DO ARBITRATORS KNOW THE LAW (AND SHOULD THEY FIND IT THEMSELVES)?

An Exchange between
Richard L. Mattiaccio and Steven Skulnik [*]

The following is an edited and condensed transcript of a broader panel discussion titled "Cutting-Edge Topics in Commercial Arbitration," conducted on April 11, 2018, at New York Law School. The recording can be accessed at http://nyls.mediasite.com/mediasite/Play/5f43f8a8bc58426fa16ce18b904e8d361d.

Jeffrey T. Zaino[1]: Can an arbitrator's independent legal research cause a court to vacate the arbitral award?

Steven Skulnik: There are two well-established principles that are at play, here. One is substantive, and one is procedural. The substantive one is that the arbitrator does not have to apply the law at all or apply it correctly for the award to be confirmed. In fact, he doesn't even have to understand the law. He can read anything he wants to inspire his award.

So, when can an award be vacated, insofar as the arbitrator's application of the law is concerned? Under very limited circumstances. In the Second Circuit there is a doctrine called "Manifest Disregard of the Law." It has been deemed obsolete in other circuits. In those circuits, even if an arbitrator manifestly disregards the law, the award will still be confirmed. But in the Second Circuit, the principle is that the party challenging the award must show that the arbitrators knew of a governing legal principle and refused to apply it, or ignored it

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altogether, and that the law was well-defined, explicit, and clearly applicable to the dispute.[2]

Moreover, the error must be obvious and capable of being readily and instantly perceived by an average person qualified to be an arbitrator.[3] Remember: the average person qualified to be an arbitrator does not even need to be a lawyer. There's no license required to be an arbitrator in New York. If you want to groom domestic animals you need a license, but to be an arbitrator you do not.

The New York Court of Appeals has held that even where the arbitrator states the intention to apply the law, and then misapplies it, the award still stands.[4] So, the arbitrator getting the law wrong is a non-issue.

The second principle, which is all about process, is where all of the courts in the United States will recognize this, because it is set forth in the statutes in Section 10 of the Federal Arbitration Act.[5] We will look at the grounds that make an award vulnerable and see whether the arbitrators doing legal research could possibly fit into one of these categories. The first one ground is where the award was procured by corruption, fraud, or undue means.[6] I don't know what "undue means" means, but it sounds like it is related to corruption and fraud and, I would think, doesn't apply to going to the law library.

Was there evident partiality or corruption on the part of the arbitrators?[7] Doing legal research can hardly be seen as akin to corruption.

Were the arbitrators guilty of misconduct in refusing to postpone the hearing or refusing to hear evidence or of any other misbehavior by which the rights of any party have been prejudiced? [8] If there were laws saying that arbitrators should not do legal research, and they did

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[2] *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 481 (2006) (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004)).

[3] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

[4] *Sprinzen v. Nomberg*, 46 N.Y.2d 623, 629 (1979).

[5] 9 U.S.C. § 10.

[6] 9 U.S.C. § 10 (a)(1).

[7] 9 U.S.C. § 10 (a)(2).

[8] 9 U.S.C. § 10 (a)(3).

it anyway, then maybe that would be misbehavior, but I am aware of no principle that defines misbehavior as such.

Finally, when the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.[9] Well, here we are positing that the award was made, and that it was mutual and final and definitive, so that is not relevant either.

There is, therefore, no ground for *vacatur* based on the arbitrator's independent legal research. If, however, an arbitrator starts doing research and is not relying on what the parties briefed, and goes off on some theory that he or she comes up with, that may not be a good practice.

Richard L. Mattiaccio: Arbitrators will do what they do and, I think, from time to time we've seen that judges will be offended by what an arbitrator does by not following the law as carefully as he or she might. So, I think we can exclude providing any guarantee that an arbitrator doing independent research will not result in *vacatur*, but it seems unlikely based on the law. If it *has* happened, it hasn't happened very often.

The issue is not, I think, whether an award would be vacated, but whether it is a particularly good practice to do that. I think in terms of a successful arbitration being a little bit like a successful attorney-client relationship or a successful marriage: in part, it is about managing expectations. You have to understand what the parties expect from you and what it is that they want you to do. I think the mistake is that we sometimes make assumptions about what that expectation is, without examining the context. Sometimes the assumptions are reasonable, and sometimes they are way off.

So, I think it's going to depend on the context. International disputes could be very different from domestic disputes, depending on the background, the legal cultures of the parties. It's a bit of a canard, the civilian versus common law distinction, as to whether or not the arbitrator is expected to know the law or to find the law. In court this is true. In Europe the civil system is more of an inquisitorial system, but it does not really translate into arbitration where the civilians

[9] 9 U.S.C. § 10 (a)(3).

don't really think that their role is to figure out what the law is. They take it from the parties and if they have questions they'll ask questions.

I don't think of it as a major risk of *vacatur,* but there is a major risk of losing credibility for the process if you don't meet the parties' expectations.

S. Skulnik: Let's talk about some hypotheticals and add some focus on what is good practice for the arbitrator.

You have two parties to a patent license dispute and they have Arbitration I. In Arbitration I the issue is interpretation of a clause in the agreement as to when the licensor is entitled to a royalty. The result of Arbitration I is that the claimant wins. And then there's a new event, in which the claimant relies on the same provision of that contract to bring Arbitration II against the licensee, who refused to pay. The hearing starts and the counsel for the claimant says: Now, I won that first arbitration, we had identical parties, we had identical issues, but I concede, or I am not arguing for issue preclusion here. Now, an arbitrator who has studied the law will know that an arbitral award between the same parties on the same issue is entitled to preclusive effect. Here, the claimant is taking that issue away from the tribunal. So this arbitrator says: I want to make a record. Are you sure you are not asking us to determine any issues, not within the scope of our authority, of *res judicata* or collateral estoppel? Because the arbitrator is going to write an award at some point where that's going to be an obvious omission, and he wants to have a record to cite in the award. We asked the party, we asked the claimant, and he said he's absolutely sure. Now, was the arbitrator doing anything wrong there?

R.L. Mattiaccio: No, the arbitrator did not do anything wrong. At some point, though, arbitrators have to accept what it is that the parties are putting before them as the dispute to be decided. So, I don't see the arbitrator insisting on a theory that neither party is advancing. Certainly, asking the question, asking if they're serious about their position, is fine, but if ultimately what is being submitted is a *de novo* question, and that's what the parties agree to arbitrate, I think that's what has to be decided.

S. Skulnik: Right, so what if the question caused this lawyer's associate to open a law book and then realize: You know what — we're not making that concession. Now, the arbitrator has interfered with the presentation of the case by the parties. Is that wrong?

R.L. Mattiaccio: I don't think there's anything wrong with that either, because when parties pick an arbitrator, they pick an arbitrator based on his or her background and capabilities. If you pick an experienced lawyer as an arbitrator as opposed to an architect or an engineer, you expect that person to bring to the table her whole experience – professional experience – and I think you would be not doing your job, if you're troubled by an issue, unless you raise it. Deciding it on your own or imposing a resolution is too much and probably rare, I think, in most cases. But asking the question and seeing where that leads is part of the process of being an arbitrator, and I don't think there's anything wrong with that.

S. Skulnik: Alright, let me try another one on you. Different case: The case is fully briefed and fully submitted, and the arbitrators are convinced that the claim lacks merit and there should be an award for the respondent. In writing the award, it turns out that the case law cited by the respondent really is not on point, and really is not binding, so the arbitrator then opens a book (or in these days, a MacBook) and in fifteen minutes finds a New York Court of Appeals case right on point that supports the respondent's position. And the arbitrator wants to cite that in the reasoned award. One of the co-arbitrators says: That's not fair, it wasn't briefed…you should re-open the record and give the parties a chance to comment on this new case that you're citing, even though it hasn't changed the outcome, because the tribunal was convinced that the case lacked merit at the outset. Did that arbitrator have a point?

R.L. Mattiaccio: I think it really depends on what impact this new precedent would have. In the international context, the International Law Association's International Commercial Arbitration Committee has published recommendations to deal with this issue, and I think they had it right.[10] First, they took the position that arbitrators are not confined to the parties' submissions as to the content of the applicable law. Then they went on to say that if arbitrators intend to rely on sources not invoked by the parties, they should bring those sources to the attention of the parties and invite their comments, at least ("at least" – I may have a problem with the "at least" part) … at least if those sources go meaningfully beyond the sources the parties have

[10] International Law Association International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", *available at* https://doi.org/10.1093/arbitration/26.2.193.

already invoked and that might significantly affect the outcome of the case. That is, I think, a workable threshold. If you're just finding better cases, it's not an issue.

If I can change the hypothetical a bit – you have a case regarding New York contract interpretation and the four corners doctrine and whether or not to bring in parol evidence, and it's a New York law question. It just so happens that one of the parties is a California party and is represented by a California law firm, and what they cite as the one case in support of their position is a Ninth Circuit opinion in a case in which New York law was applied. And that's all you have, the Ninth Circuit case. Well, you know, you're a New York lawyer – why would you be citing a Ninth Circuit case on a question, really, of settled New York law? In any event it's not determinative of the case, it's not likely to affect the outcome of the case, but as a matter of professional pride I suspect you're going to want to cite the New York Court of Appeals and not the Ninth Circuit, and you'll probably find those New York citations in the internal citations of the Ninth Circuit case in any event. So, if you're citing better cases than the parties have cited, but it doesn't change the result, you just have better cases, which I think is really not controversial.

If it changes the analysis in some way, if you're troubled by what they've forgotten to tell you about, and you just know it because it's in your background, then I think it would be a mistake to decide it based on your knowledge. At least throw it back to the parties and say, "I'm a little concerned about this issue; I'd like to have more information about it," and, if necessary, re-open the record for a few days and have them each put in a five-page letter. It doesn't have to delay the case.

S. Skulnik: I agree with that. One more example: an international case, so the memorials are flying back and forth, the legal briefing is happening, the evidentiary hearing will be just limited to cross-examination later. You, the arbitrator, are reading the briefs and you happen to have a law license and you happen to read the new cases that come out by the courts that you're interested in, maybe the New York Court of Appeals or the Second Circuit, and a new case comes across your desk that is really on point. So you wait a week or two and nobody is telling you about this new case that you think may be a game-changer. Is it a mistake for the arbitrator to write to both lawyers and say: Look, in my weekly reading I came across this case. Do either of you think it applies here?

R.L. Mattiaccio: First, if you're an arbitrator who happens to be reading what we used to call the "advance sheets" because you like to keep up with the law or because somebody's paying you to do it, and you happen upon a new, important case, then I think you would be mistaken not to bring it up, because you know about it. But that's a little different from the question of whether arbitrators should be out there researching on their own, when the parties have not asked them to. If you're compensated on an hourly or a time basis of some sort, you're running up time that nobody has authorized or asked you to do, and I think that would be wrong. I think it would be wrong to decide based on a case that you found and nobody cited to you. I think the right thing to do if you happen upon the case, is to notify the parties and say, "I'd like to have some briefing on this. Have something on my desk in 48 hours" (if you're under time pressure).

S. Skulnik: I agree with that, too.

***Audience question*:** Is it a good practice to ask the parties for permission to research in the first procedural conference?

S. Skulnik: The quick response is: My knowledge of lawyers – I've been a lawyer for longer than I haven't been a lawyer at this point in my life – is if you ask them for permission or for an acknowledgement that you're going to be doing research, they're likely to say: "You know, we've got it. We've got three associates, he has four associates. We're not paying you for that. We object." And once they object, you have a much harder time. Maybe then you're exceeding your authority. So, I wouldn't ask.

R.L. Mattiaccio: That's where Steve and I differ. I think arbitrators, by and large, at least in the American context, are not expected to do their own research. It would be a surprise to the parties to find out that their arbitrators are rummaging around the law. There are some arbitrators who are very good at doing research. They are the exception. The rule is: if they ever knew how to do research, they've probably gotten out of the habit by the time they're serving as arbitrators. At least, doing it on their own. It's different from analyzing cases and reading them. Finding the cases is a talent that, generally, people have when they're earlier in the profession more than when they're later in the profession. There are exceptions. I think, as somebody who is still counsel in cases, I don't want my arbitrator rummaging around the law without my knowing about it. If the arbitrator sees a case and thinks that the case is important, I would like to know about it and

have an opportunity to address it. I'm sure opposing counsel would want the same opportunity.

So, if you posit an agreement between the parties (that the arbitrator can do research), then the process is what the parties have decided, and, of course, if there's an agreement there's nothing wrong with it. If there's disagreement, then you've just created a problem by asking the question, but I think it's better to ask. If the answer is no, you don't do the research, and you've established a record, and you decide the case that the parties put before you. If you're troubled by it, you ask more questions.

The real problem – in my experience, anyway – occurs when you have a real difference in the quality of advocacy between one side and the other and you just know, if it's an area of the law that you've worked with, that you're not getting the full story. So, you can try to correct for that. Should you? In a purely adversarial system, you could just conclude: Well, you know, if one side doesn't hire a good lawyer, it's their problem. But I don't think that's what arbitration is about, even in an adversarial system. So, if an arbitrator thinks that she's not getting the full story, there's nothing wrong with asking for it. The problem arises when you've asked for additional briefing, and it's still terrible. That's really hard. But I think, ultimately, that the process belongs to the parties, and you have to live with that.