A Proposed Approach to Arbitrator Independent Legal Research

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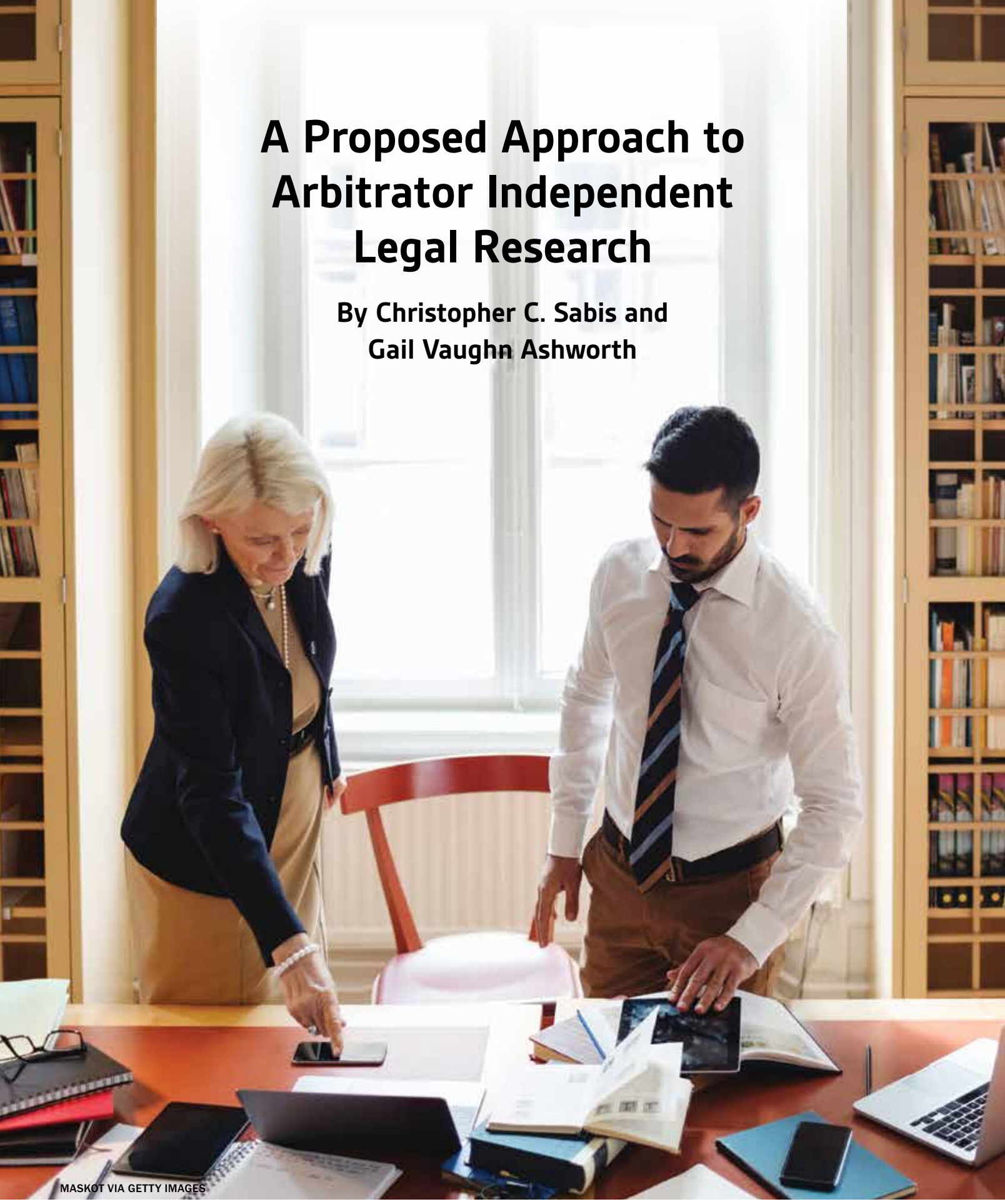

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Whether arbitrators should or should not conduct legal research independent of the parties' submissions is not a new question, but it remains a controversial one that elicits strong opinions from some arbitrators and advocates.[1] A discussion at an arbitration seminar held last year would have led an observer to believe there is a near consensus that arbitrators should not do their own independent research and should rely solely on the arguments of the parties when considering the law in an arbitration. But a review of the literature and court cases addressing the issue reveals a more complex landscape. Arbitrators disagree on whether independent legal research is appropriate and, if it is, when an arbitrator should go beyond the parties' briefs. Different commentators have offered different approaches to the legal and ethical implications of such research.

This article considers arguments for and against arbitrator independent legal research in domestic arbitrations. It begins with a brief summary of some existing literature advocating various approaches to the issue. It then addresses the ethical and legal considerations for arbitrators—particularly attorneys—who may be considering doing independent legal research during an arbitration. Finally, it considers these arguments and guidelines in proposing an approach to independent legal research by arbitrators that considers both efficiency in the arbitration process and the quality of arbitration rulings and awards.

Arbitrators disagree on whether independent legal research is appropriate and, if it is, when an arbitrator should go beyond the parties' briefs.

Existing Literature

Commentators considering some of the same authorities have reached very different conclusions about whether it is ever appropriate for an arbitrator to conduct independent legal research. The resulting approaches can be broadly categorized into three schools of thought: (1) it is almost never appropriate for an arbitrator to conduct independent legal research absent the express authorization of the parties; (2) arbitrators who are attorneys have an obligation to conduct their own legal research whenever they deem it necessary; and (3) certain types of independent legal research can be appropriate depending on the particular situation, but others should be avoided to protect against vacatur.

Independent legal research is not appropriate. Many in the arbitration community—arbitrators and advocates—maintain that it is inappropriate for an arbitrator to do independent legal research absent the express consent of the parties. Some of the arguments in support of this position were laid out by arbitrator and professor Paul Bennett Marrow. First, Marrow contends that arbitrators should refrain from "unauthorized legal research" because arbitration is a creature of contract and "[d]ecisions about the law are for the parties to make."[2] Second, Marrow argues that parties to arbitration seek a determination of which party is correct "based on the law as the parties see it," not "what the legally correct reason is."[3]

Marrow's third argument concerns bias. He argues that independent legal research by the arbitrator that "uncovers something entirely new and yet relevant," if put before the parties, could result in allegations of bias because "the inquiry could be characterized as an offer to provide assistance or, worse yet, an effort to warn."[4] Marrow maintains that "[w]hile the courts have yet to speak on the subject, it's hard to see how a court wouldn't find such an offer [for a party to comment on independently identified law] evidence of a failure to maintain the evenhandedness required by the [Federal Arbitration Act (FAA)] and the ethical rules and codes of conduct [applicable to arbitrators]."[5] He argues that independent legal research constitutes "misconduct" because it is conducted outside the view of the parties and leaves the parties unable to control the quality and thoroughness of the research.[6] Finally, Marrow points out that courts have expressly held that independent legal research is not required to avoid vacatur due to a "manifest disregard of law."[7] According to Marrow, courts "expect arbitrators to ascertain the law through the arguments put before them by the parties to an arbitration proceeding."[8] From this analysis, Marrow concludes that "[a]t least in domestic arbitration, arbitrators are well advised to seek consent from the parties before researching the law on their own."[9]

Independent legal research is permissible, and arbitrators have a moral obligation to conduct their own research. Marrow's argument against arbitrators performing independent legal research—or at least research that was not specifically authorized by the parties—prompted a response from attorney and arbitrator M. Ross Shulmister. Shulmister maintains that attorney arbitrators "are not only permitted to conduct independent research of the law, but are actually under at least a moral obligation to do so, even if the parties argue their positions on what the law is."[10]

Shulmister starts his analysis with the proposition that "arbitrators are expected to follow the law."[11] He rejects Marrow's argument that an arbitrator's review is limited to the law

TIP: Arbitrators may perform independent legal research, as a contrary rule would favor parties with resources, but they should consider costs and permit parties to address new law.

as the parties see it, contending that the U.S. Supreme Court's decision in *Steelworkers* (relied upon by Marrow) was about arbitrability and does not more generally limit the role and authority of an arbitrator.[12] Shulmister also argues that courts' refusal to *require* independent research under the manifest disregard of the law test does not mean that such research is not *permissible*.[13] He maintains that once the authority to arbitrate is established, "there is a presumption that the arbitrators have all other powers associated with that arbitration."[14] Shulmister concludes that

> arbitrators, especially those who are attorneys, should do their best to determine what law applies to their arbitration, and apply the law to the facts. . . . If the law as [the arbitrators] find it differs from the law as presented by the parties, it would be wise (although not required) that [the arbitrators] advise the parties and allow them to respond to [their] findings ([they] may be mistaken, and it is always possible there are later decisions which reject [their] legal conclusions).[15]

It depends. Not surprisingly, there is a middle ground between these two positions. Some argue, in the grand tradition of lawyers, that the propriety of independent legal research by an arbitrator *depends* on the circumstances.

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Independent legal research by arbitrators was the subject of an April 11, 2018, panel discussion at the New York Law School between arbitrators (and lawyers) Steven Skulnik and Richard Mattiaccio. Both agreed that independent research by itself is not grounds for vacatur under section 10 of the FAA.[16] Both also seemed to agree that regardless of vacatur, an arbitrator should consider what would constitute good practice in any given situation. For example, arbitrators whose experience gives them knowledge of law that is not cited by the parties are not acting improperly by asking the parties to address that law, though it may be problematic for an arbitrator to "insist[] on a theory that neither party is advancing"; the arbitrator should "[a]t 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.'"[17] Mattiaccio observed that

> 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 and 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 is anything wrong with that.[18]

Where Mattiaccio and Skulnik differed was on an audience question as to whether an arbitrator should ask the parties for permission to do independent legal research in the initial hearing. Skulnik responded that the question allows the parties to object, which may put the arbitrators in a pickle if they later have knowledge of a legal question that should be addressed. He concluded that arbitrators should not seek permission. Mattiaccio disagreed, maintaining that "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. . . . If there's disagreement, then you've just created a problem by asking the question, but I think it's better to ask."[19]

Later that same year, arbitrator and attorney Kate Krause offered a categorical approach to the middle ground. Krause starts with the premise (without citation) that "[b]ased upon the applicable law, an award derived from or influenced by an arbitrator's independent legal research may be subject to vacatur."[20] Krause proceeds to divide potential independent legal research into six categories:

(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.[21]

Though opining that "[m]ost 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," Krause maintains that there is "little consensus" as to the propriety of the last three categories.[22]

Krause then applies the National Academy of Arbitrators Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration (NAA Employment Guidelines)—discussed more fully below—which state, in part: "An arbitrator may conduct legal research independently and may decide the case without advising the parties about such research 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."[23] Krause concludes that this standard only bars legal research on an issue not raised by any of the parties. She then argues, again without citation, that "[e]vident partiality may be present whenever an arbitrator conducts independent legal research, as such research is likely to favor one party over the other."[24] Krause states that an arbitrator's failure to notify the parties of the results of independent research could deny the parties of a fair hearing, a ground for vacatur under the FAA.

Considering the other research categories, Krause questions the propriety of an arbitrator "researching additional cases on the legal issues for which the party-cited cases were referenced," category (4), because the parties' failure to cite a case could indicate that "the parties intended to exclude that case from the arbitrator's consideration."[25] Krause also finds category (5) research problematic because

> [i]f 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.[26]

Based on this analysis, Krause recommends that an arbitrator should be comfortable performing categories (1) through (3) of legal research, but that categories (4) and (5) present the risk of vacatur. Krause further concludes that arbitrators should avoid category (6) unless applicable "institution rules specifically allow it."[27]

Ethical and Legal Considerations

An analysis of these various positions requires consideration of the ethics provisions that govern arbitrators, the legal precedents that guide their conduct, and case-specific controlling authority, such as the parties' arbitration agreement. For domestic arbitrations, ethical rules and codes include the Code of Ethics for Arbitrators in Commercial Disputes (Ethics Code), the NAA Employment Guidelines, and the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (Labor-Management Code). Although there are relatively few legal precedents specifically addressing an arbitrator's independent legal research, there are statutes and cases relevant to the analysis.

Ethics Code. The Ethics Code was drafted and revised by committees of the American Arbitration Association (AAA) and the American Bar Association (ABA).[28] The Ethics Code "provides ethical guidelines for many types of arbitration but does not apply to labor arbitration," which is governed by the Labor-Management Code.[29] Multiple canons of the Ethics Code and their comments contain language relevant to the issue of independent research. Relevant portions of the Ethics Code are excerpted below.[30]

> **Canon I: An arbitrator should uphold the integrity and fairness of the arbitration process.**
> A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. . . .
> . . . .
> D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
> E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
> F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. . . .
> . . . .
> *Comment to Canon I*
> A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved . . . but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration. . . .

Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.
. . . .
Canon IV: An arbitrator should conduct the proceedings fairly and diligently.
A. An arbitrator should conduct the proceedings in an even-handed manner. . . .
B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
. . . .
E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
. . . .
Canon V: An arbitrator should make decisions in a just, independent and deliberate manner.
A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.[31]

NAA Employment Guidelines. The NAA Employment Guidelines "are a privately developed set of standards of professional conduct for arbitrators engaged in the resolution of disputes arising under an agreement to arbitrate pursuant to an employer-promulgated arbitration plan or procedure where the arbitration of employment-related disputes is a condition of employment."[32] Accordingly, the NAA Employment Guidelines govern a narrower set of arbitrations than the Ethics Code. That said, there is no obvious reason why their non-employment-specific provisions should be excluded from this broader analysis.

Unlike the Ethics Code, the NAA Employment Guidelines specifically address independent legal research performed by arbitrators. Section 2(J) states:

1. An arbitrator must make a reasonable effort to address and follow public law whenever public law is at issue in a case.
2. An arbitrator may conduct legal research independently and may decide the case without advising the parties about such research 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.
a. If the arbitrator concludes the case should be decided on the basis of a rationale or position not presented or argued by any party, the arbitrator must first give all parties an opportunity to respond.[33]

The Labor-Management Code. The Labor-Management Code "deal[s] with the voluntary arbitration of labor-management disputes and certain other arbitration and related procedures which have developed or become more common since it was first adopted."[34] Though its scope is limited in a similar manner as the NAA Employment Guidelines, there is, again, no obvious reason not to consider it here.

The Labor-Management Code, like the NAA Employment Guidelines, specifically addresses the issue of independent research in section 2:

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research
1. An arbitrator must assume full personal responsibility for the decision in each case decided.
a. The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.
b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.[35]

Relevant legal precedent. The primary legal consideration in the independent research analysis is section 10 of the FAA, which provides the conditions for vacatur of an arbitration award.[36] Under section 10, a federal district court may vacate an arbitration award

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[37]

In addition to the grounds in section 10, some circuit courts[38] have held that an arbitration award may be vacated under the doctrine of manifest disregard for the law.

An arbitral award may be vacated for manifest disregard of the law "only if 'a reviewing court . . . find[s] both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'"[39]

Manifest disregard of the law is "willful inattentiveness to the governing law,"[40] where "the arbitrator deliberately disregards what he knows to be the law."[41] "'[M]anifest disregard of the law' as applied to review of an arbitral award is a 'severely limited' doctrine."[42] "[T]he award 'should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.'"[43]

While the applicability of section 10 and the manifest disregard for the law doctrine to independent research is up for debate, there are both federal and state cases that address the issue more directly. At least four courts have made rulings that in some way support the propriety of an arbitrator conducting legal research independent of the parties' arguments.

Perhaps the most direct such ruling was in *Blake v. Transcommunications Inc.*[44] In that case, the parties' contracts stated that any issues in arbitration would be governed by Tennessee substantive law, and that the AAA's National Rules for the Resolution of Employment Disputes (which, like the AAA's Commercial Rules, do not squarely address the issue of independent research) would govern the procedural aspects of the arbitration.[45] The arbitration respondent sought vacatur of the arbitration award, arguing that the arbitrator acted in manifest disregard of the law.[46] The court upheld the award, finding that the award was not subject to vacatur. The court reasoned that

> Tennessee law governed the issues before the arbitrator, per the parties' own agreement. *Whether or not the parties raised Tennessee's securities antifraud statute, the arbitrator acted appropriately by considering all applicable statutes—not just the statutes raised by the parties. The arbitrator acted as any court would, analyzing the issues and conducting his own research and analysis of the relevant law.* A review of the award reveals that the arbitrator considered and applied relevant statutes and case law. *The fact that defendant disagrees with the arbitrator's interpretation and application of Tennessee's securities law does not mean the arbitrator displayed a manifest disregard for the law.* With no evidence that the arbitrator acted with "willful inattentiveness" to the governing law, this court will not question the arbitrator's conclusions.[47]

The Eastern District of California addressed a similar matter from the standpoint of impartiality. In *Seifert v. Werner*, the plaintiff sought vacatur of the arbitrator's award, arguing that the arbitrator had conducted legal research in an attempt to find law to support the defendant's position.[48] The court rejected the plaintiff's argument, finding that

> [Plaintiff] presents [the arbitrator]'s fee statement, which shows time spent in research and review of the authorities submitted by the parties, but does not explain how she knows that [the arbitrator]'s research was undertaken in an attempt to validate defendant's position on the statute of limitations question, particularly in light of the fact that [the arbitrator] ultimately ruled in plaintiff's favor. *Plaintiff has not supported any claim that [the arbitrator]'s research was undertaken in an attempt to reject her position; her showing that [the arbitrator] conducted legal research does not show that the arbitrator lacked impartiality.*[49]

Two additional cases address the issue of independent legal research less directly. In *DeRose v. Jason Robert's, Inc.*, an employer sought to vacate an arbitration award and issued a subpoena to the arbitrator seeking the arbitrator's file, including the arbitrator's "research and personal notes."[50] The arbitrator filed a motion to quash the subpoena, arguing that the file was "not relevant to any of the theories the defendants had advanced in support of their motion to vacate the arbitration award."[51] The appellate court affirmed the trial court's decision to quash the subpoena because "the contents of the arbitrator's file and his testimony were not relevant given the limited scope of the court's review of an arbitration award resulting from an unrestricted submission" and concluded "that the defendants had not demonstrated a clear need for any additional evidence and that it was capable of deciding the motion to vacate on the basis of the record before it."[52]

Finally, in *Shaffer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the defendant moved for vacatur because the arbitrator had failed to disclose use of two private research attorneys before hiring them to assist in the arbitration.[53] The court concluded that while "the best practice is to disclose the arbitrator's plan to use research attorneys and give the parties an opportunity to object in advance," the defendant had "not made a showing that the arbitrator's failure to follow this best practice was either misconduct or a breach of contract."[54] In addressing the issue, the court considered the propriety of arbitrators doing independent research more generally under California law:

> Doing legal research is not the same as doing informational research on the facts of a case. Equating the two would likely require arbitrators to present every individual piece of legal research—each treatise, each case—to the parties and give them a chance to challenge it. This would create significant barriers to the work of arbitrators and is not supported by a common sense, plain language reading of the statute. . . . [T]he 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.[55]

The authors' research has identified no cases in which a court questioned an arbitrator's authority to conduct independent legal research with or without the knowledge or authorization of the parties.

Arbitration agreement. Regardless of the ethical obligations and legal precedents discussed above, the parties to an arbitration clause can, of course, negotiate the terms that will govern their arbitration to the extent that such an agreement is not contrary to law.[56] Accordingly, the parties could contract for limitations on the arbitrator's ability to do legal research.

Analysis and Proposed Approach

Even arbitrators who do not object to independent legal research under appropriate circumstances acknowledge that "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."[57] But based on the available ethics rules and legal precedents, it is unclear why an arbitrator should not do independent legal research if needed, absent a provision barring such conduct in the applicable arbitration agreement.

None of the major domestic arbitration ethical codes or procedural rules prohibit independent legal research. To the contrary, the NAA Employment Guidelines specifically permit arbitrators to do independent legal research and issue an award based on that research without informing the parties unless the arbitrator plans to decide the award "on the basis of a rationale or position" not addressed at all by the parties, in which case the arbitrator should afford the parties an opportunity to address the new issue.[58] The Labor-Management Code is even less restrictive. It is unclear why employment matters specifically and commercial arbitration more generally should differ in this regard. This is particularly true given that other codes and procedural rules state that arbitrators are "not necessarily partial or prejudiced by having acquired knowledge of . . . the applicable law," are allowed to "ask questions" when they believe that the parties have provided insufficient information to resolve a dispute, and are required to "decide all matters justly, exercising independent judgment."[59]

Counterarguments to significant restrictions on independent legal research. Many of the arguments for limiting an arbitrator's discretion to conduct independent legal research—whether authorized by the parties or not—are questionable. The idea that the parties dictate what the law is even if they are wrong flies in the face of the language of many arbitration clauses stating that the substantive law of a particular state should govern any dispute. It also means that a party entering an arbitration clause gives up not only the forum and procedures it is otherwise entitled to by law but also its substantive rights.[60] Such a position seems circular and unsupported by the governing law, and inherently assumes that arbitrators have no broader duty to the public to make their best efforts to reach a correct legal outcome. But this ignores Canon I of the Ethics Code:

> An arbitrator has a responsibility not only to the parties but *also to the process of arbitration itself*, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, *an arbitrator should recognize a responsibility to the public*, to the parties whose rights will be decided, and to all other participants in the proceeding.[61]

It is also in tension with Canon V's requirement that "[a]n arbitrator should decide all matters justly, *exercising independent judgment*, and should not permit outside pressure to affect the decision."[62]

The argument that an arbitrator conducting independent legal research is an indication of bias is also unconvincing. As the comment to Canon I observes, "[a] prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved."[63] Moreover, any legal position taken by an arbitrator in an award, regardless of whether it is the result of research done by one of the parties or by the arbitrator, is going to ultimately favor one party's position over the other. But obviously an arbitrator does not manifest bias by adopting the legal position of a claimant over that argued by a respondent, or vice versa. Providing the parties with an opportunity to respond to questions raised by an arbitrator who has conducted independent research—or who just has preexisting knowledge of the applicable law—may seem biased to the party whose position is negatively affected by the law, but it is the law that is favoring a party, not the arbitrator.[64] Indeed, all of the courts that have addressed the issue have ruled that independent legal research itself does not demonstrate that an arbitrator is biased.[65]

The fact that independent research is not required to avoid vacatur due to a "manifest disregard of the law" does not mean that it is not permitted. Courts have characterized manifest disregard of the law as "willful inattentiveness to the governing law,"[66] where "the arbitrator deliberately disregards what he knows to be the law."[67] Consider a hypothetical where a case from the jurisdiction providing the substantive law under an arbitration agreement should be dispositive on the dispute. All parties to the arbitration miss the case, but subsequent inquiry reveals that the arbitrator, acting as an advocate in a case involving the same subject matter, argued and won a case in court based on the same precedent only a month before issuing an award that does not address the case. Does the arbitrator's conscious decision to ignore the governing law that the arbitrator knew was not briefed by the parties and to decide the case on the law erroneously cited by the parties put the award at risk of vacatur? Whether or not the arbitrator remembered the specific case from a month ago, the arbitrator surely remembered enough to know that some independent research would have identified the proper governing standard. Certainly there would be waiver arguments for the court to consider, but this arbitrator has apparently deliberately disregarded what the arbitrator knew to be the law and made an award that is willfully inattentive to the correct legal standard.

By contrast, arguments that independent legal research alone can subject an arbitration award to vacatur are contrary to every case the authors are aware of that has addressed the issue. These same cases call into serious question the notion that absent a specific provision in the arbitration agreement, the parties' failure to cite a particular case or statute is tantamount to an intention to divest arbitrators of their obligation to follow the law.

Proposed approach to independent legal research. Absent a contractual provision to the contrary, an arbitrator—

particularly one who is also a lawyer—is not barred from conducting independent legal research as a matter of law or ethics. An attorney is not required to check legal knowledge at the alternative dispute resolution (ADR) door. Indeed, that knowledge and experience in an area of law are often one of the reasons parties select a particular arbitrator, as evidenced by AAA's offering of industry-specific arbitrator panels in areas like construction, employment, labor, and health care. It is also why organizations like the American Health Law Association offer specialized ADR services.

But just because one can do a thing, it does not necessarily follow that one must or should do that thing in every situation. Legal research can be expensive. As Mattiaccio has pointed out, "If [an arbitrator is] compensated on an hourly or time basis of some sort, [they are] running up time that nobody has authorized or asked [them] to do . . . ."[68] The idea that independent research time that has not been specifically authorized by the parties is improper goes too far given the arbitrator obligations discussed above, but arbitrators do have a duty to conduct an arbitration in an efficient manner and keep costs down for the parties whenever possible.[69] Accordingly, absent some basis to believe that the parties have not identified the governing law, or that independent legal research is otherwise warranted, it may be best practice for arbitrators to avoid running up research costs trying to supplement the party's submissions. Arbitrators should make these determinations on a case-by-case basis.

To the extent that an arbitrator determines that independent legal research is necessary, the arbitrator should conduct such research as efficiently as possible and provide the parties with an opportunity to comment on any issues of law that may factor into the arbitrator's decision but have not been previously briefed. Furthermore, once the arbitrator has identified a new legal argument or precedent that merits consideration, the arbitrator should notify the parties of the precedent and permit supplemental briefing, thereby relying on the parties, to the extent possible, to perform any necessary additional research and hold down arbitrator fees while giving the parties the opportunity to address the precedent or legal doctrine that they did not initially brief.[70] Of course, arbitrators should not decide any issues that have not been submitted by the parties,[71] but consideration of a new legal argument does not necessarily mean deciding a new issue.[72]

One dilemma is the primary dispute between Mattiaccio and Skulnik: whether arbitrators should ask the parties for permission to do independent legal research (should it prove necessary) during the initial hearing.[73] Skulnik answered no, noting that if the parties then objected, the arbitrators would have a harder time conducting any independent research they deemed necessary.[74] Mattiaccio disagreed for a number of reasons, including: (1) domestic arbitrators are "by and large . . . not expected to do their own research"; (2) many lawyers serving as arbitrators have probably gotten out of the habit of doing their own research and are not good at it; and (3) parties' counsel don't want their arbitrator "rummaging around the law without [] knowing about it. If the arbitrator sees a case and thinks that the case important, [counsel] would like to know about it and have an opportunity to address it."[75]

Skulnik has the better argument here. Any argument that an arbitrator needs to ask the parties' permission to conduct independent legal research assumes that the arbitrator does not have that authority in the first place, which is incorrect absent a contractual provision restricting such authority. By asking for permission to do something arbitrators already have the authority to do, an arbitrator can inadvertently create problems. For example, Skulnik and Mattiaccio discussed the issue as though the parties to an arbitration would agree, but what if the claimant is fine with the arbitrator doing independent legal research but the respondent objects? Now what does the arbitrator do? If the baseline is that arbitrators have the authority to conduct independent legal research (as argued here), then they likely retain that authority over the respondent's objection. But if that is true, why did they ask in the first place? Counsel's questionable expectations notwithstanding, arbitrators should exercise their judgment in doing independent legal research given the considerations discussed above. If they identify law or a relevant issue not briefed, they can then notify the parties and give them an opportunity to address this issue. This approach addresses Mattiaccio's concerns about some arbitrators' questionable research skills and counsel's understandable desire to address whatever the arbitrators think they have uncovered.

Ensuring Efficiency and Equity in Arbitration Practices

There is room for discussion and debate around the best practices for arbitrators who are considering conducting their own independent legal research during a domestic arbitration. But the governing ethical standards, applicable rules, and existing legal precedents support an arbitrator's ability to perform independent legal research even absent specific party preauthorization. Moreover, strict or categorical restrictions on independent research, regardless of the circumstances, serve to bolster the perception that arbitration favors larger corporations over smaller companies and individuals, as the latter will often have less access to specialized legal representation.[76]

But just because arbitrators have the authority to conduct independent legal research does not mean they should do so in all instances. Arbitrators have an obligation to make arbitration as efficient and cost-effective as possible and must consider that duty when weighing the need for independent research. Arbitrators must also consider their obligation to provide the parties with a chance to address any new legal questions or doctrines that they have not previously briefed. Even a skilled arbitrator with specialized industry experience can misinterpret legal precedent or misunderstand its applicability to a particular dispute. The parties will usually understand their dispute better than the arbitrators considering it, and an arbitrator's erroneous imposition of a different legal standard over one advocated by the parties, without affording the parties a chance to opine on that standard, may place an award at risk of vacatur. Arbitrators

should consider all of these factors when deciding whether to conduct independent legal research. ◄

Notes

1. The discussion in this article is limited to legal research. There seems to be no dispute that arbitrators, like a court, should not do factual research beyond the record submitted by the parties. *See, e.g.*, Quesada v. City of Tampa, 96 So. 3d 924, 926 (Fla. Dist. Ct. App. 2012) (holding independent factual investigation to be arbitrator misconduct under Florida law and comparing such conduct to that barred by Canon 3 of the Florida Code of Judicial Conduct).

2. Paul Bennett Marrow, *Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?*, NYSBA J., May 2013, at 24, 25.

3. *Id.* (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" and is "part of a system of self-government created by and confined to the parties")).

4. *Id.* at 26.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 27 (quoting Wallace v. Buttar, 378 F.3d 182, 191 n.3 (2d Cir. 2004)).

9. *Id.* at 30.

10. M. Ross Shulmister, *Attorney Arbitrators Should Research Law: Permission of the Parties to Do So Is Not Required*, 68 Disp. Resol. J. 29, 29 (2013).

11. *Id.* at 31 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("When parties decide to arbitrate a statutory claim, they do not give up substantive rights—they merely decide to resolve issues 'in an arbitral, rather than a judicial, forum.'")).

12. *Id.* at 39–41 ("It may be true that '[a]rbitrators should not be potted palms. As decision-makers, they have an obligation to ascertain what the law is and to apply it correctly.'" (quoting *Wallace*, 378 F.3d at 191 n.3)).

13. *Id.* at 33.

14. *Id.* at 38.

15. *Id.* at 43.

16. Richard L. Mattiaccio & Steven Skulnik, *Do Arbitrators Know the Law (and Should They Find It Themselves)?*, 73 Disp. Resol. J. 97, 98, 99 (2018).

17. *Id.* at 100, 102.

18. *Id.* at 101.

19. *Id.* at 103–04.

20. Kate Krause, *May an Arbitrator Conduct Independent Legal Research—A Brief Overview—Part 1*, Arb. Comm. E-Newsl. (ABA Section on Dispute Resolution), Aug. 2018.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Code of Ethics for Arbitrators in Commercial Disputes 1 (2004) [hereinafter Ethics Code], https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.

29. *Id.* at pmbl.

30. The JAMS Arbitrators Ethics Guidelines (https://www.jamsadr.com/arbitrators-ethics/) contain similar provisions without specifically addressing independent legal research. The JAMS Comprehensive Arbitration Rules & Procedures (https://www.jamsadr.com/rules-comprehensive-arbitration/) state that "[i]n determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy."

31. Ethics Code, *supra* note 28.

32. Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration scope [hereinafter NAA Employment Guidelines], https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

33. *Id.* § 2(J).

34. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes pmbl. (2007) [hereinafter Labor-Management Code], https://www.adr.org/sites/default/files/document_repository/Code%20of%20Professional%20Responsibility%20for%20Arbitrators%20of%20Labor-Management%20Disputes_0.pdf.

35. *Id.* § 2(G).

36. *See* 9 U.S.C. § 10.

37. *Id.* § 10(a).

38. The Fourth, Sixth, and Tenth Circuits currently recognize manifest disregard for the law as valid grounds for vacatur. The Second and Ninth Circuits have rejected manifest disregard as an independent, nonstatutory ground for vacatur, but hold that manifest disregard of the law is a manner in which arbitrators can "exceed their powers" under 9 U.S.C. § 10(a)(4). The viability of the doctrine is an open question in the D.C. and Third Circuits, and the Fifth and Eight Circuits have completely abandoned the concept of manifest disregard of the law. The state of the law in the First, Seventh, and Eleventh Circuits is arguably unclear. *See* Jonathan J. Tompkins, *"Manifest Disregard of the Law": The Continuing Evolution of an Historically Ambiguous Vacatur Standard*, 12 Disp. Resol. Int'l 145, 154–62 (Oct. 2018).

39. Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (quoting Banco de Seguros del Estado v. Mut. Marine Off., Inc., 344 F.3d 255, 263 (2d Cir. 2003)).

40. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995) (quoting Jenkins v. Prudential-Bache Sec. Inc., 847 F.2d 631, 634 (10th Cir. 1988)).

41. Renard v. Ameriprise Fin. Servs., Inc., 778 F.3d 563, 567 (7th Cir. 2015) (quoting Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994)).

42. *Wallace*, 378 F.3d at 189 (quoting Gov't of India v. Cargill Inc., 867 F.2d 130, 133 (2d Cir. 1989)).

43. *Id.* at 190 (quoting *Banco de Seguros del Estado*, 344 F.3d at 260).

44. No. Civ.A. 01-2073-CM, 2004 WL 955893 (D. Kan. Feb. 4, 2004).

45. *Id.* at *2.

46. *Id.* at *5.

47. *Id.* at *6 (emphasis added).

48. No. CIV S-08-998 KJM JFM, 2011 WL 13243818, at *2 (E.D. Cal. Mar. 22, 2011).

49. *Id.* (emphasis added).

50. 216 A.3d 699, 708 (Conn. App. Ct. 2019).

51. *Id.*

52. *Id.* at 713.

53. 779 F. Supp. 2d 1085, 1086 (N.D. Cal. 2011).

54. *Id.* at 1086–87.

55. *Id.* at 1090–91. The defendants argued that the arbitrator violated California Civil Procedure Code § 1282.2(g), which requires arbitrators to disclose if they plan to base an award upon information not obtained at the hearing: the arbitrator must "disclose the information to all parties to the arbitration and give the parties an opportunity to meet it."

56. *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 (1991) ("The arbitrator's 'task is to effectuate the intent of the parties' and he or she does not have the 'general authority to invoke public laws that conflict with the bargain between the parties.'" (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974))).

57. Mattiaccio & Skulnik, *supra* note 16, at 103.

58. NAA Employment Guidelines, *supra* note 32, § 2(J).

59. *See, e.g.*, Ethics Code, *supra* note 28, at Canons I, IV, V.

60. *Cf.* Shulmister, *supra* note 10, at 31 ("When parties decide to arbitrate a statutory claim, they do not give up substantive rights—they merely decide to resolve issues 'in an arbitral, rather than a judicial, forum.'").

61. Ethics Code, *supra* note 28, at Canon I(A) (emphasis added).

62. *Id.* at Canon V(B) (emphasis added).

63. *Id.* at Canon I cmt.

64. As addressed below, giving each party an opportunity to argue a new potential issue or case is far less problematic than arbitrators simply assuming they are correct without giving the parties an opportunity to prove otherwise.

65. *See* Shaffer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 779 F. Supp. 2d 1085, 1090 (N.D. Cal. 2011) ("[T]he 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."); Seifert v. Werner, No. CIV 2-08-998 KJM JFM, 2011 WL 13243818, at *2 (E.D. Cal. Mar. 22, 2011) ("[S]howing that [the arbitrator] conducted legal research does not show that the arbitrator lacked impartiality.").

66. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995).

67. Renard v. Ameriprise Fin. Servs., Inc., 778 F.3d 563, 567 (7th Cir. 2015).

68. Mattiaccio & Skulnik, *supra* note 16, at 103.

69. *See, e.g.*, Ethics Code, *supra* note 28, at Canon I(F) ("An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.").

70. *See* NAA Employment Guidelines, *supra* note 32, § 2(J)(2)(a).

71. *See* Ethics Code, *supra* note 28, at Canon V.

72. *See* NAA Employment Guidelines, *supra* note 32, § 2(J)(2)(a).

73. Mattiaccio & Skulnik, *supra* note 16, at 103.

74. *Id.*

75. *Id.* at 103–04.

76. *See generally* Edmund L. Andrews, *Why the Binding Arbitration Game Is Rigged against Customers*, Insights by Stan. Bus. (Mar. 8, 2019), https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers; Alexia Fernández Campbell, *Google Employees Fought for Their Right to Sue the Company—and Won*, Vox (Feb. 22, 2019), https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees; Ctr. for Popular Democracy, Justice for Sale: How Corporations Use Forced Arbitration to Exploit Working Families (May 2017), https://populardemocracy.org/sites/default/files/Forced-Arbitration_web%20%283%29_0.pdf; Katherine V.W. Stone & Alexander J.S. Colvin, Econ. Pol'y Inst., Briefing Paper 414, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.