

"Opt-In" for Judicial Review of
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Uniform Arbitration Act

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"OPT-IN" FOR JUDICIAL REVIEW OF ERRORS OF LAW UNDER THE REVISED UNIFORM ARBITRATION ACT

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The Uniform Arbitration Act is one of the most successful uniform laws. It has been enacted in 35 states and 14 other jurisdictions have substantially similar statutes.¹ Originally enacted in 1955, the Uniform Arbitration Act is now being revised for the first time.

The current draft of the Revised Uniform Arbitration Act contains a number of changes from the original. While most of these changes are minor, one is of great conceptual significance. That is the provision allowing parties to "opt-in" for judicial review of arbitrators' legal rulings. This provision, currently Section 19(b), reads as follows:

In addition to the grounds to vacate an award set forth in Subdivision (a), the parties may contract in the arbitration agreement for judicial review of errors of law in the arbitration award. If they have so contracted, the Court shall vacate the award if the arbitrator has committed an error of law substantially prejudicing the rights of a party.²

A number of concerns have been expressed about this provision. One concern is that Section 19(b) improperly allows the parties to confer subject-matter jurisdiction on the court.³ Another concern is that Section 19(b) may be preempted by federal law.⁴ A third concern is that Section 19(b) is impractical.⁵ I address each of these three concerns below in Parts II, III and IV, respectively. First, though, Part I provides some necessary background.

I. ARBITRATORS OFTEN DO NOT APPLY THE LAW

The most important piece of background information necessary to assess Section 19(b) is that arbitrators often do not apply the law. Many arbitrators believe they are free to ignore legal rules whenever they think that more just decisions would be reached by so doing.⁶ Courts have directly acknowledged

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¹ REVISED UNIFORM ARBITRATION ACT [hereinafter RUAA], Prefatory Note, at 4 (Tentative Draft No. 4, February 19, 1999). For the text of the RUAA see www.law.upenn.edu/library/ulc/uarba/arb299.htm.

² See *id.* at § 19(b).

³ See *id.* at § 19, Comment(E)(8)-(9).

⁴ See *id.* at § 19, Comment(E)(7).

⁵ See *id.* at § 19, Comment(E)(12)-(14).

⁶ See Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719-20 (1999).

that "[a]rbitrators are not bound by rules of law."⁷ This "is consistent with the standard view that many parties choose arbitration because it provides a less legalistic process than litigation."⁸

Courts routinely confirm arbitration awards. Through confirmation, the court adopts the arbitrator's decision as its own, and that decision is enforced like any other ruling of the court.⁹ Courts do not often vacate arbitration awards.¹⁰ The Federal Arbitration Act ("FAA") contains the following narrow grounds for vacating an arbitration award.

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.¹¹

The law of most states, including the Uniform Arbitration Act, contains a very similar list of grounds for vacating arbitration awards.¹²

Notice that "error of law" by the arbitrator is not listed in the FAA as a ground for vacating the arbitrator's award. The same is true of state statutes. There are circumstances in which a court will vacate an arbitration award for failure to apply the law, but these circumstances are very rare. Courts have gone beyond the statutory grounds for vacating arbitration awards to add additional grounds. One of these grounds is known as "manifest disregard of law."¹³ There are few cases in which a court can say with confidence that an arbitrator has manifestly disregarded the law.

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.¹⁴

⁷ *Aimccc Wholesale Corp. v. Tomar Prods., Inc.*, 237 N.E.2d 223, 225 (N.Y. 1968). See also *Ware*, *supra* note 6, at 720-21 n.82 (citing cases).

⁸ *Ware*, *supra* note 6, at 721.

⁹ See MACNEIL, SPEIDEL & STIPANOWICH, *FEDERAL ARBITRATION LAW* §38.1.1 (1994).

¹⁰ "The conventional wisdom is that successful challenges to arbitration awards are rare." MURRAY, RAU & SHERMAN, *PROCESSES OF DISPUTE RESOLUTION* 624 (2d ed. 1996). Accord MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 9, at § 40.1.4 ("Over the years, the courts have taken a fairly uniform approach to awards: Awards should be confirmed and enforced as is unless there is clear evidence of a gross impropriety").

¹¹ 9 U.S.C. § 10(a) (1994).

¹² See UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280-283 (1997) (grounds for vacating award); See also 7 U.L.A. 1 (1997) (table of jurisdictions adopting the act).

¹³ See Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 466-79 (1998) (thoroughly discussing this ground).

¹⁴ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

An arbitration award may also be vacated on the ground that its enforcement would violate "public policy."¹⁵ Like "manifest disregard of law," this doctrine is rarely used by courts to vacate arbitration awards.¹⁶ An arbitrator's failure to apply the law, without more, does not violate public policy.¹⁷

Most cases of arbitrators failing to apply the law probably go undetected by courts because arbitration generally does not produce a transcript or other record of the proceedings or a reasoned opinion by the arbitrator.¹⁸ Sometimes, however, a court will realize that an arbitration award does not apply the law. In such a case, a court will probably confirm the award anyway.¹⁹ That is because the error of law probably does not satisfy either the "manifest disregard of law" or "public policy" ground for vacating.

The fact that courts rarely correct arbitrators' errors of law has led many parties to be wary of arbitration. They apparently like its advantages but want some check on "knucklehead"²⁰ arbitration awards.²¹ They seek assurance that judicial review of arbitrators' legal rulings will be available so they expressly provide for such review in their arbitration agreements.²² Section 19(b) responds to these parties; it would enforce their agreements.

II. JURISDICTION

One objection to Section 19(b) is that it allows private parties to "create" subject-matter jurisdiction in the courts when such jurisdiction does not otherwise exist. Those who raise this objection cite a Seventh Circuit opinion by Judge Richard Posner, *Chicago Typographical Union No. 16 v. Chicago Sun Times, Inc.*²³ *Chicago Typographical* said that "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 jurisdiction cannot be created by contract."²⁴ The arbitration agreement in *Chicago Typographical* did not provide for judicial review of arbitrators' legal rulings or even require the arbitrator to apply the law.²⁵ The language quoted above, then, is merely

¹⁵ See Hayford, *supra* note 13, at 476-80; see also MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 9, at § 40.8.1.

¹⁶ See MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 9, at § 40.8.

¹⁷ Ware, *supra* note 6, at 725.

¹⁸ See *id.* at 721-22.

¹⁹ See *id.* at 723.

²⁰ *The Arbitration About Face*, N.J.L.J., June 20, 1994 at 16.

²¹ See, e.g., Stephen A. Hochman, *Judicial Review to Correct Arbitral Error-An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 107 (1997) ("some parties will not buy into arbitration without the safety net of some degree of substantive judicial review").

²² See cases *infra* note 27.

²³ 935 F.2d 1501 (7th Cir. 1991).

²⁴ *Id.* at 1505.

²⁵ See *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 890 (9th Cir. 1997) (discussing *Chicago Typographical*):

The court, however, did not explain what had evoked that pronouncement, nor did it further explain the reasoning behind it. The opinion does not indicate that the parties attempted to confer appellate jurisdiction on the court, nor does it even indicate that the parties had asked

dicta. But it is Judge Posner's dicta so it deserves especially serious consideration. It is essential to point out, though, that no reported decision has refused to enforce an agreement providing for judicial review of an arbitrator's legal rulings.²⁶ No holdings, only dicta, support the position that such agreements improperly allow the parties to "create jurisdiction."

In contrast, there is a list of cases enforcing agreements providing for judicial review of arbitrators' legal rulings.²⁷ The count is six holdings to zero in favor of enforceability. The case law's most thorough analysis of the "creating jurisdiction" issue comes from Judge Alex Kozinski, who concurred in *Lapine Technology Corp. v. Kyocera Corp.*²⁸ In *Kyocera*, the Ninth Circuit enforced an agreement providing that "The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous."²⁹ Judge Kozinski wrote:

In general, I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld. A partial answer is that any case properly in district court under the Federal Arbitration Act must have an independent jurisdictional basis. Thus, enforcing the arbitration agreement — even with enhanced judicial review — will consume far fewer judicial resources than if the case were given plenary adjudication. The rub is that the work the district court must perform under this arbitration clause is not a subset of what it would be doing if the case were brought directly under diversity or federal question jurisdiction. It's not just less work, it is different work. Nowhere has Congress authorized courts to review arbitral awards under the standard the parties here adopted.

Nevertheless, I conclude that we must enforce the arbitration agreement according to its terms. The review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts, or on habeas corpus. I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl. Given the strong policy of party empowerment embodied in the Arbitration Act, I see no reason why Congress would object to enforcement of this agreement. This is not quite an express congressional

for some exotic standard of review.

130 F.3d at 890.

²⁶ Two other cases' dicta lend support, albeit minimal, to the notion that agreements providing for judicial review of arbitrators' legal rulings are unenforceable. *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998), said it is not "a foregone conclusion" that such agreements are enforceable. *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261 (9th Cir. 1992), said "courts will not heighten their otherwise deferential review of arbitral awards even where the arbitrators misapplied the law. . . . The fact that a court has access to detailed findings of fact and conclusions of law does not alter this deferential review." These statements are also dicta because in neither case did the agreement provide for judicial review of arbitrators' legal rulings.

²⁷ See *Kyocera*, 130 F.3d at 884; *Syncor Int'l. Corp. v. McLeland*, 1997 WL 452245, at *6-7 (4th Cir., Aug. 11, 1997) (unpublished); *Gateway Techs., Inc. v. MCI Telecommunications Corp.* 64 F.3d 993, 996-97 (5th Cir. 1995); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984); *New England Utils. v. Hydro-Quebec*, 10 F. Supp. 2d 53 (D. Mass 1998); *Collins v. Blue Cross Blue Shield of Michigan*, 579 N.W.2d 435 (Mich. App. 1998).

²⁸ 130 F.3d 884 (9th Cir. 1997).

²⁹ *Id.* at 887.

authorization but, given the Arbitration Act's policy, it's probably enough.³⁰

One cannot emphasize too strongly the overwhelming weight of case law supporting enforcement of agreements providing for judicial review of arbitrators' legal rulings.³¹ Every single case in which the issue was presented for decision has decided in favor of enforcement.³² That fact alone should overcome worries that enforcement of these agreements improperly allows the parties to "create jurisdiction." But the case for Section 19(b) is still stronger.

Other than the *Chicago Typographical* dicta, concerns in the case law about enforcing agreements providing for judicial review of arbitrators' legal rulings do not rest on the notion that such agreements "create jurisdiction." Rather, concerns in the case law rest on a lack of explicit statutory authorization for what Judge Kozinski called the "different work" the *Kyocera* district court was being instructed to do by the contract. In the absence of an agreement to the contrary, courts vacate arbitration awards only under the grounds recognized by statute or case law.³³ Enforcing an agreement providing for judicial review of arbitrators' legal rulings adds an additional ground not otherwise found in the statute or case law. Once Section 19(b) is enacted, this additional ground will be found in the statute and the concerns about enforcement will melt away.³⁴

The cases discussed above are all *federal* cases. Federal courts are limited in subject matter jurisdiction to federal question cases and cases with complete diversity of citizenship and an amount in controversy exceeding \$75,000.³⁵ The same is not true of *state* courts. They are courts of general jurisdiction. There is

³⁰ *Id.* at 891 (Kozinski, J., concurring) (citation omitted).

³¹ Scholarly comment is more evenly divided. Compare EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 436-37 (1997) (criticizing *Chicago Typographical*); Hochman, *supra* note 21, at 109 (correctly predicting result in *Kyocera*); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225 (1997) (defending *Kyocera*); Ware, *supra* note 6, at 733-36 (same); Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998) (same), with Andreas F. Lowenfeld, *Can Arbitration Coexist With Judicial Review? A Critique of LaPine v. Kyocera*, ADR CURRENTS, Sept. 1998, at 1, 12 (expressing doubts about *Kyocera*); Abby Cohen Smutny, *Judicial Review of Arbitral Awards: Comment on the Ninth Circuit Decision in LaPine Technology Corp. v. Kyocera Corp.*, MEALEY'S INT'L ARB. REP., Feb. 1998 at 18, 22 (same); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147 (1997) (same).

³² See *supra* note 27.

³³ See *supra* notes 9-19 and accompanying text.

³⁴ See Lowenfeld, *supra* note 31, at 16 ("Of course, Congress could (i) confer jurisdiction on the district courts to review arbitral awards on the merits; or it could (ii) amend § 10 of the FAA to authorize judicial review when the parties have given their consent in the agreement to arbitrate"). What Lowenfeld says of the FAA is equally true of the UAA.

Professor Lowenfeld said, "Had I sat on the panel of the 9th Circuit in *LaPine*, I think I would have dissented, though I am not sure." *Id.* at 12. So Lowenfeld is clearly skeptical about enforcing agreements providing for judicial review of arbitrators' legal rulings. Yet he acknowledges that his skepticism would be overcome by legislative authorization. Lowenfeld is referring to a federal statute, whereas RUAA is a state statute. This implicates the question of federal preemption discussed *infra* at notes 39-52 and accompanying text.

³⁵ See 28 U.S.C. § 1331 (1994) (federal question jurisdiction) and 28 U.S.C. § 1332 (1994) (diversity jurisdiction).

no doubt that state courts have jurisdiction over a petition to confirm or vacate an arbitration award rendered in that state.³⁶ Determining whether a court has jurisdiction to vacate an arbitration award is different from determining the grounds upon which the court may vacate the award. Section 19(b) deals only with the latter topic.

To put it more bluntly, Section 19(b) has nothing to do with courts' jurisdiction. Section 24 is Revised Uniform Arbitration Act's jurisdictional provision. It provides, "An agreement pursuant to Section 2 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement and to enter judgment on an award under this [Act]."³⁷ Section 24 does not expressly say that an agreement pursuant to Section 2 also confers jurisdiction on the court to *vacate* an award, but this is implied. And if it is not implied then courts lack jurisdiction to vacate under any of Section 19(a)'s grounds either. Section 19(a)'s grounds are the traditional ones:

- (1) The award was procured by corruption, fraud or other undue means.
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct by any of the arbitrators prejudicing the rights of any party.
- (3) The arbitrators exceeded their powers.
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to consider evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of Section 11, as to prejudice substantially the rights of a party.
- (5) There was no arbitration agreement, unless the party participated in the arbitration hearing without raising the objection not later than the commencement of the arbitration hearing on the merits.³⁸

Section 19(b)'s ground to vacate is, with respect to jurisdiction, no different from Section 19(a)'s grounds to vacate. They are all grounds for vacating awards over which the court has jurisdiction. They do not create jurisdiction.

³⁶ For example, the Uniform Arbitration Act provides that "The making of an agreement described in Section 1 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this Act and to enter judgment on an award thereunder." UNIF. ARBITRATION ACT § 17, 7 U.L.A. 429 (1997). "The term 'court' means any court of competent jurisdiction of this State." *Id.* See also *SBC Interactive, INC. v. Corporate Media Partners*, 1998 WL 749446, at *1 (Del. Ch. Oct. 7, 1998) ("Neither the FAA nor the Delaware Uniform Arbitration Act derogates this Court's inherent equity jurisdiction to enforce, modify or vacate arbitration awards."); *Lee v. El Paso County*, 965 S.W.2d 668, 672 (Tex. App. 1998) ("the trial court was correct in finding that it had jurisdiction under the common law to review and vacate the arbitration award."); *Coronet Ins. Co. v. Booker*, 511 N.E.2d 793, 795-96 (Ill. App. Ct. 1987) ("the Illinois Uniform Arbitration Act . . . expressly confers jurisdiction on a circuit court to enforce an arbitration agreement and to enter a judgment awarded thereunder, and to confirm, modify, correct or vacate an award."); *Daniels Ins. Agency v. Jordan*, 657 P.2d 624, 626 (N.M. 1982) ("the Uniform Arbitration Act provides a mechanism by which the courts may take jurisdiction to confirm the award, or, in the alternative, to vacate, modify or correct the award, within narrow statutory limits").

³⁷ RUAA § 24 (Tentative Draft No. 4, February 19, 1999).

³⁸ *Id.* at § 19(a).

III. FEDERAL PREEMPTION

It is highly unlikely that courts will hold Section 19(b) to be preempted by federal law. The notion that the FAA preempts Section 19(b) rests on a fundamental misunderstanding of the FAA. The central provision of the FAA provides that a "written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁹ The significance of Section 2 is apparent in light of the historical reluctance of courts to enforce pre-dispute arbitration agreements.

The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and to place such agreements upon the same footing as other contracts. While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.⁴⁰

The FAA does not preempt all state law pertaining to arbitration agreements. In fact, it expressly adopts state contract law in its command that courts enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."⁴¹ Thus, as the Supreme Court explained, "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] §2."⁴² What the FAA does preempt are state laws that single out arbitration agreements by making them less enforceable than other contracts.⁴³ In short, the FAA adopts state contract law, while preempting state "anti-contract" law.⁴⁴

To predict whether a state law is preempted by the FAA, one should first ask whether the state law prevents the enforcement of any possible arbitration agreement. If one cannot imagine an arbitration agreement that might be rendered unenforceable by the state law, then one can be nearly certain that the state law safely avoids preemption. In contrast, if one can imagine an arbitration agreement that might be rendered unenforceable by the state law then that state law is almost sure to be preempted unless it falls into the "general contract law" category discussed above. Exceptions to these generalizations are extremely rare. If these generalizations hold with respect to Section 19(b), then Section 19(b) will safely avoid preemption because Section 19(b) is pro-contract-enforcement.

³⁹ 9 U.S.C. § 2 (1994).

⁴⁰ *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989)(citations omitted).

⁴¹ 9 U.S.C. § 2 (1994).

⁴² *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

⁴³ *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *Doctor's Associates*, 517 U.S. at 688.

⁴⁴ *See Stephen J. Ware, Arbitration and Unconscionability after Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1008-13 (1996).

In a sense, federal law contains an exclusive list of the grounds upon which courts may vacate arbitration awards. This list begins with those grounds identified in the FAA.⁴⁵ The list also includes the judicially-created grounds discussed above, "manifest disregard of law" and "public policy."⁴⁶ Courts have differed somewhat on these judicially-created grounds so the exact scope of federal grounds for vacating remains somewhat unclear.⁴⁷ But whatever the federal grounds are, they do preempt additional state grounds. That is, state law may not vacate arbitration awards on grounds not recognized by federal law.⁴⁸ This principle does not, however, threaten Section 19(b).

Section 19(b) is not, in the relevant sense, a state law ground for vacating an arbitration award. Rather, it is the parties' ground for vacating an arbitration award. If Section 19(b) *required* courts to vacate awards in which the arbitrator has committed an error of law then, yes, it would clearly be preempted. But Section 19(b) merely *allows* parties to opt-in to this ground.

Whether Section 19(b) is preempted ultimately turns on whether the federal grounds for vacating are a default rule or a mandatory rule. A default rule is one the parties may contract around.⁴⁹ A mandatory rule is one that governs despite a contract term to the contrary. The notion that Section 19(b) is preempted rests on the view that the federal grounds for vacating are a mandatory rule, *i.e.*, the parties may not, by contract, add additional grounds. This mistaken view of the federal grounds contradicts the pro-contract core of the FAA. The better view is that the federal grounds for vacating are merely a default rule. "[T]he grounds for vacatur enumerated in the FAA actually are only codified forms of contractual interpretation. They serve only to aid the court in determining exactly for what the parties contracted, by representing implicit limitations on the contractual obligation."⁵⁰ Should the parties expressly adopt different grounds for vacating awards, a court should enforce the contract's express terms, not the off-the-rack, default terms of FAA Section 10(a).

Not only does Section 19(b) safely avoid federal preemption, it is already an implicit part of federal law. A state law contrary to Section 19(b) would be preempted. If a state law prohibited courts from reviewing arbitrators' legal rulings, even when the agreement called for such review, the state law would be in direct conflict with the FAA's central command: courts must enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."⁵¹ Far from being preempted by the FAA, Section 19(b) is already part of the FAA. That is the teaching of the unanimous cases cited in Part II of this paper.⁵²

⁴⁵ See *supra* note 11 and accompanying text.

⁴⁶ See *supra* notes 13-19 and accompanying text.

⁴⁷ See Hayford, *supra* note 13, at 465-80.

⁴⁸ See MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 9, at § 40.1.

⁴⁹ See Ware, *supra* note 6, at 706 n.9.

⁵⁰ Cullinan, *supra* note 31, at 422; Accord Rau, *supra* note 31.

⁵¹ 9 U.S.C. § 2 (1994).

⁵² See *supra* note 27.

In short, Section 19(b) is superfluous. It adds to state law what is already part of preemptive federal law. That said, there are a few cases when state, not federal, arbitration law governs,⁵³ and in those cases Section 19(b) will make a contribution.

One preemption point remains. Section 19(b)'s reference to "errors of law" might be interpreted with a negative inference about other errors. For example, Section 19(b) might be interpreted as implying that the parties may not contract for judicial review of the arbitrator's *factual*, as opposed to *legal*, findings. More precisely, Section 19(b) might be interpreted to prohibit enforcement of an agreement calling for judicial review of the arbitrator's factual findings. To the extent it is so interpreted, it may be vulnerable to FAA preemption. For that reason, Section 19(b) should be replaced with the following alternative language:

In addition to the grounds to vacate an award set forth in subsection (a), the parties may contract for any other standard of review of the award not prohibited by applicable law. If they have so contracted, the court shall vacate an award made by an arbitrator if the arbitrator violates this standard of review.

This alternative Section 19(b), which has been discussed by the committee drafting the Revised Uniform Arbitration Act, would clearly avoid FAA preemption by enforcing agreements providing for review of the arbitrator's factual, as well as legal, findings.

IV. PRACTICALITY

Parties who contract for judicial review of arbitrators' legal rulings will likely experience a reduction in the finality of arbitration and increased time and expense during arbitration. Is this a reason for rejecting Section 19(b)? Those who oppose Section 19(b) argue that parties unwilling to risk arbitration without judicial review of arbitrators' legal rulings are best off foregoing arbitration and relying instead on litigation.⁵⁴ That argument is an affront to party autonomy, the

⁵³ See, e.g., *Volt*, 489 U.S. at 470.

⁵⁴ See RUA § 19, Comment(E)(13)(Tentative Draft No. 4, February 19, 1999).

At its core, arbitration is supposed to be an alternative to litigation in a court of law, not a prelude to it. It can be argued that parties unwilling to accept the risk of binding awards because of an inherent mistrust of the process and arbitrators are best off contracting for advisory arbitration or foregoing arbitration entirely and relying instead on traditional litigation. *Id.*

See also *Perini Corp. v. Bay Hotel & Casino, Inc.*, 610 A.2d 364 (1992).

Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. It can be corrected or modified only for very specifically defined mistakes as set forth in section 9. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.

core policy of arbitration law.⁵⁵ Who is in a position to tell the parties that they are better off with litigation than with arbitration followed by judicial review? Let them decide that for themselves. Besides, there are good reasons why a sensible party might choose arbitration with judicial review over litigation. I predict that "opt-in clauses" will become common in contracts of great importance, where the large dollar amounts justify the added procedure.⁵⁶ I further predict that "opt-in clauses" will not often be used in run-of-the-mill contracts, where speed and finality outweigh other concerns. But, regardless of how they are used, the fundamental point is that the parties ought to have the freedom to decide when to use them.

V. CONCLUSION

States ought to enact Section 19(b) along with the rest of the Uniform Arbitration Act. Section 19(b) will foster party autonomy, without allowing parties to "create" courts' subject-matter jurisdiction and without risking federal preemption. If parties opting in for judicial review of their arbitrators' legal rulings are trading away some of the speed and finality traditionally associated with arbitration, that is their choice to make.

610 A.2d at 399 (Wilentz, C.J. concurring).

⁵⁵ See *supra* notes 39-44 and accompanying text.

⁵⁶ For sample clauses, see Hochman, *supra* note 21, at 122-128.