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Co-Chairs: Ed Lozowicki; Harout Samra

May an Arbitrator Conduct Independent Legal Research – A Brief Overview – Part 2

By: Kate Krause

This is the second part of a two-part article on the topic of arbitrator-conducted legal research. The first part, published in the August 2018 edition of this newsletter, dealt with domestic arbitration, while this part focuses on international arbitration.

As discussed in part 1 of this article, an award derived from or influenced by an arbitrator's independent legal research in domestic arbitration may be subject to vacatur under applicable institution rules or case law, depending in large part on the type of research being conducted. Although legal research conducted by an international arbitration tribunal is more common and less likely to be subject to vacatur, distinguishing among the different types of research is still critical to an analysis of whether such research is proper.

Proposed Categories of Legal Research

The following categories are helpful in determining the propriety of an arbitrator's legal research:

(1) Reviewing the cases cited by counsel in their briefs (party-cited cases);
(2) Checking the continued validity of party-cited cases;
(3) Reviewing the cases cited by the party-cited cases;
(4) Researching additional cases on the legal issues for which the party-cited cases were referenced;
(5) Researching cases on legal issues raised by the parties but for which no case law was cited; and
(6) Researching a legal issue not raised by any of the parties.

The first part of this article concluded that, although no statutes and few institution rules address legal research in domestic arbitration, it is generally accepted that arbitrators are permitted to engage in research that falls within categories (1) through (3). Categories (4) and (5) present some risk of vacatur, whereas category (6) research is likely not permitted).[1]

Member Spotlight: David Tenner

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This issue in the Arbitration Committee Member Spotlight, we are proud to hear from David Tenner, a trial lawyer, an arbitrator and a special master based in Denver, Colorado.
For more information, visit his profile at https://www.ridleylaw.com/denver-trial-lawyer-david-tenner.html

1. How did you get into the dispute resolution field?

I started serving as a court-appointed special master in 2007. That got me comfortable becoming a decision-maker. To be honest, I became an arbitrator in response to being involved in too many arbitrations where the advantages of the process were being underutilized and the awards were – how should I say this nicely? – "unexpected". So I became an arbitrator myself.

2. What roles do you currently play in the dispute resolution field—e.g., domestic arbitrator, international arbitrator, mediator, lawyer representing clients in these processes, other? What percentage of your time do you estimate that you spend in each of these roles?

I'm an arbitrator on the AAA Commercial, Large and Complex Case and Employment Panels, I'm a court-appointed special master and I'm a mediator. And I'm still a trial lawyer, representing clients in arbitrations and mediations. I think there's an advantage to being both an arbitrator and a trial lawyer at the same time. I think it makes me better at both.

[1] *See* Kate Krause, "May an Arbitrator Conduct Independent Legal Research – A Brief Overview – Part 1," ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter (Vol. 3, Ed. 3, August 2018).

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3. How did you begin your career as an arbitrator?

The folks at AAA were kind enough to take a chance on me. And wouldn't you know it? My first case went to a four-day hearing and award. So my on the job training came quickly.

4. What knowledge, experience and/or skills are essential for a successful arbitrator?

I'd have to start with respect. Respect for the lawyers and the parties and the case, for sure. But also respect for the arbitration process. It only takes one bad experience to turn a lawyer or a client away from ever arbitrating again. And you need to understand the arbitration process inside and out so the parties have confidence that you will lead the participants through the process in a thoughtful way. Just being a smart person isn't enough. I've seen more than my share of very smart lawyers and former judges who don't transition well to being good arbitrators. And it's almost always because they treat arbitrations like trials. It's how they're wired. But the advantages of arbitration can get lost in the process.

5. Do you specialize in a particular subject matter or field? If so, how did you become involved in that field.

As a trial lawyer, I never specialized in any particular type of subject matter (other than divorce and criminal work, which I avoid at all costs). So I have a broad range of experience; from patent cases to partnership disputes to professional malpractice litigation to condemnation cases, and everything in between. And there's a lot in between! Since I'm located in Colorado, I've done a lot of cases in the marijuana/cannabis industry in the last couple of years. Whether I'm acting as a trial lawyer or as an arbitrator, each case is a chance to learn something new. It's what I love most about litigation.

6. In your opinion, what is the most important issue or new development in arbitration today?

Convincing arbitrators that they are, first and foremost, service providers. And at the end of providing that service, there will usually be losers. Those losers have to walk away from the process knowing that, even though they lost, they were heard. That means making sure they understand why they lost. If you don't, you risk creating another arbitration basher who may never use the process again.

International Arbitration

Unlike in domestic arbitration, several international arbitration statutes and institution rules specifically permit the tribunal to conduct independent legal research, and a few address whether the tribunal may consider a legal issue not raised by the parties. For example, the English Arbitration Act provides that the tribunal has the power to decide "whether and to what extent it should take the initiative in ascertaining the facts and the law," "subject to the right of the parties to agree any matter." Section 34(1), (2)(g) (1996). The Act does not specify whether an issue not raised by the parties may be considered, such that category (6) research may present a risk of vacatur.

Many institutions' rules allow all six categories of legal research, at least if certain conditions are met. The London Court of International Arbitration (LCIA) Arbitration Rules allow the arbitrator to "take the initiative in identifying relevant issues and ascertaining relevant facts and the laws or rules of law," but "only after giving the parties a reasonable opportunity to state their views." Rule 22.1(iii) (2014). JAMS International Arbitration Rules & Procedures empower the tribunal to "identify the issues and ascertain the relevant facts and the law or rules of law applicable to the arbitration. . . ." The Arbitration Rules of the Singapore International Arbitration Centre (SIAC) permit the tribunal to "decide, where appropriate, any issue not expressly or impliedly raised in the submissions of a party provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond," and to "determine the law applicable to the arbitral proceeding." Article 21.4 (2016). The Arbitration Rules of the Polish Chamber of Commerce (PCC) provide: "An award may not be based on legal grounds different from those relied on by either of the parties, unless the Arbitral Tribunal notifies the parties in advance and gives them an opportunity to be heard concerning such legal grounds." Section 6, Item 2 (2015). [2]

Even in cases not brought under these and similar institution rules, international arbitrators are generally accorded broad powers to research applicable law, including issues not raised by the parties.[3] In addition, the doctrine of *jura novit curia*[4] supports a tribunal's authority to ascertain and apply legal principles not raised or fully briefed by the parties, thereby implicitly permitting category (6) research in certain situations.

International arbitration awards involving categories (1) through (5) research will thus likely not be subject to vacatur if the arbitrator's conduct in that regard is challenged. Under most institution rules, general international law, and the doctrine of *jura novit curia*, a tribunal may also conduct category (6) research—researching an issue not raised by any party—if the parties are afforded a reasonable opportunity to be heard on the issue.

Recommendations

The International Law Association (ILA) adopted Recommendations that permit the arbitration tribunal to take whatever steps it deems necessary to ascertain the contents of applicable law, including conducting legal research, while stressing that the tribunal should allow the parties an opportunity to be heard on the matters raised.[5]

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[2] The ICDR, ICC, PCA, and UNCITRAL rules do not include any provisions specifically relating to a tribunal conducting independent legal research or determining issues not raised by the parties.

[3] *See, e.g., Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998) (ICC award upheld under the New York Convention although based on legal theories not presented in the parties' pleadings, and the tribunal's failure to give the parties an opportunity to address those issues did not prevent the respondent from having a meaningful opportunity to present its case); French Language Decision 4A_538/2012 of 17 January 2017) (Swiss Federal Supreme Court held that the tribunal must give the parties an opportunity to be heard on a legal issue not raised by the parties only if the parties could not anticipate the issue would be pertinent). *But see Dreyfus v. Tusculum*, 2008 QCCS 5903 (Quebec Superior Court partially annulled an arbitration award that reformed the parties' contract based on the doctrine of frustration, where neither party had presented those issues to the tribunal).

[4] *Jura novit curia* (or *iura novit curia)*, loosely translated as "the judge/court knows the law," is most commonly applied in civil law jurisdictions. *See* Swiss First Civil Law Court, 4A 400/2008 (Feb. 9, 2009) (although the doctrine of *jura novit curia* permits an arbitration tribunal to base its award on different legal grounds from those submitted by the parties, the tribunal's failure to invite the parties to make submissions on the issue violated the parties' right to be heard). *See generally,* Franco Ferrari, Giuditta Cordero-Moss, eds., *Iura Novit Curia* in International Arbitration (JurisNet, LLC, 2018).

[5] International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Resolution 6/2008.

The ILA Recommendations specifically state that arbitrators generally should not introduce "legal issues—propositions of law that may bear on the outcome of the dispute—that the parties have not raised," except in disputes implicating rules of public policy or other mandatory rules.[6] Thus, the ILA Recommendations permit categories (1) through (5) research, but preclude category (6) research except in the specified circumstances.

The IBA Rules on the Taking of Evidence contain two provisions that bear on the propriety of category (6) research. Article 3 provides: "The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome . . . ." Article 8.5 provides: "The Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome." Unlike the ILA Recommendations, the IBA Rules permit category (6) research without limitation, although the tribunal is encouraged to notify the parties of the issue being considered.

There is an inherent tension between category (6) research and the party autonomy that undergirds arbitration. Arbitration is created and governed by the parties' agreement. If the parties choose not to present a particular legal issue to the tribunal, does it violate party autonomy for the tribunal to raise that issue? A possible countervailing consideration is that many international institution rules require that the tribunal apply the law,[7] which may supersede party autonomy and require the tribunal to conduct research on an issue not raised by the parties.

Two general principles must also be considered: the almost-universal mandates that parties be treated fairly and impartially, and that each party has a reasonable opportunity to be heard and to present its case.[8] Based upon these principles, the tribunal should always provide the parties an opportunity to address the issues raised as a result of category (6) research, and the manner in which the results of arbitrator-conducted research are presented to the parties should be carefully fashioned to ensure there is no appearance of partiality. Following these recommendations will minimize the possibility that an award will be subject to vacatur as a result of the tribunal conducting independent legal research in an international arbitration proceeding.

[Sidebox: The author would appreciate receiving readers' opinions on the propriety and best practices of arbitrator-conducted research, and their experiences with such research as advocates, arbitrators, or case managers.]

Kate Krause is an arbitrator and mediator with more than thirty years of experience specializing in complex construction, commercial, and international dispute resolution. She is a neutral for the AAA's Construction and Commercial Panels, a Fellow of the Chartered Institute of Arbitrators, and a member of the ICC/USCIB, the Dispute Resolution Board Foundation, and the International Bar Association. Contact: kkrause@katekrauseadr.com.

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7. Is there anything else you would like to tell the readers about yourself?

A couple of things. First, you'll never find a bigger fan of arbitration than me. When done well, it's an infinitely better way to try a case than in court. Second, at every arbitration or special master proceeding I preside over, I carry with me a card that pretty much sums up my philosophy about being a decision-maker. It says: "1. Listen. 2. Be patient. 3. Say something nice when you can."

Message from the Co-Chairs

Be sure to save the dates for these upcoming ArbCom & DRS events:

January 15, 12 PM ET —ArbCom Quarterly Business Meeting Via Conference Call

February 28, 12 PM ET—"Dispelling the Myths of Arbitration" Webinar

April 10-13, Annual Spring Meeting of Dispute Resolution Section and ArbCom in Minneapolis

May 16-17, Annual Arbitration Institute in Philadelphia

Please plan on attending and networking with your colleagues.

Best Wishes for Happy Holidays, Ed Lozowicki & Harout Samra

[6] Recommendations 6 and 13 (2008).
[7] *See, e.g.*, LCIA Arbitration Rules, Rule 22.2 (2014); SIAC Arbitration Rules, Rule 31.1 (2016).
[8] *See, e.g.*, UNCITRAL Model Law, Article 18 (2006); ICC Rules of Arbitration, Rule 22(4) (2017).