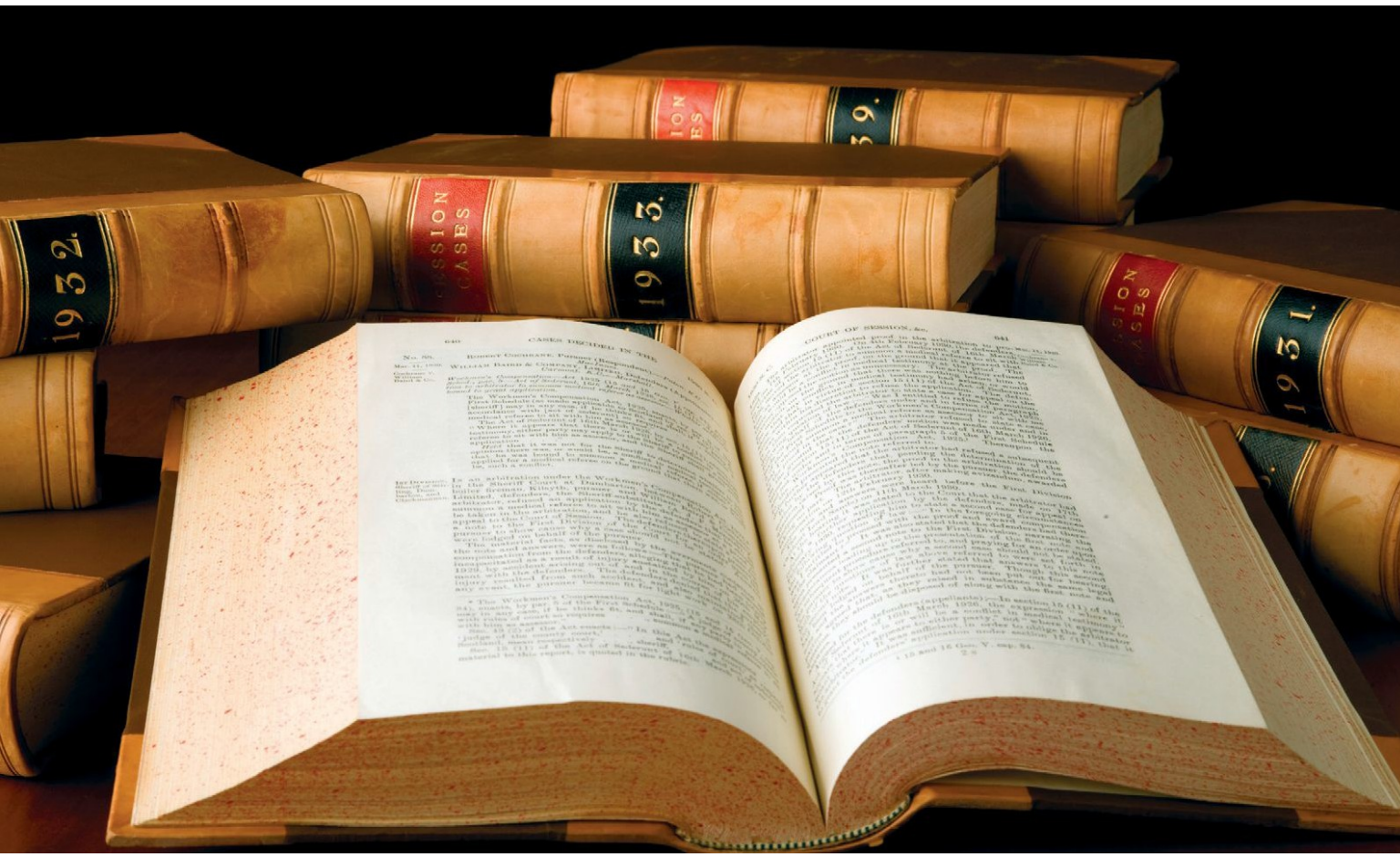

Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?

By Paul Bennett Marrow

Do arbitrators have authority to undertake independent legal research without authorization by the parties? Or, are they prohibited from doing so, as many arbitrators believe? These are vexing questions. For answers, this article looks for guidance in the Federal Arbitration Act (FAA),[1] state arbitration statutes, case law, and the rules of several arbitration institutions, as well as the Code of Ethics for Arbitrators in Commercial Disputes. The takeaway is that if an arbitrator wants an award that will withstand an attack based on "evident partiality," "misconduct" or the "exceeding of powers," there are good reasons to refrain from *unauthorized* legal research.

Why even consider the question, since the parties' attorneys (are supposed to) provide the arbitrator with briefs. The problem arises when the legal picture presented by the briefs is inadequate or just plain wrong, or where one or both parties fail to provide the arbitrator with a brief. Under these circumstances may the arbitrator research the legal issue or is it best to assume that had the parties intended to give that power to the arbitrator they would have indicated so in the arbitration clause in clear and unambiguous terms? Would it make a difference if the contract designated the governing law and required the arbitrator to apply the law, and/or called for a reasoned award?

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Looking at these questions from the perspective of an arbitrator's obligation to be diligent and thorough, and to produce fair and impartial decisions, doesn't the suggestion that independent legal research might be inappropriate seem counterintuitive? After all, if arbitrators are barred from assuring themselves of the correct law in a case, how can they meet expectations that justice will be achieved? Taking it one step further, if there is unauthorized legal research, is that action sufficient for one party to object on the grounds that the arbitrator's impartiality has been compromised?

The reader might ask if there is something about arbitration and the role that law plays that make arbitration so different from litigation; the answer is "yes." Arbitration is a consensual contractual process intended to be an alternative to (and not a copy of) litigation. In arbitration, parties can contractually agree to give up strict adherence to the law (which *must* be applied in court), in favor of a more informal process customized to their needs. They can decide for themselves what law they want to govern their agreement and any dispute that may arise, and they can even go so far as to mandate that an arbitrator not apply law and instead prescribe principles they deem fair and just. As Judge Richard Posner famously noted ". . . short of authorizing trial by battle or ordeal, or more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."[2] And even if parties want the law to apply, there is nothing to stop them from requiring that a version of law mutually agreed to shall govern, even if that version is seen by the arbitrator to be just plain wrong. Decisions about law are for the parties to make, and they may do so without accounting to an arbitrator. Parties may have good reasons for not wanting the arbitrator to research law, reasons they need not share.

Does the emphasis on the freedom to contract open the door for awards that are strange, if not bizarre? Perhaps, but remember that decisions by an arbitrator are confidential and not available as precedent.

Step back and consider the following example: Both sides disagree about whether a widget is blue. Each says the widget is their version of blue. The arbitrator sees what one side calls blue is really red and what the other side sees as blue is really white and concludes that both sides are wrong. But the arbitrator also understands that the parties don't appear to care about what blue really looks like, let alone have any interest in the arbitrator correcting them both. What they have asked is for the arbitrator to decide whose version of blue is really blue – that is, they want the arbitrator to tell them who is right and who is wrong *given their narrow definitions of what is blue*. If the arbitrator says that white is blue for the arbitration, that ruling isn't precedent that can be used in other cases. It's a ruling that reflects the wishes of the parties who, let's face it, from the get-go are blind to what blue really looks like.

Does the emphasis on the freedom to contract open the door for awards that are strange, if not bizarre?

Does this analysis encompass both federal and state laws applicable to arbitration and, in particular, the FAA? Assume that the parties have indicated they want an arbitrator to decide whether a certain state's arbitration statute is preempted by the FAA. Both sides file briefs. Side A says state law is preempted but gives a legally incorrect reason. Side B claims state law isn't preempted but gives a legally incorrect reason that's different from that offered by Side A. Are the parties asking the arbitrator to decide what the legally correct reason is or are they asking the arbitrator to decide which party is correct based on the law as the parties see it? It's the latter, even though that seems counterintuitive. In *Steelworkers v. Warrior & Gulf Navigation Co.*, the U.S. Supreme Court instructs that an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties."[3] It follows that the arbitrator is bound by the wishes of the parties, even if the arbitrator thinks that the law as stated by both parties is wrong.

In both examples, while the outcome contravenes the reality of the rules dictated by our legal system, neither the parties nor anyone else is harmed. The parties get what they bargained for, and the legal system suffers no adverse impact because the ruling isn't binding on anyone but the parties.

Silence on any issue, independent legal research being no exception, requires the arbitrator to pause before considering an action not otherwise provided for in the parties' written instructions. (This view squares with all the major *domestic* arbitration authorities discussed in this article.)

Remarkably, it seems to make a difference if the analysis involves domestic authorities as opposed to those in the international arena. Many of the legal systems outside the United States favor giving arbitrators broad discretion, especially where the parties have failed to express their wishes. Why this is so is not clear, but for whatever reason, the practitioner must be mindful of this difference.

Domestic Vacatur Statutes and Related Case Law

The FAA and all state arbitration statutes focus on the enforceability of agreements to arbitrate and arbitration awards. These statutes were not designed to mandate the contents of agreements to arbitrate, leaving it to the par-

ties to decide on the terms of their agreement. The only statutory mandate found in 9 U.S.C. § 2 is that the agreement be unequivocal, valid, irrevocable and otherwise enforceable.

What about the conduct of the arbitrator? The main limitations placed on arbitrator conduct are found in the vacatur provisions in the FAA and most state statutes based on the Uniform Arbitration Acts. These provisions allow a court to vacate an award upon a showing of evident partiality, misconduct, or the exceeding of arbitral authority.[4] Significantly, these provisions do not give courts an opportunity to review the arbitrator's decision on the merits.

Supplementing statutory grounds is the common law doctrine manifest disregard of law, which has long been a worry for arbitrators. Many courts consider this doctrine to have survived the recent Supreme Court decision in *Hall Street Associates v. Mattel Inc.*[5]

Let's look at each of these vacatur grounds in turn.

Evident Partiality

Exactly what constitutes "evident partiality" is a troublesome question. Answering it requires an analysis of the standard of proof required to establish intent. Some courts hold that showing an *appearance of bias* is sufficient while others hold this standard is not stringent enough – *actual bias* must be shown. Grappling with the question, the Second Circuit pointed out that "[b]ias is always difficult, and indeed often impossible, to 'prove,'"[6] unless an arbitrator were to publicly announce partiality. As an alternative, this court fashioned a *reasonable person* standard, which is to say that evident partiality is shown "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances."[7]

Does an arbitrator's unauthorized independent legal research constitute "evident partiality"? If the appearance of bias standard is applied, the answer probably turns on what happens once the independent research has been completed. If the research turns up nothing in opposition to what the parties have presented, it's hard to see any basis for such a claim. But suppose that the research uncovers something entirely new and yet relevant, assuming the case was before a court. For example, research uncovers a valid theory overlooked or ignored by a party. Can the arbitrator make inquiry about the discovery without being accused of being partial? This kind of inquiry is party-specific and goes to the heart of that party's substantive case. So the inquiry could be characterized as an offer to provide assistance or, worse yet, an effort to warn. The inquiry suggests that the arbitrator hasn't thought things through. Perhaps the parties have considered the issues involved and resolved them to their mutual satisfaction. And perhaps one or both of the parties are aware of the omission and, even so, have good reasons not to want the issue raised.

The claim that an arbitrator has exceeded his or her powers means that the arbitrator allegedly went beyond the authority specified in the parties' agreement.

While the courts have yet to speak on the subject, it's hard to see how a court wouldn't find such an offer evidence of a failure to maintain the evenhandedness required by the FAA and the ethical rules and codes of conduct cited in this article.

Arbitrator Misconduct

"Misconduct" requires a showing that the arbitrator's actions resulted in an unfair proceeding.[8] The inquiry is about the conduct of the arbitrator and the impact that his or her conduct has on the proceeding. In this context unauthorized independent legal research is problematic for a number of reasons. By definition such research would be conducted outside of the view of the parties, raising the question of how do the parties control for the possibility that the arbitrator might not conduct an exhaustive examination of applicable law? What assurances do the parties have that the research will consider the concerns of all sides? In addition, how can the parties assure themselves that the sources uncovered are current and germane to the dispute? Given this, in all likelihood courts will disallow independent legal research conducted without expressed consent because there is no way to ensure that the results will not be fundamentally unfair.

Exceeding of Powers

The claim that an arbitrator has exceeded his or her powers means that the arbitrator allegedly went beyond the authority specified in the parties' agreement.[9] Where the terms are definitive, there is no problem; expressed wishes govern.

What happens if an instrument is silent about a given action? Silence alone doesn't necessarily lead to a conclusion that a given power isn't authorized. The Supreme Court has instructed that, at least in cases involving arbitrability, when silence comes into play, a two-step analy-

sis is required before a power can be implied. First it must be determined if the power in question is one reserved by law for the courts. Where such is the case, it cannot be *presumed* that the parties intended to take the matter from the courts and give it to an arbitrator. It is only where there is "clear and convincing evidence" of such intent that a court will imply the power absent.[10]

The power to conduct unauthorized legal research is not one reserved by law for courts, so the way is cleared for implication. But the *appropriateness* of implying such a power involves other considerations. If parties wish law to be applied, they can say so; absent any such mandate, implying a power would appear to be tantamount to permitting courts to rewrite the agreement between the parties.[11] Implication becomes less problematic, however, where the power implied does no more than supplement an existing power. Consider an agreement that requires an arbitrator to do no more than issue a reasoned award. Assume that the parties have failed to provide briefs on the applicable law. Under such circumstances is it now appropriate to imply a power to conduct independent research? Reasoned awards that speak solely to facts are commonplace and proper, and there is no reason to assume that a reasoned award *must* also speak about law. But where a reasoned award based solely on a determination of facts is unsupportable without a discussion of law, a court should be comfortable concluding that the implied power complements a power already granted by the parties.

Manifest Disregard of the Law

The doctrine is one of last resort created by the judiciary – not by statute.[12] The doctrine holds arbitrators to account for manifestly disregarding a law that has been brought to his or her attention by the parties or by their agreement. Significantly, the doctrine does not speak to an error in the application of law. To be invoked, the arbitrator must be shown to have ignored a law

1. that was clear and explicitly applicable to the matter before the arbitrator;
2. that if properly applied, the outcome would have been different;
3. that the arbitrator had actual knowledge of the law not applied.[13]

The doctrine is about knowledge acquired by an arbitrator from a source other than his or her own research. No court has found that an arbitrator has a duty to independently investigate issues of law and apply what was discovered. In *Wallace v. Buttar*,[14] the Second Circuit appears to have found the opposite holding that, until such time as all arbitrators are required to be attorneys, an arbitrator does not have "a duty [under the FAA] to ascertain the legal principles that govern a particular claim through . . . independent legal research."[15] In arriving at this conclusion, the court expressly rejected the argument by Professor Norman Posner.[16]

> [Posner] argued that "there are powerful reasons why the manifest disregard standard shall be replaced by a broader standard . . . Because the manifest disregard standard protects an arbitral award from vacatur if the arbitrators did not know the law, it encourages arbitrators not to find out what the law is." We disagree with this contention because it seems to imply that arbitrators will not approach their task in a professional manner. . . . As decision-makers, they have an obligation to ascertain what the law is and to apply it correctly. But until the FAA is amended to require that arbitrators be attorneys, or that they possess a certain standard of legal knowledge, we see no basis upon which we can impose a duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research. *That is, we expect arbitrators to ascertain the law through the arguments put before them by the parties to an arbitration proceeding.* We recognize the possibility that a case may arise that presents concerns about the relative capacities of the parties to put the law before an arbitral panel; that is, a case where "the dispute is not between roughly equal commercial entities but between parties that are unequal in wealth and sophistication." This is clearly not such a case, however.[17]

In *Metlife Securities, Inc. v. Bedford*,[18] a district court citing *Wallace* reached a similar conclusion in a Financial Industry Regulatory Authority (FINRA) case, finding the doctrine not applicable where the "petitioner failed entirely to educate the Panel as to the legal principles which ought to have been applied to these facts – the law governing liability of corporate affiliates, which would have apprised the Panel of the legal significance of the factual arguments made. It is well established that there is no 'duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research.'"

In sum, the doctrine of manifest disregard and the issue of unauthorized research are totally separate, although it can be said that both appear to involve facts suggesting overreaching by an arbitrator.

The International Arena

The UNCITRAL Model Law on Commercial Arbitration, Article 28(2), allows parties to specify applicable law or, absent a directive, requires application of "the law determined by the conflict of laws rules which [the arbitrator] considers applicable." Some countries have their own unique statutory schemes, an example being the English Arbitration Act of 1996, and in recent years several countries have adopted the UNCITRAL Model Law.[19] Unlike the provisions found in the FAA, specific mention is made of the doctrines of *ex aequo et bono* ("what is just and fair") and *amiable compositeur* (unbiased third party). Article 28(3) directs that an arbitrator can apply these principles "only if the parties have expressly authorized" the arbitrator to do so.

But the UNCITRAL Model Law doesn't completely address the questions we are exploring. If the parties select a law but fail to brief the arbitrator on their respective positions or leave it to the arbitrator to designate law and then fail to advise as to their respective positions on that law, the arbitrator would appear to be within bounds to do independent legal research to comply because, without such research, the requirement that the arbitrator "apply" the law selected would be meaningless. But it isn't at all clear whether the arbitrator can conduct independent legal research once the parties make their respective positions known.

The rules of the major institutions administering arbitrations provide an assortment of schemes running along a continuum from total silence to specificity.

Article 34(2)(a) and (b) provides a list of grounds for refusing to recognize or enforce an award. The grounds involving arbitrator misbehavior are limited to making an (1) award that deals with "a dispute not contemplated by or falling within the terms of the submission to arbitration" or (2) an award that contains "decisions on matters beyond the scope of the submission to arbitration . . ." Both grounds focus on overreaching by an arbitrator, grounds that roughly approximate the FAA injunction against exceeding the powers specified in an arbitration agreement. The first ground speaks to limitations created by parties on disputes within the terms of the submission to arbitration. Independent legal research could conceivably be included here if an arbitrator were to research, identify and decide the merits of a cause of action not advanced by a party. The second ground speaks to a decision on matters beyond the scope of those submitted to arbitration. In the event that parties restrict an arbitrator from doing independent legal research, the argument might be made that violating that restriction would result in a decision beyond the scope of the arbitration clause.

Institutional Rules

The rules of the major institutions administering arbitrations provide an assortment of schemes running along a continuum from total silence to specificity. There are those that

1. are entirely silent on the issue but require the arbitrator to follow the law designated by the parties without indicating what the arbitrator should do if no designation is made;
2. are entirely silent but give the arbitrator great discretion in the conduct of the arbitration process;
3. require the arbitrator to follow the law designated by the parties, give the arbitrator authority to decide what law to apply should there be no designation by the parties and give the arbitrator limited authority to exercise discretion in the conduct of the hearing;
4. require the arbitrator to follow the law designated by the parties and give the arbitrator authority to decide what law to apply should there be no designation by the parties and also give the arbitrator broad discretion in the conduct of the arbitration process;
5. require the arbitrator to follow the law designated by the parties, give the arbitrator authority to decide what law to apply should there be no designation by the parties, give the arbitrator broad discretion in the conduct of the arbitration process and automatically vest the arbitrator with the power to conduct independent legal research subject only to a written directive from the parties that they wish to "opt out" and preclude the arbitrator from conducting independent legal research.

When considering the role that institutional rules play in answering these issues, the principles governing the implying of a power appear to come directly into play.

Recall that implying a power is acceptable where that power (1) is not reserved in the first instance to the courts, (2) supplements an existing power and (3) is otherwise appropriate. Where an arbitration clause incorporates by reference institutional rules, the question becomes whether the rules so incorporated resolve item (2) – the issue of when a power being implied is supplemental to an existing power. If the rules incorporated state that such is the purpose, there is no challenge. But most, if not all institutional rules don't include such a pronouncement. Instead, institutional rules focus on providing an arbitrator with a set amount of discretion. The more limited the discretion the less likely that the power thought to supplement an existing power does so. The greater the discretion, the more likely it is that the power thought to supplement an existing power does so.

Consider first the institutional rules commonly incorporated into domestic arbitration clauses. Start with the Commercial Rules of the American Arbitration Association (AAA):[20] these rules have nothing to say about the selection and implementation of law. If parties fail to make provision, the power to apply law may not exist leaving the arbitrator to resolve the dispute in whatever manner he or she deems fair and just. By incorporating these rules and saying nothing further, the parties would not create a power supplementing one that already exists because there is no existing power concerning applying law.

International Institute for Conflict Prevention and Resolution (CPR) Rule 10 requires that the arbitrator apply whatever law the parties designate; absent a designation, the arbitrator has the power to select whatever law or rules he or she deems appropriate. Unlike the

rules at JAMS, applying law isn't necessarily a given. In theory at least, the arbitrator is not barred from concluding that no law need be applied and instead may opt to do whatever seems fair and just. The CPR rules grant the arbitrator authority to vary from the prescribed procedures as necessary. But that authority is not unlimited. It is confined by the scope of the rules themselves,[21] meaning that which is "reasonable and appropriate."

The rules at JAMS anticipate the existence of such a power concerning law. Rule 24(c) instructs that the arbitrator "*shall* be guided by the rules of law" designated either by the parties in the first instance or by the arbitrator. Incorporating the JAMS rules into an arbitration clause establishes that, no matter what, applying some law is a given. The arbitrator has sufficient discretion to fill in the selection of law if the parties are silent. But the arbitrator may not proceed without applying law.[22]

None of the domestic rules reviewed here directly addresses an arbitrator's ability to conduct independent legal research when the parties present what the arbitrator believes to be an incomplete legal analysis of the issues in a case.

In the international arena things are very different. The International Arbitration Rules of the AAA,[23] UNICITRAL[24] and the International Chamber of Commerce (ICC)[25] require an arbitrator to follow the law designated by the parties and, failing such designation, allow the arbitrator to apply such law and rules as he or she deems appropriate. They all endow the arbitrator with reasonable discretion respecting the conduct of the proceeding and emphasize a need for equality and fairness for all parties.[26] Application of law being a given, the door opens for an arbitrator to conduct independent legal research if the parties fail to brief their positions on the law. If only one party provides a brief, in all likelihood the arbitrator would be barred from doing research without the consent of the other party or parties because of the mandate that all parties must be treated equally. Under such circumstances, the better solution would be for the arbitrator to bring the matter to the attention of all the parties and to follow their wishes.

The rules of the London Court of International Arbitration (LCIA) and JAMS International Rules take things to another level.

The LCIA rules not only allow arbitrators to fill a void if one is created by parties, but also empower an arbitrator to (1) adopt procedures suitable to the circumstances of the arbitration and (2) exercise the "widest" discretion with the proviso that (a) the parties can "opt out" and (b) when exercising discretion, ensuring that the results are fair, efficient and expeditious.[27] By allowing discretion that is the "widest . . . to discharge its duties allowed under such law(s) or rules,"[28] the power to conduct independent legal research is subject only to the constraint that all parties must be treated "fairly and impartially." In a situation where the parties fail to brief their positions, the arbitrator appears to have sufficient authority to proceed without the consent of the parties, although the arbitrator would still be required to advise the parties of the details of the research and provide adequate assurances that all positions were researched and carefully considered.

JAMS International Arbitration Rules (2011) go even further. Article 20.4 provides:

> Unless the parties at any time agree otherwise in writing, the Tribunal will have the power, on the application of any party or on its own motion, to identify the issues and to ascertain the relevant facts and the law or rules of law applicable to the arbitration, or to inquire into the merits of the parties' dispute.

Article 20.4 doesn't condition the ability of an arbitrator to do independent legal research on the failure of the parties to brief their positions. Theoretically, even if the parties brief their positions, the article appears to allow the arbitrator to independently conduct legal research if the parties' briefs seem inadequate or otherwise problematic.

Ethical Standards

While the canons and/or codes of professional conduct don't have the force of law, they establish standards of conduct that an arbitrator cannot ignore; they form a valuable benchmark for measuring the quality of service provided by an arbitrator.

Most institutions providing arbitration require arbitrators to comply with the canons adopted and approved by the AAA and the American Bar Association (ABA).[29] There are several individual canons that must be read together to appreciate their impact on the issue of independent legal research.

Canon I(D) requires that arbitrators "conduct themselves in a way that is fair to all parties . . ." Canon I(F) requires that the arbitrator "conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision." Canon IV(A) speaks to the need for an arbitrator to "conduct proceedings in an even-handed manner." Part IV(E) states that if an arbitrator determines that "more information than has been presented is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses and request documents or other evidence, including expert testimony." Finally, Canon V(A) dictates that the arbitrator "should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues." Still, the Canons stop short of offering a specific mandate about an arbitrator's obligation concerning independent legal research.

In the field of domestic labor and management, arbitrators are expected to comply with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[30] Section 2 G(1) of the Code has a provision that appears to touch on the issue at hand.

> An arbitrator must assume full personal responsibility for the decision in each case decided.
>
> a. The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.
> b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.

Arbitration is all about what the parties contract for.

Without question, this provision goes further than any other in recognizing independent research as an issue and sanctioning arbitral discretion absent a mutually acceptable mandate by the parties.

The International Bar Association (IBA) has developed "Rules of Ethics for International Arbitrators."[31] In the Introduction to its Rules, the IBA explains:

> International arbitrators should be impartial, independent, competent, diligent and discreet. These rules seek to establish the manner in which these abstract qualities may be assessed in practice. Rather than rigid rules, they reflect internationally acceptable guidelines developed by practicing lawyers from all continents. They will attain their objectives only if they are applied in good faith.

Rule 3 of the IBA discusses elements of bias. Rule 3.1 focuses on the definition of partiality. "Partiality arises when an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject matter of the dispute." Rule 3.2 adds that "[f]acts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has . . . already taken a position in relation to it."

The AAA/ABA Canons and the IBA Rules, when read together, emphasize the need for an arbitrator to maintain an atmosphere of fairness, objectivity and focus on the issues as presented by the parties. Given the relative clarity of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, implying from quoted portions of the Canons and Rules of the AAA/ABA and IBA a sanction for independent legal research seems inappropriate. Had the authors of those Canons and Rules wished to directly address issues involving independent conduct by an arbitrator, they could have followed the example set by the Code applicable to arbitrators for labor-management disputes.

Conclusion

Arbitration is all about what the parties contract for when settling on an alternative to traditional litigation in a courthouse. The law imposes no restrictions on the freedom to contract other than to require that all terms must be "valid, irrevocable and enforceable in law or equity for the revocation of a contract."[32]

In court, judges must apply the law; rulings by some courts can form precedent and bind other courts. So it is consistent that judges are allowed to independently review the law without consent of litigants. In arbitration things are different, not because of disrespect for the law, but because of the priority given to the parties' wishes.

At least in domestic arbitration, arbitrators are well advised to seek consent from the parties before researching the law on their own. While international arbitration rules may seem to give broader authority, the same caution is advisable. The reality of non-enforcement provisions in international arbitration laws and treaties suggests that an award based on the arbitrator's independent legal research may be subject to challenge. Therefore, an arbitrator who feels compelled to research the law to make sure his or her award will be correct should not act on this feeling without first securing written permission to do so from all parties.

For the still skeptical reader: Assume you're an arbitrator in a domestic matter that involves a contract thought by the claimant to be unconscionable. At the hearing, the claimant offered proof of procedural unconscionability but failed to offer proof of substantive unconscionability. The respondent did not object or even mention the lack of proof concerning the substantive issue. You have been provided with briefs from all sides and as you read through them you become convinced that both sides have missed a critical issue. Neither party has addressed whether or not proof of procedural unconscionability alone is sufficient for you to declare the contract unenforceable. Your case manager has sent you an email reminding you that you must submit your award the next day. It is now 9:00 in the evening, and you decide to research the issue on your own. You draft a reasoned award discussing the fruits of your research and state that, based on your research, you find for the respondent.

Fast forward: six months later you receive a call from the case manager. She wants you to know the award was vacated and that she has received a nasty letter from the claimant's attorney. It seems it cost the claimant $15,000 to undo your award. The claimant's attorney is demanding your removal from the roster of arbitrators because of your conduct.

The case manager reminds you of the policy of the institution concerning independent legal research by an arbitrator. She asks for an explanation. What is your response? ■

1. 9 U.S.C. §§ 1–16.

2. *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994).

3. 363 U.S. 574, 581 (1960).

4. 9 U.S.C. § 10(a)(2)–(4); Uniform Arbitration Act § 12 (a)(2-3); California and New York have enacted unique statutes not fashioned after the Uniform Arbitration Acts. *See* Cal. Code. Civ. Proc. § 1286.2(a)(3)–(5); CPLR 7511(b)(1)–(5). The statute enacted in Georgia allows for the vacating of an award where an arbitrator manifestly disregards law. See O.C.G.A. § 9-9-13(b)(5).

5. 552 U.S. 576 (2008).

6. *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984).

7. *Id.*

8. *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 23 (2d Cir 1974) (the arbitrator "need only grant the parties a fundamentally fair hearing").

9. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).

10. *First Options v. Kaplan*, 514 U.S. 938, 945 (1995).

11. *Collins & Aikman Floor Coverings Corp. v. Froehlich*, 736 F. Supp. 480, 484 (S.D.N.Y. 1990); *accord*, *In re Texans Cuso Ins. Grp., LLC*, 421 B.R. 769 (2009).

12. *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

13. *Duferco Int'l Steel v. T. Klaveness Shipping*, 333 F 3d 383, 389–90 (2d Cir. 2003).

14. 378 F.3d 182 (2d Cir. 2004).

15. *Id.* at 190.

16. *See* Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 515 (1998).

17. *Wallace*, 378 F.3d at 191, n.3 (emphasis added).

18. 456 F. Supp. 2d 468, 473 (S.D.N.Y. 2006), *aff'd*, 254 F. App'x 77 (2d Cir 2007).

19. According to the UNCITRAL website, at least 64 nations have adopted the Model Law. In addition four territories of Australia, three within Canada, two within China and two overseas territories of the United Kingdom of Great Britain and Northern Ireland have adopted the Model Law. The Model Law has been adopted by at least seven American states: California, Connecticut, Florida, Georgia, North Carolina, Ohio and Texas. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

20. The FINRA Code of Arbitration Procedure – Customer Code and Industry Code – follows the same substantive format of the Commercial Rules of the AAA.

21. CPR Rule 9.1.

22. JAMS Rule 22(a):

> The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

23. AAA art. 28:

> 1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

24. UNCITRAL art. 35:

> 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

25. ICC art.21:

> 1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

26. Compare:

> AAA Article 16, Conduct of the Arbitration:
>
> 1. Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
>
> UNCITRAL Article 17:
>
> 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
>
> ICC Article 22:
>
> 4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

27. LCIA arts. 14.1, 14.2; art. 22.3.

28. LCIA art. 14.2.

29. Code of Ethics for Arbitrators in Commercial Disputes (2004).

30. As amended and in effect September 2007 and approved by the AAA, the Federal Mediation and Conciliation Service and the National Academy of Arbitrators.

31. Available at: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

32. FAA § 2.