarified by its 1987 opinion in *United Paperworkers International Union v. Misco, Inc.*[49] Extensive analysis of these two vacatur standards is not called for here. It is sufficient to note that in several of their various incarnations, the "manifest disregard of the law" and "public policy" grounds have provided courts with license to interject themselves into the merits of disputes that the parties have contractually agreed are to be resolved by arbitration.

Because of the widespread embrace of these two nonstatutory grounds by the federal courts, the Drafting Committee debated the advisability of codifying them at substantial length.[50] The primary argument in favor of codification was the opportunity it would provide for channeling and stabilizing the law pertaining to each ground by providing uniform, statutory articulations of the standards to be employed by the courts in determining when vacatur is warranted. The temptation to use the RUAA as the vehicle for achieving this goal, one that Congress and the federal courts have yet to achieve, was balanced by the two primary downside risks associated with codification.

The first downside to codification of the "manifest disregard of the law" and the "public policy" nonstatutory grounds lies in the inability of the United States courts of appeal to achieve clear consensus as to the most appropriate analytical model for either standard. The Drafting Committee was initially disquieted by the difficulty inherent in devising a "bright line" standard for either ground. That concern, coupled with the uncertainty as to the ultimate posture of the relevant federal law, should the Supreme Court or Congress eventually choose to articulate a single, definitive standard for one or both grounds, indicated strongly against codification. The second reason for the Drafting Committee's reticence, linked directly to the first, goes to the specter of FAA preemption should the Supreme Court or Congress ever decide that the four statutory grounds set out in § 10(a) of the FAA constitute the sole, exclusive grounds for vacatur, thereby mooting any state law provision for additional statutory grounds.

Upon balancing these considerations, the Drafting Committee decided to forego codification of the "manifest disregard of the law" and "public policy" grounds for vacatur, leaving their further refinement, or a determination that either standard should be rejected as inconsistent with § 10(a) of the FAA, to the Supreme Court or Congress. Given the decision just described not to codify either of the two

47. 346 U.S. 427 (1953).
48. 461 U.S. 757 (1983).
49. 484 U.S. 29 (1987).
50. State courts have rarely addressed the "manifest disregard of the law" or "public policy" grounds for vacatur.

seminal nonstatutory grounds for vacatur, it was a relatively easy call for the Drafting Committee to omit reference in the RUAA to any of the remaining nonstatutory grounds founded on the "essence" from the agreement standard that is the centerpiece of labor arbitration vacatur law. The problems inherent in attempting to define a single, uniform threshold for vacatur and the tendency, reflected in the burgeoning federal court case law in recent years, of these "essence" based grounds to eventually metastasize into tests that sanction vacatur for "big" errors of law, contract interpretation, or fact convinced the Drafting Committee that the ultimate legal fate of these standards should be left to the developing federal and state court case law arising under the FAA.

C. The Issue of "Opt-In" Review

No single issue consumed more of the Drafting Committee's time and energies than the question of whether section 23 of the RUAA should incorporate a provision expressly permitting parties to contractually "opt-in" to either judicial or appellate arbitral review of arbitration awards for errors of law, fact, or any other grounds not prohibited by applicable law. This concept was rejected by a wide margin as the result of a sense-of-the-house motion to that effect introduced and passed by the Committee of the Whole at the revised act's first reading before NCCUSL in July 1999. The Drafting Committee subsequently voted 5-3 not to include in section 23 a provision allowing parties to contract for review of awards by appellate arbitral panels.

1. The Factors Weighed by the Drafting Committee

Despite the ultimate decision not to legislatively sanction the "opt-in" device, the ongoing debate as to the propriety of including such provisions in commercial arbitration agreements warrants a discussion of the key factors weighed by the Drafting Committee. The Drafting Committee's deliberations centered primarily on the advisability of "opt-in" clauses providing for judicial review of disputed awards. It identified three value-added dimensions offered by legislative sanction of the contractual "opt-in" review device.

First, such a provision would clearly inform the parties that they can opt-in to enhanced judicial review. Second a carefully-crafted "opt-in" provision could serve a "channeling" function by establishing uniform standards for the types and extent of judicial review permitted, facilitating the development of a consistent body of case law pertaining to those contract provisions. Finally, it is asserted that permitting parties to contractually ensure themselves access to some form of meaningful review of challenged awards might encourage many who are now reluctant to submit their disputes to final and binding arbitration to do so.

The risks/downsides inherent in codification are several. Paramount is the assertion that permitting parties a "second bite at the apple" on the merits effectively eviscerates arbitration as a true alternative to traditional litigation. The Drafting Committee majority became convinced that inclusion of an opt-in section in the RUAA would propel large numbers of attorneys to put review provisions in

arbitration agreements, as a safe harbor in order to avoid manifold malpractice claims by their clients who lose in arbitration. Inclusion of opt-in provisions in arbitration agreements would virtually guarantee that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial arbitration of its finality and making the process far more complicated, time consuming, and expensive.

At the same time, arbitrators would be effectively obliged to provide detailed findings of law and, if the parties agree to judicial review for errors of fact, findings of fact in order to facilitate judicial review. In order to lay the predicate for the appeal of unfavorable awards, transcripts would become the norm and counsel would be required to expend substantial time and energy making sure the record would support an appeal. Arbitrators would find themselves routinely involved in post-award judicial proceedings requiring significant time and expense. Finally, the time to resolution in many cases would be greatly lengthened, as well as increasing the prospect of reopened proceedings on remand following judicial review.

The third argument raised in opposition to an opt-in provision is the prospect of a backlash of sorts from the courts. The courts have blessed arbitration as an acceptable alternative to traditional litigation, characterizing it as an exercise in the freedom of contract that has created a significant collateral benefit of making civil court dockets more manageable. They are not likely to view with favor parties exercising the freedom of contract to gut the finality of the arbitration process and throw disputes back into the courts for final decision. Courts faced with that prospect may well lose their recently acquired enthusiasm for commercial arbitration.

2. The Imbedded Legal Issues

An explicit statutory sanction of contractual agreements for a mode and standard(s) of review not presently provided for by the FAA, state arbitration acts or the definitive case law raises several problems beyond those associated with finality-related matters. The first concern is FAA preemption. The Supreme Court has made clear its belief that the FAA preempts conflicting state arbitration law. Neither FAA § 10(a) nor the federal common law developed by United States courts of appeal permit vacatur for errors of law. Consequently, there is a legitimate question of federal preemption concerning the validity of a state law provision sanctioning contractual authorization of vacatur for errors of law when the FAA does not permit it.

The second major impediment to inclusion of an "opt-in" provision for judicial review in the RUAA (and contractual provisions to the same effect) is the contention that the parties cannot contractually "create" subject-matter jurisdiction in the courts when it does not otherwise exist. This "creation" of jurisdiction transpires because a statutory provision that authorizes the parties to contractually create or expand the jurisdiction of the state or federal courts can result in courts being obliged to vacate arbitration awards on grounds they otherwise would be foreclosed from

relying upon. Court cases under the federal law show the uncertainty of an "opt-in" approach.[51]

The obvious tension here is between enforcement of the parties' agreement to arbitrate and the need to ensure the finality of the arbitral result. The less obvious factor upon which this tension turns is the proper reach of the parties' freedom to contract and whether it extends to an arbitration agreement that effectively moots the key dimension of the process—its finality. Whatever perspective one takes on this matter, in the end it reduces to a question of the propriety of private parties contractually instructing a court to decide a matter that in the absence of that contractual instruction the court would be without authority to decide. Stated another way the inquiry becomes: Is the standard for judicial review of commercial arbitration awards a matter of law properly determined by Congress, state legislatures and the courts, or can the parties properly instruct the courts as to the standards for vacatur—even if they conflict with the standards set down in § 10(a) of the FAA?

3. The Bottom Line

In the end, the negative policy implications recited above, and reflected in the sense-of-the-house motion approved by NCCUSL in July 1999, led the Drafting Committee to reject contracted-for judicial review and to instead consider legislative sanction of contractual provisions for appellate arbitral appeals mechanisms. Because they do not enmesh the courts in the merits of disputes the parties have contractually committed to arbitration, "opt-in" appellate arbitral review mechanisms are less troublesome than "opt-in" provisions for judicial review. Most important to the Drafting Committee's deliberations, there are no significant legal impediments—FAA preemption or otherwise—to legislative sanction of "opt-in" provisions for appellate arbitral review. This is so because the review mechanism they create is confined to the parties' contractual relationship and does not interject the courts into it. Nevertheless, in the end, the Drafting Committee decided not to include in the RUAA a statutory sanction of internal, appellate arbitral review.

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51. *See, e.g.*, Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal [court] jurisdiction cannot be created by contract.") (labor arbitration case). *But see* UHC Mgmt. Co. v. Computer Sciences Corp., 148 F.3d 992 (8th Cir. 1998); Gateway Technologies, Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995). The court, relying on the Supreme Court's contractual view of the commercial arbitration process reflected in *Volt, Mastrobuono* and *First Options of Chicago* held valid a contractual provision providing for judicial review of arbitral errors of law. *Id.* at 996. The court concluded that the vacatur standards set out in § 10(a) of the FAA provide only the default option in circumstances where the parties fail to contractually stipulate some alternative criteria for vacatur. *Id. See also* LaPine Tech. Corp. v. Kyocera, 130 F.3d 884 (9th Cir. 1997). Regarding state court treatment of this question see *Chicago Southshore & South Bend R.R. v. Northern Indiana Commuter Transportation District*, 682 N.E.2d 156, 159 (Ill. App. 3d 1997), *rev'd on other grounds, Chicago Southshore & South Bend R.R. v. Northern Indiana Commuter Transportation District*, 184 Ill. 2d 151 (1998); *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. App. 1984); and *NAB Construction Corp. v. Metropolitan Transportation Authority*, 180 A.D. 436, 579 N.Y.S.2d 375 (N.Y. App. Div. 1992).

The Drafting Committee's action leaves parties free to contractually create any variant of review mechanism they mutually deem appropriate. It also leaves the issue of the legal propriety of "opt-in" provisions for judicial review to the developing case law under the FAA and state arbitration statutes. This result is stark testimony to the pervasive effect of FAA preemption on state law regulation of the arbitration process.

IV. CONCLUSION

The preceding analysis demonstrates how the Revised Uniform Arbitration Act was drafted largely in juxtaposition to the Federal Arbitration Act, guided in clearly defined terms by the rule of federal preemption articulated by the Supreme Court in *Southland* and its progeny. The degrees of freedom permitted the RUAA Drafting Committee in the face of the FAA's preemptive effect varied according to the category of issue being considered. The sweeping rule of enforceability drawn from § 2 of the FAA by the Supreme Court, in conjunction with the "equal footing" standard requiring that the enforceability of arbitration agreements be determined pursuant to general contract law rules, left the Drafting Committee with little discretion regarding the "front end" issues. Thus, the revised act does little more than restate § 2 of the FAA regarding enforceability and codify the current federal case law regarding issues of substantive and procedural arbitrability.

As explained above, the Drafting Committee's attention with regard to the "back end" issues focused almost entirely on vacatur. The Drafting Committee was sorely tempted to redirect and interject a modicum of discipline into what has become a chaotic area of the law. Nevertheless, in the end it decided that the current flux in the vacatur case law emanating from the federal courts, coupled with the specter of federal preemption should the current disarray ever be ameliorated, dictated that section 23(a) of the RUAA be limited for the most part to a restatement and sharpening of the grounds for vacatur set out in § 10(a) of the FAA.

The less substantial threat of preemption for the "borderline" issues and the maneuvering room permitted the states by the *Volt/Mastrobuono* caveat to the rule of federal preemption for these types of matters liberated the Drafting Committee to take significant action. Depending on the manner in which the relevant federal law pertaining to each of these matters evolves in the coming years, the pertinent RUAA provisions will either constitute the definitive law, or provide a fall-back option for parties who elect not to govern their arbitrations by the otherwise controlling federal law standards.

When dealing with the "procedural issues" that generally are not the subject of definitive federal law, the Drafting Committee was substantially free to fashion the type and number of rules it believed necessary to ensure the efficient and fair functioning of the commercial arbitration process in today's legal environment. At the same time the state of the relevant federal law obliged the Drafting Committee to frame statutory language sufficiently respectful of the FAA's pro-arbitration public policy. This was necessary in order to ensure that state arbitration acts

founded on the RUAA would still provide an option the parties to arbitration agreements can elect if the developing federal law were to depart from the state law model with regard to particular issues. It is with regard to these issues that the RUAA likely will make the greatest contribution toward ensuring the maturation and institutionalization of commercial arbitration as a truly viable surrogate for litigation in the courts.

The Drafting Committee, NCCUSL and those of us who served as Advisors and Observers to the Drafting Committee can be quietly proud of the product of our efforts. I am convinced that the careful attention we paid to ascertaining and respecting the reach and effect of the FAA produced a uniform act that will stand the test of federal preemption. The RUAA will provide the states with a template for bringing the legal framework for arbitration into the twenty-first century that is up to the task of regulating a process that is expected to stand in the place of the courts in today's increasingly fast-paced, complex, and highly litigious world of commerce.