DISPUTE RESOLUTION JOURNAL®

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Legal Research, Honorable Engagements, and an Integrated Theory of Arbitration

Charles H. Barr[1]

The author reviews two articles that essentially conclude that an arbitrator should not conduct legal research without the express authorization of the parties. He then examines the theory of arbitration underlying that answer and articulates an alternative theory of arbitration. The author then unequivocally concludes that arbitrators may, in fact, conduct legal research without the parties' express authorization.

Debate has been percolating, if not raging, in the arbitral community for at least a decade about whether an arbitrator should conduct legal research without express authorization of the parties. This article reviews two others that offer an essentially negative answer to the question, examines the theory of arbitration underlying that answer, and articulates an alternative theory of arbitration that yields an unequivocal answer of "yes."

The two articles reviewed here are a 2013 article by Paul Bennett Marrow in the *New York State Bar Journal* and a 2018 article by Kate Krause in the *ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter*.[2] Both admit that an

[1] Charles H. Barr, of counsel to Health Sciences Law Group LLC, may be contacted at cbarr@cbarrlaw.com. Svetlana Gitman assisted in the preparation of this article.

[2] Paul Bennett Marrow, "Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?," New York State Bar Ass'n Jour. (May 2013), pp. 24-31; Kate Krause, "May an Arbitrator Conduct Independent Legal Research—A Brief Overview—Part 1," ABA Section on Dispute Resolution's

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arbitrator's power to conduct legal research can be implied but they take a narrow view of the circumstances sufficient to do so.

The Marrow article concludes that an arbitrator should refrain from unauthorized legal research to avoid vacatur based on evident partiality, misconduct, or exceeding powers.[3] Underlying that conclusion is a theory of arbitration in which the arbitrator need not apply rules of decision derived from substantive law unless the arbitration agreement expressly or implicitly requires application of substantive law to resolve the dispute.[4]

The Krause article, while more equanimical in tone, lands in proximity to the Marrow article regarding the propriety of an arbitrator's legal research. The Krause article breaks legal research into the following categories:

1. Reviewing cases cited by the parties,
2. Checking the continued vitality of party-cited cases,
3. Reviewing cases cited by party-cited cases,
4. Researching additional cases on legal issues for which the parties cited cases,
5. Researching legal issues raised by the parties but for which no case law was cited, and
6. Researching legal issues not raised by any party.[5]

Arbitration Committee E-Newsletter, Vol. 3, Ed. 3 (August 2018). See also M. Ross Shulmister, "Attorney Arbitrators Should Research Law: Permission of the Parties to Do So Is Not Required," Dispute Resolution Jour., Vol. 68, No. 3 (2013), pp. 29-44, reprinted in Amer. Arb. Ass'n Handbook on Arbitration Practice (2d ed. 2016), pp. 265-78. The Shulmister article answers affirmatively to the question under consideration. The Shulmister article is a rebuttal of the Marrow article, and its analysis is narrower than that of this article. It distinguishes and discredits Marrow's reading of case law in support of his premise. It does not address the competing theories of arbitration underlying negative and affirmative answers to the question of whether an arbitrator should conduct legal research.

[3] Marrow, supra note 2, at 24; see Federal Arbitration Act (FAA), 9 U.S.C. § 10(a)(2)-(4).

[4] See Marrow, supra note 2, at 25.

[5] Krause, supra note 2, at 1.

The first three categories, according to the Krause article, should be within an arbitrator's implied powers.[6] But the first category (reading cited cases) is not really legal research. The second and third categories (cite-checking cited cases and reading cases cited in those cases) describe legal research of the most rudimentary sort: in effect, an arbitrator reading and cite-checking what the parties put in front of her rather than conducting an independent search for illuminative authority.

Both the Marrow and Krause articles use the word "independent" in their titles and discussions to describe legal research by an arbitrator. That word must mean either independent of the parties' express agreement, in which case it is redundant of "without authorization by the parties,"[7] or independent of the parties' citation to authorities. If the latter meaning is correct, then Krause categories 1 through 3 do not describe "independent" legal research.

With respect to any substantial ("independent") legal research (categories 4 through 6), the Krause article cautions that it presents "some risk of vacatur unless specifically permitted by the parties' agreement or applicable institution rules."[8] While the article does not discuss the theory of arbitration underlying its conclusion, the theory championed in the Marrow article is necessarily implicit in that conclusion, as the discussion below should reveal.

Significance of the Question

A preliminary inquiry is whether the issue of an arbitrator's power to conduct legal research lacks significance because an arbitrator as a matter of routine can simply obtain the parties' express authorization before undertaking the research. For several reasons, an arbitrator who requests such authorization cannot count on getting it. Once there is an express objection to an arbitrator's proposed legal research, the arbitrator who considers

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[6] Id. at 1, 3-4.

[7] Marrow, supra note 2, at 24.

[8] Krause, supra note 2, at 5.

such research essential to resolving the case and concludes she has the implied power to conduct it is in a worse position than before she sought the parties' consent.[9]

A prominent motivation for choosing to arbitrate is to resolve a dispute more expeditiously and economically than in a public forum.[10] Legal research can be time-consuming, particularly if the issues are unsettled, complex, or numerous. If the arbitrator's compensation is based on an hourly rate, one or more parties may wish to avoid the expense of legal research.[11]

A more ominous reason party consent may not be obtainable is that one party may not wish the arbitrator to uncover the relative weakness of its legal position. In some cases the parties fervently believe that their opposing legal positions are correct; that is more likely when the dispositive legal issues are unsettled or one or both parties are unrepresented by counsel. In other cases, however, counsel for one party knows in her heart of hearts that her client's legal position is, while arguable, inferior to that of the opposing party. That counsel may believe she can nonetheless out-brief her opponent—that is, cover up the relative weakness of her client's position through superior wordsmithing. The arbitrator's legal research, particularly if it is "independent" rather than rudimentary, would dissipate that strategy.

An *a Priori* Theory of Arbitration

A fundamental premise of the legal system is that a court or other public tribunal (e.g., an administrative agency serving an adjudicative function) must resolve a dispute by:

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[9] See Richard L. Mattiaccio & Steven Skulnik, "Do Arbitrators Know the Law (and Should They Find It Themselves)?," Dispute Resolution Jour., Vol. 73, No. 1, pp. 97-104 (2018), at 103.

[10] See Am. Arb. Ass'n, "Measuring the Costs of Delays in Dispute Resolution," https://go.adr.org/impactsofdelay.-html?_ga=2.58255913.280552962.1654380949-761301773.1633724954; David L. Evans & India Johnson, The Top Ten Ways to Make Arbitration Faster and More Cost Effective, Am. Arb. Ass'n, https://tinyurl.com/b8bkuc7b.

[11] See id.

1. Ascertaining the relevant facts,
2. Ascertaining the rules of decision under governing substantive law and the tribunal's procedural rules, and
3. Applying those rules of decision to the facts.

The second step in that methodology necessarily implies the permissibility and indeed the requirement of the tribunal's legal research to the extent necessary to pinpoint the rules of decision. For example, in a dispute arising from a contract between merchants for the sale and purchase of widgets, a court would consult Article 2 of the Uniform Commercial Code (or, for example under Louisiana law, another set of rules governing commercial sales) as adopted by the law of the governing jurisdiction—including official commentary and case law, if necessary—to ascertain the rules of decision.

The *extent* to which a case calls on the tribunal to conduct legal research—that is, whether and the extent to which "independent" rather than merely rudimentary research is necessary—depends on the accuracy and completeness of the parties' briefs on the legal issues. In every case, however, a conscientious tribunal should perform at least the research sufficient to satisfy itself that the parties' briefs *are* accurate and complete. (They rarely are.)

The Marrow article portrays arbitration differently. It argues that an arbitration agreement not only specifies arbitration as a private-forum alternative to a public forum but also wipes the slate clean with respect to the source of rules of decision to resolve the dispute. The substantive law that a court must apply does not apply in arbitration unless the agreement expressly or implicitly adopts that law for that purpose:

> 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 than arbitrator not apply law and instead prescribe principles they deem fair and just. . . . 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.[12]

If the arbitration agreement provides the arbitrator with extralegal rules of decision or enjoins her to decide according to what she considers "fair and just," there is no occasion for the arbitrator to conduct legal research. Moreover, under the Marrow article's theory of arbitration there is no default rule or presumption that the arbitrator is to apply governing substantive law in the absence of indication otherwise: "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."[13]

While it is true that freedom of contract in an arbitration agreement extends as far as the Marrow article posits, the point is wholly theoretical in nature and divorced from the realities of arbitration and its underlying disputes. I have never seen or heard of an arbitration agreement that instructs the arbitrator *not* to apply governing substantive law, which crafts its own rules of decision, or which simply tells the arbitrator to decide on the basis of what she considers "fair and just."[14]

As a practical matter, the parties' agreement on *a priori* rules of decision in lieu of governing substantive law is impossible because any formulation of the *a priori* rules would tip the balance toward a result in favor of one party and against another. If the rules of decision are in dispute, that formulation is exactly what the parties are disputing. If the dispute is purely factual, then one of the parties would prevail under its version of the facts and the governing substantive law, and that party would never agree to rules of decision derived from another source. In short, opposing parties will never agree to rules of decision other than

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[12] Marrow, supra note 2, at 25 (emphasis in original).

[13] Id.

[14] See Shulmister, supra note 2, at 267 ("It appears there is no case involving an arbitration agreement that contained a provision that a law, otherwise applicable, shall not apply.").

those supplied by governing substantive law, because under the latter rules one of them will win.

The idea that there exists a set of *a priori* principles on a conceptual plane "above" that of the law and which yields rules of decision that are "fair and just" is a mirage. The law, which includes the principles of equity, is precisely the community's expression of what is "fair and just," and in a democracy that expression is with the consent and participation of the community itself. If it is granted that, as the Marrow article contends, arbitration is "part of a system of self-government created by and confined to the parties,"[15] allowing an arbitrator to decide on the basis of what she considers "fair and just" would nonetheless amount to nothing other than self-government of persons (namely, arbitrators), not of laws, ultimately turning on the arbitrator's unfettered personal view of what is "fair and just." No party would logically trust or voluntarily submit to a dispute resolution mechanism, whether public or private, which places no normative constraint on that purely personal perspective.[16]

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[15] Id. (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (in turn quoting Shulman, "Reason, Contract and Law in Labor Relations," 68 Harv. L. Rev. 999, 1004-05 (1955)). The *Steelworkers* Court's description of arbitration was in the context of arbitration of labor disputes, which it contrasted with arbitration in the commercial context. See Steelworkers, 363 U.S. at 578-82. The grievance procedure, which incorporates arbitration as its dispute resolution mechanism, is "a part of the continuous collective bargaining process." Id. at 581. As such, it "demand[s] a common law of the shop…." Id. at 580 (quoting Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1498-99 (1959)). That procedure differs fundamentally from commercial arbitration designed to resolve disputes that arise under diverse contracts and relationships on a more *ad hoc* basis. To equate arbitration with "a system of self-government" outside the collective bargaining context would be questionable at best. Even under labor law, there is no warrant to assume that the "common law of the shop" supplants rather than supplements public law.

[16] To be sure, courts have occasionally remarked to the effect that an arbitrator can ignore the law and decide according to her personal conviction of what is "fair and just." See, e.g., Fagan v. Village of Harriman, 140 A.D.3d 868 (N.Y. App. Div.) ("An arbitrator is not bound by principles of substantive law … and may do justice and apply his or her own sense of law and equity to the facts.…") (internal quotations and citations omitted), leave to appeal

As for opening the door to results of arbitration under an *a priori* theory that are "bizarre" from a legal perspective, an eventuality that the Marrow article admits, its response is "no harm, no foul": since arbitration awards are confidential and non-precedential, "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."[17] But not all awards are confidential. For example, Financial Industry Regulatory Authority (FINRA) awards are published on FINRA's website,[18] and therefore may be cited in FINRA cases for their persuasive value. Even in other arbitration forums in which awards are not published, awards known to a party may be produced and cited for their persuasive value. This practice is prevalent in mass arbitrations, where thousands of cases with common facts and legal issues, which could have been aggregated in a class action if a judicial forum were available, are separately filed against the same respondent. Awards cited for their persuasive value may in fact persuade. To the extent awards based on an arbitrator's *ad hoc* conception of what is "fair and just" or on other extralegal rules of decision can be and are produced and cited for persuasive value, the potential for adverse impact on the reliability and integrity of arbitration is apparent.

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denied, 63 N.E.3d 71 (2016). It is unclear whether such statements are an endorsement of that supposed principle or a recognition that judicial review of arbitration awards is so narrow and circumspect that an arbitration award will typically not be subject to vacatur solely for the reason that the rules of decision emanated from the arbitrator's "own brand" of justice. See First State Ins. Co. v. National Cas. Co., 781 F.3d 7, 8 (1st Cir. 2015) (describing scope of judicial review of arbitration awards as "among the narrowest known in the law" (internal citation omitted)). See also Thomas A. Telesca, Elizabeth S. Sy & Briana Enck, "Must Arbitrators Follow the Law?," Franchise L. Jour., Vol. 41, No. 3, pp. 347-65 (Winter 2022), at 350-51.

[17] Marrow, supra note 2, at 25.

[18] *See* FINRA, Arbitration Awards Online, https://www.finra.org/arbitration-mediation/arbitration-awards.

An Integrated Theory of Arbitration

In contrast to the *a priori* theory of arbitration espoused by the Marrow article, an integrated theory of arbitration is based on the premise that parties expect arbitration to resolve their dispute according to governing substantive law and the procedural rules of the arbitral forum. This theory is "integrated" because it recognizes arbitration as a dispute resolution mechanism within the larger context of the legal system as a whole, not as a mechanism outside that system. As in a public forum, the expectation that arbitration resolve a dispute according to law necessarily implies the tribunal's power to conduct legal research to the extent necessary to uncover the law applicable to the dispute, or at least to assure itself that the parties have done so accurately and completely.

Parties' expectations that governing substantive law will supply the rules of decision are reflected in arbitration agreements and arbitral forum rules. Many and perhaps most well-drafted arbitration agreements specify and require the arbitrator to apply the law of a particular jurisdiction.[19] The Marrow article raises but does not answer the question of whether such a provision implicitly authorizes the arbitrator to research that law.[20] The Krause article allows that if the arbitration agreement includes a specification of applicable law, "it is more likely that the power to conduct legal research will be implied."[21]

This is too timid. A provision that requires the arbitrator to apply the law of a particular jurisdiction should give rise to a conclusive inference that the arbitrator has the power as well as the obligation to conduct legal research to the extent necessary to identify the correct rules of decision. Otherwise the arbitrator risks breach of the arbitration agreement if the parties' expositions do not accurately and completely analyze governing substantive law so as to reveal those rules.

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[19] See Am. Arb. Ass'n, "Alternative Dispute Resolution ClauseBuilder® Tool" ("It is common for parties to specify the law that will govern the arbitration proceedings."). See also Shulmister, supra note 2, at 267.

[20] See Marrow, supra note 2, at 24.

[21] Krause, supra note 2, at 3.

Many arbitration agreements also require that the arbitrator issue a reasoned award. The Marrow article postulates that "where a reasoned award based solely on a determination of the facts is unsupportable without a discussion of law," the reasoned award requirement implies the arbitrator's power to research the law.[22] This implicitly concedes that an award *not* based on governing substantive law—that is, in which the rules of decision, whether or not expressed, are derived extralegally or from an arbitrator's personal conception of what is "fair and just"—is not "reasoned." Moreover, in light of the prescribed methodology discussed above for resolving legal disputes, a discussion of law (or at least brief reference to it in a simple case) is invariably necessary to comport with the requirement of a reasoned award.

Only if an arbitration agreement fails to specify controlling law and does not require a reasoned award should resort to arbitral forum rules be necessary to imply the arbitrator's power to conduct legal research. The Marrow article looks first at the Commercial Rules of the American Arbitration Association® (AAA®) and posits that they "have nothing to say about the selection and implementation of law."[23] That proposition is questionable. The AAA rule that specifies preliminary hearing procedures for commercial cases includes on the checklist of items to be addressed at the preliminary hearing the "substantive law govern[ing] the arbitration."[24] Specification of the source of such law is *de rigueur* in AAA preliminary hearing orders. Moreover, the Krause article points out that the AAA's Code of Ethics for Arbitrators in Commercial Disputes envisions that the arbitrator may have a "research assistant," which permits if not requires the inference that "some type of legal research" by or on behalf of the arbitrator is appropriate.[25]

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[22] Marrow, supra note 2, at 27.

[23] See id. at 28.

[24] Telesca et al., supra note 16, at 351; AAA Commercial Arbitration Rules and Mediation Procedures, Rule P-2(a)(v)(c) at 37.

[25] Krause, supra note 2, at 2 (citing AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII(B) (2014)). It is unclear, however, whether the Krause article considers "some type of legal research" to include "independent" (i.e., other than rudimentary) legal research.

In any event, all other arbitration rules cited in the Marrow and Krause articles *do* say something about selection and implementation of substantive law.[26] For example, Judicial Arbitration and Mediation Services (JAMS) Rule 24(c) provides that an arbitrator "shall be guided by the rules of law" as designated by the parties or, if there is no such designation, by the arbitrator. According to the Marrow article, "[i]ncorporating the JAMS rules into an arbitration clause establishes that, no matter what, applying some law is a given."[27] Ironically, the Marrow article may overread the rule to the detriment of its own *a priori* theory of arbitration,[28] but even under a more nuanced construction, the requirement that an arbitrator be "guided by the rules of law" suffices to imply the power to conduct legal research to ascertain what those rules are for the case at hand.

U.S. arbitration agreements commonly designate JAMS or AAA as the arbitral forum, which allows the claimant to choose between them.[29] It is doubtful those agreements would imbue the claimant with that choice if the arbitrator were required to decide the case according to governing substantive law in one forum but not in the other, which in many cases would render that choice outcome-determinative.

The fact that not all arbitrators are attorneys[30] does not change party expectation that law will provide the rules of decision. Just as a *pro se* party in a public or private forum is expected to and must present her case, including the applicable law, notwithstanding her lack of legal training, so a non-attorney arbitrator must do her level best, with or without a "research assistant," to uncover the governing substantive law. Parties who agree to an arbitrator without legal training presumably have decided to risk imprecision of the arbitrator's law-determining

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[26] See Marrow, supra note 2, at 28-29; Krause, supra note 2, at 2.

[27] Marrow, supra note 2, at 29.

[28] See Telesca et al., supra note 16, at 351 (suggesting that under rule arbitrator can be "guided by" but not bound by law).

[29] See, e.g., Shaffer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 779 F. Supp. 2d 1085, 1093 (N.D. Cal. 2011).

[30] JAMS arbitrators *are* required to be attorneys.

skill in exchange for a compensating skill in the industry from which the dispute arose.

The Marrow article cites two cases holding that an arbitrator's failure to ascertain the legal principles that govern a particular claim through independent legal research does not constitute manifest disregard of the law.[31] Those cases premise that holding on the fact that arbitrators are not always required to be attorneys or possess "a certain standard of legal knowledge."[32] But the fact that an arbitrator may choose (or, more accurately, does not risk vacatur by choosing) to rely solely on the parties' expositions of the law to ascertain the rules of decision does not logically dictate that an arbitrator may not legitimately make the opposite choice and conduct legal research herself or through a research assistant.[33]

The Krause article notes that there are "[n]o known cases" discussing the prospect of vacatur for evident partiality, arbitrator misconduct, or exceeding arbitral authority by means of arbitrator-conducted legal research.[34] Neither does the Marrow article point to any such case.[35] The absence of case law discussing an arbitrator's legal research, much less vacating an award on

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[31] Marrow, supra note 2, at 27 (citing Wallace v. Buttar, 378 F.3d 182 (2d Cir. 2004); Metlife Securities, Inc. v. Bedford, 456 F. Supp. 2d 468 (S.D.N.Y. 2006), aff'd 254 F. App'x 77 (2d Cir. 2007)).

[32] Wallace, 378 F.3d at 191 n.3.

[33] See Shulmister, supra note 2, at 276 ("[C]laiming the lack of duty to research the law equates to a prohibition of research without authority is a logical *non sequitur*.") Yet the title of the Shulmister article is: "*Attorney* Arbitrators Should Research Law: Permission of the Parties to Do So Is Not Required" (italics added). That does not go far enough. *All* arbitrators are permitted to and should research the law to the best of their abilities and to the extent required to resolve the case properly. Whether they are *required* to do so, in the sense of risking vacatur if they do not (as opposed to the obligation to do the job right), is a separate question, and one that does not depend on whether or not they are attorneys. See also Krause, supra note 2, at 5 (holding of lack of duty to research law may imply that arbitrator has power to do so under some circumstances).

[34] Krause, supra note 2, at 3.

[35] See Marrow, supra note 2, at 24-26.

that basis, is significant. It suggests that disappointed parties to arbitration are not even raising the issue in petitions to vacate.

The expectation that an arbitrator will consult law for rules of decision, and the necessary implication that the arbitrator is therefore empowered to conduct legal research to the extent necessary to illuminate those rules, is for all intents and purposes universal. William W. Park, Professor of Law at Boston University Law School, considers it a "trivial point"—that is, not rationally debatable—that "arbitration implicates a reasoned evaluation of facts and legal norms."[36] He notes: "In choosing arbitration, the parties have not sought simply to make peace, noble as that goal might be. Rather, they have committed to a decision-making process founded on a search for an accurate portrayal of the facts and the law."[37] If parties to an arbitration agreement intend to depart from that model, it is reasonable to require that the intention be explicit in the agreement. Absent such a signal, which should be exceedingly rare, the correct result in arbitration should duplicate the correct result in a court of competent jurisdiction, assuming no difference in outcome-determinative procedural rules of those forums.[38]

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[36] William W. Park, "Arbitrator Bias," 12 Transnational Dispute Management Journal (2015), https://scholarship.law.bu.edu/faculty_scholarship/15, at 80.

[37] Id. See also Shulmister, supra note 2, at 267 (arbitrators are expected to follow the law).

[38] Procedural rules in arbitration differ from those in court, which may lead to different results. For example, action or inaction constituting a default—that is, forfeiture of the right to pursue or contest a claim—in one forum (say, a court) may not have that effect in the other (say, an arbitration). The test of whether a legal rule is substantive or procedural "is not whether the rule affects a [party's] substantive rights; most procedural rules do. What matters is what the rule itself regulates: if it governs only 'the manner and the means' by which [the parties'] rights are 'enforced,'" it is procedural. If it constitutes a rule of decision "'by which [the tribunal] will adjudicate [those] rights,'" it is substantive. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (internal citations omitted).

The (Mostly) Illusory Exception of Honorable Engagements

Those familiar with reinsurance law may have their hands in the air: "what about honorable engagements?" Under an arbitration agreement containing an honorable engagement clause, an arbitrator, may, among other things, "abstain from following the strict rules of law."[39] This echoes the observation in the Marrow article that "parties can contractually agree to give up strict adherence to law."[40]

If an honorable engagement clause in fact authorizes an arbitrator to "abstain from following the strict rules of law," then it is a *pro tanto* endorsement of the *a priori* theory of arbitration and rebuke to the integrated theory. Honorable engagement clauses are typically found in reinsurance and retrocessional agreements,[41] although they have also shown up in other insurance contexts.[42] But nothing inherent in the honorable engagement

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[39] Continental Cas. Co. v. Certain Underwriters at Lloyds of London, 10 F.4th 814, 817 (7th Cir. 2021). See also PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd., 400 F. App'x 654, 654-55 (3d Cir. 2010) (materially equivalent language); First State Ins. Co. v. National Cas. Co., 781 F.3d 7, 12 (1st Cir. 2015) (similar language); Century Indem. Co. v. Certain Underwriters at Lloyd's London, 584 F.3d 513, 550 (3d Cir. 2009) (similar language); U.S. Life Ins. Co. v. Superior National Ins. Co., 591 F.3d 1167, 1178 n.12 (9th Cir. 2010) (similar language); Harper Ins. Ltd. v. Century Indem. Co., 819 F. Supp. 2d 270, 272 (S.D.N.Y. 2011) (similar language); Starr Indem. & Liab. Co. v. G&G Underwriters, LLC, 2021 WL 3500957, *2 (S.D.N.Y. Aug. 9, 2021) (slip opinion) (citing Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 261 (2d Cir. 2003) (similar language)); On Time Staffing, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA, 784 F. Supp. 2d 450, 452 (S.D.N.Y. 2011). See also Charles H. Barr, "A Boost for Arbitrator Discretion Under Honorable Engagement?," ARIAS U.S. Quarterly (2d Quarter 2022), pp. 10-17, https://www.arias-us.org/publications/quarterly-archives/.

[40] Marrow, supra note 2, at 25.

[41] See Barr, supra note 39, at 10.

[42] See Peterson-Dean, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 2020 WL 635665, *2 (S.D.N.Y. Feb. 11, 2020); Aloha Petroleum, Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA, 25 F. Supp. 3d 1305, 1312 (D. Haw. 2014); On Time Staffing, LLC, 784 F. Supp. 2d at 450 (all concerning

concept necessarily limits its application to reinsurance and retrocession agreements, or even to insurance agreements in general. Hypothetically, such a provision can be inserted in any arbitration agreement.

In U.S. practice, however, the effect of an honorable engagement clause appears to be considerably less sweeping: it is to provide an arbitrator with broad discretion to order remedies she deems appropriate. Specifically, this broad discretion translates into power to order remedies not expressly authorized by the arbitration agreement.[43]

There is no indication that an arbitrator's remedial discretion under an honorable engagement clause differs from that of a court. If the legal prerequisites for a particular remedy—e.g., specific performance—are satisfied and the parties' contract does not expressly prohibit that remedy, a court can grant it even if the contract does not expressly authorize it.[44] Thus, in practice an honorable engagement does not authorize an arbitrator to grant a remedy not available under law or equity. Nor have courts maintained, apart from *dicta*, that an honorable

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agreements between National Union and its insured); Starr Indemnity, 2021 WL 3500957, *2; Iowa Municipal Ins. Ltd. v. Berkshire Hathaway Homestate Companies, 2009 WL 5175201, *1 (N.D. Iowa 2009) (both concerning agency agreements regarding insurance).

[43] Continental Cas., 10 F.4th at 821; PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd., 659 F. Supp. 2d 631, 636 (E.D. Pa. 2009), aff'd 400 F. App'x 654 (3rd Cir. 2010); First State Ins., 781 F.3d at 12 ("empowers arbitrators to grant forms of relief, such as equitable remedies, not explicitly mentioned in underlying agreement"); Harper Ins., 829 F. Supp. 2d at 278; Starr Indem., 2021 WL 3500957, *2; On Time Staffing, 784 F. Supp. 3d at 454 ("broad grant of [remedial] authority to arbitration panel"). These cases cite Banco de Seguros, 344 F.3d at 261-62, for the proposition that it grants arbitrators wide remedial discretion, including the power to order remedies not expressly authorized by the parties' agreement. But see Century Indem., 584 F.3d at 557-58 (construing honorable engagement clause to grant arbitrators wide discretion in admission and exclusion of evidence).

[44] See, e.g., JoMar Group, Ltd. v. Brown, 2023-Ohio-98, 206 N.E.2d 8, 12-13 (Ct. of App.) (reciting elements of specific performance, which do not include contract's express authorization of remedy).

engagement authorizes an arbitrator to depart from the law in any other respect.[45]

Under the analogous French law concepts of *amiable compositeur* (unbiased third party) and *ex aequo et bono* ("the right and the good" or "what is fair and just"), an arbitrator "may disregard or temper rules of law whose strict applications would violate equity under the circumstances."[46] Park minces no words in expressing his view of those doctrines: "Rather than aiming for legal accuracy, the arbitrators reach toward general notions of 'right' encrusted with emotional overtones and sometimes in tension with court decisions, statutes or strict contract terms."[47] He "wonders from whose perspective . . . the 'fair and just' label would be applied."[48] As already mentioned, the law incorporates principles of equity. In any event and as the Marrow article points out, the widely adopted United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration provides that an arbitrator can apply those doctrines "only if the parties have expressly [so] authorized."[49]

Nonetheless, honorable engagements cannot be completely eliminated as a burr in the saddle of an integrated theory of arbitration. The possibility remains that a court will, other than in *dictum*, expressly construe an honorable engagement clause to authorize an arbitrator to depart from the rule of law, such as, for instance, a statute of limitations. Moreover, there are rare cases

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[45] See Elwood Ins. Ltd. v. Onebeacon America Ins. Co., 2011 WL 679840, *3 (Mass. Super. Ct., Suffolk Cty. Feb. 9, 2011) (suggesting in *dictum* that honorable engagement clause, which "frees the panel from technical constraints under any body of substantive or procedural law," entitled arbitrators to ignore statute of limitations under law that was otherwise applicable); Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London, 202 Wis. 2d 673, 690 n.8, 552 N.W.2d 420 (Ct. App. 1993) (suggesting in *dictum* that honorable engagement clause entitled arbitrators to award prejudgment interest at a rate in excess of that prescribed by Wisconsin law).

[46] Park, supra note 36, at 75-76; see also Marrow, supra note 2, at 27.

[47] Park, supra note 36, at 76.

[48] Id. n.221.

[49] Marrow, supra note 2, at 27 (citing UNCITRAL Model Law Article 28(3)) and n.19.

in which, under an arbitration agreement containing an honorable engagement clause, a court has upheld an arbitral remedy that arguably impaired a party's statutory or contractual right.[50]

On the other hand, the weight of an honorable engagement clause standing alone remains unclear. When all was said and done, the *Continental Casualty* court relegated it to the relatively modest role of "removing doubt" about its decision to uphold the award[51]—thereby implying that it would have reached the same decision without the honorable engagement clause, based on its extremely deferential scope of review under the FAA. Other courts upholding arbitral remedies under arbitration agreements containing honorable engagement clauses have mentioned the clause among other factors in its analysis but do not appear to have accorded it decisive weight.[52] It is possible and perhaps plausible that at the end of the day, the honorable engagement is a mere makeweight.

Whatever their import, in U.S. practice honorable engagement clauses appear only in a miniscule percentage of arbitration agreements. All things considered, at least under U.S. practice the clause has less teeth (if it has any at all) than its typical language suggests on its face. The honorable engagement does not seriously threaten the viability of an integrated theory of arbitration.

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[50] See Banco de Seguros, 344 F.3d at 261-62 (upholding arbitrators' order requiring prehearing security, which arguably violated foreign-state party's right under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1609, to immunity from prejudgment attachment); Continental Cas., 10 F.4th at 818 (upholding arbitral remedy that cut off cedent's future billings of reinsurer on asbestos claims).

[51] See id. at 822.

[52] See, e.g., Banco de Seguros, 344 F.3d at 261-62 (relying on interpretation of agreement to waive immunity from prejudgment attachment, in addition to arbitrators' broad remedial discretion under honorable engagement clause); Employers Ins., 202 Wis. 2d at 684-86 (relying on ambiguity of provision regarding deadline for submissions to arbitrators, in addition to honorable engagement clause, to uphold arbitrators' extension of period for fact finding and discovery).

Legal Research Should Not Lead to Vacatur

Under an integrated theory of arbitration, an arbitrator is in all cases—leaving aside the ephemeral possibility of an arbitration agreement that expressly requires departure from the law—implicitly authorized and indeed obligated to conduct the legal research necessary to ascertain the substantive law that supplies the rules of decision. That is true regardless of whether or how well the parties brief the legal issues;[53] the parties' briefing proficiency affects only the extent and type (rudimentary or "independent") of legal research required. It is true regardless of the relative sophistication of the parties and the differences or equality between them with regard to the existence or proficiency of their briefs.[54] It is true regardless of whether any or all of the parties are represented by counsel. It is true even with respect to an issue the parties have not raised if addressing that issue is necessary to resolve the case under governing substantive law.[55]

An arbitrator is authorized to conduct legal research in all cases because in a government of laws and not of people, there is one correct result under the facts and governing law in each legal dispute. There is similarly one correct resolution of each

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[53] Cf. Marrow, supra note 2, at 28, 29 (suggesting that whether or the extent to which parties brief legal issues may affect arbitrator's research authority); Krause, supra note 2, at 4 (suggesting that when one party cites no case law and the opposing party misrepresents the law, the arbitrator has research authority, and a contrary result when neither party cites case law).

[54] See Marrow, supra note 2, at 27 (quoting Wallace, 378 F.3d at 191 n.3) (suggesting that disparity in sophistication of parties may affect arbitrator's duty to research law).

[55] See Krause, supra note 2, at 2 (contending that the AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon V(A), prohibits an arbitrator from deciding, and therefore implicitly from researching, any "issue" that has not been submitted to the arbitrator). The problem with that contention is the canon's use of the word "issue." Parties normally submit a dispute, not discrete issues, to arbitration. Submission of a dispute is submission of all issues necessary to resolve in order to resolve the dispute. It is possible for parties to reach a partial settlement resolving some issues, and in that case, of course, the arbitrator's legal research on issues settled by the parties is unnecessary and inappropriate.

constituent legal issue, whether it is a binary issue such as liability or a "sliding scale" issue such as damages or comparative negligence. It is an arbitrator's mission to find and deliver the correct result in each case she decides, no less than it is a judge's mission to find and deliver the correct result in each case she decides.

Therefore, an arbitrator should incur no risk of exceeding authority by conducting legal research without express authorization of the parties. Nor is an arbitrator's legal research inherently tantamount to evident partiality or misconduct. Both the Marrow and Krause articles caution that legal research without express authorization of the parties, particularly on issues not raised by any party, risks the appearance that the arbitrator is assisting one party at another's expense.[56] That risk, which is equally present in a judicial forum, is ameliorated by assuring that the research is in fact competent, comprehensive, and even-handed, and that the award so reflects.[57] Of course, arbitrators and judges, like all humans, are fallible, but are systemically entrusted to be less so than the parties and counsel contending before them. At bottom, the goal of reaching the correct result justifies the residual risk of an appearance of partiality if the arbitrator must address an issue the parties failed to raise.

In *Shaffer*,[58] a case in which the arbitration agreement explicitly required the arbitrator to adhere to substantive law, the court held that an arbitrator did not commit misconduct, was not shown to be impartial, and did not deprive the parties of the benefit of their bargain by hiring two research attorneys to assist him with the case without disclosing that fact to the parties. The court observed that "the hiring of two research attorneys to assist the arbitrator does not create doubt about the impartiality of that arbitrator. On the contrary, assistance from able research attorneys can improve the ability of an arbitrator to come to his or her decision."[59] The same result should follow *a fortiori* if an

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[56] See Marrow, supra note 2, at 26; Krause, supra note 2, at 3, 5.

[57] With respect to an issue not raised by a party, competent legal research must consider whether there is a legal consequence of the party's failure to raise it—i.e., the possibility of waiver.

[58] Shaffer, 779 F. Supp. 2d at 1093.

[59] Id. at 1091.

arbitrator does her own legal research without assistance, and under an integrated theory of arbitration that should be true in virtually all cases, regardless of whether the arbitration agreement expressly requires adherence to governing substantive law.

Implications for a Fair Hearing

Can an arbitrator's legal research adversely affect the fairness of a hearing, even if it does not amount to ground for vacatur? The Krause article suggests that an arbitrator "advise the parties of the results of any arbitrator-conducted legal research and provide the parties an opportunity to respond," reopening the hearings for that purpose if necessary.[60] Under an integrated theory of arbitration, where a judge and arbitrator employ the same decisional model, the short answer to that suggestion is that an arbitrator is no more required than a judge to take those measures. If the parties had a fair opportunity to present their cases but one or more of them missed the train or got on the wrong one, it is a hard-learned lesson. The parties "got what they bargained for."[61]

The Krause article nonetheless implies that a different fairness standard must apply to arbitration, such that the parties are entitled to respond to anything new the arbitrator turns up in research. The article contends: "Arguably, an arbitrator conducting any type of independent legal research without notifying the parties of the results of that research denies the parties a fair hearing, as the parties are unable to determine the reliability and thoroughness of the arbitrator's research."[62] A conceivable justification for this different standard, although the Krause article does not allude to it, is that the substantive result of litigation—that is, whether it is the correct result under governing law—is subject to judicial appellate review, while the substantive result of arbitration is not.

The problem with calling for supplemental briefs and reopening hearings every time an arbitrator's legal research uncovers *anything* that the parties did not is that it increases expense and

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[60] Krause, supra note 2, at 5.

[61] See Marrow, supra note 2, at 25.

[62] Krause, supra note 2, at 3.

delay, counter to one of the principal motivations for choosing arbitration in lieu of litigation. The solution lies in a balance between the competing goals of fairness on one hand and expedition and economy on the other. In this respect an important distinction exists between an issue and argument or analysis of that issue. If the parties have identified and addressed all relevant legal issues, but the arbitrator's analysis of one or more issues differs from that of the parties, fairness does not inexorably demand an opportunity for the parties to rebut or support the arbitrator's analysis. But if an arbitrator finds it necessary to research an issue no party raised, or where all parties demonstrably misapprehended a crucial issue, the balance should ordinarily tip toward requesting supplemental briefs or providing the parties some other meaningful opportunity to respond. One would hope a conscientious and fair-minded judge would do the same.

Conclusion

A theory of arbitration that is consistent in decisional methodology and substantive rules of decision with the public legal system inspires more confidence and trust in arbitration than an *a priori* theory that places it outside the legal system in those respects. That is especially true if, as this article contends, parties uniformly (or nearly so) choose arbitration as an alternative to the public forum to save time and money or to maintain confidentiality,[63] but not to access different rules of decision.

An integrated theory of arbitration allows an unequivocal and affirmative answer to the question of whether an arbitrator has the power and obligation to conduct the legal research necessary to unearth the rules of decision under governing law. That answer eliminates the need to address on a case-by-case basis whether that power and obligation are implied by the arbitration agreement and incorporated arbitral forum rules.

[63] See, e.g., Amer. Arb. Ass'n Code of Ethics for Arbitrators in Commercial Disputes, Canon VI.B.