ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter

August 2018 **Vol. 3, Ed. 3**

Co-Chairs: Ed Lozowicki; Louis Burke **Incoming Co-Chair: Harout Samra**

May an Arbitrator Conduct Independent Legal Research – A Brief Overview – Part 1

By: Kate Krause

This is the first part of a two-part article on the topic of arbitrator-conducted legal research. This part focuses on domestic arbitration, and the second part, to be published in a future edition of this newsletter, will focus on international arbitration.

The question of whether an arbitrator may or should conduct independent legal research is a thorny one. Based upon the applicable law, an award derived from or influenced by an arbitrator's independent legal research may be subject to vacatur. This article focuses on the distinction among the types of research being contemplated. This distinction is critical, as the propriety of independent research may hinge upon the type of research the arbitrator wishes to undertake.

Proposed Categories of Legal Research

To effectively analyze whether an arbitrator may conduct legal research in particular situations, the following categories of research are proposed:

(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.

Most arbitrators would agree that category (1) research is not only permissible, but likely required for an arbitrator to satisfy her obligation to fairly consider the evidence presented. The remaining types of research present more nuanced considerations, and there appears to be

Member Spotlight: Jaya Sharma

• • •

This issue in the Arbitration Committee Member Spotlight, we are proud to hear from Jaya Sharma, a full-time arbitrator and mediator based in Madison, Wisconsin. For more information, visit her website at www.sharmadr.com

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

My initial foray into the field of Alternative Dispute Resolution was by happenstance after I joined the Wisconsin Department of Transportation (WisDOT) in 1996. During my tenure at WisDOT, I worked to ensure that contractors on federally funded projects complied with state regulations. I also assisted small subcontractors in understanding and navigating the intricacies of public sector contracting.

In 2000, the U.S. Department of Transportation implemented sweeping regulatory changes affecting federal aid recipients nationwide. This required state and local public sector recipients to revamp their transportation procurement and contracting programs to ensure compliance. Wisconsin entities stood to lose millions in federal aid if found in noncompliance.

While working at WisDOT, I began consulting with public sector entities on meeting compliance requirements. In 2001, I left WisDOT and established myself as a solo practitioner providing legal assistance to small firms owned by women and minorities working on highway projects. I discovered that these subcontractors were often cash-strapped and lacked the financial means to litigate claims against more established prime contractors. Often subcontractors lacking the financial means to litigate their disputes were forced to declare bankruptcy.

• • •

Large contractors on federally funded projects typically seek to maintain amicable working relationships with small subcontractors since they are required to subcontract a portion of their work to small businesses owned by women and minority enterprises. In an effort to facilitate such relationships, I often served as a mediator/conciliator in resolving disputes thereby allowing these entities to maintain long term and productive relationships. This experience piqued my interest in exploring other ADR mechanisms, such as arbitration, to resolve disputes in a cost and time efficient manner.

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 have served in the roles of mediator, arbitrator, and advocate representing clients in mediations and arbitrations, primarily in the domestic arena. Approximately 50% of my focus is equally split between serving as a mediator and arbitrator. The remaining portion of my time is spent advocating on behalf of clients and performing transactional and public policy consulting activities. I earned a Diploma in International Commercial Arbitration from the Chartered Institute of Arbitrators, UK and obtained an Accredited Mediator Certification from the Center for Effective Dispute Resolution (CEDR) London. In 2012, I became a Fellow of the Charter Institute of Arbitrators which resulted in further opportunities in the field.

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

After I received my Diploma in International Commercial Arbitration, I was accepted by the American Arbitration Association (AAA) as a neutral on the Construction and Commercial Panels.

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

One of the most essential skills for a successful arbitrator is the ability to manage arbitration proceedings efficiently and expediently and to possess a thorough understanding of the Arbitral Rules governing the proceedings. The arbitrator must skillfully facilitate the presentation of each case while preventing unnecessary delays and additional costs. An understanding of the substantive area of law ensures that parties are accorded a fair hearing. Subject matter expertise is imperative, particularly in arbitrating cases in the construction, intellectual property, and patent law fields.

little consensus among arbitrators as to whether such research is within an arbitrator's powers, and even less consensus as to the wisdom of conducting such research if it is allowed.[1]

Domestic Arbitration

Although no statues have been found that specifically address the issue of arbitrator-conducted legal research, there are a few institution rules that do. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes permits an arbitrator to conduct independent research if not inconsistent with the parties' agreement.[2] The National Academy of Arbitrators (NAA), one of the authors of the Labor-Management Arbitration Guidelines, provides even greater specificity in its Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration:

An arbitrator may conduct legal research independently and may decide the case without advising the parties about such results or the results of any such research, so long as the arbitrator does not decide the case on the basis of a rationale or position that no party has presented or argued.[3]

Thus, the only category of legal research not permitted by the NAA is category (6) research. The AAA's Code of Ethics for Arbitrators in Commercial Disputes permits an arbitrator to obtain help from a "research assistant," thereby impliedly allowing the arbitrator to conduct some type of legal research.[4] However, the AAA Code of Ethics appears to disallow category (6) research (researching a legal issue not raised by any of the parties) by prohibiting an arbitrator from deciding any issues other than "submitted issues."[5]

[1] *See Independent Legal Research by an Arbitrator – What Are Your Thoughts,* blog of the New York State Bar Association Dispute Resolution Section (2015), electronic copy available at: http://nysbar.com/blogs/ResolutionRoundtable/2015/10/independent_legal_research_by_.html. *See generally,* Paul Bennett Marrow, *Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?*, 81 New York State Bar Assn. Journal (May 2013).

[2] Section 2(G) (2007).

[3] Section 2.J.2 (2014).

[4] Canon VII(B) (2014).

[5] Canon V(A) (2004).

The law on vacatur of an arbitration award may assist in determining which categories of legal research an arbitrator may properly undertake. The Federal Arbitration Act (FAA)[6] and many state arbitration statutes set forth three grounds for vacatur of an arbitration that are relevant to this analysis: evident partiality, arbitrator misconduct, and exceeding arbitral authority. No known cases discuss any of these grounds for vacatur in the context of arbitrator-conducted legal research, but the rationale underlying each ground may be instructive.

Evident partiality may be present whenever an arbitrator conducts independent legal research, as such research is likely to favor one party over the other. However, it is particularly problematic with respect to category (6) research. By researching an issue not raised by any of the parties, the arbitrator might be deemed to be acting as an advocate for the party that is benefitted by that issue. Notifying the parties of the issue and allowing them an opportunity to be heard may not obviate the problem, such that conducting category (6) legal research is more likely to be challenged on the grounds of evident partiality than any other category of research.

Arbitrator misconduct is generally concerned with the overall fairness of the proceedings – whether a party has been prejudiced by the arbitrator's conduct.[7] 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.

An arbitration award will be subject to vacatur on the grounds of exceeding arbitral authority if the arbitrator was not authorized to conduct the independent legal research on which the award was based. Absent a provision in the parties' arbitration agreement or a statute or institution rule that directly addresses the issue, the question becomes whether there is an implied power to undertake such research. If the arbitration agreement or applicable statutes or rules require that the arbitrator apply the law, it is more likely that the power to conduct legal research will be implied. Further, the parties' express or implied granting of related powers can inform the determination of whether an arbitrator is empowered to conduct legal research.

This analysis provides helpful guidance on the propriety of proposed research. For example, category (2) research (checking the continued validity of party-cited cases) is likely within the arbitrator's implied powers, since ensuring cases are still valid law is arguably merely an adjunct to reviewing the cases cited by the party. Category (3)

Jaya Sharma, Cont.

• • •

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

In addition to my legal training, I have a Masters Degree in Public Policy and Administration. My experiences in working as a consultant with various public sector entities has provided a thorough understanding of the Administrative Rulemaking process. This knowledge and experience has enhanced my ability to work with both public and private sector stakeholder groups in mediating policy-based disputes.

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

Recently arbitration has garnered negative attention in the eyes of the general public. High-profile cases involving political figures and celebrities accused of sexual harassment has strengthened the belief that arbitration is an unjust mechanism for resolving sexual harassment and employment discrimination cases, as perpetrators are seldom held accountable. Many employers include mandatory arbitration clauses in employment contracts forcing plaintiffs to bring these actions before an arbitrator instead of in a court of law. The public's perception is that the arbitration process is unjust due to the confidential nature of the arbitral process where cases are decided under a cloak of secrecy and plaintiffs are not permitted the benefit of prior precedence, unlike in a court of law. Media coverage of recent arbitration cases place an emphasis on the "forced" nature of arbitration, essentially contending that employees are in an unequal bargaining position vis-a-vis their employer, and thus coerced to sign agreements which mandate arbitration or waive the right to class action suits.

Recent Supreme Court decisions such as *Epic Systems v. Lewis* upholding the right of an employer to bar collective arbitration by the inclusion of a class action waiver clause in the arbitration agreement have added to the perception that "forced" arbitration agreements place parties in unequal bargaining positions and are, therefore, an unjust form of dispute resolution.

This is a critical issue for the ADR community. The lack of the public's trust in arbitration as a fair and effective dispute resolution mechanism only serves to diminish confidence in ADR practitioners. As ADR professionals, we must be keenly attuned to the perceptions and needs of consumers, i.e., the public we aim to serve and work together as a community to address users' concerns.

[6] 9 U.S. Code § 10(a).
[7] FAA, 9 U.S. Code § 10(a)(3); *Bell Aerospace Co. v. Local 516, UAW*, 500 F.2d 921 (2d Cir. 1974) (FAA § 10(a)(3) requires only that the arbitrator grant the parties a fair hearing).

Jaya Sharma, Cont.

• • •

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

For the past 20 years, I have worked to ensure equity and diversity in public sector procurement and contracting. I have also advised various public sector entities in designing and tailoring their public procurement programs to comply with federal, state, and local laws and regulations. In the course of my experiences, I had the opportunity to assist a South African Department of Transportation delegation in incorporating elements of the public procurement policies the Wisconsin Department of Transportation implemented to increase diversity and inclusion in its procurement program.

As a result of my efforts on behalf of the South African delegation, I was selected to complete an internship with a prominent Johannesburg law firm. During the internship, I assisted a Senior Partner in drafting legislation governing the much-maligned National Police Force, an organization responsible for atrocities under the draconian discrimination laws of the apartheid regime. In 1995, the legislation was introduced before the South African Parliament and enacted into law.

research (reviewing the cases cited by the party-cited cases) is a step removed from category (2) research, but still should be within the arbitrator's implied powers, since a party citing a case has essentially also referred the arbitrator to the cases cited within the party-cited case.

In contrast, category (4) research (researching additional cases on the legal issues for which the party-cited cases were referenced) appears qualitatively different. By not including a citation to a case, either directly or through reference to it in a cited case, it can be argued that the parties intended to exclude that case from the arbitrator's consideration. It would be difficult in that situation to argue that the parties impliedly granted the arbitrator the power to review additional cases. However, a different situation is presented when one party cited no case law on an issue because it considered the relevant legal issue to be well-settled in its favor, but the other party cited cases that misrepresented the law. In that case, the non-citing party could reasonably assert that the arbitrator had the power to either conduct independent research or permit further briefing on the issue.

Category (5) research (researching cases on legal issues raised by the parties but for which no case law was cited by either party) is more problematic. If the fact that one or both of the parties raised a legal issue sufficed to grant implied power to the arbitrator to conduct legal research, such power would extend to all but category (6) research. Instead, the only power that should be implied in this case is the power to request briefing on any issue for which no authorities were cited.

Supreme Court: Class Waivers Reign Supreme

By: Alejandro Caffarelli, Caffarelli & Associates Ltd.[1]

The Federal Arbitration Act ("FAA") was enacted in 1925 in response to judicial hostility to the private arbitration of commercial disputes. It provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable" unless it is otherwise deemed illegal. The National Labor Relations Act ("NLRA"), on the other hand, protects employees' right to band together for "mutual aid and protection," and due to the imbalance in power between labor and management invalidates any agreement that purports to limit that right.

In the 2016 case of *Lewis v. Epic Systems Corp.*,[2] the Seventh Circuit Court of Appeals determined that an arbitration agreement that purported to waive an employee's right to participate in a class action lawsuit was in fact illegal and unenforceable by virtue of the fact that it hindered the right to engage in protected, concerted activity under the NLRA. Authored by Judge Diane Wood, the Seventh Circuit emphasized the need to harmonize the two statutes, and that Epic's attempt to use the FAA to limit employees' rights to band together under the NLRA failed to do just that.

On May 21, 2018, the United States Supreme Court issued its eagerly anticipated decision on Epic Systems' appeal,[3] which was consolidated with two other cases: *Ernst & Young v. Morris*[4] and *National Labor Relations Board v. Murphy Oil USA, Inc.*[5] Authored by newly appointed Justice Gorsuch, (and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito), the 5-4 decision in favor of Epic Systems significantly shifts the balance of power in favor of management. Turning Judge Wood's opinion on its head, Justice Gorsuch rejected the notion that there was a conflict between the FAA and the NLRA, noting that the NLRB has only recently taken the position that the NLRA prohibits class waivers (but ignoring the fact that the Supreme Court has similarly only recently has taken the position that the FAA applies to employment relationships). Perhaps not surprisingly given Justice Gorsuch's well documented hostility to the *Chevron* doctrine, the Court also disregarded the NLRB's position on the basis that the FAA was at issue, which the Board lacked authority to administer.

In a 30-page dissent that was read from the bench, Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan), criticized the majority's opinion as "egregiously wrong." Ginsburg noted that both the NLRB and federal courts have long held that joint legal proceedings are the types of activities protected under the NLRA, and that the FAA's savings clause was specifically designed to exclude agreements purporting to limit that right. More significantly, Justice Ginsburg emphasized the practical effect of the majority's ruling, pointing out that "employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

As to category (6) research, it is unlikely that a reasonable argument can be made that the parties have impliedly granted an arbitrator the power to research issues not raised by any of the parties. This is particularly true under institution rules that specifically preclude an arbitrator from deciding issues not submitted by the parties.[8] At least two cases addressed one aspect of the issue of legal research, holding that there is no "duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research."[9] Although not specifically considering the question, it is arguably implicit in the holdings that an arbitrator has the power to conduct such research, at least in some circumstances.

Recommendations

An arbitrator in a domestic dispute should be comfortable conducting categories (1) through (3) research, which include checking the validity of party-cited cases and reviewing cases cited within party-cited cases. Categories (4) and (5) research, including reviewing other cases not cited by any party or by party-cited cases on issues raised by the parties, may present some risk of vacatur unless specifically permitted by the parties' agreement or applicable institution rules. Arbitrators would be well-advised to avoid category (6) research in domestic arbitrations unless institution rules specifically allow it.

An arbitrator should advise the parties of the results of any arbitrator-conducted legal research and provide the parties an opportunity to respond. The arbitrator must use extreme caution, however, in how the information is presented to the parties to avoid any appearance of partiality. The best practice would be to simply notify the parties of the case citations the arbitrator's research has revealed, and ask the parties to provide supplemental briefs discussing those cases, without providing the arbitrator's interpretation of the cases. If the arbitrator's research is undertaken during the period from submission of closing briefs to the date the award is to be submitted, the hearings should be re-opened until supplemental briefs are submitted to ensure that the award can be provided during the required period after the hearings are closed.

Finally, consideration should be given to raising the issue of arbitrator-conducted research at the preliminary hearing, and including in the scheduling order the parties' agreement, if any, on the types of legal research the arbitrator is entitled to undertake.[10] This approach is recommended because it recognizes that arbitration is a creature of the parties' agreement, and protects the integrity and validity of the arbitration award.

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, Commercial, and Large, Complex Case Panels, and is a member of the Chartered Institute of Arbitrators, the ICC/USCIB, the Dispute Resolution Board Foundation, and the International Bar Association. ContacIn early 2012, the American Arbitration Association published an article titled Arbitrator Disclosure in the Internet Age, which was co-authored by one of the current authors.[11] The rapid evolution of social media since that time merits that the topic be revisited.

Epic Systems, Cont'd.

Justice Ginsburg concluded by stating that "[c]ongressional correction" of the court's decision is "urgently in order." While that sentiment is shared by the author, it is extremely unlikely that such correction will take place given the current composition of both congress and the executive branch. As former President Obama once said, "elections have consequences."

1. Alejandro Caffarelli is a trial lawyer and the founder of Caffarelli & Associates, Ltd., a Chicago firm primarily representing employees in labor & employment matters.
2. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).
3. *Epic Sys. Corp. v. Lewis*, 584 U.S. ___ (May 21, 2018).
4. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).
5. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[8] AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon V(A) (2004); *see also*, CPR Code of Ethics, Canon V(A) (2005).
[9] *See, e.g., Wallace v. Buttar*, 378 F.3d 182 (2d Cir. 2004); *Popkave v John Hancock Distr. LLC*, 768 F.Supp.2d 785 (E.D. Pa. 2011); *Metlife Securities, Inc. v. Bedford*, 456 F. Supp. 2d 468, 473 (S.D.N.Y. 2006), aff'd, 254 F. App'x 77 (2d Cir 2007).
[10] The arbitrator will likely want to charge the parties for time spent conducting legal research, and the parties' prior agreement will remove any objections to paying for research they had not authorized.
[11] Ruth V. Glick and Laura Stipanowich, Arbitrator Disclosure in the Internet Age, Dispute Resolution Journal, vol. 67, no 1 (Feb. 2012).