NEVADA'S *MASTROBUONO*: HOW THE 2001 LEGISLATURE THREW ANOTHER WRENCH INTO THE PUNITIVE DAMAGES MACHINE OF ARBITRATION LAW

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I. INTRODUCTION

As various jurisdictions adopt the Revised Uniform Arbitration Act (RUAA), state legislatures must decide which provisions they will enact and which provisions they will reject. The Nevada Legislature enacted the RUAA on May 31, 2001, in its entirety, with one important exception: the provision that grants arbitrators the authority to award punitive damages.[1] The rejection of this specific provision is problematic, as it could lead to interpretation difficulties with respect to either arbitration agreements governing disputes in the State of Nevada, or arbitration agreements referring to Nevada state law for the governance of the arbitration process. Due to the fact that the Supreme Court refused to determine whether arbitrators have the authority to award punitive damages when the issue was presented in *Mastrobuono v. Shearson Lehman*

1. *Compare* NEV. REV. STAT. § 38.238 (2001), *with* UNIF. ARBITRATION ACT § 21(a)-(e) (amended 2000), 7 U.L.A. 39 (Supp. 2002).

Hutton, Inc.,[2] the Nevada Legislature may have guaranteed that the issue will arise again.

Part II of this Note discusses the place that arbitration occupies in our judicial system. Part III identifies the problem that arose in *Mastrobuono*, which may be revisited soon due to the Nevada Legislature's rejection of the punitive damages provision. Part IV recognizes how the National Conference of Commissioners on Uniform State Laws (NCCUSL) dealt with the punitive damages quandary presented in *Mastrobuono*. Part V summarizes how the RUAA has fared thus far in the various state legislatures, including the enactment process in Nevada. Finally, Part VI examines how the Nevada RUAA can lead to further difficulties in determining whether arbitrators have the authority to award punitive damages, providing the groundwork for the issue in *Mastrobuono* to be revisited.

II. ARBITRATION'S PLACE IN THE AMERICAN JUDICIAL SYSTEM

Arbitration is defined as "[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding."[3] As a means of dispute resolution, arbitration has a special place in American jurisprudence. Using a blend of contract law and governing arbitration statutes,[4] the drafters of arbitration agreements may determine, either by express provision or by reference, both the site of the arbitration proceeding[5] and the procedure of the arbitration process.[6] "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[7] Arbitration is first and foremost dictated by the contract terms specified by the parties,[8] and parties are generally

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2. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).
3. BLACK'S LAW DICTIONARY 100 (7th ed. 1999).
4. STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, ARBITRATION CASES AND MATERIALS 1 (1998).
5. *See* Bear, Stearns & Co. v. Bennet, 938 F.2d 31, 32 (2d Cir. 1991) (holding that an arbitration forum selection clause is enforceable).
6. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) (stating that parties may "specify by contract the rules under which [an] arbitration will be conducted").
7. Bear, Stearns & Co. v. Bennet, 938 F.2d at 32 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)).
8. *See* 9 U.S.C. § 4 (2000) (stating that courts will make an order which directs the parties to proceed with arbitration in accordance with their contract terms); *see also* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 478-79 (recognizing that Congress's principal purpose was enforcing private arbitration contracts according to their terms).

free to structure their arbitration agreements as they see fit.[9] "The central element of arbitration is the intention of the parties as expressed in the arbitration agreement. The agreement determines the process."[10]

Judicial enforcement and interpretation of arbitration agreements is dictated by two bodies of statutory arbitration law, the Federal Arbitration Act (FAA) and each respective jurisdiction's arbitration statutes.[11] Parties' agreements to arbitrate disputes are enforceable to the extent of any contract,[12] and statutory claims may be resolved in an arbitral forum if an agreement to arbitrate so dictates.[13] In their selection of provisions that govern the arbitration process, parties may decide that the statutes of a particular jurisdiction will govern the arbitration proceeding.[14]

The situs of the suit may have tremendous ramifications if the terms of the arbitration agreement are ambiguous or leave certain procedural aspects undefined. If an arbitration agreement is included as a provision in a contract involving interstate commerce, the FAA and federal courts govern,[15] and the

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9. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).

10. Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 51 (1997).

11. HUBER & TRACHTE-HUBER, *supra* note 4, at 5.

12. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (holding that an Alabama statute prohibiting enforcement of arbitration agreements was pre-empted by the strong federal policy in favor of arbitration as written in the Federal Arbitration Act); *see also* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 474 (reiterating Congress's intent to place arbitration agreements "upon the same footing as other contracts") (quoting H.R. REP. No. 68-96, pt. 1, at 2 (1924)); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (recognizing that the FAA was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate"). *But see* Dean Witter Reynolds, Inc. v. Trimble, 631 N.Y.S.2d 215, 217 (N.Y. Sup. Ct. 1995) (limiting the authority of courts to enforce specific provisions in arbitration agreements if an overriding public policy has been recognized by the judiciary).

13. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (holding that state employment discrimination claims are arbitrable); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding that claims based on the Age Discrimination in Employment Act of 1967 are arbitrable); Jordan L. Resnick, *Beyond* Mastrobuono*: A Practitioners' Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913, 918-19 nn.28-32 (1995) (listing Supreme Court decisions that recognize the arbitrability of claims under the Sherman Act, the Copyright Act of 1976, the Employee Retirement and Income Security Act, the Racketeer Influenced and Corrupt Organizations Act, the Securities Act of 1933, and the Securities and Exchange Act of 1934).

14. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 478-79 (upholding the parties' intent that the arbitration proceeding was to be governed by California state rules of arbitration).

15. 9 U.S.C. § 2 (2000) (providing that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable"); *id.* § 4 (providing that a party to such an arbitration agreement "may petition any United States

courts will use the FAA to enforce the arbitration proceeding "in the manner provided for in [the parties'] agreement."[16] As the Supreme Court has stated in dicta, "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[17] However, if an arbitration agreement is included as a provision in a contract that does not involve interstate commerce or a maritime transaction, and absent any choice-of-law provision in the contract, the statutes of the jurisdiction in which the arbitration is to take place govern the arbitration proceedings.[18] When the situs of the proceeding is agreed upon by the parties, not only will the statutes of that jurisdiction fill in by default in the absence of specific necessary provisions,[19] the decisional law of that jurisdiction may also limit the parties' rights in an arbitration proceeding.[20]

Although the Supreme Court has stated that by agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute,[21] it is possible that punitive damage awards provided for by statute or recognized in the common law may be limited or eliminated by the terms of the arbitration agreement itself.[22] This is not the concern of this Note, as the issue to

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district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement").

16. *Id.* § 4; Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 474-75.

17. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 476.

18. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) (holding that state arbitration law is to be applied to an arbitration provision in a contract not covered by the FAA).

19. UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 2 (Supp. 2002) (stating that the Revised Uniform Arbitration Act provides a default mechanism if the parties have not agreed to or left out a particular issue). Some examples are who decides the arbitrability of a dispute and by what criteria, how a party can initiate an arbitration proceeding, and whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding. *Id.*

20. *See* Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 794 (N.Y. 1976) (holding that the authority to award punitive damages in New York is limited to judicial tribunals and may not be exercised by arbitrators); Resnick, *supra* note 13, at 931 n.105 (identifying Arkansas, Colorado, Indiana, Minnesota, Nebraska, New Hampshire, New Mexico, and West Virginia as those states that embrace policies similar to that of New York's as found in *Garrity v. Lyle Stuart, Inc.*).

21. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

22. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 479) (reiterating that "'parties are generally free to structure their arbitration agreements as they see fit'"). The dissent in *Mastrobuono* strongly advocates giving effect to the parties' intentions of precluding punitive damage awards by an arbitrator. *Id.* at 71 (Thomas, J., dissenting). Additionally, counsel for the National Workrights Institute in Princeton, New Jersey, acknowledged the possibility that arbitration agreements could eliminate the authority of arbitrators to award punitive damages: "[The American Arbitration Association] says the damages provisions must be the same [as in a courtroom], but there is no law

be dealt with is the Nevada statutory arbitration law which, either by reference or default, may lead to the elimination of an arbitrator's power to award punitive damages, regardless of a claimant's statutorily created substantive right to an award for punitive damages.[23]

III. THE *MASTROBUONO* QUANDARY

In *Mastrobuono*, the Supreme Court had the opportunity to determine whether limitations placed upon an arbitrator's authority to award punitive damages were a violation of claimants' substantive rights.[24] The Court did not rule on that issue, however, finding the basis for its holding in an analysis of the arbitration agreement itself.[25]

Paragraph 13 of the agreement between the brokerage firm and the client in *Mastrobuono* contained both an arbitration provision and a choice-of-law provision, which specified that the contract was to be governed by New York law.[26] Also present in paragraph 13 of the parties' agreement was a provision that any controversy between the parties arising out of their transactions was to be arbitrated in accordance with the rules of the National Association of Securities Dealers (NASD).[27]

In 1976, The New York Court of Appeals ruled that the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators.[28] Conversely, the NASD Code of Arbitration Procedure "indicate[d] that arbitrators may award 'damages and other relief,'" which the Court held to include punitive damage awards.[29] Although the Court had the opportunity to overrule precedent established by *Garrity v. Lyle Stuart, Inc.*[30] and declare once and for all that arbitrators had the authority to enforce all substantive rights of parties—including the statutory right to punitive damage awards—the Court

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that says it is illegal to exclude punitive damages [from arbitration]." David G. Savage, *Justice in Job Disputes*, A.B.A. J., May 2001, at 30, 32 (citation omitted).

23. *See* discussion *infra* Part VI.

24. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 52.

25. *See id.* at 58-64 (holding that "the best way to harmonize the choice-of-law provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators").

26. *Id.* at 54-55.

27. *Id.* at 59.

28. Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 794 (N.Y. 1976).

29. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 61 (quoting NASD CODE OF ARBITRATION PROCEDURE ¶ 3741(e) (1993)).

30. Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976).

instead focused on the terms of paragraph 13 and the various statutes, decisional law, and arbitration rules it invoked.[31]

The Court found that the holding in *Garrity*, which prevented arbitrators from awarding punitive damages, directly contradicted the NASD Code of Arbitration Procedure.[32] Due to its belief that courts' paramount role in interpreting arbitration provisions is to enforce the agreement of the parties,[33] the Court held that this contradiction was fatal to the drafters' intent to prevent punitive damages from being awarded.[34] In its holding, the Court relied upon the common law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted the contract.[35] The party who drafted the arbitration agreement incorporated New York decisional law by reference with the intent to preclude the arbitrator from awarding punitive damages, so the Court interpreted the ambiguity against the drafter, Shearson Lehman Hutton, Inc., and upheld the arbitrator's award of punitive damages.[36] Because the Supreme Court was presented with the issue of whether arbitration agreements can eliminate an arbitrator's authority to award punitive damages and did not resolve the issue, the Court guaranteed that the issue would be relitigated again and again, depending upon the nature of the agreement and the applicable state law.[37] Consequently, "practitioners must be aware that their work has just begun and academics must be prepared to argue for and against the intervening actions by private parties that will alter the nature of the debate" about punitive damage awards by arbitrators.[38] As Jordan L. Resnick wrote, "the legal community must be prepared for anything and everything,"[39] and prophetically, Resnick's words have rung true now that Nevada has enacted the RUAA and added another twist to the debate.[40]

IV. NCCUSL'S ATTEMPT TO REMEDY THE *MASTROBUONO* PROBLEM

The NCCUSL drafted the Uniform Arbitration Act (UAA) in 1955[41] in an effort to bring uniformity to the body of arbitration law that is governed primarily

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31. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 58-64.
32. *Id.* at 62-63.
33. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 476 (1989).
34. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 62-63.
35. *Id.* at 63.
36. *Id.* at 63-64.
37. Resnick, *supra* note 13, at 936.
38. *Id.* at 938.
39. *Id.*
40. *See* discussion *infra* Part V.
41. UNIF. ARBITRATION ACT Prefatory Note (1955), 7 U.L.A. 2 (1997).

by individual states' statutes.[42] The NCCUSL has recognized and touted the fact that the UAA has been adopted either in its entirety or in substantially similar form in forty-nine states.[43] The UAA, although the preeminent statutory scheme governing arbitration in the individual states, did not include either a provision dictating the form of the award or the availability of specific damages.[44]

In the years since the NCCUSL drafted the UAA and offered it for passage in various jurisdictions, courts have struggled with a multitude of issues arising out of increasingly complex arbitration agreements, including: who decides the arbitrability of a dispute, the availability of provisional remedies, initiation of arbitration proceedings, consolidation of proceedings, arbitrator impartiality and disclosure, arbitrator immunity from civil actions, and the amount and form of awards by arbitrators.[45] The NCCUSL recognized these modern arbitration issues and revisited the UAA with the intent of providing state legislatures a more up-to-date statute to govern arbitration proceedings within their jurisdictions.[46]

Although the NCCUSL recognized that case law has established the authority of arbitrators to award punitive damages in most situations,[47] some courts still remain hesitant to completely grant that authority to arbitrators.[48] The 2000 revision of the RUAA was written to expressly grant arbitrators the

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42. *Id.* at 1-2. *See generally* Peter H. Berge, *The Uniform Arbitration Act: A Retrospective on Its Thirty-Fifth Anniversary*, 14 HAMLINE L. REV. 301, 303-06 (1991) (giving a concise history of the movement from the common law to uniform arbitration statutes in the United States).

43. The opening paragraph of the Prefatory Note of the 2000 revision of the Uniform Arbitration Act begins: "The Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws. Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation." UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 2 (Supp. 2002); Uniform Law Commissioners, Newsroom, *Revised Uniform Arbitration Act Receiving Widespread Support, available at* http://www.nccusl.org/nccusl/pressreleases/pr2-22-01-1.asp (July 2, 2002); HUBER & TRACHTE-HUBER, *supra* note 4, at 5.

44. UNIF. ARBITRATION ACT §§ 1-25 (1955), 7 U.L.A. 1 (1997); UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 2 (Supp. 2002).

45. UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 2 (Supp. 2002).

46. *Id.*

47. UNIF. ARBITRATION ACT § 21(a) & Comment 1 (amended 2000), 7 U.L.A. 39 (Supp. 2002).

48. *See* Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 796 (N.Y. 1976) (holding that the authority to award punitive damages in New York is limited to judicial tribunals and may not be exercised by arbitrators); Resnick, *supra* note 13, at 931 n.105 (identifying Arkansas, Colorado, Indiana, Minnesota, Nebraska, New Hampshire, New Mexico, and West Virginia as states that embrace policies similar to New York's as found in *Garrity v. Lyle Stuart, Inc.*).

authority to award punitive damages or other exemplary relief.[49] Section 21 of the RUAA provides that "[a]n arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim."[50] However, section 21 is not the final word, even within the framework of the RUAA itself. Section 4 of the RUAA dictates which provisions of the Act can be waived and which cannot.[51] By failing to expressly provide that parties cannot waive their rights to punitive damage awards, section 4 leaves the impression that parties can prevent an arbitrator from awarding such damages by agreement.[52] The comments to section 21 do in fact indicate that it is a waivable provision, but "there is doubt whether one of the parties by contract can eliminate the right to attorney's fees or punitive damages or other exemplary relief."[53] Under the provisions of the RUAA, therefore, courts have the final authority to determine whether parties can eliminate punitive damage awards by agreement.[54] Because the Supreme Court has yet to rule on the issue of whether parties can contractually eliminate punitive damage awards by arbitrators,[55] it remains to be seen whether parties can eliminate punitive damages either by express agreement or by reference to statutory law, substantive law, or arbitration rules.[56]

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49. UNIF. ARBITRATION ACT § 21(a) & Comment 1 (amended 2000), 7 U.L.A. 39 (Supp. 2002).

50. *Id.* § 21(a).

51. *Id.* § 4.

52. *See id.* § 4 and Cmts.

53. *Id.* § 21 Cmt. 2.

54. *See id.*

55. The Court had an opportunity to make that determination and skirted ruling on the issue in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). *See* Resnick, *supra* note 13, at 934-38 (discussing the anticipation and subsequent disappointment with which the Supreme Court's decision in *Mastrobuono* was received); *see also supra* Part I.

56. The courts of appeals, however, have wrestled with the issues of reference to substantive law or arbitration rules. *See, e.g.*, Kelley v. Michaels, 59 F.3d 1050, 1055 (10th Cir. 1995) (relying on the analysis in *Mastrobuono* to arrive at the conclusion that the arbitrator had the authority to award punitive damages); Lee v. Chica, 983 F.2d 883, 887 (8th Cir. 1993) (holding that a reference to the rules of the American Arbitration Association (AAA) allow an arbitrator to award punitive damages); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063 (9th Cir. 1991) (applying an analysis similar to that in *Mastrobuono* to an AAA provision to determine that arbitrator had authority to award punitive damages); Fahnestock & Co. v. Waltman, 935 F.2d 512, 518 (2d Cir. 1991) (holding that a clause providing for the governance of the arbitration agreement by New York law prevented an arbitrator from awarding punitive damages); Raytheon Co. v. Automated Bus. Sys., Inc., 882 F.2d 6, 10 (1st Cir. 1989) (holding that reference to AAA rules, which allow any form of "just and equitable remedy or relief," grants an arbitrator the authority to award punitive damages); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1387 (11th Cir. 1988) (holding that, as in *Mastrobuono*, reference to a provision that allows an arbitrator to award

It is important to note that when state legislatures enact the UAA and the RUAA, those statutes do not automatically dictate the terms and procedures of arbitration agreements made within their jurisdictions.[57] The arbitration agreements themselves dictate the process of arbitration;[58] the only occasion upon which state law comes into play in determining the scope and rules of arbitration is when an agreement not involving maritime transactions or interstate commerce either specifically makes reference to the state law as governing the arbitration process,[59] or lacks a necessary provision.[60] In the case of the latter, the state arbitration statute acts as a default provision filling in the missing necessary terms of the arbitration agreement.[61] The application of a state arbitration statute to an agreement to arbitrate may have tremendous consequences. Although the common law may provide that punitive damages can be awarded by an arbitrator who conducts an arbitration proceeding within its jurisdiction, the common law may be replaced by a statute that evinces a contrary intent.[62] As a result, any enactment of the RUAA by a state legislature without the express provision granting authority to arbitrators to award punitive damages may be construed as a purposeful legislative decision to bar punitive damage awards in arbitral proceedings.[63]

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punitive damages contradicts a drafter's effort to defeat such an award by providing that the laws of New York are to govern).

57. *See* UNIF. ARBITRATION ACT Prefatory Note (1955), 7 U.L.A. 2 (1997) ("Many of the provisions, are designed to meet problems not anticipated by the parties when the agreement was made and for which no provision exists in the agreement."); UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 2 (Supp. 2002) ("In most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue.").

58. *See* discussion *supra* Part II.

59. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 478-79 (1989) (upholding the parties' intent that the arbitration proceeding was to be governed by California state rules of arbitration).

60. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) (holding that state arbitration law is to be applied to an arbitration provision in a contract not covered by the FAA).

61. *See* UNIF. ARBITRATION ACT Prefatory Note (1955), 7 U.L.A. 2 (1997) ("Many of the provisions, are designed to meet problems not anticipated by the parties when the agreement was made and for which no provision exists in the agreement."); UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 2 (Supp. 2002).

62. *See* Nicholas S. Zeppos, *Chief Justice Rehnquist, the Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 684-88 (1994) (discussing the process used by Congress to overrule the Supreme Court and the connotations associated with being overruled).

63. *See* discussion *infra* Part VI.

V. HOW THE RUAA HAS FARED IN THE STATE LEGISLATURES

The RUAA has been enacted in four jurisdictions[64] and has been introduced in the legislatures of fourteen others.[65] It can be expected that the remaining thirty-three jurisdictions will consider passage of the RUAA in the near future, as forty-nine jurisdictions adopted the UAA of 1956.[66] Of the four jurisdictions that have enacted the RUAA, three have enacted the provision that expressly grants arbitrators the authority to award punitive damages in arbitration proceedings.[67]

The remaining jurisdiction, Nevada, enacted the RUAA almost in its entirety on May 31, 2001.[68] On March 30, 2001, before the bill introducing the RUAA was presented to the Senate for a vote, the Senate Judiciary Committee considered and approved an amendment eliminating the provision of the RUAA that granted arbitrators the authority to award punitive damages.[69] In addition, the Nevada Legislature rejected all references in that section to punitive damage awards.[70] When the RUAA was presented for enactment to the Nevada Assembly, it was presented in its amended form, which did not include the punitive damages provision.[71]

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64. HAW. REV. STAT. § 658A (Supp. 2001); NEV. REV. STAT. §§ 38.206-38.248 (2001); N.M. STAT. ANN. § 44-7A (Michie Supp. 2002); UTAH CODE ANN. §§ 78-31a-101-131 (Supp. 2002) (effective May 15, 2003).

65. H.B. 2491, 45th Leg., 2d Reg. Sess. (Ariz. 2002); H.B. 5660, 2002 Leg., Reg. Sess. (Conn. 2002); B14-0209, 2001 Leg., 14th Council Sess. (D.C. 2001); S.B. 1280, 56th Leg., 2d Reg. Sess. (Idaho 2002); H.B. 3057, 92d Gen. Assem., 2001-02 Gen. Assem. (Ill. 2001); S.B. 75, 112th Gen. Assem., 2d Reg. Sess. (Ind. 2002); S.F. 665, H.F. 1857, 82d Leg., Reg. Sess. (Minn. 2001-02); S.B. 1021, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002); S.B. 514, 210th Leg., 2002 2d Sess. (N.J. 2002); H.B. 343, 124th Gen. Assem., Reg. Sess. (Ohio 2001-02); S.B. 1555, 48th Leg., 2d Sess. (Okla. 2002); H.B. 363, 2001 Leg., 66th Bicennial Sess. (Vt. 2001); S.B. 307, Gen. Assem., 2002 Reg. Sess. (Va. 2002); S.B. 483, H.B. 2543, 75th Leg., 2002 Reg. Sess. (W. Va. 2002).

66. *See* Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, *Introductions & Adoptions of Uniform Acts, a Few Facts About the . . . Uniform Arbitration Act (2000)*, *available at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp (July 2, 2002) (listing the four states that have enacted the RUAA and the 14 states in which legislation has been introduced).

67. HAW. REV. STAT. § 658A-21; N.M. STAT. ANN. § 44-7A-22; UTAH CODE ANN. § 78-31a-122(1) (effective May 15, 2003).

68. *Compare* NEV. REV. STAT. §§ 38.206-38.248, *with* UNIF. ARBITRATION ACT § 21(a)-(e) (amended 2000), 7 U.L.A. 39 (Supp. 2002).

69. S.J. Amend. 151, 71st Leg., Reg. Sess. (Nev. 2001).

70. *Compare* NEV. REV. STAT. § 38.238, *with* UNIF. ARBITRATION ACT § 21(a)-(e) (amended 2000), 7 U.L.A. 39 (Supp. 2002).

71. *First Reprint of Uniform Arbitration Act: Hearings on S.B. No. 336 Before the Senate Committee on Judiciary*, 2001 Leg., 71st Sess. (Nev. 2001).

The RUAA was passed by both the Nevada Senate and Assembly in its amended form and signed into law by the Governor on May 31, 2001.[72] Thus, as amended by the Senate Judiciary Committee, Nevada's new arbitration act does not include the language providing that an arbitrator may award punitive damages or other exemplary relief.[73] Instead, it provides:

> (1) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitral proceeding.
> (2) As to all remedies other than those authorized by subsection 1, an arbitrator may order such remedies as he considers just and appropriate under the circumstances of the arbitral proceeding.[74]

The consideration and rejection of (1) the provision that authorized arbitrators to award punitive damages, and (2) the provision that made reference to punitive damages awarded by arbitrators, may lead contract drafters and the courts to the conclusion that Nevada intended to prevent arbitrators from making awards for such relief,[75] opening the door for drafters to refer to the arbitration law of Nevada as a means of avoiding any punitive damages awards.

VI. How the Nevada Enactment Leads to *Mastrobuono* Issues

A contract drafter who desires all disputes arising out of the contract to be resolved in an arbitral forum may explicitly dictate the rules that govern any arbitration proceeding.[76] If the drafter does not specify the rules for the arbitration proceeding, the subject matter of the contract will dictate which law controls: If the subject matter is either a maritime transaction or impacts interstate commerce, the FAA will control,[77] all other subject matters are

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72. Nev. Rev. Stat. §§ 38.206-38.248.

73. *Compare* Nev. Rev. Stat. § 38.238, *with* Unif. Arbitration Act §§ 1-33 (amended 2000), 7 U.L.A. 6-52 (Supp. 2002).

74. Nev. Rev. Stat. § 38.238(1)-(2).

75. *See* discussion *infra* Part VI.

76. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) (stating that parties may "specify by contract the rules under which [an] arbitration will be conducted").

77. *See* 9 U.S.C. § 2 (2000) (providing that "[a] written provision in any *maritime transaction* or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable") (emphasis added). "Maritime transactions" are defined as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." *Id.* § 1. "Commerce" is defined as:

controlled by the relevant arbitration law of the situs of the arbitration proceeding.[78] With that in mind, a contract drafter charged with the responsibility of including an arbitration provision to govern the resolution of disputes under the contract may use that opportunity to specify the arbitration laws of a particular state to serve as the rules of the proceeding.[79] Given *Mastrobuono*'s holding that contradicting contract terms regarding the authority of the arbitrator to award punitive damages will be construed against the drafter,[80] the smart drafter can eliminate all ambiguities in an arbitration provision by referring to only one body of arbitration law.[81] The holding in *Mastrobuono*, combined with the Supreme Court's holding that parties may contractually choose a state's statutory arbitration rules to govern any arbitral proceeding[82] and the Nevada Legislature's rejection of the RUAA provision that expressly grants arbitrators the authority to award punitive damages,[83] may have inadvertently given contract drafters the opportunity to avoid punitive damages awards in arbitration merely by naming Nevada arbitration law as the law to govern any disputes arising out of the contract.

Although it would seem relatively straightforward to preclude arbitral punitive damage awards by including a choice-of-law provision that refers to the

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> [C]ommerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

Id.

78. *See, e.g.*, Bernhardt v. Polygraphic Co., 350 U.S. 198, 200-05 (1956) (holding that state arbitration law is to be applied to an arbitration provision in a contract not covered by the FAA).

79. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 478-79 (upholding the parties' intent that the arbitration proceeding was to be governed by California state rules of arbitration).

80. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995); *see* discussion *supra* Part III.

81. The United States Supreme Court held that the NASD Code of Arbitration Procedure ¶ 3741(3), referred to in the arbitration agreement at issue in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. at 52, gave the arbitrator authority to award punitive damages. This was held to directly conflict with the New York choice-of-law provision in the same contract, which resulted in the destruction of the drafter's intent to preclude the arbitrator from awarding punitive damages under the New York Court of Appeals holding in *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976). Were the drafter given the opportunity to refer to a body of statutory law that controlled not only the procedural aspects of arbitration, but also limited the power of the arbitrator to award punitive damages, avoiding a similar conflict would be simple.

82. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. at 478-79 (upholding the parties' intent that the arbitration proceeding was to be governed by California state rules of arbitration).

83. *Compare* NEV. REV. STAT. § 38.238 (2001), *with* UNIF. ARBITRATION ACT § 21(a)-(e) (amended 2000), 7 U.L.A. 39 (Supp. 2002). *See* discussion *supra* Part IV.

laws of Nevada as governing any arbitration proceeding, a court faced with construing any such provision will be required to make critical inquiries as to whether the provision actually operates as intended. As this Part progresses, it will become apparent that those critical inquiries will not crystallize into an obvious result, and they may lead to the same debate that arose in *Mastrobuono*.

A. *The Choice-of-Law Inquiry*

If a party wishes to force another party to the contract to submit their dispute to an arbitrator, the party seeking enforcement of the arbitration provision may petition the court to compel arbitration according to the terms of the agreement.[84] When a contract dictates that the statutes of a particular jurisdiction are to govern an arbitral proceeding arising out of the contract, a court must determine, as a preliminary measure, whether the choice-of-law provision in the arbitration agreement is valid. Once a court is satisfied that a valid and enforceable arbitration provision refers to the laws of a specific jurisdiction, those laws will likely be applied "if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[85] "[T]he best way of ensuring that [the parties'] desires will be given effect" is to "refer expressly to the state of the chosen law in their contract."[86]

Express reference to the law of a particular forum was held to be valid and enforceable by the Supreme Court of the United States in *M/S Bremen v. Zapata Off-Shore Co.*[87] Such forum selection clauses should be honored by the parties and will be enforced by the courts absent "fraud, undue influence, or overweening bargaining power."[88] In *Scherk v. Alberto-Culver Co.*,[89] the Supreme Court extended these principles to arbitration agreements, upholding an arbitral forum selection clause in a business contract between an American manufacturer and a European businessman.[90]

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84. *See, e.g.*, NEV. REV. STAT. § 38.221(1)(b) ("On motion of a person . . . alleging another person's refusal to arbitrate pursuant to the agreement . . . (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.").

85. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

86. *Id.* § 187 cmt. a.

87. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-15 (1972) (holding that a contractual choice-of-forum clause providing that "[a]ny dispute arising must be treated before the London Court of Justice," is prima facie valid and must be enforced by the courts).

88. *Id.* at 12.

89. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

90. *See id.* at 519 n.14 (holding enforceable a forum selection clause that required the arbitration of any disputes be held before the International Chamber of Commerce in Paris).

The holdings in *Bremen* and *Scherk*, while standing predominantly for the proposition that parties may choose the situs of either a judicial or arbitral proceeding, also stand for the proposition that the parties may, by the terms of their agreement, dictate the governing law of those proceedings.[91] Although parties are given practically unfettered discretion in drafting agreements, that discretion is tempered by the overriding purpose of the FAA—enforcing agreements to arbitrate.[92] The Supreme Court has balanced the rights of parties to dictate the terms of their agreement with the congressional purpose of the FAA by holding that the choice of governing law will be upheld so long as the laws of the chosen jurisdiction do not stand "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[93] Thus, if the chosen state law does not thwart the primary purpose of the FAA, that choice will be given full effect by the courts.[94] By enacting the RUAA, the State of Nevada has avoided any possible conflicts with the FAA or any possibility of FAA preemption.[95] Therefore, a contract provision specifically referring to the law of

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91. *Id.* at 519; M/S Bremen v. Zapata Off-Shore Co., 407 U.S. at 13 n.15. For a good analysis of a dispute in which the selection of the forum did not dictate the rules governing the arbitration proceeding itself, see *Bear, Stearns & Co., Inc. v. Bennett*, 938 F.2d 31 (2d Cir. 1991).

92. *See* 9 U.S.C. § 2 (2000) ("A written provision . . . evidencing a transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . . ."); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (providing that the congressional intent behind the FAA was "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate").

93. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 477 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see* UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 3 (Supp. 2002) (recognizing that a line of Supreme Court cases "establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in sections 2, 3, and 4 of the FAA").

94. The drafters noted:

> If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that 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.

UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 3 (Supp. 2002) (citations omitted).

95. *See* NEV. REV. STAT. § 38.219(1) (2001) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."); UNIF. ARBITRATION ACT Prefatory Note (amended 2000), 7 U.L.A. 3 (Supp. 2002) (summarizing Supreme Court holdings construing choice-of-law provisions in arbitration agreements: "*Volt* and *Mastrobuono* establish that a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA.").

Nevada as governing an arbitration proceeding will be specifically enforced by the courts, and arbitration in accordance with Nevada's governing statutes will be ordered. This initial determination, however, is the proverbial tip of the iceberg for a court faced with interpreting Nevada's new arbitration statutes, as a detailed analysis of the arbitrator's authority to award punitive damages will be vastly more complicated.

B. *Post-Award Challenges to Arbitral Awards*

The choice-of-law inquiry, in light of Nevada's passage of the RUAA, is a relatively insignificant first hurdle for an interpreting court to clear. The majority of litigation in the arbitration law arena occurs after the arbitrator has entered the award,[96] at which time the parties may petition a court for enforcement, modification, or *vacatur* of the arbitrator's award.[97]

Once a controversy under a contract has been properly referred to arbitration, and the arbitrator has made a record of the award and notified the parties of the award,[98] a party to the proceeding has two options: (1) The party "may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order,"[99] or (2) The party may make a motion to the court to vacate the award.[100] In a situation where a party drafts an

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96. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Garrity v. Lyle Stuart, Inc., 386 N.Y.S.2d 831 (N.Y. 1976).

97. UNIF. ARBITRATION ACT § 22 (amended 2000), 7 U.L.A. 41 (Supp. 2002).

98. NEV. REV. STAT. § 38.236(1) ("An arbitrator shall make a record of an award . . . [and] [t]he arbitrator or arbitral organization shall give notice of the award, including a copy of the award, to each party to the arbitral proceeding.").

99. *Id.* § 38.239.

100. *Id.* § 38.241. This section provides:

> [T]he court shall vacate an award made in the arbitral proceeding if:
>
> (a) The award was procured by corruption, fraud, or other undue means;
>
> (b) There was:
>
> (1) Evident partiality by an arbitrator appointed as a neutral arbitrator;
>
> (2) Corruption by an arbitrator; or
>
> (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitral proceeding;
>
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to NRS 38.231, so as to prejudice substantially the rights of a party to the arbitral proceeding;
>
> (d) An arbitrator exceeded his powers;

arbitration agreement with an express reference to Nevada law that precludes an arbitrator from awarding punitive damages, the appropriate motion to vacate the award will be under section 38.240(1)(d). This provision requires a court to vacate an award where "[an] arbitrator exceeded [his] powers."[101] If a construing court determines that a reference to Nevada arbitration law is proper and that law prohibits an arbitrator from awarding punitive damages, the motion to vacate will be successful. However, upon examination of the language of section 38.238 of the Nevada Revised Statutes, it is unclear whether Nevada law actually precludes arbitrators from awarding punitive damages.

C. *Divining Legislative Intent*

A court faced with the challenge of determining whether arbitrators are empowered to award punitive damages in an arbitral proceeding pursuant to a choice-of-law provision specifying that Nevada law will control, will look first to the appropriate statutes for guidance. Under the newly enacted Nevada Uniform Arbitration Act, an arbitrator is limited to "ordering such remedies as he considers just and appropriate under the circumstances of the arbitral proceeding,"[102] which reflects a narrowing of the RUAA as it was originally drafted.[103] Recall that the RUAA in its original form specifically empowered arbitrators to "award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim."[104] This discrepancy between the Nevada statute and the original text of the RUAA may become a controlling factor when a court attempts to ascertain whether arbitrators under Nevada law are authorized to award punitive damages, but before the difference may be taken into consideration, a court must first attempt to construe the meaning of the applicable statute.

> (e) There was no agreement to arbitrate, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing; or
>
> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.233 so as to prejudice substantially the rights of a party to the arbitral proceeding.

Id.

101. *Id.* § 38.240(1)(d); *see also* Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117, 122 (2d Cir. 1991) (reversing an arbitrator's award of punitive damages under a substantially similar provision in the FAA because, by referring to the laws of New York in the choice-of-law provision, the arbitrator was barred from awarding punitive damages; thus, the award exceeded the arbitrator's powers) (citation omitted).

102. NEV. REV. STAT. § 38.238(2).

103. *Compare id.*, *with* UNIF. ARBITRATION ACT § 21(a)-(e) (amended 2000), 7 U.L.A. 39 (Supp. 2002).

104. UNIF. ARBITRATION ACT § 21(a) (amended 2000), 7 U.L.A. 39 (Supp. 2002).

"In construing a statute, [the court's] primary goal is to ascertain the legislature's intent in enacting it, and [the court] presume[s] that the statute's language reflects the legislature's intent."[105] Therefore, to divine the meaning of the "just and appropriate under the circumstances" language present in the Nevada statute, a court will first attempt to "give that language its ordinary meaning and not go beyond it."[106]

Although no court has construed exactly what "just and appropriate under the circumstances" means, the NCCUSL has indicated that the language "preserves the traditional, broad right of arbitrators to fashion remedies."[107] However, the comments to the RUAA, not present in the Nevada statute, will not be considered by a court in examining the statute's plain meaning because "a court cannot go beyond the statute in determining legislative intent."[108] The principle of "plain meaning" is very simply applied: "If the language of a statute has a 'plain meaning,' it must be followed."[109] "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which . . . [it] is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[110]

Unfortunately for a construing court, an attempt to interpret the statute according to its plain language in this case will be fruitless. Although "just and appropriate under the circumstances" could arguably empower arbitrators to award punitive damages, certainly an equally compelling argument could be made that such language, by not expressly empowering arbitrators to make such awards, precludes punitive damage awards by arbitrators. When "a statute or portion thereof . . . is capable of being understood by reasonably well-informed persons in either of two or more senses," the statute or portion thereof is ambiguous.[111] When a statute is ambiguous, "the plain meaning rule has no application . . . [and] the intent of the legislature is the controlling factor in statutory interpretation."[112] A court will then consider "'the context and spirit of

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105. Moore v. State, 27 P.3d 447, 449 (Nev. 2001) (citing Anthony Lee R. v. State, 952 P.2d 1, 6 (Nev. 1997)).

106. State v. Granite Constr. Co., 40 P.3d 423, 426 (Nev. 2002).

107. UNIF. ARBITRATION ACT § 21 cmt. 3 (amended 2000), 7 U.L.A. 41 (Supp. 2002). Comment 3 also provides that an arbitrator's "authority to structure relief is defined and circumscribed not by legal principle or precedent but by broad concepts of equity and justice," and that "broad remedial discretion is a positive aspect of arbitration." *Id.*

108. Robert E. v. Justice Court of Reno Township, 664 P.2d 957, 959 (Nev. 1983).

109. WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 75 (2d ed., West Wadsworth 1984).

110. *Id.* (quoting Caminetti v. United States, 242 U.S. 470, 485 (1916)).

111. Robert E. v. Justice Court of Reno Township, 664 P.2d at 959.

112. State v. Granite Constr. Co., 40 P.3d 423, 426 (Nev. 2002) (citing Robert E. v. Justice Court of Reno Township, 664 P.2d at 959).

the statute in question, together with the subject matter and policy involved,'"[113] as well as "the title of a statute,"[114] "other words or phrases used in the statute or separate subsections of the statute,"[115] and "legislators' statements . . . when they are a reiteration of events leading to the adoption of the statute rather than an expression of personal opinion."[116]

When determining legislative intent, a court may explore a wide variety of recorded proceedings from the legislature itself, such as committee reports, floor debates, hearings, rejected proposals, and even legislative silence.[117] In its exploration of the legislative history of the Nevada enactment, a court would certainly take into consideration any pertinent Nevada Senate Judiciary Committee reports, as "[c]ommittee reports are the most frequently cited and relied upon sources of legislative history."[118] Courts frequently cite such sources because "[l]egislative reports and other pertinent legislative history may help to provide the appropriate context."[119] A construing court will therefore explore the committee reports of the Nevada Legislature to ascertain whether the absence of the punitive damages provision indicates the intent to preclude arbitrators from making such awards.

1. *The Demise of the Punitive Damages Language*

When the RUAA was presented to the Nevada Assembly, it had been passed by the Nevada Senate without the language authorizing arbitrators to award punitive damages.[120] An analysis of the legislative history of the Nevada RUAA bill reveals that the Senate Committee on Judiciary considered the RUAA on three occasions.[121] On February 23, 2001, the Senate Committee on Judiciary

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113. Moore v. State, 27 P.3d 447, 449 (Nev. 2001) (quoting Gallagher v. City of Las Vegas, 959 P.2d 519, 521 (Nev. 1998)).

114. United States v. State Eng'r, State of Nev., 27 P.3d 51, 57 (Nev. 2001) (Becker, J., concurring in part and dissenting in part) (citing Minor Girl v. Clark County Juvenile Court Servs., 490 P.2d 1248, 1250 (Nev. 1971)).

115. *Id.* (citing Bd. of County Comm'rs v. CMC of Nev., Inc., 670 P.2d 102, 105 (Nev. 1983)).

116. *Id.* at 58 (citing Khoury v. Md. Cas. Co., 843 P.2d 822, 824 (Nev. 1992)).

117. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

118. *Id.* at 637.

119. NCR Corp. v. Comptroller of the Treasury, Income Tax Div., 544 A.2d 764, 767 (Md. 1988) (citing Kaczorowski v. City of Baltimore, 525 A.2d 628, 632-33 (Md. 1987)).

120. SENATE COMM. ON JUDICIARY, FIRST REPRINT OF UNIFORM ARBITRATION ACT, S.B. 71-336, 1st Sess., at 9 (Nev. 2001).

121. S.B. 336, 71st Leg., Reg. Sess. (Nev. 2001), *available at* http://www.leg.state.nv.us/71st/Reports/history.cfm?ID=4105 (Sept. 22, 2001) (adopting the Revised Uniform Arbitration Act).

unanimously passed a motion to request a bill draft to adopt the RUAA.[122] That bill draft, which became Senate Bill 336,[123] was presented to the Senate Committee on Judiciary on March 22, 2001.[124] During the March 22, 2001, committee meeting, the RUAA was discussed at length, with some emphasis placed upon the punitive damages provision.[125]

Senator Mark A. James, Chairman of the Senate, opened the discussion of the punitive damages provision in section 21(a) of the RUAA by commenting that "'the case law is clear the courts have determined that it is against policy for an arbitrator to award punitive damages.'"[126] Mr. Frank Cassas, an attorney from Reno, Nevada, who was present to answer questions about the RUAA, replied that "'[the RUAA] makes it clear that the arbitrator has the authority under the new statute.'"[127] When Senator James requested further legal analysis on the provision authorizing arbitrators to award punitive damages, Mr. Cassas explained that "the arbitrator has the same grant of authority to resolve a dispute that a judge would have."[128]

In response, Senator James remarked: "'If I remember right, law school cases, saying that damages that are not compensatory, that are designed to make a statement, to punish someone, or to set an example, are not properly in the hands of an arbitrator, as the authority should lie with the court.'"[129] Mr. Cassas replied: "'That was the state of the law when you and I went to law school,'"[130] but "the courts have [since] stated that if the legislature decides the litigants are entitled to punitive damages, 'why should not the arbitrator, resolving the same dispute, have the same authority?'"[131] After a brief discussion on bifurcated proceedings, Senator James closed the hearing on Senate Bill 336 with the committee having taken no action on the bill.[132]

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122. MINUTES OF THE SENATE COMM. ON JUDICIARY, 71st Leg., Reg. Sess., *available at* http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/214.html (Nev. Feb. 23, 2001).

123. S.B. 336, 71st Leg., Reg. Sess. (Nev. 2001), *available at* http://www.leg.state.nv.us/71st/Reports/history.cfm?ED=4105 (Sept. 22, 2001) (adopting the Revised Uniform Arbitration Act).

124. MINUTES OF THE SENATE COMM. ON JUDICIARY, 71st Leg., Reg. Sess., *available at* http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/654.html (Nev. Mar. 22, 2001).

125. *See id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.*

The Nevada Senate Committee on Judiciary briefly addressed the RUAA for the third and final time on March 30, 2001.[133] In that committee meeting, Senator James opened the discussion with a comment regarding the state of the law of punitive damages, stating "it would be a revolutionary law which would allow arbitrators to award punitive damages, and [that] the proposed amendment would omit it."[134] The proposed amendment to which Senator James referred was amendment number 151,[135] which deleted both references to punitive damages in section 28 of Nevada Senate Bill 336.[136]

Without any further discussion regarding the authority of an arbitrator to award punitive damages, Senator Mike McGinness "moved to amend and . . . pass Senate Bill 336," with Senator Terry Care seconding the motion.[137] The motion carried unanimously.[138] Consequently, the language of the RUAA that empowered arbitrators to award punitive damages came to an abrupt and unfortunate end in Nevada.

2. *Construing the Senate Judiciary Committee Minutes*

The Minutes of the Senate Judiciary Committee clearly show that the committee fully considered the punitive damages language of section 21 of the RUAA before rejecting it. First, Senator James stated that punitive damages "'are not properly in the hands of an arbitrator, as the authority should lie with the court.'"[139] Second, Mr. Frank Cassas informed the committee members that "the courts have [since] stated that if the legislature decides the litigants are entitled to punitive damages, 'why should not the arbitrator, resolving the same dispute, have the same authority?'"[140] Finally, immediately before Senate Bill 336 was amended, Senator James commented that "it would be a revolutionary law which would allow arbitrators to award punitive damages, and [that] the proposed amendment would omit it."[141]

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133. MINUTES OF THE SENATE COMM. ON JUDICIARY, 71st Leg., Reg. Sess., *available at* http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/732.html (Nev. Mar. 30, 2001).

134. *Id.*

135. S.J. Amend. 151, 71st Leg., Reg. Sess. (Nev. 2001).

136. *Compare id.*, *with* S.B. 336, 71st Leg., Reg. Sess. (Nev. 2001).

137. MINUTES OF THE SENATE COMM. ON JUDICIARY, 71st Leg., Reg. Sess., *available at* http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/732.html (Nev. Mar. 30, 2001).

138. *Id.*

139. MINUTES OF THE SENATE COMM. ON JUDICIARY, 71st Leg., Reg. Sess., *available at* http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/654.html (Nev. Mar. 22, 2001).

140. *Id.*

141. MINUTES OF THE SENATE COMM. ON JUDICIARY, 71st Leg., Reg. Sess., *available at* http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/732.html (Nev. Mar. 30, 2001).

Those statements, made as a "reiteration of events leading to the adoption of the statute rather than an expression of personal opinion,"[142] should indubitably demonstrate to a court that the legislature fully intended to preclude arbitrators from wielding the authority to award punitive damages. With the Minutes of the Senate Committee on Judiciary in hand, a court interpreting the Nevada arbitration statute will have no alternative but to acknowledge that the legislature intended to preclude arbitrators from awarding punitive damages. As a result, Nevada now joins only a handful of states that limit such arbitral awards,[143] thwarting the NCCUSL's language specifically authorizing arbitrators to make an award of punitive damages "if such an award is authorized by law in a civil action involving the same claim."[144]

D. Mastrobuono *Revisited*

Even if a contract includes a choice-of-law provision that provides for Nevada law to control all controversies arising out of the contract, and even if a court finds that section 38.238 of the Nevada Revised Statutes precludes arbitrators from awarding punitive damages, the analysis does not end there. The Supreme Court in *Mastrobuono*, faced with the task of interpreting a choice-of-law provision favoring "the laws of the State of New York," still found itself attempting to determine whether the agreement conclusively barred the arbitrator from awarding punitive damages.[145] The Court, upon a reading of the choice-of-

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142. United States v. State Eng'r, State of Nev., 27 P.3d 51, 58 (Nev. 2001) (Becker, J., concurring in part and dissenting in part) (citing Minor Girl v. Clark County Juvenile Court Servs., 490 P.2d 1248, 1250 (Nev. 1971)).

143. Prior to the enactment of the RUAA in Nevada, the Nevada Supreme Court had yet to rule on the issue of whether arbitrators are empowered to award punitive damages. An examination of the case law in Nevada reveals that the Nevada Supreme Court would have upheld an arbitrator's award of punitive damages had the arbitrator found that the plaintiff proved by clear and convincing evidence that the defendant was guilty of "oppression, fraud or malice, express or implied," as provided under section 42.005 of the Nevada Revised Statutes. Wichinsky v. Mosa, 847 P.2d 727, 730-31 (Nev. 1993) (applying the Uniform Arbitration Act, and Nevada statutory and tort law). Four jurisdictions (Arkansas, Indiana, New Mexico, and New York) have held that arbitrators are precluded from awarding punitive damages. *See* McLeroy v. Waller, 731 S.W.2d 789, 792 (Ark. 1987) (providing that state law prohibits tort claims from being resolved by arbitration); Sch. City of E. Chi., Ind. v. E. Chi. Fed'n of Teachers, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981) (holding that as a matter of public policy, punitive damages are beyond the jurisdiction of an arbitrator); Shaw v. Kuhnel & Assoc., 698 P.2d 880, 881-82 (N.M. 1985) (stating that "[i]t is for the court to determine issues of fraud"); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 832 (N.Y. 1976) (holding that the authority to award punitive damages in New York is limited to judicial tribunals and may not be exercised by arbitrators); UNIF. ARBITRATION ACT § 21 cmt. 1 (amended 2000), 7 U.L.A. 39 (Supp. 2002).

144. UNIF. ARBITRATION ACT § 21(a) (amended 2000), 7 U.L.A. 39 (Supp. 2002).

145. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59-64 (1995).

law provision in the securities trading account agreement at issue in that case, stated that the provision "may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship."[146] The Court went on to state:

> Even if the reference to "the laws of the State of New York" is more than a substitute for ordinary conflict-of-laws analysis . . . the provision might not preclude the award of punitive damages because New York allows its courts, though not its arbitrators, to enter such awards. In other words, the provision might include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals.[147]

The Court, in determining the weight that should be given to the choice-of-law provision, stated: "It is not, in itself, an unequivocal exclusion of punitive damages claims."[148] Applying that same analysis to a choice-of-law provision that favors Nevada law as governing an arbitration proceeding, a court could find that the provision is limited in its scope, acting either merely as a substitute for the conflict-of-laws analysis a court would have to engage in when attempting to construe the contract,[149] or as a means of defining the substantive rights afforded the parties were the claim before a judicial tribunal.[150]

The Court also found that the choice-of-law provision in the securities agreement at issue contradicted the reference to arbitration in accordance with NASD rules, which the Court held to authorize punitive damages awards by arbitrators.[151] Due to the fact that those contradicting references were present in the same agreement, the Court held that, in accordance with the common law rule of contract interpretation that ambiguities should be construed against the drafter, arbitrators were empowered to award punitive damages under the agreement.[152] This holding represents an important construction for a court attempting to interpret an arbitration agreement governed by the laws of the State of Nevada.

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146. *Id.* at 59.
147. *Id.* at 59-60 (citations omitted).
148. *Id.* at 60.
149. *See id.* at 59 (discussing the possibly limited scope of a choice-of-law provision in the securities agreement at issue).
150. *See id.* at 60 (alluding to a party's continuing right to punitive damages in arbitration if so entitled in a proceeding before a court).
151. *See id.* at 61 (holding that the NASD's Code of Arbitration Procedure, which provided that arbitrators may award "damages and other relief," included the authority to award punitive damages).
152. *Id.* at 62-63; *see* discussion *supra* Part III.

Such reference could authorize an arbitrator to award punitive damages regardless of the limitation placed upon arbitrators in section 38.238 of the Nevada Revised Statutes.[153] Because the Nevada Revised Statutes provide that punitive damages are an appropriate remedy in certain situations[154]—any award of which is determined by the "trier of fact"[155]—a reference to "the laws of the State of Nevada" may be held to be inherently ambiguous because the prevention of punitive damages awards by arbitrators contradicts the authority of the trier of fact to award punitive damages.[156]

If a reference to "the laws of the State of Nevada" is held to be ambiguous, a court, applying the well-settled rule that "'in cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language,'"[157] will hold that the drafting party's attempt to preclude a punitive damages award by an arbitrator is defeated, and the arbitrator's award of punitive damages will be upheld. As a result, a court construing a reference to Nevada laws will be forced to engage in an analysis of applicable state law and its interaction with the agreement at issue. Consequently, like the *Mastrobuono* Court, the debate over whether arbitrators have the authority to award punitive damages will remain unresolved.

VII. CONCLUSION

The United States Supreme Court has twice been given the opportunity to settle the continuing debate over whether arbitrators have the authority to award punitive damages.[158] However, because the Supreme Court has yet to resolve the issue of whether parties can eliminate punitive damage awards by a contractual provision, it remains to be seen whether restrictions on statutorily created rights authorizing punitive damages may be enforced. The RUAA was drafted and offered to the individual jurisdictions in 2000 to eliminate many of the difficulties associated with interpreting arbitration agreements. As of the writing of this Note, only four states have enacted the RUAA, and one of them may have

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153. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 62-63.

154. *See, e.g.*, NEV. REV. STAT. § 42.005 (2001) (providing for an award of punitive damages where "the defendant has been guilty of oppression, fraud or malice, express or implied").

155. *Id.* § 42.005(3).

156. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 61-62.

157. Williams v. Waldman, 836 P.2d 614, 619 (Nev. 1992) (quoting Jacobson v. Sassower, 489 N.E.2d 1283, 1284 (N.Y. 1985)).

158. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. at 58-64 (avoiding the opportunity to settle the issue of arbitral authority to award punitive damages); J. Alexander Sec., Inc. v. Signe Mendez, 511 U.S. 1150 (1994), *cert. denied*, (O'Connor, J., dissenting) (recognizing the existing circuit court split regarding arbitrators' authority to award punitive damages).

already created a potential quagmire of litigation for parties to contracts governed by its state arbitration laws.[159] The jurisdictions that have yet to enact the RUAA, including the fourteen states in which the Act has already been introduced to their respective legislatures, have an opportunity to avoid this new spin on the problem presented to the Supreme Court in *Mastrobuono*.

Nevada has inadvertently enacted a statute that guarantees, at least in some measure, that litigation will be required to determine whether specific reference to the laws of the State of Nevada precludes arbitrators from awarding punitive damages. While practitioners and commentators patiently await final word from the Supreme Court on this issue, individual jurisdictions now have the opportunity to complicate the field of arbitration law even further.

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159. The number of states referred to in this sentence are those states that have enacted the RUAA by August 15, 2002.